

TOWARDS A SMARTER AND MORE JUST FORTRESS EUROPE. COMBINING TEMPORARY LABOR MIGRATION AND EFFECTIVE POLICIES OF RETURN

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The EU's restrictive migration regime is reaching the limits of its effectiveness. After two decades in which an impressive array of instruments to control migration has been developed, irregular migration remains a persistent problem. The European Commission estimated that at the beginning of the twenty-first century, between 4.5 and 8 million foreign nationals were illegally residing in EU territory. A lower figure for the year 2005 was provided by the Clandestino research team (2009), which estimated that the range was more likely to be between 2.8 and 6 million. This lower figure is a consequence of the enlargement of the European Union to include eight more countries (including Poland) in 2004, and another two (Bulgaria and R omania) in 2007. As a result, many migrants residing illegally in Western Europe were legalized overnight (Ruhs, 2007). In view of demographic developments – falling fertility rates and a declining working-age population – the need for low-skilled non-EU labor migrants is likely to continue (Organization for Economic Co-operation and Development (OECD), 2008). In combination with a restrictive EU immigration regime, this creates new groups of illegal migrants. In addition, the strict asylum procedures in place in the EU are generating a permanent contingent of failed asylum seekers who become illegal if they stay in the country. A Europe without illegal residence is inconceivable, though the size of that residence will fluctuate.

Governments may respond in several ways to the presence of illegal migrants. One strategy is to accept and tolerate them for economic and humanitarian reasons. This policy was characteristic of most West European countries in the period 1970-1990 (Cornelius, Martin & Hollifield, 1994). A second strategy, pursued mostly by South-European countries, is to legalize these groups through regularization programs (Levinson, 2005). A third strategy is to combat illegality. This Fortress Europe-strategy has been the principal strategy in most continental European welfare states since the early 1990s (Engbersen & Van der Leun, 2001). It is currently also becoming dominant in other European countries and has risen to the top of the European public agenda. It also is becoming more dominant in the United States (Jencks, 2007; National Conference of State Legislatures, 2009).

In this policy proposal we focus on this third strategy. We will show that the construction of Fortress Europe has led to various social problems in the terrain of criminal justice. Our argument is that these 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 more temporary labor migration is allowed for.

The defining characteristic features of 'Fortress Europe' are the following.

1. Growing militarisation of the EU's external borders, especially at strategic places such as the 8.3 kilometer border separating Morocco and the Spanish enclave of Ceuta. However, EU enlargements in 2004 and 2007 created 4,787 kilometers of new eastern borders (Jesien, 2003). Such a long border makes hermetic border controls impossible.

2. A greater focus on 'remote control' and 'internal' border controls given the porous nature of external borders. Migration control is expanding towards the 'outside' as well as the 'inside'. The shift to the outside is marked by the desire to prevent unwanted migrants and asylum seekers from reaching EU territory. 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 has increasingly shifted to third countries (Lavenex, 2006). The shift to the 'inside' includes, among other things, various measures that exclude illegal migrants from the formal labor market and public provisions. This emphasis on internal border controls has led to increasing involvement on the part of employers and public housing corporations, welfare agencies, schools and healthcare bodies in those controls (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 or semi-public organizations. Furthermore, employer sanctions, particularly in the Nordic and continental welfare states are enforced more strictly (Broeders 2009; Carrera & Guild 2007).

The shift to the inside also entails the tracing, identification and detention of unwanted migrants who reside in the territory in spite of external border control, as well as 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/SIS-II, VIS and Eurodac, have been developed to enable states to identify migrants' movements. These databases are storing a massive amount of data on migrants, including biometric markers. The idea is to register as many migrants as possible from 'suspect' legal

categories (asylum seekers are registered in Eurodac) and 'suspect' countries of origin (visa-applicants will be registered in the VIS), in order to identify migrants who may cross the line into illegal residence at a later stage (Broeders, 2007).

3. An 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, both at traditional prisons and on islands, at airports and in large cities (Jesuit Refugee Service Europe, 2005). In 2007 13% of the penitentiary capacity in the Netherlands was intended for the administrative detention of illegal migrants (Van Kalmthout, 2007:103).

One can defend the position that the number of unwanted migrants has remained limited because of Fortress Europe's deterring effects (see also Jandl, 2007; Torpy, 2000). Still, Fortress Europe is unable to combat irregular migration effectively. In some countries large numbers of illegal migrants work in jobs that are hard to fill otherwise. Furthermore, in many countries the expulsion of illegal migrants remains problematic. In the Netherlands, for instance, less than half of the detained illegal migrants are effectively expelled from the country. Contrary to political rhetoric, that number has decreased in recent years (Van Kalmthout, 2007). This goes for other EU countries too. Fortress Europe has led to substantial human costs and social problems confronting the criminal justice system. We outline four of these below.

1. The increased difficulty of crossing the border legally has led to professional human smuggling (Jandl 2007; Kyle & Koslowski 2001). Stricter controls have made illegal crossing more risky, increasing migrants' dependence on human smuggling organizations. As Jandl (2007: 311) notes "(...) there is ample evidence for an increasing role of human smugglers in facilitating irregular migration".

2. There is a link between increased fatalities and intensified border controls (cf. Castles, 2006; Cornelius, 2001). Intensified controls have led to longer journeys under more dangerous circumstances. Although data are scarce and contested, the number of people that do not survive their journeys has increased. The number of annual fatalities reported by the NGO United varied between 770 and 1,300 in the 2002-2006 period. The total number of documented deaths between 1993 and 2006 is 7,200 (Spijkerboer, 2007).

3. A vulnerable undocumented outsider class is emerging throughout Europe (Engbersen, 1999). This is a heterogeneous category of migrants who, if they opt for illegal residence, are predestined to have an inferior social status, because they lack access to most social and political rights. Their presence has led to the return of pre-welfare state 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. They risk detention and expulsion if they call in help of the authorities (Goodey, 2003), and their

housing opportunities are spatially concentrated in high crime areas (Leerkes, 2009).

4. Detention and expulsion risks dampen crime rates; this is an important reason why crime among legal migrants tends to be limited. Yet there is 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 identification 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 been found. Furthermore, it appears that the institutional exclusion of illegal migrants from the formal labor market and public provisions generates forms of subsistence crime in relation to marginalization and extreme poverty (Engbersen, Van der Leun & De Boom, 2007; Leerkes, 2009). Illegal residence may also become a risk factor for problematic drug use, particularly in case of homelessness, which is often coupled with involvement in crimes to finance it. So far, this problem of marginalization and crime has been particularly documented for the Netherlands. More recently, similar observations have been reported on Belgium (Van Meeteren, Van San & Engbersen, 2008).

Restrictive immigration policy is in our opinion largely inevitable. In the more comprehensive welfare states, the paradox of solidarity and exclusion plays a key role (Freeman, 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).

Yet the social problems created by Fortress Europe give rise to the question whether a more rational and just migration policy can be conceived. In our view the challenge will be to find the right balance between a closed and an open border, which will above all 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 demands in various sectors of the European labor market, now and in the future. The enlargement of the EU resulted in increased potential sources of labour, particularly from Eastern Europe, that can meet shortfalls (Black, Engbersen, Okólski & Panțîru, 2009). Over the last decade, third-country nationals have increasingly been replaced by workers from within the EU. It is nevertheless to be expected that in the longer term – after the end of the current economic crisis – wages within the EU will show fewer disparities, leading to reductions in internal

EU migration. This means that labour will ultimately have to come from non-EU countries.

Labour migration will counter the rise of human smuggling organizations and the occurrence of residence and subsistence crime. It will also reduce the number of 'bogus' asylum seekers because there is a legal labor channel they can use to find employment in Europe (Crisp, 2007). At the same time, it is essential that illegal migrants can be returned to their country of origin. This is crucial for the legitimacy of the European migration policy, but it will also ensure that problems of exploitation, victimization and of residence and subsistence crime can be reduced and will remain temporary, i.e., before repatriation takes place. Below, we will explain why both strategies can go together very well.

TEMPORARY MIGRATION

It is important to consider new systems of temporary migration. Considerable experience has been gained in Europe in recent years with temporary migrant worker programmes (TMP), covering working holidays, seasonal agricultural work, sector-based schemes, overseas students, intra-corporate transferees, etc. (OECD, 2008). But these programmes are limited and do not meet the demand for low-skilled workers in agriculture, construction, trades, hospitality and domestic work. Apart from the requirement of equal treatment on the labor market in terms of rewards and labor conditions, additional 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 TMP's programs. Crucial elements are: (1) a clear delineation of the length of the contract (not exceeding five years); (2) employers initiate specific TMPs, but governments must create and control the conditions governing the arrival and return of temporary labor migrants (3) use is made of substantial 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 (Crisp 2007; Global Commission on International Migration, 2005; Van 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, TMP'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 (Castles 2006; OECD 2008). Furthermore, we like to emphasize that temporary labor migration programs are not a replacement for regular labor migration programs and official developmental assistance (ODA). They are also not a form of 'total justice'. These programs will be highly selective just as the current irregular flows of labor migration. Very poor people without skills and economic and social capital do not migrate.

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 conceal their identity and nationality, but also if source countries are reluctant to take migrants back. Dutch research, which was carried out in two big centers for Alien Detention, confirms that international relations influence expulsion rates. It turns out that illegal migrants who are in a political sense from 'near' countries – countries that are aspiring EU membership and the former Dutch colony Surinam – are more likely to be expelled than illegal migrants from other source countries, quite independent of differences in willingness to return on the part of illegal migrants (table 1).

Table 1. Expulsion chances of detained illegal migrants according to country of origin and willingness to return on the part the migrant.

	Released	Expulsed	Total
<i>Countries aspiring EU membership^a / Surinam:</i>			
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%)
<i>Other countries:</i>			
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%)

Source: Secondary analyses of data (examination of dossiers and in-depth interviews) that was gathered in 2003 by Van Kalmthout, Graft, Hansen & Hadrouk (2004a; 2004b).

Notes: ^a This category includes all countries that have been admitted to the EU after Van Kalmthout's study had been completed (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Malta, Cyprus, Romania and Bulgaria)

as well as all countries that are still, at the time of writing, candidates for EU membership (Croatia, Macedonia, Turkey).

Therefore, reluctant source countries will, of course, be more likely to cooperate with return migration if they gain by doing so. Indeed, a number of countries already demand concessions for their involvement in external border control (Lavenex, 2006). While such concessions do not necessarily have to lie on the terrain of migration policy – there is some evidence that the weapons ban on Libya was lifted in return for external border control (Human Rights Watch, 2006) – more space for legal labor migration is high on the political agenda of many source countries that have an interest to send unemployed workers abroad hoping that these will send remittances to the source country. In the present conditions, source countries risk losing a remitter if they cooperate with expulsion procedures, while it is uncertain whether other nationals will make it to the EU to replace the migrant. If there would be more space for TMP's, the 'replacement' of remitters would be less problematic. Furthermore, there is some evidence that an increase in the number of temporary migrants will result in a higher volume of remittances to source countries, even if this would presuppose a reduction in the number of nationals who settle more permanently. This is because there appears to be an inverted "U" time pattern in migrant remittances, where remittances tend to increase in the first five to eight years after migration, but eventually decrease with time spent in the country of destination (Amuedo-Dorants & Pozo, 2006).

Finally, more space for temporary legal labor migration may also contribute to a greater perceived fairness of the international migration regime. Sociology of law teaches 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 migration behavior, it can be hypothesized that more space for labor migration will increase the willingness on the part of source countries and migrants to co-operate with migration control. That would constitute another reason to adopt the pragmatic idealism we have propagated in this policy proposal.

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