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TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF SEXUAL EXPLOITATION

Since 2000, a UN Convention, the "Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime" signed in Palermo in 2000, has standardised the definition of trafficking in human beings on an international level. A subsequent framework decision passed by the Council of the European Union required all member states to amend their domestic laws in accordance with the UN provision. Germany complied with this request in February 2005 by changing its criminal code.⁸⁸

Since then, trafficking in human beings is no longer considered a crime against sexual self-determination, but a crime against the personal freedom of a human being. Section 232 of the German Criminal Code refers to "Trafficking in Human Beings for the Purpose of Sexual Exploitation", and Section 233 of the German Criminal Code to "Trafficking in Human Beings for the Purpose of Exploitation of Labour".⁸⁹ There is a lot of speculation about the scope of this crime, but none of the published figures are trustworthy. The only reliable numbers for Germany are those published by the German Federal Criminal Police Office in its annual report on trafficking in human beings. This report can obviously only list those cases the police are aware of or those that were investigated. These figures say nothing about those cases that have not been reported and there are no reliable estimates, either. In addition, there is a discrepancy between the case numbers of the specialised counselling centres and those of the police. Aside from a simple number difference, there is also a discrepancy regarding the various countries that are not included in the police report on trafficking in human beings. The counselling centre Ban Ying has for example assisted women from 19 countries who were trafficked into the sex industry. The annual report of the German Federal Police only mentions 9 main countries of origin⁹⁰ for trafficked persons.

Tension between Voluntary Sex work and Trafficking in Human Beings

In public discourse trafficking in human beings is often linked to "forced prostitution"; this is legally misleading and also does not reflect the reality of many trafficked persons, because they were not forced into prostitution; instead they had to work as sex workers under conditions that are comparable to slavery. Also, the report of the federal police clearly points out that more than one third of trafficked people had agreed to work in the sex industry.⁹¹ These figures reflect the reality,

⁸⁸ See also chapter 3

⁸⁹ for information on trafficking in human beings for the purpose of exploitation of labour, you may refer to the article by Cissek – Evans in this publication.

⁹⁰ German Criminal Police Office 2008, p.8

⁹¹ German Criminal Police Office 2008. p.10

since quite a few women⁹² – also migrant women – have reported that they had voluntarily decided to work as sex workers, at least for a short while. They lament the working conditions and the associated exploitation, but not the fact that they are working in the sex industry. In addition, nobody ever speaks of forced cooks or something similar when referring to trafficking in human beings for the purpose of labour exploitation, and for this reason, the term “forced prostitution” is not used in this text.

The laws amended in 2005 have caused a problem that was certainly not intended, but that can significantly impact its practical implementation. Section 180B (2) of the German Criminal Code⁹³ is worded as follows: “*person will be punished, who **influences** a person under the age of twenty-one years to take up or continue prostitution...*” whereas Section 232 (1) of the German Criminal Code⁹⁴ says “*...a person will be punished who **brings** anybody under 21 years of age to start or continue to work in prostitution...*”

Apparently it very easy to accuse somebody of “bringing” someone else into prostitution, the practical impact is, that the police almost routinely investigate against landlords, brothel owners etc. for trafficking when encountering a 18–21 year old sex worker in a brothel or similar environment, even if no force or coercion is initially apparent.

The consequences of this provision are also reflected in the statistics. Thus, the report of the Federal Police 2007 indicates that an increasing number of persons under the age of 21 have been trafficked.⁹⁵ A closer analysis shows that for example 52%⁹⁶ of the German victims are between 18 and 20 years old. Of course also Germans can get trafficked in Germany, but it is disproportionately more difficult to show force or coercion for them than for immigrants. It would, therefore, be interesting to study how many of the 18–21 year old victims of trafficking in human beings are sex workers who work under good working conditions, but are only included in the statistics on victims of trafficking in human beings because of their age.⁹⁷

Causes of Trafficking in Human Beings

Much has been written about the causes of trafficking in human beings; often, the discussions cite poverty as one of the causes. Certainly, the hope for improving the personal economic situation plays an important role in the decision for a migration, but the practice has shown that this is not the only cause for trafficking in human beings. Interviews with trafficked persons have made clear that many of the women had experienced various forms of gender-specific violence in their countries of origin, so that it can be assumed that “*human rights violations in the country of origin are often also a cause for trafficking in human beings*”.⁹⁸

⁹² Even if the wording of the law is gender-neutral, at least the trafficking of human beings into the sex industry is, de facto, trafficking in women, which is why this article mainly deals with trafficking in women

⁹³ In force until Feb. 2005

⁹⁴ In force since Feb. 2005

⁹⁵ See German Criminal Police Office 2008. p. 9

⁹⁶ *Ibida* p. 9

⁹⁷ Also see German Criminal Police Office 2008, p.6

⁹⁸ See Follmar-Otto, Petra 2007. p.70. (Translation N.P)

There is also an interesting study by the ILO (International Labour Organisation) that points out that trafficked persons have *"no access to the necessary funds and social capital"*⁹⁹i.e. they do not have the funds or the social network necessary to finance their trip. Therefore, they must borrow money from shady lenders or rely on the help of agents or similar persons to be able to migrate. These, however, often expect to financially profit from the women's labour after they have entered the new country.

A new, very interesting aspect relating to the causes of trafficking in human beings was introduced by the EU Expert Group on Trafficking in Human Beings. It considers the immigration restrictions in the target countries to be one of the causes of trafficking in human beings: *"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..."*¹⁰⁰

Entry Options

Depending on the country of origin, of course, the entry options of the women vary. While new EU citizens have no problems to enter the country legally, women from other countries in Central and Eastern Europe try to either enter the country with false passports from the new EU countries or travel, usually by land, without the necessary documents, because they know that it is almost impossible for men and women without any financial means to obtain a Schengenvisa. Some women did know that they did not have a visa before starting their trip, some only find out during the course of their travels.

Women from Asian, African, and Latin American Countries cannot really enter the country by land, which is why the majority of them initially flies to Germany and enters the country legally. To be able to do so, they need papers, invitations, etc. which increases the entry expenses. Usually, they enter the country on a tourist visa that is valid for 3 months. After it expires, they are mostly "illegal" and therefore similarly at risk for blackmail as those women, who entered without any documents, or they are told that they can/must get married to legalise their status, at least on paper. Many women agree to these marriages for lack of other options, or because they hope to obtain an (at least temporary) residence status. They usually do not know that a residence permit based on a lie is always risky, because their legality depends, in fact, on the good will of the husbands and a call to immigration is usually enough to illegalise the women – even after several years of marriage.

Indicators for Trafficking in Human Beings

This kind of vulnerability and consequently the risk of blackmail is a core element of trafficking in humans, because it allows for an extremely high degree of exploitation. It can replace the traditional imprisoning of a person, because the residence permit ties the women to the perpetrator just as effectively. It is therefore not surprising that some trafficked persons report that they could freely move about

⁹⁹ See international labour organisation 2006, p. 67.(Translation N.P.)

¹⁰⁰ See EU Expert Group on Trafficking in Human Beings 2004. p. 11

after some time. Nevertheless, they work in conditions that are similar to slavery and that are not at all comparable with the working condition of a self-determining sex worker. The women report, for example, that they cannot refuse any clients or sexual practices, and are often not even entitled to insist on condoms. In addition, some women report that they had to fulfil the sexual wishes of the person who trafficked them (against their will and free of charge). Their earnings, if any, are absolutely disproportionate to what the clients pay. The distribution of the prostitution proceeds plays an important role in identifying trafficking in human beings. With regard to the income distribution, the police in Berlin for example believe that a strong indication for trafficking is given if more than 50% of the earnings must be handed over.¹⁰¹ Some women have reported that they did not receive any money until they had "worked off" their debt; some were allowed to keep up to 15%.

Also the amount and the repayment conditions are important with regard to the actual or supposed debt incurred in connection with the entry into Germany. Women from Central and Eastern Europe report, for example, that they have to "work off" up to 3500 Euros for the trip, whereas women from Thailand have "worked off" amounts ranging from 15,000 – 35,000 Euros. They do not only have to pay disproportionately high fees for the trip, but for room and board, etc. The amount of the fees shows that they are in no relation to the actual cost of an entry into Germany. The repayment conditions are usually fixed and cannot be negotiated by the women, which is why we consider this a clear form of debt bondage. The draft of the new bill on trafficking in humans from 2005 is based on the assumption that debt bondage must be "*seen as a relationship of dependence in which the creditor exploits the labour of the debtor for years to work off actual or supposed debt*".¹⁰² Eydner expands this definition, convinced that "*debt bondage gets its slavery-like character by limiting basic civil rights [...] of the person in bondage, albeit not formally but factually, and thus subjecting him/her to the arbitrariness of the master*".¹⁰³ All this applies to trafficked persons - in every industry.

Living Conditions of Trafficked Persons

In Germany, a clear distinction is made between a trafficked person and a witness, i.e. a trafficked person who has agreed to testify against the perpetrators. Due to the fact that there are cooperation contracts or similar agreements between the specialised counselling centres and the police in almost all German states, it must be assumed that most witnesses receive the support of a specialised counselling centre, if so desired.¹⁰⁴ Access to specialised counselling centres varies, however. While a few years ago, the police was referring many women to the specialised counselling centres, this is no longer the case. Some women are referred to the specialised counselling centres by hospitals or other help centres, others are referred by

¹⁰¹ The German Supreme Court has made various rulings: One of them from March 1999 (BGH 2StR 608/98) makes clear that keeping 50% of the proceeds of a sex worker constitutes exploitation. Another ruling from April 2004 (BGH 4StR 67/04) explains that merely keeping 50% of the proceeds does not suffice to constitute exploitation, especially if the sex workers get a portion of the proceeds from drinks and finally a ruling from July 2005 (BGH 2 StR 131/05) indicating that it can always be considered exploitation if sex workers only get to keep 20% of their proceeds.

¹⁰² See Bundestag printed matter 15/3045, 2004. (Translation N.P.)

¹⁰³ Eydner 2006 p. 12 (Translation N.P.)

¹⁰⁴ Also see Franke in Chapter 5.

acquaintances (usually other trafficked women), and some are referred by clients. Some women also manage to escape on their own and come to the specialised counselling centres in a round-about way. The specialised counselling centres do not differentiate between trafficked persons who are willing to testify and those who do not want to or cannot testify. Both groups of women receive assistance and support. But the law makes a big distinction between the two groups. It is not enough to be a trafficked person to be guaranteed access to basic human rights. Access to basic human rights is only guaranteed if the trafficked persons are official witnesses. Trafficked persons have to want to testify, they have to be able to do so, and that their testimony needs to be of use to the criminal prosecution. Trafficked persons who cannot testify (because they are traumatised, cannot remember due to drug use, or because they do not have enough information about the perpetrator), who are too scared to testify or if their testimony is not relevant to the criminal case have to leave the country.¹⁰⁵ The law stipulates that this group of trafficked persons should be given the possibility of a so-called "voluntary return",¹⁰⁶ because such a return would at least allow them to re-enter the EU. But to be allowed to do so, the women must fully cooperate with the police. If they refuse to do so, a "voluntary return" is no longer an option. The manner in which the specialised counselling centres deal with trafficked persons who do not want to have any contact with the authorities varies from one centre to the other and very much depends on the financial resources and the political position of the centre. Probably only very few specialised counselling centres have the resources to finance this group of trafficked persons for a longer period of time. Therefore, most of these women are only assisted for a short period of time to provide them with legal information about their situation. They must then decide themselves, if they should leave the country or remain in an irregular status.

Reflection Period

Theoretically, immigration authorities can issue potentially trafficked people an exceptional permission of stay without further investigation/hearing for at least one month according to Section 60a of the Residence Act, or issue a different residence permit. It is even possible to release a potentially trafficked person from a detention centre. The Convention of the Council of Europe explains the purpose of this provision:

"Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperation with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her."¹⁰⁷

In practise, however, this option is used only very rarely. The police complain that there are no clear guidelines on why to issue these permits, whereas many NGO s

¹⁰⁵ This also applies if it is not possible to find out who the perpetrator is or if the perpetrator dies.

¹⁰⁶ "Voluntary return" was the buzz word in 2006, because the jury had its doubts about how voluntary these returns actually were. In fact, this kind of return is not really voluntary, since it is the only way the trafficked person can prevent deportation.

¹⁰⁷ 107 Article 13.1 of the Council of Europe convention to fight trafficking in human beings (ETST No. 197)

believe that the process is made unnecessarily difficult. Disputes about the different assessments of a possible victimisation of a person are therefore inevitable.

Witnesses in a criminal case

The overall legal provisions for witnesses in a criminal case are very complex, and for most trafficked people not easy to understand and/or to deal with. One of the core functions of the specialised counselling centres is therefore to inform clients in this regard (in their native language). Officially acknowledged witnesses may stay in Germany for as long as the state prosecutor¹⁰⁸ needs them. They are issued a residence permit pursuant to Section 25 para. 4a of the Residence Act. This special permit was only introduced in August 2007, but has already created a multitude of practical problems. The fact that it is only issued to trafficked persons labels them and makes them recognisable as such. Aside from the problems this creates with regard to data protection,¹⁰⁹ it also endangers women from countries in which prostitution is forbidden when they return. Since their documentation includes this special permit that is issued only for trafficked persons, these women must anticipate criminal prosecution upon their return. Hamburg is the only German state that has recognised this problem, and that has created a practical solution, stamping the respective woman's documents only with a permit as per Section 25 of the Residence Act. To be able to provide her with the funds allowed by the law for asylum seekers, the immigration authority faxes a cover letter to the responsible agency, explaining that this is a residence permit as per Section 25, para. 4a. it would be a welcome development if other German states implemented a similar procedure.

This residence permit can be withdrawn, if, for example, the witness contacts the accused.¹¹⁰ Usually, however, these women can stay in Germany until the criminal proceedings have been concluded, which often takes up to 3 years. It is theoretically possible for these women to leave the country during this time and to return for the trial, but practically, this leads to so many problems that it is almost never done.¹¹¹

Trafficked women who testify can, if desired, contact a specialised counselling centre that will provide them with safe accommodations. According to German asylum laws they receive approx. 200 Euro/month plus medical assistance in emergencies. It is actually, however, extremely difficult to obtain funding for

¹⁰⁸ The problem here is that it is often unclear in the beginning which prosecutor's office is responsible, delaying the issuance of the residence permit.

¹⁰⁹ see article 11.1 of the Council of Europe convention: "Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)."

¹¹⁰ In reality, this is very difficult, because often, trafficked women are related to the perpetrators. This problem is particularly significant in cases, where victims and perpetrators have (small) children together. The children are entitled to see both parents and the parents must allow them to do so. It is difficult to do this, if the parents cannot have any contact. It is also feared that the perpetrators could use this regulation to allegedly prove that they had contact with the witness to have the witness's residence permit withdrawn.

¹¹¹ A new problem here seems to be the tendency of state prosecutors who assume that it should be no problem for (old and new) EU citizens to spend this wait period in their country of origin. It remains to be seen if this will cause testimony to be lost, because the women eventually cannot return to Germany in time for the trial.

psychological care on the basis of the asylum law. The situation is especially problematic for persons from the new EU countries affected by trafficking in human beings, because due to the fact that their countries have joined the European Union, they may, just like all other EU citizens, legally reside in Germany and do not need a residence permit, but there are no clear provisions guaranteeing any kind of social services for them. They must either make their own living during this period, something trafficked persons are usually unable to do, or there is a lot of confusion as to what services they are entitled to. It is urgently necessary for the government agencies to legally clarify this area and uniformly apply any existing provisions. As witnesses in a criminal trial, the women may also, if so desired, appear as joint plaintiffs and are, therefore, entitled to a lawyer who will represent them at court. The cost for the lawyer fees can be assumed by legal aid.¹¹²

In theory, witnesses waiting for a trial are allowed to work. In practice, however, this is very difficult. The shorter the period the residence permit is issued for, the more difficult it is to find an employer willing to employ them under these uncertain conditions. In addition, many trafficked persons are traumatised and need time to rebuild their lives. Some also have drug problems. Regardless, it is always difficult to return to the routine of daily living and working. Unless they are EU citizens, they also cannot enrol in some kind of professional training or even a higher education courses. They also usually cannot really make any plans for the future. A supplementary problem occurs out of the fact, that trafficked women can neither invite nor visit their children during this waiting period.

Situation after the Criminal Case

Once the criminal case has been closed, trafficked persons must usually leave the country, unless there is direct proof that they would be in danger upon their return. In this case, they can apply for residence as per Section 25, para. 3 of the Residence Act, requiring them to prove a direct endangerment. This is usually very difficult. It is almost impossible for specialised counselling centres to assess the situation in the various countries of origins and to prove their assessment. It is also very difficult for the police to confirm something that might happen, but for which there is no concrete evidence. But this kind of proof, however, is exactly what the Federal Office for Migration and Refugees (BAMF) would require for its decisions. Trafficked persons are usually not affected by state or political violence; they are threatened by individuals who, however, operate in countries in which the governments possibly do not sufficiently protect women. The risk is reassessed annually, until, after eight years, the trafficked person becomes entitled to permanent residence. Aside from the difficulties of finding a responsible official case manager who will agree for eight years with the assessment of the danger, there is an additional psychological problem, since it is very stressful for women to continue to be viewed as a trafficked person for another eight years. The only other option would be a residence permit as per Section 25, para. 4, sentence 2 of the Residence Act, requiring that *"departure from the federal territory would constitute exceptional hardship for the foreigner due to special circumstances pertaining to the individual case concerned"*. The advantage of this permit is that the BAMF does not need to become involved.

¹¹² See also Franke in chapter 5.

Also, women who marry a German citizen or a legal migrant during this waiting period in Germany enter into a new kind of dependency that can take a heavy toll on the relationship. Pursuant to Section 31 of the Residence Act, they must have lived at least two years with their marital partner from the time the (marriage-related) residence permit is issued, and must also be able to prove cohabitation. Should this marriage fail before the end of these two years, the women must leave the country, unless a continuation of the marriage would have constituted a "particular hardship". This must be proven once again, which is difficult to do. The only safe residence status after the trial would be if the woman had a child with a German citizen or legal resident. During this time of their life, however, many of the trafficked persons do not want to have a child.

The description of the living conditions of trafficked persons makes clear that becoming a witness in a trial against traffickers is usually not a real option. On the one hand, they endanger themselves and their families by giving testimony, and on the other, they lose years of their life waiting for the trial that would be better used to establish a new life in their country of origin. The result for criminal prosecutors is clear: less and less criminal cases are brought against traffickers in Germany. Unfortunately, there is no reason to believe that this is an indication for a decrease of the phenomenon in Germany. Rather, it seems that what the state is prepared to offer trafficked persons is far from being enough. Apparently, Italy was faced with similar problems 10 years ago, and decided to solve them differently: the number of cases pertaining to trafficking has therefore increased significantly.

In Italy – where also the principle of mandatory prosecution of offenses is obeyed – the residence permit of trafficked persons is, for the most part, not linked to their status as a witness in a criminal case. To obtain a right of residence for initially 6 months, the trafficked persons must provide the police with simple information allowing the police to verify if they really were trafficked. Once their victim status has been ascertained, they get a temporary residence permit. This permit can be renewed, if the woman shows that she is willing to integrate herself into society and can become permanent, if she can integrate herself into the labour market. Once these women have obtained a permanent residence permit, they are subject to the same legal regulations as other immigrants.¹¹³ In Germany, the perpetrator's lawyers often allege that the witnesses are only testifying to "weasel" a residence permit out of the authorities. If all trafficked persons had a residence permit, regardless of whether they want to testify or not, defending lawyers could no longer use this strategy that seriously affects the witnesses' credibility. Some countries disapprove of Italy's system, because they are afraid that some immigrants would become legalised in this manner. Antislavery International, however, has pointed out that this has not happened in Italy.¹¹⁴

Instrumentalisation of Trafficking in Human Beings

Trafficking in human beings, and particularly for the purpose of sexual exploitation, is an issue that enjoys great political attention and obviously offers a large projection surface for various interest groups. Opponents of the prostitution law use the issue

¹¹³ For a more detailed description of the Italian system, refer to Prasad, Nivedita 2005

¹¹⁴ See Pearson 2002

of trafficking in human beings for example to fight against the legalisation of prostitution. They argue that the Prostitution Act makes it more difficult to fight trafficking in human beings. The evaluation of the prostitution law commissioned by the federal government shows that this is not the case.¹¹⁵

Due to fact that practically only migrants seem to get trafficked, the issue is very closely tied to migration policies and is used to prevent or restrict entry into the country. Unfortunately, this is confirmed again and again, most recently in connection with the World Cup, which had given rise to absurd estimates suggesting that up to 40,000 "forced prostitutes" would come to Germany on the occasion of the World Cup. While some clearly recognised how absurd these estimates were even before the World Cup,¹¹⁶ many were not convinced. Rather, the politicians used the debate to consider *"the introduction of a temporary visa for all third countries that are possibly countries of origin for the trafficking in women and children."*¹¹⁷ This proposal had been made by Franco Frattini, then EU Justice Commissioner. It came under a lot of pressure, so he withdrew it and apologised, but it is, however, a good example for the erroneous belief that entry restrictions are a good way to prevent trafficking in human beings. On the contrary: The best way to prevent trafficking in human beings would be to create normal job opportunities for immigrants. This is also one of the demands of the convention of the Council of Europe listed as article 5.4: *"Each Party shall take appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory"*. This is also in line with the recommendations of the EU Expert Group on Trafficking in Human Beings.¹¹⁸ Unfortunately, these opinions and recommendations are not implemented but rather ignored. Those that pertain to criminal law are usually implemented, leaving the impression that criminal prosecution is more important than the protection of trafficked people. It is also not primarily viewed as a human rights problem, but an immigration problem.

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¹¹⁵ Federal Ministry of Family Affairs, Senior Citizens, Women, and Youth 2007, 2007 p. 80

¹¹⁶ See Prasad/Rohner 2006, this text was published several times before the World Cup.

¹¹⁷ „EU Commission demands mandatory visa to fight prostitution during World Cup“ in: www.rhein-main.net/sixcms/list.php?page=fnp2_news_article&id=2822990 Last access: 8.3.2006. (Translation N.P)

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