1462-4745; Vol 12(2): 169–186
DOI: 10.1177/1462474509357375

PUNISHMENT
& SOCIETY

Return to sender?

Administrative detention of irregular migrants in Germany and the Netherlands

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Abstract

The expulsion of irregular migrants has become a political priority in many (northern) EU member states. In countries such as Germany and the Netherlands this has resulted in a rather puzzling situation in which the capacity for the administrative detention of irregular migrants is *increasing*, while the number of effective expulsions seems to be *decreasing*. In this article two theoretical perspectives are used to analyse these developments: a perspective emanating from the criminological framework of the 'new penology' and one resulting from the 'migration control literature'. These perspectives combined offer explanations for this paradoxical situation – by highlighting the importance of identification and the frustration thereof by irregular migrants and countries of origin – and for the apparent irrationality of the use of, sometimes very lengthy, administrative detention of irregular migrants.

Key Words

administrative detention • expulsion • irregular migration • migration control • new penology

INTRODUCTION

In February 2009 irregular migrants and asylum seekers rioted and set fire to their detention barracks on the Italian 'immigration detention island' of Lampedusa. Facilities such as these are found all over Europe and detain irregular migrants and asylum seekers. The migrants detained in these centres may have been intercepted while travelling into the EU, they may be asylum seekers that are kept there during their immigration procedure in what the UNHCR terms 'pre-admission detention' or they may be apprehended irregular migrants detained while pending expulsion. In all of these cases detention is not a matter of criminal law and prison sentences, but rather a matter of administrative detention, a temporary, bureaucratic measure to enable the enactment of other policies, such as expulsion. The legal regime therefore differs from that of the

prison, even though the accommodation and day-to-day regime of detention are often similar or have even worse conditions than the prison system.

In this article the focus is on the administrative detention of irregular migrants apprehended 'domestically' and who are to be expelled because of their irregular status. Even though the most familiar face of irregular migration is that of a border problem, in recent years the internal or domestic component of the 'fight against illegal migration' has been significantly stepped up in a number of European countries (Broeders and Engbersen, 2007). Detention centres play a central role in this internal migration control. Administrative detention is not just widely used to prevent entry, but is increasingly used to facilitate the expulsion of domestically apprehended irregular migrants. All over the EU, member states have been expanding their detention capacity with the intention to increase the number of effective expulsions of irregular migrants and rejected asylum seekers (Calavita, 2005; Jesuit Refugee Service, 2005; Welch and Schuster, 2005; de Giorgi, 2006; van Kalmthout et al., 2007). The incarceration of irregular migrants is an administrative detention, a bureaucratic measure rather than a conviction on criminal charges, meant to facilitate expulsion. However, effective expulsion policies are not easily achieved. The moral and legal restrictions as well as the heavy drain on government resources such as detention capacity and personnel severely limit the State's possibilities (Walters, 2002). Or as Noll (1999: 269) puts it, forced returns come with 'high economic, political and psychological costs'.

Despite its contested nature, detention and expulsion policies figure prominently on the political agenda in many EU member states. 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. The Dutch White Paper on Return for example states that 'return policy should not be a closing section but rather an integral part of immigration policy itself' (Minister voor Vreemdelingenzaken en Integratie, 2003: 5) and the German Ministry of the Interior stipulates that the 'use of forced returns cannot be missed' (Bundesminsterium des Innern, 2008: 154). However, there are serious indications that the number of expulsions in countries such as these is declining, rather than increasing (van Kalmthout et al., 2004; Kreienbrink, 2007). This leads to a rather puzzling situation: the capacity for the administrative detention of irregular migrants is *increasing*, while the number of effective expulsions seems to be *decreasing*.

That in turn leads to a number of questions about the effectiveness and nature of immigrant detention. If administrative detention is a measure meant to facilitate expulsion policies and expulsion figures are dropping, how effective, then, is administrative detention? More importantly, it leads to the central question for this article: what is the nature of the administrative detention of irregular migrants in light of stagnating expulsion policies? Is it a rational administrative measure supporting immigration policy or does it serve another – less explicit – policy goal? To answer this question I will look in detail at developments in two northern EU member states where expulsion and detention have been put firmly on the agenda.[1] These countries are Germany and the Netherlands. I will look at these developments through two competing theoretical lenses, one originating from criminological literature and the other from migration studies literature. Phrased in the briefest form, the perspective emanating from new penology literature considers administrative detention to be an end in itself, while the

migration control perspective expects detention to be a means to the end of establishing control over migration processes through effective expulsion policies.

THEORETICAL NOTES ON THE ADMINISTRATIVE DETENTION OF IRREGULAR MIGRANTS

Immigrant detention is an increasingly prominent theme in criminology. In the Netherlands irregular residence is not a criminal offence, and therefore not punishable by criminal law. In Germany it is a criminal offence, although 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. In recent years the general increase in (immigrant) detention has been subject to criminological theoretical debate under the headings of the new penology and the new punitiveness. These theories put forward explanations for the growing culture of control and the increased use of the detention regime. In this article these theories are applied to the specific case of internal migration control of irregular migrants, which requires some adaptation of the original insights as these are usually not applied to irregular migrants. Alternatively, the issues of administrative detention and expulsion of irregular migrants are also the subject 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. The differences in outlook and expectations between the two theoretical approaches on the matter of detaining and expelling irregular migrants will be outlined below. Either way, detention plays a central role in this article, both theoretically and empirically. The detention regime regulates the inflow of irregular migrants through its capacity to detain and to some extent also regulates the outflow by arranging the conditions for expulsion. It is the central link that determines whether the apprehension of irregular migrants ends in their expulsion or their return to the streets and their life in irregularity.

The 'penal state' and 'migration control'

Feely and Simon coined the concept of the 'new penology' in 1992. According to these authors,

> 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 and Simon, 1992: 452)

In the new penology the emphasis is on actuarial policies that are instrumentalized by aggregate classification systems for purposes of surveillance, confinement and control. In short, the penal system becomes a system of control that manages 'dangerous' populations, while ideas of rehabilitation and correction are left behind:

> In particular, the emergence of what is seen as a permanently marginal and, thus, irredeemably dangerous segment of the population – the so-called 'underclass' – calls for their control and containment, while rendering any prospect of treatment and integration futile. (Cheliotis, 2006: 315)

The goal of policy programmes characterized by a 'new penology logic' is not so much to eliminate crime, but rather to make it tolerable through systemic co-ordination (Feely and Simon, 1992: 455). Under this logic, detention becomes a policy of risk management not of *individual* offenders, but of *categories* of people considered to be dangerous. Or, as de Giorgi (2006: 106) puts it: 'It is not so much the individual characteristics of subjects that are the object of penal control, as instead those social factors which permit to assign some individuals to a peculiar risk-class.' Control shifts to risk categories such as 'poverty', 'welfare dependency', 'race' and 'irregular status'. One of the main *indicators* of the existence of this 'new penology' is rising incarceration figures in western countries; first and foremost in the USA but increasingly in Western Europe as well. Popular anxiety and fear of an underclass fuels the demand on the State to provide security and to keep the streets safe. This culture of fear and insecurity, which 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, risk and the search for policies to address the (presumed) sources of this societal fear: the various manifestations of the modern day underclass (Wacquant, 2001b; Ericson, 2007; Reiner, 2007).

According to various authors, the underclass and the increase in incarceration rates have a distinct colour. Wacquant (1999, 2001a) notes that African-Americans are increasingly overrepresented in the American prison population and sees this as the new penal management of poverty, which replaced welfarism as the dominant strategy to deal with the underclass (Matthews, 2005: 177). Irregular migrants can also be increasingly regarded as part of this new underclass (Engbersen, 1999; Calavita, 2005; Schinkel, 2005; de Giorgi, 2006). Especially in Europe there is a specific trend to use an administrative detention regime as an instrument of the 'management of unwanted migrants'. Wacquant (1999: 218) notes that in France 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 and Hansen, 2003). Even in the United States, where illegal migration is usually not subject to much *internal* migration control, Inda (2006: 116) notes a 'surge in the numbers of undocumented immigrants incarcerated in county jails, federal prisons and immigration detention centers' (see also Ellermann, 2005). A new penal approach to the irregular migrant underclass is likely to focus first and foremost on the system of immigrant detention: increased surveillance of 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. They would even be regarded as ineffectual, similar to the devaluation of rehabilitative programmes for the normal prison regime.

Migration control theory, on the other hand, would consider expulsion a logical aim for which governments should strive, as it is the ultimate indication of a government's control of migration flows. Here the State is expected to seek new ways of establishing control on migration flows: at the border and abroad as well as within the borders through internal migration control (Lahav and Guiraudon, 2000; Zolberg, 2002; Cornelius et al., 2004). To this end states seek to close off so-called policy gaps, the 'significant and persistent gap between official immigration policies and actual policy outcomes' (Cornelius et al., 2004: 4). These gaps are usually caused either by unintended policy consequences or they result from inadequate policy implementation.

From this perspective it is not a surprise to note 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 'unfinished' without a serious return policy. This message of an immigration policy without loopholes is intended for the (would be) migrants and the domestic population alike. In the context of the UK, Gibney and Hansen (2003: 7) speak of a 'removal gap' that according to the Home Secretary undermines public support for asylum policies, and therefore needs to be 'closed'. To resolve the problem of a 'removal gap' governments have to look at their own procedures and bureaucratic organizations. The Government becomes preoccupied with scrutinizing and reforming its own procedures (Walters, 2002). Identification of irregular migrants is a *sine qua non* for their expulsion (van der Leun, 2003; Broeders, 2007; Ellermann, 2008). Administrative detention becomes the central link in a chain of control and information exchange between various state agencies. No country of origin accepts undocumented return migrants making anonymity an important shield against expulsion. Identification with a view to (re-) documenting an irregular migrant is indispensible for successful expulsion and usually takes place within the walls of a detention centre.

On ends and means

Either way, both 'mass-incarceration of the underclass' in the new penology perspective or 'expelling the unidentifiable' in the migration control perspective demand much of the State's human and financial resources. In addition, they need a legal framework that suits the political priority of tackling the 'irregular migrant problem'. This 'new' problem – leaving aside for now whether the problem itself or the perception of it is new – has led to the enactment of policies and laws that Ericson (2007) characterizes as '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, as may be the case here if administrative detention is covertly used to manage irregular migrants as a dangerous group. Irregular migrants, although very vulnerable in a legal sense, are 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. Desperate times are often presented by governments as a justification for desperate measures: 'Normal legal principles, standards and procedures must be suspended because of a state of emergency, extreme uncertainty, or threat to security with catastrophic potential. The legal order must be broken to save the social order' (Ericson, 2007: 26). Or, in new penology terms: 'Actuarial justice invites it [the underclass] to be treated as a high-risk group that must be managed for the protection of the larger society' (Feely and Simon, 1994: 192). The question is how far the State wants to bend the law when it comes to immigrant detention and expulsion? More specifically, how much 'counter law' will be allowed in dealing with the underclass of irregular migrants, who are by law the ultimate 'non-citizens'?

Factories of exclusion or factories of identification?

The crucial question for this article is about the nature and function of immigrant detention in Germany and the Netherlands, specifically the question of whether immigrant detention centres function as 'factories of exclusion' or as 'factories of identification'. 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: incarceration as management of the risk category of 'the irregular migrant'. Some authors detect the logic of the new penology in the practices of irregular immigrant detention. For example Boswoth (quoted in Lee, 2007: 850) holds that '[t]he point is that prisons and detention centers . . . are singularly useful in the management of non-citizens because they provide both a physical and a symbolic exclusion zone'. The underlying rationale for this policy varies from the symbolic message that 'our' immigration systems are not soft (cf. Walters, 2002: 286), reassuring the public that dangerous groups are being dealt with, to a more neo-Marxist interpretation in which incarceration and criminalization serve to produce a 'reserve army' of cheap and docile labourers (Calavita, 2003; de Giorgi, 2006). The new penal approach might expect policies preoccupied with the visible signs of social insecurity resulting from irregular migration, which would explain full detention centres. Expulsion is an added bonus but will be much less of a priority, as the prison 'does the trick': detention is an end in itself. Detention centres then function as Bauman's (1998) 'factories of exclusion', in which people are 'habituated to their status of the excluded'.

A migration control perspective would see administrative detention 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 (Andreas, 2003; Cornelius, 2005), 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. If expulsion is the underlying policy goal, simply 'warehousing' irregular migrants would be pointless. Detention would have to serve different goals: to prevent abscondment and, more importantly, to prepare for expulsion through the identification and documentation of irregular migrants. Turning them back on to the street would have to be considered defeat; another chapter in the story of states losing control on migration. Migration control theory would expect states to construct new internal migration policies that may close the policy gaps that undermine migration control. That means adopting policies that not only detain and *exclude*, but also detain and *identify*, in order to make expulsion policies feasible. In short, detention centres will have to be operated as *factories of identification*. In order to do so the State has to organize police detention and expulsion into a chain that can 'secure the pre-conditions of removal'. This means co-ordinating all measures that serve the identification, localization and documentation of irregular migrants (Noll, 1999: 268).

EMPIRICAL DEVELOPMENTS IN ADMINISTRATIVE DETENTION IN GERMANY AND THE NETHERLANDS

The detention of irregular migrants is officially seen as a part of migration policy. The United Nations High Commissioner for Refugees (UNHCR) 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 article focuses on the category of migrants who do not have a legal right of residence (any more), are apprehended at the border, apprehended by the domestic police or are 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. Administrative detention is considered vital to prevent absconding. Detention is obviously the ultimate form of 'localization', one of Noll's (1999) 'preconditions of removal'. But its major official goal is that of identification: determining nationality in the absence of travel or identity documents and arranging travel documents. Van Kalmthout (2005: 325) mentions that one of the main justifications for immigrant detention in the Netherlands is the shedding or destroying of identity papers, the use of false papers and the insufficient co-operation of irregular migrants with the authorities to establish their identity (see Grimm, 2004 for the German case).

Within the EU there are huge differences between national legal frameworks that regulate the detention regime for irregular migrants. Two indicators are often mentioned to determine the 'severity' of the detention regime. 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 staying on to be a criminal offence, meaning that there is no ground under criminal law for detention. In a smaller group of EU countries,[2] including Germany, irregular residence is a criminal offence that is usually punishable with fines and detention (van Kalmthout et al., 2007: 64). However, even though irregular residence is a criminal offence in Germany, irregular migrants are not usually detained under criminal law. As in most countries, immigrant detention is administrative detention and is not considered a punitive measure, but rather a measure to safeguard other purposes, mainly expulsion (Dünkel et al., 2007: 377). Second, the EU member states vary considerably in terms of the length of time that an irregular migrant can be held in detention: some countries measure the length of stay in hours, others in days and others in months. Some even lack any maximum prescribed by law. The length of administrative detention in Germany and the Netherlands is long when compared to most other European countries. The German authorities can detain irregular migrants for up to 18 months. In the Netherlands such detention has no fixed duration (van Kalmthout et al., 2007: 59). In principle it can last until expulsion is realized or still remains a possibility:

> When expulsion has not been realized within 6 months, the courts generally rule that the interest of the foreigner who has to be released weighs more 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 and Hofstee-van der Meulen, 2007: 650)

That leaves the authorities ample room to manoeuvre.

Filling the Dutch and German detention centres

Van Kalmthout (2005: 322) gives a brief overview of the increase in Dutch 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. By then, the new detention capacity was specifically designated for (irregular) migrant detention, instead of 'earmarking' cells in normal prisons for immigrant detention. It is also noteworthy that the Dutch Expulsion Centres in Rotterdam and at Schiphol airport were introduced under the banner of a government programme that was called 'Towards a safer society'. In other words, the intensification of expulsion policies by means of 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 3310 places (DJI, 2007). If we set the increase in immigrant detention capacity against the background of the overall increase of the Dutch detention capacity in the same time period, the following picture emerges. Total detention capacity has been steadily increasing since 2000. However, it seems to be stabilizing and more recently even decreasing slightly, whereas the capacity for immigrant detention keeps on rising steadily. 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 (Broeders, 2009).

The German regime for the detention of irregular migrants differs from the Dutch case in a number of respects. First of all, the prison system is decentralized. The *Länder* are responsible for the buildings and the personnel, which has contributed to large differences between facilities and regimes. Second, these differences are also visible in the more specific case of immigrant detention for the purpose of expulsion. Whereas in the Netherlands, especially since the 1990s, the detention facilities are specifically designated for immigrant detention and immigrants are thus kept separate from the normal prison population, the regime in Germany is more 'mixed'. The facilities for administrative detention vary considerably among the *Länder*, ranging from special facilities for the administrative detention of irregular migrants to 'normal' prisons where they are held alongside criminal convicts. There are three different models of detention: (1) special establishments for the administrative detention of irregular migrants, (2) detention in regular prisons (*Justizvolzugsanstalt*, JVA) or (3) in special departments of such a JVA (van Kalmthout et al., 2007: 54). A detailed overview of the detention facilities in the various *Bundesländer* in 2004 gives the impression that a large part of the German capacity for administrative detention is realized within JVAs, some of it in separate sections, but much of it as an 'earmarked' part of regular capacity (Dünkel et al., 2007: 381–2). A number of the German detention facilities have a rather bad reputation and have been visited and reported on unfavourably by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on numerous occasions throughout the 1990s and the 2000s (Dünkel et al., 2007: 377–8).

Due to its decentralized structure, the development of Germany's detention capacity over time is difficult to measure. Dünkel et al. (2007: 379–80) give some indication of

development over time, but these data must be treated with the utmost care because they do not measure capacity, but the actual stock of detained foreigners who are pending removal on a specific day (1 January) per year. The only information that can be taken from these data is that capacity has increased since the early 1990s and that a small number of *Bündeslander* seem to take up the largest share of them. The current capacity for the administrative detention of irregular migrants awaiting removal is roughly 2250 places (Dünkel et al., 2007: 380). That is not much, especially when set against a background of 222 German prisons with a total capacity of 80,000 places: a 'mere' 2.8 per cent of the total prison capacity. However, if we focus on Berlin, one of the *Länder*, we gain more insight. Berlin has a specialized 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 immigrant detention, quotes figures for this Berlin facility in the year 2002. According to official figures 5676 people were taken into immigrant detention (*Abschiebungshaft*) during that year (Pieper, 2008: 187), which means that on average every place in Köpenick was used almost 17 times during 2002. Though it is of course impossible to extrapolate this figure to the other *Länder*, it does give some indication of intensive use of the available detention capacity.

Leaving detention, leaving the country?

Immigrant detention can end in one of two possible outcomes: either the irregular migrant is expelled or released back onto the streets. In the latter case, it is likely that he will go back to his prior life with the same irregular status for which he was brought into detention in the first place. On the basis of statistics from the Dutch Immigration Services (IND) for the years 2000 and 2001, the Dutch Advisory Committee on Migration 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). In 2005 the IND reported that it had been possible to proceed with deportation for 60 per cent of all irregular migrants detained in that year (Immigratie- en Naturalisatiedienst, 2006: 65). On the basis of his research among 400 immigrant detainees in 2003–4, van Kalmthout (2007: 101) claims the percentage of irregular migrants that are actually expelled is much lower and may even be below 40 per cent. This is a rather low percentage, especially when set against a background of rising length of detention and increasing costs: an estimated 35,000 detention costs per successful expulsion. More importantly, the absolute number of expulsions from the Netherlands has been dropping since 2002, from a peak of 12,015 deportations in that year, to 7765 deportations in 2006 (Broeders, 2009: 139). Set against the background of the increases in immigrant detention capacity this signals a trend of a decreasing effectiveness of expulsion policies. So far, it seems that the intensification of the detention regime has not translated into an increase of actual expulsions in the Dutch case.

Figures for 2000–1, reveal the average length of immigrant detention in the Netherlands to be 36 days (ACVZ, 2002: 23). However, long-term detention from 15 up to 18 months is no exception (van Kalmthout and Hofstee-van der Meulen, 2007: 650). The length of detention is firmly but inversely linked with the likelihood of expulsion. In a research project using a sample of 400 detained irregular migrants, van Kalmthout et al. (2004: 95–8) found that 56 per cent were detained for less than three months,

22 per cent for between three and six months and 22 per cent for longer than six months. Tellingly, the number of irregular migrants who were effectively expelled was highest among those who were detained under three months (67%). This percentage dropped significantly as time went on; only 19 per cent of those who were detained longer than three months were effectively expelled. This mechanism was confirmed in a study by the ACVZ (2002: 23–4). Roughly 80 per cent of the detained irregular migrants who were expelled were in detention for less than 28 days. Conversely, the average length of detention of irregular migrants who were released because expulsion could not be implemented was 121 days. This makes the detention regime harshest for those irregular migrants who (eventually) prove to be 'undeportable'. Moreover, release from detention does not mean these irregular migrants would not 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. (2004: 145) found that, of a subset of detained irregular migrants (n = 262) on whom the immigration authorities have dossiers, 18 per cent have been in immigrant detention before. To some 'undeportable' irregular migrants the detention system risks becoming a revolving door.

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 8000 deportations in 1985, a number that climbed to 15,000 in 1990, peaked at 47,000 in 1993 and stabilized at around 35,000 by 2000. More recently, the German figures have a taken a more significant tumble. There was a steady decrease in the number of expulsions during the 2000s that intensified after 2005 (Kreienbrink, 2007). In 2006, the number of deportations stood at 13,894. In the German case the decrease seems connected to the very large inflow of asylum seekers, especially in the early 1990s, peaking at 438,191 applications in 1992. Since then, the number of asylum applications has dropped steadily to 19,164 in 2007 (Bundesamt für Migration und Flüchtlinge, 2008). The composition of deported aliens during the 1990s followed suit and 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– 4, estimates that roughly one-third of the current population in immigrant detention does *not* have an asylum background. If one considers the dominant focus on rejected asylum seekers in German expulsion policy, the drop in the expulsion figures becomes less dramatic than it first seems.

For the length of immigrant detention there are only estimates and 'averages'. On average, administrative detention in Germany lasts six weeks. Research published in 1990 showed that that the proportion of detained irregular migrants awaiting expulsion who spend more than six months in custody is roughly 10–20 per cent (Dünkel et al., 2007: 383). More recent data do not seem to be available. The relation between the length of immigrant detention and actual expulsions cannot be determined accurately for the German case, as the necessary statistics are lacking. However, estimates range from 60 per cent to 80 per cent of administrative detainees that are actually expelled (Dünkel et al., 2007: 386; Kreienbrink, 2007: 152). That is significantly higher than in the Netherlands.

Identifying irregular migrants: frustrations and innovations

The fact that deportation figures decrease while budgets and staffing for detention and deportation are rising can be explained to a large extent by the growing problem of undocumented and unidentifiable irregular migrants. Without documents there can be no expulsion. The impact of this 'problem of the papers' has increased enormously since the mid-1990s. In 2002, officials of the German Interior Ministry stated 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 (Ellermann, 2008). The situation in the Netherlands is similar. Of the 400 detainees in van Kalmthout et al.'s study, 61 per cent had no documents at all. After taking out the remaining false and invalid documents, a total of 88 per cent did not have any useful documentation (van Kalmthout et al., 2004: 59). This problem is the result of a lack of co-operation – or even active obstruction – of the irregular immigrant, the (supposed) country of origin of the immigrant or both. The problems with irregular migrants primarily involve the destroying of identity papers, being silent or lying about identity and country of origin and refusing to co-operate with the immigration authorities and the embassies of their (supposed) countries of origin. The fast increase in the number of undocumented cases in immigrant detention during the last decade is an important indication that irregular migrants are well aware of 'the importance of not being earnest' (Engbersen and Broeders, 2009: 878). A simple lie can be a valuable and effective instrument for an individual irregular migrant to prevent expulsion. Countries of origin are often unwilling to co-operate. 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). Noll (1999: 274) maintains that some countries of origin handle the issuing of travel documents for irregular migrants as a sort of an 'informal filter for remigration'. Confronted with these obstructions that lead to dropping expulsion rates, the Dutch and German authorities have been looking for 'counter measures' to professionalize the identification process and to increase pressure on both the individual migrant and the authorities of the countries of origin. These measures are sought at both the domestic and the European level. Ultimately the authorities are trying to develop instruments that make the process of identification less dependent on the co-operation of migrants themselves.

Getting irregular migrants to co-operate with the authorities in establishing their identity seems like a direct route towards identification and expulsion. The most important 'instrument' that the authorities use to do this is the detention regime itself, as it represents a severe source of pressure on irregular migrants. Besides the mere fact of being incarcerated, the regime is usually harsher than that of 'normal' prisons as the facilities and circumstances are austere. There is often overcrowding, a lack of medical and legal aid and poorly qualified or even unqualified staff (Dünkel et al., 2007; van Kalmthout and Hofstee-van der Meulen, 2007). As irregular migrants are by legal definition not supposed to return to society, all programmes that might prepare regular prisoners for their return to society, are lacking. Furthermore, irregular migrants that refuse to co-operate 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

co-operate, just as it is meant to deter other migrants from a life in illegality (van Kalmthout et al., 2007: 53).

The authorities use the period of administrative detention to find out the identity of irregular migrants by means of repeated interviews, language tests and research in files, documents, registrations and databanks. When the authorities suspect – as opposed to prove – they have determined an immigrant's nationality they often have to 'present' this immigrant at the embassy of the 'suspected' country of origin. The embassies must recognize the immigrant as a citizen before they might be willing to provide a new passport or a *laissez passer*. Depending on the available proof of identity and nationality, this is either done 'on paper' or in person (van Kalmthout et al., 2004). Presenting migrants is hardly an 'exact science' and in both Germany and the Netherlands, the authorities sometimes present the same migrant to a number of embassies. Germany sometimes brings the representatives of various embassies together to prevent what the German authorities call 'embassy tourism', that is, to limit the risk that various successive embassies reject the migrant as their own (Kreienbrink, 2007: 137). In the Netherlands the authorities take some migrants past a number of different embassies without substantial indication for a specific country of origin, but in the hope of 'passing' the right one. However, this so-called 'embassy shopping' does not usually produce results, but does yield a lot of protest from the legal profession (van Kalmthout et al., 2004).

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). As readmission agreements primarily serve the interests of the countries that wish to expel irregular migrants, they have to contain either effective threats or incentives for the countries of origin, in order for them to sign the agreement (Kreienbrink, 2007; Ellermann, 2008). But even with signed agreements, many states have found out that there can be a huge difference between the paper reality of a bilateral agreement and the practical implementation of that agreement. The difficulties that individual member states have with the negotiation of readmission agreements have made them look for European answers. The idea is to use the political weight of the EU as a tool to negotiate readmission agreements with uncooperative countries (Mitsilegas et al., 2003; Lavenex, 2006). However, there is fierce resistance from countries of origin against these policies, as they consider them to be an instrument for 'externalizing' European problems. Even a celebrated 'success', such as 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, unclear and disputed as soon as the ink was dry (Roig and Huddleston, 2007: 371). Moreover, the EU consequently burdens negotiations by trying to include transit migration. For the countries of 'origin' that means taking 'back' transit migrants who are not nationals and for which there is no obligation to do so under international law. As many East European and Mediterranean countries have their own difficulties negotiating readmission clauses with their sending countries, they fear getting stuck with European problems (Cassarino, 2007; Roig and Huddleston, 2007). Moreover, if these countries of transit lack the political will, the political leverage and the capacity to send 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 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 and Huddleston, 2007: 382).

Identification remains crucial and the most effective way to identify uncooperative irregular migrants would be by means of instruments that do not require their co-operation at all. Many of the national and international database systems the Dutch and German authorities now use, still require at least a minimal degree of co-operation from the irregular migrant in question. At the very minimum a name is needed to make a match between a detainee and the stored information. In light of this 'structural flaw' in the available databases, the German and Dutch authorities are increasingly embarking on a strategy of including biometric identifiers into immigration databases. The use of biometric identifiers, such as digitalized fingerprints, photographs suitable for facial recognition or retina scans, would make the authorities less dependent on the immigrant's co-operation as biometric information makes 'sweeping searches' in the available data possible. For Germany and the Netherlands, this biometric turn in (internal) migration control is primarily located at the EU level. In recent years, the EU member states have been developing a network of immigration databases aimed at documenting migration histories in order to 're-identify' irregular migrants apprehended in EU member states (Broeders, 2007). The network of EU databases comprises the Schengen Information System (SIS) and its successor under construction (SIS II), the Eurodac database and the Visa Information System (VIS) that is also under construction. All of the systems, except the original SIS, (will) register biometric identifiers. Irregular migration itself obviously defies registration, but irregular migrants apprehended in member states can be registered in the SIS. Those who enter through asylum procedures are registered in Eurodac and those who enter on a legal visa will, in the future, be registered by the VIS. The development of this new digital and biometric border is a potential boost for the State's capacity to identify irregular migrants. Documenting identities, in combination with biometric identifiers on the legal entry routes of asylum, tourism and other legal forms of migration that require a visa, may effectively close off these routes for irregular migrants or make them much more vulnerable to identification and expulsion when caught. Once this gathering of biometric data is fully operational, the identification process will become less dependent on the co-operation of individual migrants to reveal their true identities. Assuming that the body does not lie – and governments do assume this when they talk about biometrics – identification may become a 'simple' matter of cross-referencing for certain parts of the irregular migrant population (for example, rejected asylum seekers and 'visa-overstayers'). This is bound to make the identification of detained irregular migrants easier.

CONCLUSION

Set against a background of an *increasing* capacity for the administrative detention of irregular migrants and a *decreasing* number of effective expulsions, this article tries to determine the nature and function of the administrative detention of irregular migrants in Germany and the Netherlands. Are these prison facilities essentially operated as factories of exclusion, as might be assumed from a new penology perspective, or are they operated as factories of identification, as proposed by migration control literature?

Looking at recent developments in both countries, it would seem that both logics can be found in the organization of administrative detention and in expulsion policies.

The declining expulsion rates are an indication of a failing expulsion regime. At the same time they function 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 can relatively easily frustrate the identification process – and therefore their expulsion – has lifted identification to an even more central place in policy making. Theoretically the migration control perspective explains best why the Dutch and German governments are embarking on the difficult road of expulsion as their efforts to close the deportation gap are based on the political motivation to be in control of migration. The heavy investment in policies aimed at detention and identification in recent years, which is likely to continue, supports the thesis of a developing 'factory of identification'. However, given the difficulties with identification, immigrant detention cannot optimally function as a clearing house for irregular migrants, that is, being a (short) stop over preparing them for expulsion. This is especially noteworthy in light of the fact that the data strongly suggest that the overall majority of successful expulsions in both countries are effectuated in the first weeks and months of detention. The longer detention lasts, the less likely the outcome will be expulsion. Still, both governments keep significant numbers of irregular migrants in detention for much longer than that, and keep up a legal framework that allows for detention up to 18 months in Germany and theoretically even longer in the Netherlands. The lengthy and 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 with a higher chance of being deported – and thus releasing 'undeportable' cases much earlier – would seem a more effective and rational approach. What can account for this apparent irrationality?

Here the new penology perspective comes to the fore. Political rhetoric and public anxiety moulded irregular migrants into a policy category that has to be dealt with. As de Giorgi (2006) points out, irregular migrants are in essence not detained because of individual crimes or behaviour, but because of their 'membership' of a group that is classified as dangerous, or at least unwanted. Administrative detention may simply be a way to deal with this group, especially when expulsion is failing. Administrative detention would then serve as a deterrent for irregular migrants and as a reassurance for the domestic population. The 'undeportable' irregular migrants are held in a detention regime that is harsher than that of normal prisons. The length and conditions of immigrant detention (especially in the Netherlands where illegal residence is not even a criminal offence) brush against the limits of the legal system and amount to what Ericson (2007: 24) labels counter law in which 'traditional principles, standards and procedures of criminal law' are undermined. From the perspective of the new penology the social exclusion of irregular migrants for a longer period of time may already be measured as a valuable outcome of policy. Detention then simply functions as a 'factory of exclusion' that keeps irregular migrants off the streets and sends a message of control. An added value, and a slightly more rational line of reasoning, is the idea that a long and harsh detention regime may serve as a deterrent for current and future irregular

migrants. The immigrant's valuable lie comes at a high cost. With the growing importance of immigrant detention the individual irregular migrant finds himself increasingly cornered between the rock of prison and the hard place of expulsion.

Notes

1 The choice for Germany and the Netherlands does not mean to imply that these developments only take place in these countries, or even only in specific parts of Europe. It is rather a result of the fact that this article is based on a larger research project that focused on the broader theme of control and surveillance of irregular migrants in Germany and the Netherlands (Broeders, 2009), of which the matter of detention and expulsion is a part.
2 Besides Germany these countries are Finland, Ireland, France and Cyprus.

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