

*Distinction between Trafficking and Illegal Residence*

The public discourse on undocumented migrants, labour exploitation of migrants and human trafficking often only focuses on the debate around 'illegal immigration'. Yet, concentrating solely on illegal immigration detracts from the real problems associated with these topics. In many cases, labour migrants enter destination countries legally with all required documents. This is usually the case where migration via a land route does not seem possible. Some trafficked people are even citizens of the destination country. For example, in 2003 in Germany about 10% of the trafficked people in the sex industry were German citizens (BKA 2004: 5).

Even in the group of undocumented migrants, a large percentage enters the countries legally, but become illegal residents as a result of regulations imposed by destination countries. This is why concentrating on illegal immigration throughout the entire discussion is too narrow in its focus and does not correspond to reality. It seems the topic of trafficking is used as an instrument for restrictions on migration.

Policies should clearly stress that trafficking in human beings is a serious crime and human rights violation, which needs to be addressed separate and apart from other forms of illegal activities, in particular illegal migration. (EU Experts Group 2004: 10)

Undoubtedly both, trafficked persons and undocumented migrants, start off as labour migrants who are looking to improve their economic situation. The legal restrictions imposed on foreigners make both groups vulnerable to blackmail and exploitation.

In some cases, there is a grey zone between trafficking and undocumented entry, especially if people become captured in debt bondage as they have to repay smuggling fees. However, it is vital to distinguish the two phenomena. Organising an illegal entry into Western Europe is difficult. Hence, most people who would like to migrate are dependent on the help of migration facilitators or 'smugglers'. While some migrants can pay for this service in advance, others have to be prepared to work off the 'debts' of the journey once they are in the destination country. Some migrants are able to pay these debts at fair terms, others are being exploited. This way undocumented migrants can get trafficked.

Both trafficking and smuggling are criminal offences. Smuggling of human beings or facilitated migration can be considered an offence against the borders or the sovereignty of a state, while trafficking always constitutes a violation of the individual freedoms of a person – predominantly of women. Trafficked people are hardly ever forced to migrate. At Ban Ying, a German counselling centre in Berlin, there has not been a single case of coerced migration in 15 years.

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Until the migrants enter the destination country, both groups – smuggled and trafficked persons – assume that they will achieve their migration objectives. This guarantees that the migrant will cooperate during the journey, since it appears to serve his or her own goals. Once they arrive in the destination country, migrants who have been ‘smuggled’ can generally move around independently from the smugglers, since they have paid for a service that was effectively rendered. For trafficked persons, their dilemma becomes palpable once they successfully enter the destination country and the conditions for working off the ‘debts’ become clear. An essential means of applying pressure on migrants is their ‘voluntary’ illegal entry.

Undocumented migrants can generally determine their living and working conditions in the given, albeit very narrow, context. Trafficked people, however, are at the mercy of the traffickers, who not only exploit them but also take advantage of their dilemma or use violence, threats, or deception to force them to work and generally control their lives.

Also the quantitative difference should not be underestimated. In Germany, for example, it is assumed that approx. 1,000,000 people are living as undocumented residents (Alt 2003). For years, about 1,000 trafficked people have been reported in the German Federal Criminal Police statistics. This number only includes trafficked people in the sex industry who have cooperated with the police. So far, the numbers of trafficked people in other employment sectors in Germany were not documented due to the fact that only recent legislative changes consider all forms of trafficking. However, even the highest estimates of the number of trafficked persons fall far short of the assumed number of undocumented migrants.

Both groups risk being deported if they end up in a police raid. A trafficked person can delay her deportation if she reports that she is a victim of crime and is prepared to testify as a witness. Generally, in all European destination countries she is then granted a temporary residence permit for the duration of the legal proceedings. However, Germany for example does not offer non-trafficked undocumented migrants this option. Suing for unpaid wages is generally not an option for undocumented migrants, because there is no guarantee that filing a claim will not lead to deportation. Yet trafficked workers do in fact have the theoretical option of suing for unpaid wages.

A closer analysis of the two phenomena of trafficking and undocumented migration reveals that they are very different criminal offences. These differences can only be tackled appropriately if they are considered to be separate phenomena.

### *Distinction between Trafficking and Labour Exploitation*

New policy and legislative documents, which seek to concur with the complex UN Trafficking Protocol, contribute to an increasing confusion when it comes to distinguishing between trafficking and labour exploitation. While NGOs on the one hand were strongly lobbying for an expansion of the definition, they on the other

hand fear that the capacities of their counselling and support centres would be quickly exhausted.

While trafficking always entails the exploitation of a work force, including sexual or other services demanded outside of employment arrangements, the reverse is not necessarily true. The term trafficking can only be used if the situation includes elements of contemporary forms of slavery, debt bondage, serfdom or forced labour. Although today not every form of trafficking in Europe can be identified as serfdom or debt bondage some core elements can legally be proven such as considering a person as property, selling and purchasing a human being, restricting the freedom of a human being, imposing de facto rightlessness or using deception or coercion. The first report of the EU Experts Group on Trafficking in Human Beings stresses:

[...] the element of coercion makes it clear that, in order to qualify as trafficking, the exploitative outcome must be such that it constitutes forced labour or services, slavery or slavery-like practices. (EU Experts Group 2004: 49)

A problematic aspect is the fact that many people in this situation do not understand that they are trafficked persons because they may have originally agreed to work under certain circumstances. However, according to the EU Experts Group, this original agreement is only significant if the party in question was provided with detailed information about the working conditions – based on the concept of ‘informed consent’.

Keeping this in mind, it is obvious, that people can decide to migrate – even without documents – and to work as sex workers, and then still get trafficked. They can state that they are willing to work under exploitative conditions, but by definition, they cannot consent to forced labour or agree to slavery-like practices. Of course, not every underpaid undocumented woman labour migrant – even sex workers – is a trafficked person.

The term ‘exploitation’ is problematic since it is not uniformly defined. Some countries do not determine minimum wages, which could give the labour migrant an idea of what work is well paid, poorly paid, or even paid at a rate that is considered to be exploitative. This leads international conventions to rather use the term ‘forced labour’, which is defined in ILO Convention 29 as:

[...] all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. (ILO 1930: art. 2)

### *Potential Dangers of the Trafficking Discourse*

In recent years, more and more critical voices state that the trafficking discourse damages both, the migration discourse and the international sex workers movement. It is feared that governments will use the topic of trafficking as an instrument to make national borders impenetrable and restrict the freedom of movement of women. Another point that is continuously being brought up is the apparent

privileged treatment of trafficked people compared to other vulnerable groups. Bangladesh can serve as an example when it comes to restricting the freedom of movement for women. The government of Bangladesh uses trafficking to legitimise the massive restriction of the freedom of movement of its female citizens (Jana 2002). Such measures that violate human rights are only conceivable in a discourse that makes no distinction between trafficking and smuggling. If distinctions were made between the two concepts, it would be apparent that migration restrictions cannot prevent trafficking.

In fact, the opposite is true. An adequate way to prevent trafficking is to create regular labour opportunities for migrants. Conversely, the view also exists that increasingly stringent immigration restrictions are responsible for the increase of trafficking. The EU Experts Group states:

State policies in promoting immigration restrictions and reducing opportunities for regular migration have not been effective in preventing migration. Rather they have created a market for irregular migration, often as organised serious crime, through trafficking and smuggling of people. (EU Expert Group 2004: 11)

The sex workers movement fears that the trafficking discourse will compromise a woman's voluntary decision to work in the area of prostitution, as has happened so often throughout history (Doezema 2002). The opportunity for migrants to be legally employed must therefore obviously include employment in the prostitution sector. The need for employees in both the prostitution sector and the low wage sector is undisputed. People, who are prepared to do this work, will migrate voluntarily, so states could consider supporting this potential.

The fear that the human trafficking discourse may be instrumentalised to restrict immigration is not unfounded. In Germany, it is currently discussed how a liberalisation of German visa policies in the Ukraine has affected human trafficking. The media presentation suggests that visa liberalisation has led to an increase of trafficking victims from Ukraine. However, there is no proof that these policies did indeed promote human trafficking. The only proven fact is that several labour immigrants received visas and used them to enter Germany safely in order to work voluntarily without the required documents. According to Ban Ying's information, there is only one trafficked victim who entered Germany during the liberalisation phase. This particular case is continually cited in the press, hence, giving the wrong public impression on the dimension of the impact of more liberal visa policies.

In many countries, migration channels for highly skilled workers have been opened up, but for labourers in the low wage sector or prostitution hardly any migration opportunities exist. If the low wage sector were to be opened to migrants entering the country, it must be ensured that they cannot be exploited. There must be minimum standards required by employment laws that labour migrants can use to orientate themselves. The trafficking discourse can serve as a good basis. The International Labour Office believes:

[...] that the global movement against trafficking has certainly given an impetus to the understanding of, and action against, forced labour [...]. (ILO 2005: 7)

This has been proven true in practice. For example, Ban Ying was able to implement minimum standards for domestic staff employed by diplomats. This group of female labour migrants lives and works in an extremely precarious situation. Their residence in Germany is tied to their work in the household of a certain diplomat. Additionally because of their diplomatic immunity, these employers cannot be arrested under German jurisdiction. This special legal construct makes this group of women an extremely vulnerable group in the context of trafficking. By sensitising the responsible authorities on the basis of the trafficking discourse, it was possible to slightly improve the situation for domestic staff.

### *Visions for the Trafficking Discourse*

Currently, trafficking is being discussed as a high-priority topic in nearly every country of the European Union. Unfortunately, the discussion often yields the impression that it centres on issues that harm trafficked people more than helping them, since it solely focuses on the migration process. From a human rights based approach, this is unacceptable. The EU report also vehemently criticises this manner of proceeding:

From a human rights perspective, the primary concern is to combat the exploitation of human beings under forced labour or slavery-like conditions, no matter whether such exploitation involves a trafficked person, a smuggled person, an illegal migrant or a lawful resident. In the application of the UN Trafficking Protocol, policies should therefore focus on the forced labour and slavery-like outcomes of trafficking, rather than on the process through which people arrive in such conditions. (EU Expert Group 2004: 8)

Implementing this demand would mean huge progress for trafficked people, but it would not improve the situation of undocumented migrants. They are still not granted access to fundamental human rights, and no Western European country is improving this situation. None of these countries has ratified the UN Migrant Workers' Convention. The convention emphasises that access to fundamental rights should not derive from a legal residence permit. It provides the 'right to rights' for undocumented people.

Currently, in nearly all European countries trafficked people can only obtain a temporary residence permit – and thus access minimal care – if they are willing to serve as witnesses. By doing so, the destination countries are neglecting their human rights responsibilities. Italy appears to be the sole exception since in Italy the willingness to testify is separated from granting a residence permit (see pp. 114). Hence, trafficked people have the right to assistance, support and security, which victims of other acts of violence who are legal residents are entitled to without question. Given a residence permit guarantees a minimum safety, which enables a trafficked person to start recovering and to take further informed decisions. This should serve as a good practice for other states.