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Fortress Europe? – Controlling Illegal Immigration

1. INTRODUCTION: IMMIGRATION IN EUROPE – PERSPECTIVES AND CONCEPTS

The concept of a ‘Fortress’ Europe carries both, critical connotations as well as a positively evaluated meaning. Allegations of establishing a fortress Europe to the disadvantage of the third and developing world, refugees, asylum seekers, the poor and finally with detrimental effects for the very basic values of open and democratic societies based on the rule of law and respect for human rights, have been voiced since the eighties when the first signs of a common European Union immigration policy became visible.² These voices – demanding for ‘politics, not policing’ – grew louder during the nineties and they reflect ultimately a mixture of concerns which are raised by partisans of human rights as well as by critics of alleged negative effects of globalization. On the other hand, European police forces and ministries of home affairs called for tighter border controls and convincing concepts that cut down the number of immigrants to the European Union member countries and perceived immense risks of uncontrolled immigration.³ The media and a wide range of political parties throughout Europe also participate in and profit from the discourse on safety, crime and immigration. The concept of a ‘Fortress’ from this perspective points to urgent needs for the exclusion of risks and the pursuit of safety as well as preservation of economic and social stability.⁴ The belt of European candidate states in Central Europe – at the end of the eighties of then emigration countries – has joined the ranks of European Union member states as regards political sensibilization for immigration and political and legislative moves towards tightening up of immigration controls.

In fact, immigration has become a high ranked European concern over the last two decades. This is due in particular to the opening of borders between East and

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 2. See e.g. <http://www.humanrights.de/congress/2000/04/25/32.html>.
 3. J.H. Dearden, ‘Immigration Policy in the European Community’, DSA European Development Policy Study Group *Discussion Paper No. 4* (1997).
 4. See e.g. A. Wimmer, ‘Katastrophenbefürchtungen in einem Einwanderungsland a contre coeur’, in E. Currie and T. Wunderlich, eds., *Deutschland – ein Einwanderungsland? Rückblick, Bilanz und neue Fragen* (Stuttgart 2001) pp. 481–493.

West of Europe as well as to a debate on safety in Europe, the onset of which is marked by the creation and implementation of the Schengen Treaties and the abolition of inner border controls in most of Western Europe. Strengthening control of the external Schengen borders certainly has been at the centre of the attempt to reduce unwanted and illegal immigration. However, the need for a common European immigration policy – as expressed from the end of the eighties on – is also caused by displacement phenomenon (which became visible at the beginning of the nineties when drastic changes in German asylum law led immediately to increases in the numbers of asylum seekers in neighbouring European countries and of course subsequent changes in immigration laws of the respective neighbouring countries⁵).

But, it is not only immigration per se that is dealt with in current political debates. The topic of immigration is mingled (and actually confounded) with other sensitive and sometimes emotional, but always ideologically and politically exploitable issues such as ethnicity and ethnic differences, nationality, identity, national identities and finally order, safety and stability. Immigration then is linked with organized crime, in particular organized drug trafficking, trafficking in humans, smuggling of illegal immigrants and the emerging shadow economies (red light districts, prostitution, sweatshop labour) which today absorb substantial parts of the (non-EU) immigrant population.⁶ The dominant perspective on immigration and ethnic minorities currently is characterized through crime, deviance and conflict. Assumptions on causal links between immigration (or the minority status) on the one hand and crime and deviance on the other hand, point first of all to powerful belief patterns concerning the potential of conflicts and instability associated with immigration and the ‘alien’.⁷

The topic ‘immigration, ethnicity and crime’ therefore is most sensitive as it facilitates polarization and is susceptible for political exploitation. Indeed, the issue of ethnic minorities and especially asylum seekers as well as their perceived potential for threatening public safety has become a rallying point for authoritarian sentiments in European societies as well as for new right wing political parties and extremist groups.⁸ Accounts of pogrom-like events as well as individual acts of hate motivated violence and bias crime are on display in the annual reports of the European Monitoring Centre on Racism and Xenophobia⁹ and they are summarized in the country reports of the European Commission Against Racism and Intolerance.¹⁰ The 1999 EUMC report and the ECRI 2001 report describe hate incidents and pogroms as being wide spread

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5. B. Hall, *Immigration in the European Union: Problem or Solution? The Number of Asylum Seekers is Rising Sharply across the European Union. Given the EU's Ageing Population, is a Return to Selective Immigration Inevitable?* (London 2000).
 6. See e.g. Organization for Security and Cooperation in Europe, ‘Trafficking in Human Beings. Implications for the OSCE. Review Conference’, 3 *ODIHR Background Paper* (1999).
 7. H.-J. Albrecht, ‘Ethnic Minorities, Crime and Criminal Justice in Germany’, in M. Tonry, ed., *Ethnicity, Crime and Immigration. Comparative and Cross National Perspectives* (Chicago, London 1997) pp. 31–99.
 8. See E. Wiegand, ‘Ausländerfeindlichkeit in der Festung Europa: Einstellungen zu Fremden im europäischen Vergleich’, in H. Schock and G. Wacker, eds., *Einwanderung und Asyl. Eine Dokumentation sozial- und rechtswissenschaftlicher Forschung* (Nürnberg, Bonn 1995) pp. 31–39.
 9. EUMC, European Union 2000, *Annual Report 1999* (Vienna 2000) p. 17.
 10. ECRI, Council of Europe 2001, *Annual Report on ECRI's Activities Covering the Period From 1 January to 31 December 2000* (Strasbourg 2001).

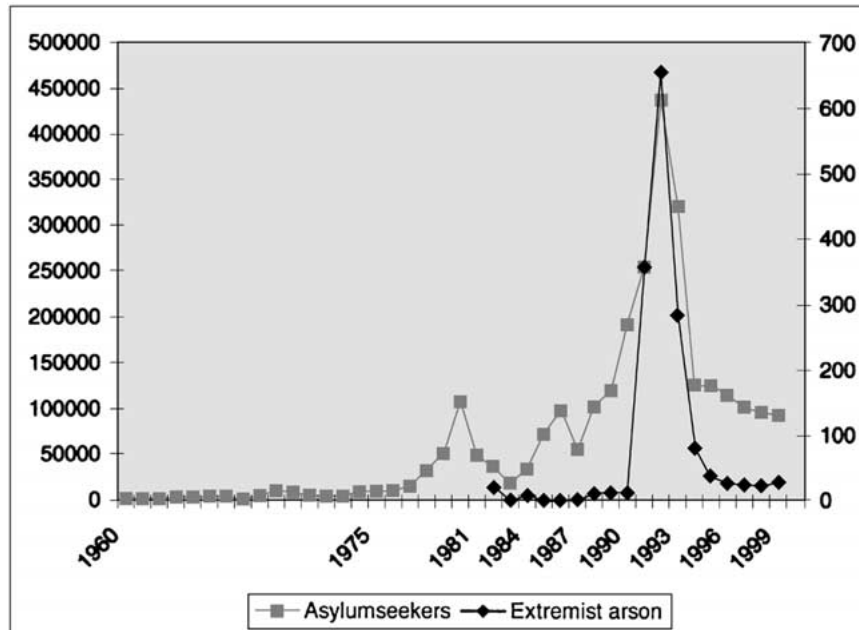
and as affecting every European country. However, statistical accounts vary considerably and in particular statements on the trends in hate crime incidents seem almost impossible as there do not exist common definitions and approaches as to what should be regarded to establish hate violence or racist violence and related acts (over time and across countries). It is only recently that some countries (Germany and England/Wales) have started to collect data on hate crimes as part of police crime data collection. But, it is in particular the emergence of group violence directed against (visible) minorities which attract attention and evidently have – though they can be regarded also as rare events – the power of creating considerable fear and feelings of unsafety not only in minority groups but in societies at large. Europe wide surveys confirm that – measured through attitudes and perceptions – quite substantial parts of autochtone populations see themselves as being (very or quite) racist. From the Eurobarometer opinion poll carried out in 1997 it is known that some 33% of the population in the European Union member states perceive themselves as being quite or very racist (Eurobarometer No. 47.1, 1997). The high potential of the immigration and crime issue for political and social exploitation is visible also in criminology and social science at large. Critical approaches on the one hand and ‘realist’ views on the other hand present their opposing cases with either stressing that absence of research on immigration and crime will make the topic totally exploitable for right wing politicians or assuming that fear of immigration and ethnic minorities as well as hate crimes committed against members of ethnic minorities are provoked by reporting and publishing on crimes committed by immigrants or members of ethnic minorities their causes and preventive devices. In fact, the provocation argument seems to have some merits because the longitudinal data available for Germany demonstrate a strong correlation between the number of asylum seekers and the number of hate arsons.

But, the curves as displayed in Graph 1 follow perfectly also the intensity of the debate on asylum problems in the German political system and with that the data support, a view which relates the debate on asylum problems with violence against asylum seekers. In addition, Graph 1 displays a time lag in the number of hate arsons which gives support to the assumption that the dramatic increase in hate arson is linked also to the German re-unification as well as the coming down of the ‘iron wall’ in Europe and not solely to the mere number of asylum seekers (which after all is not known to the public).

Furthermore, there are different angles and levels of analysis as regards legal and illegal immigration. Immigration may be seen as a safety valve for sending societies as it contributes to reducing pressures on local labour markets, it contributes to economic growth in sending societies through returning migrants who import both, professional skills and capital.¹¹ On the other hand, brain drain might be caused by migration. Therefore, from a global economic view free labour migration may be assessed to increase economic growth and wealth, foster welfare maximisation in the same way as free movement of capital and free trade does, while on local levels these issues are evaluated differently.

Illegal immigration has of course become an important political topic also because

11. J.H. Dearden, *loc. cit.*



Graph 1: Asylum seekers and Extremist (hate) Arson in Germany.¹²

of the enormous reduction in opportunities for legal immigration.¹³ With illegal and unwanted immigration other issues have moved upwards on political agendas, too. Smuggling and trafficking of humans as part of organized crime and an underground economy have attracted attention,¹⁴ moreover, foreign and international terrorism has been linked to immigrants and immigration (not just since the 11th of September 2001 terrorist acts in New York and Washington but as early as in the seventies).¹⁵ Smuggling of immigrants across borders became a sensitive topic in particular also through accounts of the death toll which has created serious discussions and problems in view of the fundamental values representing the basis of the European Union. Incidents like those of the 58 Chinese nationals found suffocated in a container in Dover¹⁶ or the regular reports on scores of clandestine migrants found drowned on the beaches of Spain and Italy fuel a debate on how best to respond to those enormous risks illegal immigrants evidently are ready to take by attempting to climb over the walls of the fortress Europe.

12. Source: Bundesamt für Verfassungsschutz, *Jahresberichte 1982–2000* (Berlin 1983–2001); Bundesamt für Statistik, *Statistisches Jahrbuch* (Wiesbaden 1960–2001).
13. P. Andreas, 'Smuggling Wars: Law Enforcement and Law Evasion in a Changing World', in T. Farer, ed., *Transnational Crime in the Americas* (New York, London 1999) p. 86.
14. P. Andreas, *loc. cit.*, pp. 86–87.
15. D. Ward, 'Reassessing Terrorism', 17 *Crime & Justice International* (2001) pp. 19–23.
16. A.A. Aronowitz, 'Smuggling and Trafficking Human Beings: The Phenomenon, the Markets That Drive It And the Organizations That Promote It', 9 *European Journal on Criminal Policy and Research* (2001) pp. 163–195.

It is estimated that 60–90% of illegal immigrants today have been supported by organized groups in travelling to Europe and crossing European borders.¹⁷ At large there exist estimates that put the number of immigrants illegally smuggled and trafficked at some 4 million per year.¹⁸ Brokerage of illegal immigrants into labour markets is obviously concentrating on the construction business, house servants, sweatshops and agriculture as well as various types of shadow economies.¹⁹ Conventional organized crime is involved in trafficking immigrants, in particular the Chinese triads.²⁰ In Germany, estimates put the number of illegal immigrants in the construction business at approximately 500,000. According to recent estimates some 4.5 million illegal Mexicans alone live and work in the US (most of them in those areas of the southern belt where agriculture plays a major role).²¹

Control of illegal immigration conceptually becomes an attempt to distinguish between genuine politically motivated refugees from mere economic migrants and to separate those migrants threatening order, stability and peace in society from those who are wanted for their professional and technological skills. So, the question is how to make selections among immigrants and whom to define as a potential risk and burden and whom to welcome as an ‘asset’ for economy and culture. The German discussion on amending immigration laws certainly presents a very good example which demonstrates how and to what extent immigration policies have switched into an economic cost-benefit analysis mode which is based on attempts of long term demographic predictions and planning as well as short term economic and commercial demand for labour force.²²

2. WHY IS THE FOCUS ON ILLEGAL IMMIGRATION, OR, IS BUILDING A FORTRESS JUSTIFIED?

2.1. Immigrants and immigration: Sensitive and risky issues

There are several grounds that explain the ‘Fortress’ rhetoric in Europe. The most important reasons certainly are ‘safety feelings’ and crime. Immigration in Europe since the early sixties has been associated with crime and other social problems and therefore immigration has also become a central topic in the debates on safety in European Union countries.²³ As is demonstrated through the creation and implementation of the Schengen treaties the immigration topic has grown into a most significant concept as regards the European Union policies with respect to crime and crime control.²⁴

17. A.A. Aronowitz, *loc. cit.*, p. 169.

18. A.A. Aronowitz, *loc. cit.*, p. 164.

19. Organization for Security and Cooperation in Europe, *loc. cit.*

20. Yiu Kong Chu, *The Triads as Business* (London, New York 2000) p. 115.

21. ‘Out of the Shadows’, *Time* (30 July 2001) pp. 26–29.

22. See e.g. *Der Spiegel* (3 August 2001) Spiegel-online: www.spiegel.de.

23. M. Tonry, ‘A Comparative Perspective on Minority Groups, Crime, and Criminal Justice’, 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) pp. 60–73, at p. 60.

24. H.-H. Kühne, *Kriminalitätsbekämpfung durch innereuropäische Grenzkontrollen? Auswirkungen der Schengener Abkommen auf die innere Sicherheit* (Berlin 1991); Bundeskriminalamt, ed., *Moderne Sicherheitsstrategien gegen das Verbrechen* (Wiesbaden 1999).

Control of immigration is even equated with control of crime and the creation of stable social conditions. The particular relevance of the topic of the relationship between safety and immigration results from the process of globalization in the economy, the shrinking of the first labour market, and the rapid expansion of shadow economies as well as mass unemployment, the consequences of which become visible in feelings of unsafety, segregation and the emergence of inner city ghettos,²⁵ in the loss of social solidarity and massive signs of bias hate and bias violence. With such processes the view of immigration and attitudes towards immigrants (and ethnic minorities) changes and moves immigrants into the role of individuals and groups carrying an extreme risk of:

- contributing to instability and violence either actively as offenders or passively as violence provoking victims; or
- exploiting host countries and host societies either through marketing illicit goods and services or through living on social security and property crime.

This view is re-enforced through other signs of disintegration and conflict displayed by immigrant groups. It is, in particular, their high share of unemployment and low achievements in training and education which make immigrants (in particular immigrants from non-EU countries) a social group evidently living at the margins of societies. Unemployment rates among non-EU immigrants is at least the two-fold of what can be observed among the majority group.²⁶

However, European societies are diverse and sometimes also inconsistent in their responses to immigration. Policies of naturalization vary as are varying policies with respect to administrative detention and criminal justice responses to legal and illegal immigrants. The political discourses in Europe have in the last decade highlighted naturalization, asylum, refugee policies, employment and immigration although the primary interest certainly everywhere refers to containment of immigration at large and independent of the motives of migration. Administrative policies certainly display an up and down (and with that also inconsistency or ambivalent attitudes) with letting the group of illegal immigrants grow over a certain period of time and responding to that growth with regularisation policies. Illegal immigration into the European Union by Europol is estimated to amount to some 500,000 people each year with most of these either finding employment as undeclared workers or in the shadow economies. Some European countries rather early, resorted to regularisation or amnesty measures and the number of those finally permitted to stay legally as a result of such regularisation policies was estimated at approximately 1.8 million between 1970 and the mid-nineties. However, it seems that these policies of regularisation and amnesties have gained momentum in recent years. As, e.g. in Italy regularisation of illegal immigrants in 1999 addressed some 250,000 cases of which 145,000 were accepted, only 14,000 were rejected (some 91,000 are still being processed). Belgian authorities

25. P. Wiles, 'Ghettoization in Europe?', 1 *European Journal of Crime Policy and Research* (1993) pp. 52–69.

26. P. Muus, 'International Migration: Trends and Consequences', 9 *European Journal of Crime Policy and Research* (2001) pp. 31–49, at p. 45.

received during January 2000 alone 33,443 demands for regularisation; in France, the operation 'Chevenement' generated 140,000 applications for regularisation.²⁷ These figures demonstrate that European societies are still absorbing scores of immigrants although the instruments used to enter immigrants into a safe legal position evidently have changed. The price immigrants pay today for a safe place in European countries in many instances consists of a prolonged period of uncertainty, illegality and an enormous risk of criminalization. Moreover, the risky process of slipping into Europe on clandestine routes makes immigrants also exposed to all sorts of criminal and other victimization.²⁸

During the 50s and 60s immigration took place almost exclusively on the basis of labour immigration (finding its expression in active recruitment of labour immigrants in most Western European countries) as well as on the basis of post-colonial relationships. Immigration today is – as has been pointed out earlier – predominantly unwanted immigration triggered by military conflicts, civil wars and rapid processes of economic and cultural transformation in third world countries.²⁹ The process of constructing immigration as a social, economic, political and crime problem has gained momentum with the socio-political and economic changes in the East of Europe and the opening of the formerly tightly controlled borders between Western and Central European countries.

2.2. Why do people migrate?

At the beginning of the new millennium, estimates put the number of non-EU nationals in EU-countries at approximately 10 million representing some 3% of the European Union resident population. Recently, a study on immigration of EU member countries has revealed quite interesting, though not unexpected results. Interviews have been carried out with non-migrants as well with migrants from 5 countries (Turkey, Egypt, Ghana, Senegal and Morocco).³⁰ From the data collected for this study it seems clear that the main motive for migration is economic reasons (however, there are also clear gender patterns with women being motivated first of all by family reasons). Then, the destination of migration is first of all determined by the availability of family and friendship networks. This explains why there are – despite the same motives for emigration and despite varying conditions of immigration – clear preferences which remain the same for legal and illegal immigrants (with Turkish people choosing mainly Germany, Moroccans choosing Spain or France and Egyptians, Senegalese and Ghanaians choosing Non-EU destinations) prevail and evidently do not change.

27. Le Monde (Saturday 12 February, 2000) p. 2; P. Muus, *op. cit.*, p. 37.

28. C. Geisler and C. Steinbrenner, 'Schleuserkriminalität. Erscheinungsformen, kriminologische Erkenntnis und Verurteilungspraxis', 84 *Monatsschrift für Kriminologie und Strafrechtsreform* (2001) pp. 460–467; for the US-Mexican border see P. Martin, 'US Immigration Policy: Meeting 21st Century Challenges', in E. Currell and T. Wunderlich, eds., *op. cit.*, pp. 495–520, at p. 503.

29. E. Reyneri, "'Migrants" Insertion in the Informal Economy, Deviant Behaviour and the Impact on Receiving Societies', *The Comparative Reports. Tables of Contents and Abstracts* (Milano 1999).

30. L. Hearing and R. van der Erf, 'Why do People Migrate? Statistics in Focus. Populations and Social Conditions', 1 *EuroStat Theme 3* (2001).

Information relevant for migration is provided primarily by family and friends living in the countries of destinations (with information covering first of all economic and labour conditions and least the statutory conditions of immigration). Interviews carried out in the sending countries as well as in Spain and Italy show that there is a quite significant proportion reporting experiences with undocumented entry as well as overstaying in receiving countries. Some 20% of interviewed Turkish individuals reported attempts of undocumented entry and overstaying while corresponding rates in the groups of Ghanaian, Senegalese etc., oscillate around 10%. The main motive for non-migration is – not surprisingly – family bonds (and a certain threshold is set by economic resources with migration demanding a certain minimum of financial funds).

2.3. Links between immigration, safety and crime

When summarizing the knowledge that has been produced so far on links between immigration on the one hand and crime and deviance on the other hand,³¹ we may conclude that:

- some immigrant groups exhibit much higher proportions of crime participation or crime involvement than do majority groups;
- however, some immigrant groups display the same degree of crime involvement or even less participation in crime as is observed in the majority group,³²
- first generation immigrants of the 50s and 60s obviously have been involved much less in crime than second or third generation immigrants and immigrants arriving in the 80s and 90s;
- what most immigrant groups have in common is a socially and economically disadvantageous and precarious position which puts them at risk in becoming involved in shadow economies, drug markets and acquisitive crime in general;
- but, cultural differences between socially similarly situated groups can result in different crime patterns, different in terms of both, the structure of crime involvement and the magnitude of crime involvement;
- cultural differences found between immigrant groups concern the capacity for community building and for the preservation of the cultural and ethnic homogeneity of the immigrant group;
- such cultural differences are evidently important in explaining varying degrees of both creation and access to social and economic opportunities be they legal or illegal in different ethnic or immigrant communities and social groups;
- immigrants are certainly as much at risk as they pose risks in terms of deviance and crime. Insofar, they are not different from the majority group.

31. M. Tonry, *loc. cit.*, pp. 60–73.

32. M. Tonry, ed., *op. cit.*

2.4. What changed with regard to immigration and immigrants?

The context of immigration and migration has changed considerably during the last two decades as have migration patterns:

- social and economic changes in the last 20 years in general have worked to the disadvantage of immigrants. The success stories of immigration which are known, from the 19th and even 20th century Europe and North America, concern immigrant groups which managed to work their way up and to integrate (economically and culturally) into mainstream society. Such as e.g., several waves of Polish labour immigrants settled at the end of the 19th and the beginning of the 20th century in West Germany (in particular in coal mining areas); they melted rather rapidly into main stream society and became invisible as a distinct group within half of a century;³³
- the traditional concept of immigration and cultural conflicts which was developed to explain social problems attributed to immigration in North America obviously is not a concept that fits to the European situation as most immigration in Europe starts off in European countries (including Turkey) or in areas neighbouring Europe (as e.g. Maghrebian countries); this, in turn creates new networks of migration and a pluralism of ‘transnational communities’;
- it is essentially the disappearance of low skilled work and the transformation of industrial societies into service and information societies dependent on high skilled staff which have contributed to changing labour markets drastically and with that have changed the basic framework of traditional mechanisms of social integration (which always was based upon labour and employment).³⁴ Shadow economies and black markets, in particular in metropolitan areas, now offer precarious employment opportunities for newly arriving immigrants;
- political changes in Europe then have contributed to the legal status of immigrants considerably through changing the statutory framework of immigration as well as enforcement policies. While in the sixties and seventies most immigrants entered European countries legally (as labour immigrants or on the basis of family re-unification schemes), today, the legal status of new arrivals points either to illegality or to the precarious status of asylum seekers, refugees and merely tolerated immigrants who are subject to strict administrative controls and threatened by serious risks of criminalization (as a consequence of not complying to administrative controls);³⁵
- with the transformation of labour markets into places where highly skilled staff are needed immigrants also adopted an image of being unemployed and being dependent on social security. As agendas of crime policies are certainly not only

33. See e.g. H.-J. Albrecht, *loc. cit.*, pp. 31–99.

34. W.J. Wilson, *When Work Disappears* (New York 1997).

35. H.-J. Albrecht, ‘Foreigners, Migration, Immigration and the Development of Criminal Justice in Europe’, in A. Rutherford and P. Green, eds., *Criminal Justice 2000* (London 2000) pp. 131–150, Workshop of the International Institute for the Sociology of Law on “Criminal Policy in Transition: Criminal Policy Trends into the New Millenium”, Oñati/Spain, 15–16 May 1998.

preoccupied by crime and victimization but in particular by assumed precursors of crime and deviance, family problems, unemployment, lack of education and professional training become of paramount importance in describing the potential of problems associated with immigrant populations;

- then, immigrants tend of course to concentrate in inner city ghettos. Migration and immigration in Europe are headed towards metropolitan areas and with that towards areas that are increasingly plagued by all sorts of social problems, including the emergence of inner city ghettos;
- there are important changes in the structure of immigrants. Labour migrants of the fifties and sixties are predominantly from rural areas while immigrants from the eighties and nineties are from metropolitan areas (where resources for migration are more readily available than in disadvantaged areas of developing countries);
- Migration and immigration of the second half of the 20th century then has led to the rapidly developing phenomenon of ethnic and migration networks and with that into the establishment of transnational communities³⁶ providing for ample opportunities to move across Europe and representing an alternative to the European Union master plan of free movement of goods and people.

3. ILLEGAL IMMIGRATION: EUROPEAN UNION POLICIES AND RESPONSES

3.1. European policies

When trying to account for European Union policies and European legal frameworks as well as European treaties it is justified to start with the Schengen Accord of 1985 and the Treaty Implementing the Schengen Accord of 1985 (as of 19 June 1990) – now part of the European Union treaties (the Schengen Acquis). There, rules have been adopted which should establish a common regime of control of immigration into the Schengen space (Articles 3 through 8), a common practice of issuing visas and providing for harmonization of criminal offence statutes as regards smuggling and trafficking of immigrants. Furthermore, the structure of duties of transportation companies in terms of controlling visa and immigration requirements has been laid out as well as a common framework of asylum procedures. The Schengen Information System (SIS) shall be used to exchange information on immigrants, visas and control of illegal immigration. With the European Action Plan to Control Illegal Immigration (as of 22 September 2000) the Schengen rules have been reinforced with implementing a programme of collecting and analyzing permanently intelligence on immigration and a call for measures to control smuggling and trafficking activities. Among such measures proposed we find close cooperation with sending and transit countries and support for such countries in their attempts to reduce illegal migration, implementation of intensive controls of the external borders of the Schengen space, permanent exchange of information between member countries, intensive internal

36. A. Portes, 'La Mondialisation Par Le Bas', in P. Bourdieu, ed., 'Delits d'Immigration', 129 *Actes de la Recherche en Sciences Sociales* (1999) pp. 15–25.

policing of illegal immigration on the basis of national laws, systematic finger printing of illegal immigrants, strict enforcement of deportation, imposition of sanctions for transporting immigrants to Schengen countries without proper documents and visas, finally, coordination of criminal law based control of smuggling immigrants to Schengen countries.

Harmonization of asylum laws and procedures as well as visa and immigration policies as initiated through the Schengen treaties have been developed further through several European Union treaties as well as directives issued by the Council. With a decision of the Council as of 20 June 1994, a standard for immigration was implemented which shall prevent immigration with the goal of seeking employment completely. Immigration for that purpose according to this decision shall be permitted only if job vacancies cannot be filled with member state labour force.

Recommendations as of 22 December 1995, concern harmonization of measures devised to control illegal immigration in terms of systematic checks of the immigration status in case of application for certain state organized services and before hiring a foreign national. Recommendations also concern introduction of sanctions for employers hiring foreign nationals without permits of residence. Recommendations as of 27 September 1996, then focus on employment of illegal immigrants and ways to prevent undocumented labour.

The Treaty of Amsterdam finally moves the rules for visa, asylum and immigration (Articles 61 through 69) from the 'Third Pillar' to the 'First Pillar' and makes these areas a genuine European Union policy and legal issue. Since ratification of the Treaty of Amsterdam the Vienna Action Plan as of 3 December 1998 and the Tampere Conclusions as of 15/16 October 1999, represent important moves towards creating and implementing a common immigration and asylum policy.

With the directive on establishing EURODAC (in force since 15 December 2000) a European information system has been made operative where fingerprints of illegal immigrants are entered as well as such personal data on immigrants which shall prevent multiple applications for asylum (asylum-shopping) in the Schengen space.

Recent initiatives in the field of immigration control concern a French proposal (4 September 2000) to harmonize and intensify criminal law against complicity in acts of illegal immigration (facilitation of illegal immigration), including also the proposal to introduce criminal corporate liability in this area. These initiatives have led to a series of proposals and reports (Report of the Commission on The Immigration Policy of the Union as of 22 November 2000,³⁷ proposal of the Commission as regards control of trafficking in humans as of 7 May 2001,³⁸ protocol of the 2314. Conference of the Council (Justice etc.) as of 1 December 2000,³⁹ protocol of the 2350. Conference of the Council as of 28/29 May 2001⁴⁰) which concentrate on harmonization and intensification of criminal law based control of illegal immigration and improvements in the field of police cooperation.

37. <http://www.eu-kommission.de/pdf/justundinnen/migrationspolitik.pdf>.

38. http://www.europa.eu.int/eur-lex/de/com/dat/2000/de_500PC0854_01.html.

39. <http://ue.eu.int/Newsroom/tree-browse.cfm?BID=86&LANG=4>.

40. <http://ue.eu.int/Newsroom/tree-browse.cfm?BID=86&LANG=4>.

Summarizing European Union policies and developments in the last two decades it may be concluded that humanitarian and human rights based principles were operative in the programmes and law making in the field of immigration. This refers in particular to the 1951 Geneva convention and the protection of refugees as well as the European convention and national constitutions that provide for protection of asylum seekers. In this respect, in particular the Tampere meeting has sought to develop a co-ordinated European Union approach to asylum seekers and refugees. On the other hand, the focus is on illegal immigration, the separation of immigrants who are welcome from those who are not welcome and establishing a system of control which takes into account the aforementioned concerns. With that safety and cost-benefit concerns have become operational guidelines in framing immigration and asylum policies.

Western Europe pursued a policy of active recruitment of foreign workers and an open policy towards former colonies until the beginning of the seventies when, with the first signs of a severe economic crisis such active and state sponsored recruitment policies came to a sudden end.⁴¹ Immigration activities and immigration policies can be roughly broken down into four periods starting with labour migration in the fifties and sixties which then was followed by a period where immigration was largely based on family reunion or marriage migration. During the eighties, asylum was at the centre of immigration and finally illegal labour trafficking became an important way of entering Western Europe with corresponding policies turning the attention first to asylum and then towards control of illegal immigration and trafficking in migrants.⁴²

At the beginning of the new millenium family reunion is still an important mechanism of immigration as are asylum procedures and plain clandestine immigration, however, there are signs that economic immigration has been re-assessed by the European Union and the member states. The new policy evidently shall allow for both, an adequate and flexible response to labour market needs and the drying up of illegal markets for immigration and migrant labour.⁴³ The focus in the emerging European Union immigration policy is now on:

- proactive measures;
- planning;
- flexibility;
- integration; and with that
- prevention of hate violence and hate speeches which is seen to create serious obstacles to integration.⁴⁴

41. For a summary see H. Rittstieg and G.C. Rowe, *Einwanderung als gesellschaftliche Herausforderung* (Baden-Baden 1992) pp. 14–26.

42. See from the Turkish perspective A. Akgündüz, 'Labor Migration from Turkey to Western Europe. An Analytical Review from its Commencement (early 60s) to the Recruitment Halt (1973/74)', 11 *Revue Europeenne des Migrations Internationales* (1995) pp. 153–177.

43. Communication From the Commission To the Council and the European Parliament, *On a Community Immigration Policy*, Brussels, 22.11.2000, COM (2000) 757 final.

44. Communication From the Commission To the Council and the European Parliament, *op. cit.*

However, in 1998, the Austrian EU Presidency presented a ‘Strategy Paper on Asylum and Immigration Policy’⁴⁵ which demonstrates that behind all rhetorics on flexibility and retaining full rights of asylum and the protection of refugees there exists the unbroken political will to cut down immigration (and that there exist also moves towards changing the international agreements on refugees, in particular the 1951 Geneva convention).⁴⁵ The paper recommends demonstration of ‘political muscle’ in order to prevent refugees and migrants to attempt entering European countries. In fact, the paper openly advocates a type of foreign policy action which moves against refugee-generating countries and argues for tough measures against illegal immigration including stepping up forced re-patriation. The paper certainly advocates the concept of establishing a Fortress Europe and highlights everything which could ultimately make Europe a fortress which keeps migrants (and refugees) out.

3.2. Proactive means of controlling illegal immigration

Proactive means to control illegal immigration concern first of all information campaigns launched in major sending countries to deter “wannabees” (those who want to) from starting migration. The European Union then attempts to develop a continuing dialogue with countries from which immigration originates in order to create and to contribute to conditions which are on the one hand favourable to prevention of migration and on the other hand contribute to improvements in cooperation with these countries as regards taking back illegal immigrants.

3.3. POLICING BORDERS

Massive increase in the number of border police at the external borders of the Schengen space can be observed as well as massive upgrading of hardware deployed in order to seal the borders completely. It goes without saying that attempts of sealing land and sea borders in Europe prove to be impossible as countries like Spain, Italy and Greece provide for ample opportunities to go ashore without having to take too many risks (of being intercepted by border police; however, there exist other risks which take a heavy toll of lives as has been mentioned earlier). Implementing border controls which conform with the Schengen standards lays a heavy burden on candidate countries which today serve as a belt of safe third countries (allowing e.g. German authorities to refuse entry to asylum seekers trying to enter the territory of the Federal Republic of Germany from these countries). So, e.g., Slovenia predicts that instead of 700 police now on duty at the southern (and future Schengen-) border 3000 will be needed to comply with Schengen border control standards.

45. *Strategy Paper on Immigration and Asylum Policy*, from the Austrian Council Presidency to the K4 Committee, 1.7.98, 9809/98 CK4 27.

3.4. Internal controls

The fortress, in fact, is evidently not characterized much by physical walls that cannot be penetrated by illegal immigrants but rather:

- through control mechanisms which work from within and seek to identify illegal immigrants within the Schengen space;
- by reducing the attractiveness of immigration to Europe in general;
- by increasing deterrence through strict deportation and repatriation policies;
- and finally by creating criminal offence statutes which carry heavy penalties not that much for illegal immigrants themselves but for those who support illegal immigration through smuggling or otherwise facilitate entering and remaining on the territory of Schengen.

Internal controls then, are certainly visible also through the use of physical controls as exerted on immigrant populations by way of imprisonment.

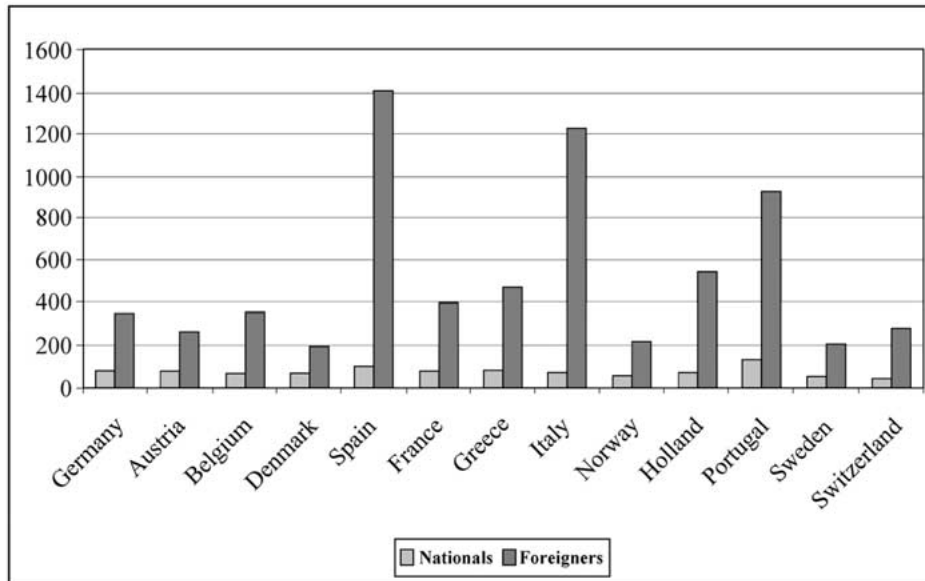
3.5. Internal controls: Prison and imprisonment

The question of whether and to what extent European criminal justice systems have adopted control oriented responses towards the new immigrants (with a precarious or illegal status) and thus have followed the threat and danger discourse as developing in the political system as well as in the media certainly will find answers in an inspection of data on prison sentences and imprisonment.

When looking at European prison systems it seems clear that immigrants continue to represent the most important single category of sentenced and unsentenced prisoners. Graph 2 demonstrates that for foreign populations the rate in many European countries comes close to what is reported about imprisonment practices in some parts of the US.

The question of course is whether these data can be interpreted as indicating punitiveness, deterrence and control towards immigrants. Of course, the data have to be treated with caution as there exists no reliable data on the number of foreign nationals which could serve as a basis for calculating prisoner ratios for foreign nationals. Then, the number of foreign nationals is an underestimate of the real number of immigrants (or descendents from immigrants) as more or less substantial numbers of immigrants will be hidden because they have adopted the nationality of the immigration country (e.g. all ethnic Germans immigrating from the former Soviet Union or citizens from former colonial areas as in England, France or Holland). First of all, however, the data demonstrate quite clearly that Europe is closer to the US than is normally assumed. If the size of immigrant minorities in European countries would be similar to the size of minorities in the US and if current imprisonment practices would remain the same under the condition of another magnitude of immigrant populations then the prisoner rates of Europe and the US would not be that different after all.

When going deeper into the structure of immigrant prison populations we find



Graph 2: Prisoner Rates (100,000) for Nationals and Foreigners in Europe (1997).⁴⁶

that in many European countries major parts of the immigrant prison population can be linked to drug trafficking and drug offences in general. Almost 50% of foreign nationals detained in Spanish prisons have been sentenced because of drug offences.⁴⁷ The doubling of the prisoner rate between 1990 and 1992 in Italy also has been explained with tougher responses to immigrants on the one hand and tougher responses to drug offences on the other hand.⁴⁸ We may therefore assume that it is in particular the response to the drug market which explains high rates of imprisonment among selected groups of immigrants. However, there is evidently a second area of changes which accounts for the heavy use of imprisonment in groups of immigrant offenders. Here, German data shall be used in order to describe trends and discuss possible explanations.

The developments in conviction rates and prisoner rates in Germany show the significant impact of unconditional and conditional dismissals, fines and suspended prison sentences in replacing prison sentences from the late 1960s on. Looking at sentencing practices in the last decades, we may observe several long-term trends. The absolute number of offenders convicted and sentenced was rather stable during the 70s and 80s oscillating around 700,000 per year and around approximately 1,000 to 1,100

46. Source: S. Palidda, M. Frangouli and A. Papanitiou, *Les Conduites Déviantes et La Criminalisation des Immigrés* (Milano 1988).

47. Direccion General de Instituciones Penitenciarias 1999, Gabinete Technico, Datos Penitenciarios (Madrid 1999).

48. M. Pavarini, 'The New Penology and Politics in Crisis. The Italian Case', 34 *BritJCrIm* (1994) pp. 49-61.

criminal convictions per 100,000 of the population in the nineties. During the mid-90s the figure increases towards 760,000. The obvious stability in conviction and sentencing rates is certainly due to the successful implementation of non-prosecution policies cutting off steadily increasing numbers of suspects. The increase in the numbers of offenders sentenced during the 90s is accounted for by the rapidly growing proportion of foreign offenders. The rates of sentenced offenders among the German population on the other hand has even decreased when considering developments during the last 20 years. While 1,342 sentenced German offenders have been counted per 100,000 of the resp. population in 1975, in 1996 the rate amounted to 1,076/100,000.⁴⁹

The development of prisoner rates since the 60s very clearly reflects the apparent success of alternatives to imprisonment such as day fines and suspended prison sentences. The prisoner rate dropped from some 100/100,000 at the end of the 60s to some 65 at the beginning of the 70s to increase then until the beginning of the 80s (due to the increasingly punitive response to drug trafficking (and partially also to sexual offences)). Since the beginning of the 80s the prisoner rate had decreased again, until the beginning of the 90s and shows an until now unbroken upward trend. The latest developments in prisoner rates can be attributed to the foreign and immigrant offender. It is in particular (the new) immigrants (and immigrant drug offenders) who account for the increase in the use of imprisonment in the 90s. With the resident offender in principle nothing changed in the last decades. That is also true for the resident immigrant offender who is eligible for alternatives or community sanctions and who is in fact sentenced to community sanctions as are German nationals. Most probably the latter will continue to be subject to the trends in the sanction systems which have been developed since the 60s and 70s. It is for these resident and settled offenders that intermediate and community based sanctions still play a major role as are diversionary practices and non-prosecution policies. In turn, this means that the role of imprisonment for these groups will continue to decline or at least remain stable. On the other hand, illegal immigrants, asylum seekers, migrants and that means the unsettled groups fall immediately under the regime of pre-trial detention and remand prisons (and subsequently under prison sentences and imprisonment) because they cannot meet those criteria which have been set as conditions for imposing alternatives to imprisonment and for restricting remand detention.

3.6. Internal controls: Administrative detention and deportation

Immigrants fall then under a second system of control which consists of administrative mechanisms as made available in immigration or foreign national laws.⁵⁰ The basic approach of the conventional European immigration laws or foreign nationals laws fits well to the construction of immigration problems pointing to a mixture of concerns like crime, unemployment, poverty, illicit drugs and informal economies. Foreign

49. See for an overview H.-J. Albrecht and R. Teske, 'Crime and Crime Control in Germany', in G. Barak, ed., *Crime and Crime Control – A Global View* (Westport/CT 2000) pp. 29–63.

50. B. Nascimbene, ed., *Expulsion and Detention of Aliens in the European Union Countries* (Milano 2001).

Nationals Laws (or immigration laws) in fact have been enacted with the aim of regulating risks and dangers associated with the foreign national (or immigrants). The basic risks which have traditionally been linked to foreign nationals and which according to Foreign Nationals Laws in Europe have always been made grounds for expelling (or excluding) foreign nationals concern:

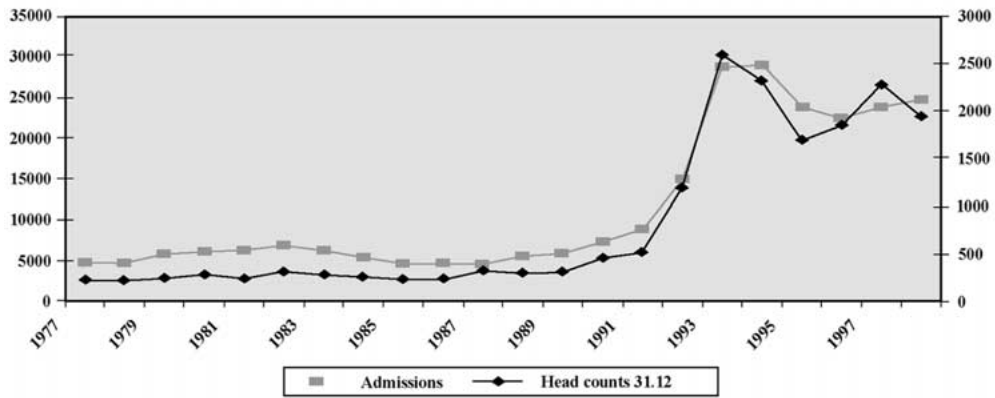
- crime;
- poverty;
- prostitution.⁵¹

Illegal immigrants in particular have slipped into the role of the ‘Lumpenproletariat’ and the ‘dangerous classes’ that the then emerging metropolitan areas had in the 19th century. They have become part of the new ‘dangerous classes’ in post-modern societies, or, as modern sociology would put it: migrant and immigrant populations have become risks in need of management and control. In the analyses of how manageable these risks actually are, however, we have to consider also, that besides normative questions related to immigration and asylum, side effects pop up which in turn shape the manageability of such risks. There is a black market for illegal immigration today, adjusting permanently to changes in the legal framework of immigration within Europe. Related to that is the informal or shadow economy that is obviously operating very efficiently because of the ongoing and cheap supply of undocumented labour and labour force that has to rely on illicit economies. The tighter immigration is controlled the more expensive immigration gets and the more immigration will be organised in order to reduce external costs for those organising illegal immigration (moreover, normative and moral costs must be added as tighter controls in general mean also greater risks to the life and limb of immigrants; the discussion on the death toll of illegal immigration and how to respond to that is a good account of how such costs are weighed in current European immigration politics). With that a basic dilemma shows up which is known from other social problem fields and which should prevent adopting strategies of elimination in responding to these social problems. With that we should also remind ourselves that migrants and immigrants make up a very vulnerable group. They may, as a group, contribute to risks of modern societies but as individuals they are most vulnerable and endangered persons.

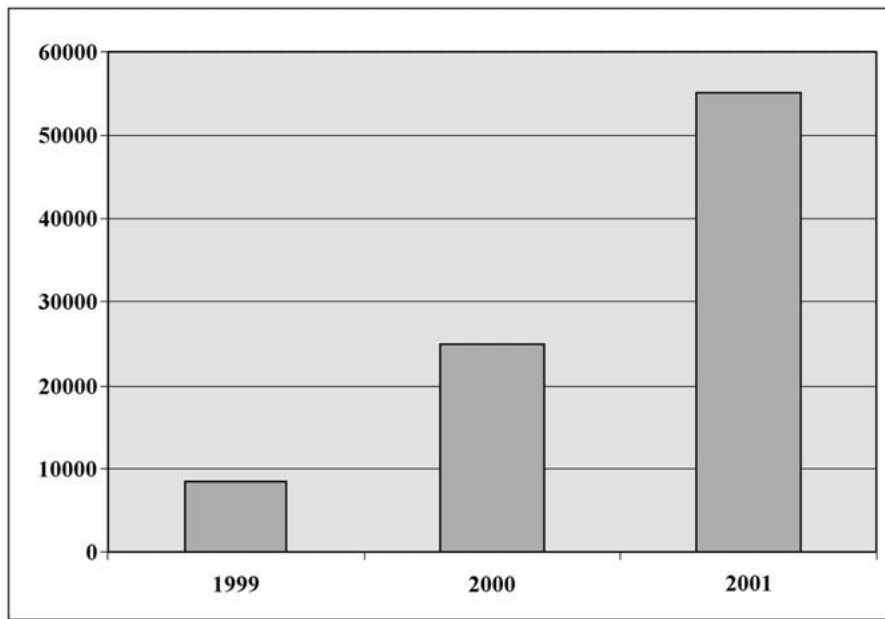
Around 1990, a process started off in the Federal Republic of Germany that centred around administratively detained immigrants. From several hundred detained persons at any given day in the 80s the figure went up dramatically with several thousand illegal immigrants detained (prior to deportation) at any day in the 90s. The rather rapid increase in the number of detained immigrants points to important changes. The roots of these changes are found first in the transition processes in the East of Europe with the opening of the formerly tightly sealed borders and growing numbers of migrants, tourists as well as asylum seekers. Moreover and second, the Schengen treaties of 1985 and 1990 demand for uniformity and common European concern for immigration policies. Third, those developments in detention practices obviously are related to changes in the social and legal conception of immigration.

51. B. Nascimbene, ed., *op. cit.*, pp. 542.

Fortress Europe?



Graph 3: Annual Admissions in Administrative Detention and Head Counts in Germany as of January 1st 1977–1998.⁵²



Graph 4: Illegal Immigrants Intercepted in France on the Way to Great Britain.⁵³

52. Source: Statistisches Bundesamt, *Strafvollzug* (Wiesbaden 1978-2000).

53. Source: *Le Figaro*, Friday 14 September 2001, p. 17; data for 2001 cover the period between 1 January 2001 and mid-September 2001.

Significant changes can also be observed in attempts to enter illegally England through the tunnel connecting France and England. From 1999 up to now the number of those arrested and detained in France has increased dramatically. While in the year 1999, some 8,500 illegals were detained in a camp established in Northern France solely for immigrants headed to England, the number climbed up to 25,000 in the year 2000 and between 1 January 2001 and mid-September 2001 the figure even had risen to 55,000. The average detention time amounts to some 6 weeks.⁵⁴

What we observe with respect to immigration and the responses to immigration is both, the emergence and the construction of a new social problem as well as the emergence of social control systems devised to respond to that problem.

New criminal law has been created in the field of immigration and asylum, representing a combination of criminal offence statutes and administrative offence statutes. These offence statutes point towards illegal immigration itself as well as trafficking and smuggling in immigrants, sharp restrictions in free movement of asylum seekers who are placed under the threat of criminal punishment in case of leaving those districts they are assigned to, labour laws having been tightened up during the last years as a response to clandestine labour. These developments are part of the move from a rather liberal concept of labour immigration in the 60s towards the conception of migration and immigration as a social problem. Immigrants (and those supporting immigrants to cross borders or to stay illegally) today are faced with ever harsher penalties. Maximum penalties for smuggling activities now oscillate in Europe to circa 10 years (with few exceptions) and thus are treated as serious crimes. In fact, in many systems they fall under the concept of organized crime and therefore attract punishment which otherwise is reserved for the most serious crimes.

Table 1: Maximum Penalties for Illegal Immigration and Smuggling Activities in Various European countries

| Country | Germany | Austria | France | England | Italy |
|---|----------|---------|----------|----------|----------|
| Immigration without proper visa | 1 year | – | 1 year | 6 months | |
| Immigration or over-staying despite a deportation order | 3 years | | 3 years | 6 months | 6 months |
| Smuggling (for profit) | 5 years | 1 year | 5 years | 6 months | 3 years |
| Organized and other serious forms of smuggling | 10 years | 3 years | 10 years | 7 years | 12 years |

54. *Le Figaro*, Friday 14 September 2001, p. 17.

In principle, there are two approaches to foreign nationals in controlling immigration and migration.

- Exclusion from entry (partially in terms of entry into a detention centre or into airport detention);
- Exclusion after having entered and lived in a country because of revocation of a permit of residence or simply because of overstaying or being denied asylum or refugee status.

With the first approach a preventive model of control is established that has led e.g. in Europe to the phenomenon of airport detention on the one hand as well as to immediate transportation back to the country from where the immigrant originated, the latter being the result of 'safe third country' rules.

With the second approach a mixture of preventive and repressive measures is implemented. The statutory grounds that allow withdrawal of a permit of residence essentially refer to those risks which through immigration policies and enforcement of immigration laws should be prevented. These grounds concern basically:

- committing criminal offences;
- creating other dangers;
- and finally, poverty or becoming dependent on social security.

A look on the relationships between criminal procedures and administrative immigration procedures reveals a process of intertwining criminal and administrative approaches to the control of immigrant populations.

- First, in criminal procedural laws devices have been introduced that allow for consideration of administrative decision making when deciding upon dismissal of cases.
- Second, sentencing decisions may consider administrative decisions on deportation and expulsion through mitigating criminal sentences.
- Third, when enforcing prison sentences in cases of immigrant offenders it is increasingly allowed to consider deportation in parole decision making. Thus the minimum length of a prison sentence to be served prior to parole in case of a parolee to be deported immediately after release from prison is cut down significantly.

Consequently, a combination of administrative and criminal control for immigrants is established which allows for much more flexibility in responding to criminal offences committed by immigrants than the criminal law alone. Expulsion and deportation thus can turn into repressive measures and punishment which is added to or exchanged with ordinary criminal penalties. Administrative procedures may replace criminal procedures and allow thus for more administrative convenience and for less safeguards derived from the rule of law.

Reviewing available statistical information on the number of immigrants detained prior to deportation and similar trends can be observed in Europe. It is obvious, that administrative detention became more important at the end of the 80s. This coincides with the political and economic change in Eastern Europe as well as

implementation of the Schengen treaties and the emergence of the European Union as outlined in the Maastricht treaty. It is remarkable then, that administrative detention accounts for an increasing proportion of immigrants placed in custody.

As regards length of confinement of illegal immigrants prior to detention, wide variation in Europe exists. The upper limits of detention vary between three months and a maximum detention period up to indeterminate detention limited by the principle of proportionality only. In fact, detention of illegal immigrants was not at all provided for until now by Italian law, however, an amendment of the Italian immigration law has revised this position. But, Italian immigration law today allows a rather modest period of administrative detention only.

On the average, detention length seems to be rather low with up to several weeks or approximately one month representing the mean duration of detention. Thus, it is a typical short term imprisonment with all the problems known to be associated with this type of short term detention. However, some cases exhibit detention periods of well above one year. Although long detention periods affect but a small subgroup of detained immigrants, it is to this group where the question of what detention regimes should be applied becomes of paramount importance. Therefore, a second series of questions relates to detention regimes. Although, in principle, all systems accept that separation of detained immigrants from sentenced and remand prisoners should take place, there is still a widely used practice to detain illegal immigrants together with sentenced and remand offenders. As illegal immigrants do not serve prison time, they should be separated from prisoners in order to avoid that detention regimes applied to administratively detained immigrants come too close to those applied to criminal offenders and to avoid hardening of perceptions that illegal immigrants represent a category of persons who, in principle, should be treated the same way as treated criminal offenders.

4. CONCLUSIONS

The fortress Europe which, after all, may emerge with the pursuit of the measures outlined above, certainly is not the traditional fortress we usually think of when talking about fortresses – with tall walls and powerful towers – but it is a fortress that is made out of internal and soft controls on the one hand and a certain amount of hardware to detect and identify intruders at the borders on the other hand. Finally, the fortress consists also of a mixture of normative concepts made out of laws and political programmes as well as factual concepts set up to prevent unwanted immigration.

Thus, the European ‘Fortress’ is established through various means and measures. Among these we find the most important process of creating images and beliefs as regards positive and negative consequences of immigration. Furthermore, selection criteria separating positively evaluated immigrants (needed and wanted for economic and demographic reasons) and immigrants not welcome because of being perceived to present intolerable risks point to the evident changes in the profile of European immigration policies towards concepts based on flexibility, cost-benefit-analysis and consideration of safety feelings.

As policing external borders of the Schengen space are evidently not that efficient

in preventing illegal immigration, there is a trend towards developing and implementing a comprehensive policy which is based on prevention and repression, proactive and reactive means, cooperation and coordination (also with sending countries). The trend toward an information-intensive pattern of control of illegal immigration becomes visible, too. The increase of intensity of information refers to collection, analysis and exchange of data.

What is lacking concerns evaluation research and intelligence on what works in controlling immigration and in particular in the management of problems that are linked to illegal immigration. However, we have to acknowledge here that approaches to prevention based on persuasion and discouragement will certainly fail as will repressive and mechanic means of immigration control fail as long as the intensity of push factors cannot be controlled. The most important push factors – that after all is clear – refer to economic conditions and the powerful will in humans to be able to lead a better and a safer life.