

Towards a Smarter and More Just Fortress Europe. Combining Temporary Labor Migration and Effective Policies of Return

Godfried Engbersen and Arjen Leerkes

The European restrictive migration regime has reached its limits. Illegal migration and illegal residence remain persistent phenomena after two decades in which an impressive arsenal of instruments for migration control has been built. The European Commission estimated that in the beginning of the 2000s between 4.5 and 8 million foreign nationals were residing illegally in the EU member states. More recently, a lower figure was provided by the Clandestino research team, which estimated that there are between 2.8 and 6 million illegal migrants in the EU. This lower figure is the result of the expansion of the EU with eight countries in 2004 (including Poland) and two countries in 2007 (Bulgaria and Romania). Due to these expansions a large number of illegal migrants who were residing in the older EU countries were legalized overnight (Ruhs 2007). Whether or not the decrease in the number of illegal migrants is permanent is an open question. Considering the low fertility rates and the decline in the working age population there will remain a demand for low-skilled labor migrants from outside the EU (CEC 2005; OECD 2008). Therefore, new groups of illegal migrants will be created if the restrictive immigration policy is continued. Besides this, the restrictive procedures for granting political asylum will generate a permanent contingent of rejected asylum claimants who become illegal if they do not leave the country. A Europe without illegal migrants is unimaginable.

Governments may respond to the presence of illegal migrants in several ways. A first strategy is to accept and tolerate illegal residence for economic and partly humanitarian reasons. This policy of toleration was characteristic for most Western-European countries in the 1970-1990 period (Cornelius et al. 1994). A second strategy, which has chiefly been pursued by South-European countries, is to convert the illegal into the legal through legalization programs. A third strategy is to combat illegal residence. This 'Fortress Europe' strategy has been dominant in most continental European welfare states since the beginning of the 1990s. More recently, it is also becoming dominant in the other EU countries.

In this contribution we focus on the third strategy. We will show that the construction of Fortress Europe has led to various social problems on the terrain of criminal justice. Our

argument is that these social problems can be solved, at least in part, by admitting a larger number of temporary labor migrants from outside the EU, particularly if temporary labor programs are designed with an eye to source country development. Interestingly, research suggests that more space for legal labor migration does not necessarily obstruct restrictive aspects of immigration policy. On the contrary, there is good reason to believe that restrictive aspects can be carried out more effectively if a greater volume of temporary labor migration is admitted.

Typical features of Fortress Europe are:

- 1 A growing militarization of the EU's external border, especially at strategic places such as the 8.3 kilometer border separating Morocco and the Spanish enclave city of Ceuta. At the same time, the EU-enlargements in 2004 and 2007 have created 4,787 kilometers of new eastern borders (Jesien 2000). Such a long border makes watertight border control impossible;
- 2 As a consequence of external border control porosity, migration control is expanding towards to 'outside' as well as to the 'inside'. The shift to the outside is marked by the desire to prevent unwanted migrants and asylum seekers from reaching the territory of the receiving states. This is done by means of carrier sanctions, but also by pressing source and transit countries to stop illegal migrants from entering the EU. As a consequence of this externalization of border control the *de facto* EU border is increasingly shifted to third countries (Boswell, 2003; Lavenex, 2006). The shift to the 'inside' includes, among other things, a multitude of measures that exclude illegal migrants from the formal labor market and public provisions. In this process, employers and functionaries of public housing corporations, welfare agencies, schools, and public health institutions are legally obligated to check whether workers and clients are legally residing in the country (Guiraudon 2003; Van der Leun 2003). (Such internal border control provides an interesting case of what Garland (2001: 124) has called 'responsibilization strategies', in which state agencies prompt action by non-state organizations.) Employer sanctions are enforced ever more strictly, particularly in the Nordic and continental welfare states. The shift to the inside also entails the tracing, identification and detention of illegal migrants who reside in the territory in spite of external border control and who do not leave in spite of their exclusion

from the formal labor market and the welfare state. In the past years states have obtained much more legal and technical possibilities to check identities. Large EU databases such as SIS/SISII, VIS and Eurodac or the UK's e-Borders program are developed to assist the monitoring of migrant movements. These databases are storing a massive amount of data on migrants, including biometric identifiers. The idea is to register as many migrants from 'suspect' legal categories (asylum seekers are registered in Eurodac) and 'suspect' countries of origin (visa-applicants will be registered in the VIS) as possible, in order to monitor migrants who may cross the line into illegal residence at a later stage.

- 3 A steep increase in detention capacity to facilitate the identification and expulsion of apprehended illegal migrants. There are now more than two hundred detention centers in the EU located at strategic sites, such as traditional prisons, islands, airports, seaports and detention boats in large cities (Jesuit Refugee Service Europe 2005). In 2007 no less than 13% of the total penitentiary capacity in the Netherlands was intended for the administrative detention of illegal migrants (Van Kalmthout 2007:103).

One can defend the argument that the number of illegal migrants and asylum seekers has remained limited because of Fortress Europe's deterring effects (see also Tonry, 2000; Jandl 2007). Still, Fortress Europe does not work optimally for a number of reasons. In some countries we can observe large numbers of illegal migrants who work in jobs that are hard to fill in other ways. Furthermore, in many countries the expulsion of illegal migrants turns out to be problematic. In the Netherlands, for example, less than half of the detained illegal migrants are effectively expelled from the country. Contrary to political rhetoric, that number is even decreasing over the years (Van Kalmthout, 2007). This problem exists in other EU countries as well. Moreover, Fortress Europe requires substantial financial and human costs and social problems on the terrain of criminal justice. We will mention four of these:

- 1 The increased difficulty to cross the border legally has led to various forms of people smuggling (Kyle and Koslowski 2001; Jandl 2007). As illegal border crossing has become more risky over the years more and more migrants resort to professional smuggling organizations. In Jandl's words (2007: 311) " (...) there is ample evidence for an increasing role of human smugglers in facilitating irregular migration."

2. There is a link between intensified external border control and *increased fatalities* (cf. also Cornelius 2001 and Castles 2006; Carling 2007). The intensified controls have led to longer journeys under more dangerous circumstances. Although information on this is scarce and contested, the number of people who do not survive their trips has increased. The number of fatalities reported by the NGO United, which has the most comprehensive data available, varies between 770 and 1,300 per year in the 2002-2006 period. The total number of documented deaths in the 1993-2006 period stands at 7.200 (Spijkerboer 2007). Actual numbers are higher than these documented cases.

- 3 A vulnerable *undocumented outsider class* is emerging throughout Europe. It involves a heterogeneous category of migrants who, if they opt for illegal residence, are predestined to an inferior social status because they will be excluded from most civil and social rights. Their presence has led to the return of old phenomena of exploitation, direct dependence on employers, illegal labor sub-contractors and family (Engbersen, 1999). For two reasons, criminal victimization rates are likely to be high among illegal migrants. First, they risk detention and expulsion if they call in the help of the authorities (see Goodey, 2003). Second, illegal residence in urban environments tends to be concentrated in high crime areas (Leerkes, 2009).

- 4 Although detention and expulsion risks tend to depress crime rates, there is also evidence that illegal residence status may incite crime involvement, particularly in the context of a policy of internal border control. It appears that the increased need to be able to show an ID has led to a major increase in ‘residence crime’, i.e. the use of false, borrowed or bought ID’s. The case of Amsterdam provides an indication of the extent to which residence crime may occur. In this city of about 750,000 legal inhabitants, 92,500 ID’s were reported lost over the last five years and only one fifth of these have eventually been found. Furthermore, it appears that the institutional exclusion of illegal migrants from the formal labor market and public provisions incites, or reinforces, forms of subsistence crime in relation to marginalization and extreme poverty (Leerkes, 2009). It appears that illegal residence may also become a risk factor for problematic drug use in the context of

a policy of institutional exclusion, particularly in case of homelessness, which is often coupled with involvement in crimes to finance it. So far, this problem of subsistence and drug-related crime has been documented for the Netherlands in particular. More recently, similar observations have been reported for Belgium (Van Meeteren, Van San & Engbersen, 2008).

Restrictive immigration policy, which includes a restrictive policy on illegal residence, is in our opinion largely inevitable. In the more comprehensive welfare states, *the paradox of solidarity and exclusion* plays a key role (Freeman, 1995; Teulings, 1995). Maintenance of national, comprehensive forms of internal solidarity (in the fields of health care, social security, education, public housing) for the benefit of native citizens and denizens implies the exclusion of unwanted outsiders from the welfare state's social entitlements (no external solidarity). If too many immigrants gain access too easily to welfare entitlements and don't pay taxes to support these, their continuation and legitimacy might be endangered. Aside from this, it is often felt that restrictive policies benefit the integration of those migrants who have arrived in previous immigration flows (Bade, 2004). More recently, there has also been concern that continuing immigration, in particular from Arab countries, might conflict with established 'cultural' institutions and mores, such as equality between the sexes, gay rights and the separation between religion and the state (Fortuyn, 2001).

Yet, given the social problems in and around Fortress Europe, the question has to be raised of whether a more rational and just migration policy can be conceived. The challenge of a smarter and more just Fortress Europe will be to find the right balance between closedness and openness. Above all, this will require a combination of a strategy of increased labor migration and a strategy of increased return migration. There should be more openings for legal labor migration in order to meet the very real demand in various sectors of the European labor market, now and in the future. This will counter the rise of human smuggling organizations and the occurrence of residence and subsistence crime. At the same time, it is essential that illegal migrants – their number is likely to be lower if the first strategy is successful – can be returned to their country of origin. The latter is crucial for the legitimacy of the European migration policy, but will also ensure that problems of exploitation, victimization and of residence and subsistence

crime, in so far as these would still occur, will remain temporary, i.e. before repatriation takes place. Below, we will explain why both strategies can go together very well.

Temporary Migration.

We must consider new systems of temporary migration. In the past few years several Europe has gained several experiences with temporary migrant workers programs (TMWP), such as working-holiday makers, seasonal agricultural workers, sector based schemes, overseas students, and intra-corporate transferees (OECD, 2008). Yet these programs do not meet the total demand for low skilled work in agriculture, construction, trades, hospitality and domestic work. Therefore, more experiments are needed. Apart from the requirement of equal treatment on the labor market in terms of rewards and labor conditions, these experiments should be based on two principles:

1. The temporariness of labor migration is central.
2. Labor migration programs will meet the demand for labor but are also designed to contribute to development objectives in the countries of origin.

Several pleas have already been made to realize such 'smart' TMWP's programs. Crucial elements are: (1) a clear delineation of the length of the contract; (2) whereas employers initiate specific TMWP's governments are to create the conditions for the arrival and return of temporary labor migrants; (3) use is made of return premiums, which could consist of social security savings, pensions savings, or a share of developmental aid money (4) there are schemes for facilitating the productive investment of return premiums (GCIM, 2005; Rush, 2005; Crisp, 2007; Os van den Abeelen, 2007), such as reserving part of the return premiums for scholarship funds for the benefit of the migrants' children. In other words, TMWP's should be designed and framed in ways that do justice to the interests of all parties involved (employers, governments, workers) in the countries of destination and origin.

Because the effects of such programs will have to prove themselves in practice, it is recommendable to increase the number of serious experiments (OECD, 2008; Castles, 2006).

Why temporary labor migration may assist migration control

The effective exclusion of illegal migrants requires the co-operation of countries of origin and transit. That is increasingly acknowledged with respect to the initial phase of migration as we have described with the move towards the externalization of control. But it is also true for the final phase of return. Return may fail if illegal migrants try to conceal their identity and nationality, but also if countries of origin are reluctant to take illegal migrants back. Reluctant countries will, of course, be more likely to co-operate with return migration if they gain by doing so. Indeed, a number of countries are already demanding concessions for their involvement in *external* border control (Lavenex, 2006). While concessions for the involvement in migration control do not necessarily have to lie on the terrain of migration policy – there is some evidence that the weapon ban on Libya was lifted in return for the country’s co-operation with external border control (Human Rights Watch, 2006) – more space for legal labor migration is high on the political agenda of many source countries. More space for temporary legal labor migration may also contribute to a greater perceived fairness of the international migration regime. Sociology of Law teaches us that rules are more likely to be followed without formalized social control if these are perceived as legitimate by the actors involved. Although we lack systematic information on the perceived legitimacy of migration rules and its importance for actual migration behavior, it can be hypothesized that more space for labor migration will increase the willingness on the part of countries of origin and migrants to co-operate with migration control for ‘moral’ reasons. That would constitute another reason to adapt the pragmatic idealism we have propagated in this paper.

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Table 1a. Expulsion rates among detained nationals of countries aspiring EU membership according to (un)willingness to return

	Released	Expulsed	Total
Wants to return	1 (9%)	10 (91%)	11 (100%)
Does not want to return	4 (19%)	17 (81%)	21 (100%)
Total	5 (16%)	27 (84%)	32 (100%)

Table 1b. Expulsion rates among detained nationals of other non-EU countries according to (un)willingness to return

	Released	Expulsed	Total
Wants to return	18 (32%)	38 (68%)	56 (100%)
Does not want to return	96 (50%)	97 (50%)	193 (100%)
Total	114 (46%)	135 (54%)	249 (100%)