ARTICLES

Criminal Victims/Witnesses of Crimes: The Criminal Offences of Smuggling and Trafficking of Human Beings in Germany, Discretionary Residence Rights, and Other Ways of Protecting Victims

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A. Introduction: Legislative Cornerstones

In the crusade against organized crime, it has become more and more accepted that the often trans-border crime cannot sufficiently be tackled by enhanced enforcement and cooperation between states alone. An alternative tool may be what can be termed the instrumentalization of the victims to enable the prosecution of organized criminals. This brings to the fore the dilemma that the victims are often themselves offenders, as a rule, breaching provisions of immigration law. Therefore, it is typically not in their interest to bring offences of trafficking and smuggling, of which they are the victims, to the attention of the authorities. Initiatives at the international[1] and EU/EC level, which grant limited residence rights to those victims who collaborate in the prosecution of the offenders, attempt to deal with this conflict of interest. This implies at least a partial recognition of the status of the victim.

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[1] On the international level, *see* the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/55/383, p. 53 (2000). Art. 7 of this instrument reflects the idea of a residence permit to victims of trafficking. The further Protocol against the Smuggling of Migrants by Land, Sea and Air, UN Doc. A/55/383, p. 62 (2000) does not contain any provision concerning residence rights.

In the following article, the mechanisms available under German law will be elucidated. This must to be considered against the backdrop of measures adopted at the level of the European Union.

I. EUROPEAN UNION INITIATIVES

Initiatives to cooperate in the fight against organized crime are widely accepted and established. On the European level today, these are either taken as measures of cooperation in police, justice and criminal matters under the "third pillar"[2] or via the separate but also co-operative institutional set-up of EUROPOL.[3] Trafficking in human beings is a crime that falls into this category. Whereas the classic approach to combat cross-border crimes is to encourage implementation of effectively deterrent sanctions and cooperation on the enforcement level, more recent measures include considerations for the victims of these crimes, most notably, in a trafficking, i.e. criminal law/criminal procedural context.[4]

A second line of legislative action is opened up by the Community competences created by the Treaty of Amsterdam[5] to pursue a Common Asylum and Immigration Policy.[6] In recent years the EC adopted ample secondary legislation in this respect.[7] The proclaimed aim of this policy is to combat illegal immigration.[8]

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[2] *See, e.g.*, the Council Framework Decision on Combating Trafficking in Human Beings of 19 July 2002, 2002 O.J (L 203) 1. Tom Obokata, *EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal*, 40 COMMON MARKET LAW REVIEW 917 (2003); Ryszard Piotrowicz, *European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers*, INT'L J. OF REFUGEE L. 263 (2002).

[3] Overview by Tom Obokata, *EU Action Against Trafficking of Human Beings: Past, Present and the Future*, *in* Guild & Minderhoud, *supra* note ‡.

[4] Art. 7 of the Framework Decision of the EC Council on Combating Trafficking in Human Beings of 19 July 2002, 2002 O.J. (L 203) 1.

[5] Title IV, Art. 61-68 EC, especially, Art. 63 No. 3 EC.

[6] Prominently laid out by the Conclusions of the Presidency of the European Council of Tampere, 15/16 October 1999, para. 10 ff.

[7] The more recent measures adopted were: "Qualification Directive" - Council Directive 2004/83/EC of 29 April 2004 "on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted", OJ 2004 L 304/12, and the "Family Reunification Directive" – Council Directive 2003/86/EC of 22 September 2003 "on the right to family reunification", 2003 O.J. (L 251) 12. Summary of the measures adopted up to then at Katja Ziegler, *Integration und Ausgrenzung im Lichte der Migrationspolitik der Europäischen Union – die Festung Europa?*, *in* INTEGRATION UND RECHT 127, 140 (Sahlfeld et al. eds., 2003).

The focus soon shifted to include efforts to "tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants."[9] It urges the adoption of legislation, foreseeing severe sanctions against this serious crime. One aspect of this was the adoption of a directive "defining the facilitation of unauthorized entry, transit and residence"[10] that defines assistance to illegal entry as a criminal offence and requires Member States to impose adequate sanctions. However, the call did not stop short at "detecting and dismantling the criminal networks." The European Council of Tampere emphasized that "[t] he rights of the victims of such activities shall be secured with special emphasis on the problems of women and children."[11] This recognition of the status of victimhood in a context of – often-illegal – immigration has been carried farthest by a 2002 proposal for a Council directive "on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities."[12] The proposal provided for residence permits[13] in order to protect victims of trafficking *and* smuggling alike, if the latter "might be reasonably regarded as victims, who have suffered harm."[14] This protection depends on the willingness to cooperate with the authorities, i.e. it exists in the interest of criminal prosecution of traffickers and smugglers.[15] The adopted Directive watered down the protective thrust of the proposal in that the extension to victims of smuggling is only optional for Member States.[16] Also, the Directive seems to be ambiguous about an obligation of the

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[8] The European Council of Tampere (15/16 October 1999) stressed in its Conclusions (para. 3) the need for the "Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes."

[9] Conclusions of the Presidency of the European Council of Tampere, 15/16 October 1999, para. 23.

[10] Council Directive 2002/90/EC of 28 November 2002, 2002 O.J. (L 328) 17.

[11] *Supra* note 9.

[12] Commission Proposal (COM) (2002) 71 final, 2002 O.J. (C 126) E/393.

[13] Of a duration of six months, renewable *see* Art. 8 (4) Directive 2004/81/EC of 29 April 2004, 2004 O.J. (L 261) 19.

[14] Explanatory Memorandum, COM (2002) 71 final, p. 7 (section 2.2.2.).

[15] Criticism regarding this restriction by Piotrowicz, *supra* note 2, at 267.

[16] Art. 3 (2)Directive 2004/81/EC of 29 April 2004, 2004 O.J. (L 261) 19. Also, the access to the labor market has been put more at the discretion of Member States (Art. 11).

Member States to at least consider whether the further presence of a victim is conducive to criminal prosecution.[17]

The Directive has been criticized as offering too little for too much,[18] i.e. too little incentive for victims of trafficking and smuggling at too high a cost, namely the revelation of their irregular residence that will in most cases eventually lead to their expulsion and repatriation. In the following, the scope of the criminal offences of smuggling and trafficking and the current options available under German law to take account of the dual role of the victims as victims and offenders against immigration law will be examined.

II. GERMANY

In Germany the criminal offences of smuggling and trafficking in human beings look back on a longer tradition. In recent years, particularly since the 1980s,[19] there have been numerous attempts to reform these offences, generally leading to more severe sanctions. However, these amendments tended to involve fine-tuning and filling existing *lacunae* in the law rather than the creation of new offences. *Smuggling* relates to assisting with illegal entry or residence. Such assistance is, in principle, punishable as an inchoate offence to illegal entry or residence. A separate offence of "smuggling" (thus termed) covers the more serious forms of assistance. Whereas German immigration law has been significantly changed by the Immigration Act (*Zuwanderungsgesetz*) that entered into force on 1 January 2005,[20] the Act only led to a reshuffling of numbers of the provisions on smuggling in the new Residence Act (*AufenthG – Aufenthaltsgesetz*).[21] Whereas the offence of smuggling is contingent on illegal entry or residence of a foreigner, trafficking is not. *Trafficking* (thus called) used to criminalize only the exploitation of persons in a situation of vulnerability where they are influenced or induced to practice prostitution or to commit other acts of a sexual nature. A recent overhaul of the legislation in this area has, how-

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[17] *See* Art. 10 of the Proposal, COM (2002) 71 final, p. 22 on the one hand and Art. 8 Directive 2004/81/EC of 29 April 2004, 2004 O.J. (L 261) 19.

[18] Piotrowicz, *supra* note 2.

[19] Friedrich-Christian Schroeder, *Irrwege aktionistischer Gesetzgebung – das 26. StÄG (Menschenhandel)*, 50 JURISTENZEITUNG 231, 232 (1995).

[20] Statute of 30 July 2004, Federal Law Gazette (Bundesgesetzblatt, BGBl.) 2004 I, p. 1950 ff.

[21] This article will refer to the numbers of the law in force. §§ 92a and 92b of the (old) Foreigners' Act (Ausländergesetz, AuslG) relate to 96 and 97 AufenthG (new).

ever, broadened the scope of the terminology. A recent amendment[22] to the Criminal Code (*StGB – Strafgesetzbuch*))[23] unifies and extends the existing offences in reaction to the Palermo Protocol and the EU Framework Decision on Trafficking of July 2002[24] and includes new expanded provisions dealing not only with trafficking into sexual exploitation but also with trafficking for the purposes of exploitative employment, slavery, bondage and debt servitude which were in part previously codified outside the Criminal Code.[25]

The factual situations of smuggling and trafficking are often entangled. This feeds into a confusion regarding their respective criminal offences. The confusion is compounded by the fact that cases of trafficking are often not discovered in their full gravity: a high number of potential trafficking cases remain unrecorded or appear "only" as smuggling instead of trafficking.[26] Sometimes this focus on smuggling is due to the difficulty in proving trafficking. For example, illegal entry is often a factual element, but not a legal precondition of trafficking for sexual exploitation. The following factual elements constituting smuggling will often be present with trafficked women: They may cross the border illegally or with forged papers;[27] those who are in possession of short-stay visa may exceed their maximum permissible stay, or take up work (such as prostitution) against the residence status.[28] Whereas illegality of residence and trafficking often exist alongside each other, a conclusion that trafficking never occurs during *legal* stays would be precarious: the often *pro forma* legalization of residence may serve to protect exploiters from investigation into their practices. In other words, where women who have been trafficked for prostitution obtain a work permit or acquire residence status, such as by marriage (of convenience), this may protect the traffickers from

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[22] Statute of 11 February 2005, BGBl. I 2005, p. 239, in force 19 February 2005.

[23] §§ 180b, 181 (old), §§ 232, 233, 233a (new) StGB.

[24] *See supra* note 1, at 2.

[25] *See* Explanatory Memorandum in Deutscher Bundestag, Drucksache (BT Drs.) 15/3045 p. 6. Trafficking for the purpose of organ transplantation would remain in a separate statute: the Transplantation Act, BGBl I 1997, p. 2631.

[26] JOHANNES HOFMANN, MENSCHENHANDEL. BEZIEHUNGEN ZUR ORGANISIERTEN KRIMINALITÄT UND VERSUCHE DER STRAFRECHTLICHEN BEKÄMPFUNG 93 (2002).

[27] *Id.*, at 101.

[28] *Cf.* Federal Court of Justice (Bundesgerichtshof, BGH), 53 NEUE JURISTISCHE WOCHENSCHRIFT 1732 (2000). (women from the Ukraine coming on tourist visa and working as prostitutes); HOFMANN, *supra* note 26, at 102.

investigation.[29] Cases in which women are recruited by marriage brokers and where the husbands (sometimes in cooperation with the broker) then traffic the women as prostitutes are reported frequently.[30]

In addition, smuggling may lead to exploitation (and thus resemble trafficking) as the smuggled person has incurred a debt *vis-à-vis* the smuggler that he or she may need to pay off,[31] for example by working in a brothel owned by the smuggler or of those who paid the smuggler.[32] Intentional "illegalization" of residence by the exploiters is also very common: for example, when women are deprived of their passports (as is often the practice with trafficking),[33] they are in breach of the duty to carry a passport.[34]

Besides the enhanced criminalization of trafficking and smuggling, another trend is emerging: the recognition of trafficked or smuggled women and girls as victims.[35] Media coverage of cases like the 35 Tamils who almost froze to death while being smuggled into Germany in 1996 in the back of a lorry seem to have played an instrumental role in this change of perception – at least in public discourse.[36] This

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[29] BGH, judgment of 17 March 2004, 2 StR 474/03, 9 NEUE ZEITSCHRIFT FÜR STRAFRECHT – RECHTSPRECHUNGS-REPORT 233 (2004), *available at* www.bundesgerichtshof.de). HOFMANN, *supra* note, 26, at 107, 241; DREIXLER, DER MENSCH ALS WARE. ERSCHEINUNGSFORMEN MODERNEN MENSCHENHANDELS UNTER STRAFRECHTLICHER SICHT 208 (1998).

[30] Landeskriminalamt Nordrhein-Westfalen (LKA NRW), Lagebild Menschenhandel Nordrhein-Westfalen 2002, p. 24, *available at* http://www.lka.nrw.de/lagebilder/lagebild_menschenhandel_2002.pdf.

[31] HOFMANN, *supra* note 26, at 104.

[32] As was the case, in BGH, 9 NStZ-RR 233 (2004). *See also* the Explanatory Memorandum to the Proposal for a Council Directive "on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities", COM (2002) 71 final, p. 2 (section 1.1.).

[33] *See*, *e.g.*,the facts of BGH, 52 JZ 153 (1997).

[34] According to § 3 (1) AufenthG.

[35] *See* the parliamentary debate on the amendment of the trafficking provisions, Deutscher Bundestag, Plenarprotokoll 15/109 of 7 May 2004, pp. 9946 ff.; also the Question of Members of the German Parliament on trafficking of human beings in Germany to the Federal Government, Deutscher Bundestag, Drucksache 15/1938 of 5 November 2003, p. 2, and Answer of the Federal Government, Drucksache 15/2065 of 21 November 2003.

[36] *Cf.* Klaus Sieveking, *Staatliche Reaktionen auf Illegalität in Deutschland – europa-, ausländer- und arbeitsrechtliche Aspekte, in*, MIGRATION UND ILLEGALITÄT 91 (Eberhard Eichenhofer, ed., 1999).

trend is, however, also counteracted by policy changes: a politically high-profile criminal case at the Regional Court (*Landgericht, LG*) of Cologne[37] recently revealed the large-scale abuse of an administrative order given by the Ministry of Foreign Affairs in 2000,[38] which was intended to simplify and speed up the Schengen visa application process. The formal requirement of a financial guarantee normally undertaken by the inviting host and meant to insure the financial viability of the stay was no longer required if a guarantee by a third-party was presented. This lead not only to a state of near-siege of the German Embassy in Kiev and a soaring number of visa applications, but also to the flourish of faked invitations and the creation of companies set up by smugglers and their accomplices, selling these guarantees like insurance policies.[39]

The legal system currently does not reflect explicitly this growing recognition of victims. There are no specific legal provisions relating to victims of trafficking and smuggling, especially in the way residence permits are issued. However, existing provisions in the immigration law and rules of witness protection may *be applied* to give limited protection and might entail limited rights of residence. The possibilities for protection available under German law would, in principle, be the same for victims of trafficking and smuggling because they derive from general provisions of immigration law and criminal procedure law. These means of protection will be discussed after an outline of the criminal offences of illegal entry/residence, smuggling and trafficking.

B. The Criminal Offence of Smuggling Foreigners

Besides the independently codified offences of trafficking and smuggling of persons technically so termed, incitement to or assistance with illegal entry or residence by third persons also amount to offences that could be called smuggling in a "non-technical" sense.[40] Hence, third persons inciting or assisting a migrant to ille-

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[37] The court's judgment was followed by a parliamentary questioning of the Government, in which the government was accused of by-passing immigration law, *see* Deutscher Bundestag (BT), Plenarprotokoll 15/99 of 24 March 2004, pp. 8833 ff.; the current debate in the opposition is about instigating an inquiry commission, *see* Peter Carstens, *Andere Instrumente erforderlich*, FRANKFURTER ALLGEMEINE ZEITUNG, 11 November 2004, at 3.

[38] So called Volmer-Erlass, named after the then Secretary of State, who was a member of the Green Party in the coalition government.

[39] LG Köln, judgment of 9 February 2004, B. 109-32/02; *see* also Guido Heinen, *Schleuserkriminalität: Justiz kritisiert Auswärtiges Amt*, DIE WELT, 11 February 2004; Barbara Oertel, *Schleusung ohne staatliche Billigung, taz*, 14 February 2004, at 7; FAZ, 26 February 2004, at 4.

[40] In conjunction with §§ 26, 27 StGB which may be read into all criminal offences.

gally enter or reside may be held liable under two offences: first, for smuggling as independently codified and secondly as accessories to the offence of the migrant's illegal entry or residence. Therefore, if the aggravating elements of smuggling or trafficking (such as a financial gain, repeated commission of the offence, assisting several foreigners or acting professionally, etc.) are not met, the criminal sanctions for assisting an illegal entry or residence remain as a fallback position. Given that the offence of smuggling is also conditional on actions breaching the immigration rules,[41] a brief consideration of the grounds of the criminal offence of illegal entry or residence is also necessary.

I. The Criminal Offence of Illegal Entry or Residence

The Residence Act (AufenthG) proscribes[42] illegal entry and residence[43] in its basic, i.e. least severe form, as punishable by imprisonment of up to one year, or a fine, in addition to the possibility of expulsion.[44] The elements of the offences are:[45] entry or residence without a necessary permit or visa[46] or, where no prior permission is necessary, residence or entry without the obligatory possession of a passport.[47]

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[41] Mentioned in § 95 AufenthG.

[42] § 95 AufenthG. Less severe breaches of immigration law are only offences under administrative law (e.g. negligent stay without permit), §§ 98 AufenthG, § 10 EU Free Movement Act (Freizügigkeitsgesetz/EU 2004). These are outside the ambit of this article. *See* KATHARINA AURNHAMMER, SPEZIELLES AUSLÄNDERSTRAFRECHT 91 (1996). The obligation on carriers not to transport persons into Germany who lack the necessary passport or visa can be enforced by fines (§ 63 AufenthG).

[43] § 95 AufenthG.

[44] §§ 53-55 AufenthG.

[45] Survey by Volker Westphal & Edgar Stoppa, *Straftaten bei unerlaubter Einreise und unerlaubtem Aufenthalt von Ausländern,* 52 NJW 2137 (1999); and Hans-Peter Welte, *Illegaler Aufenthalt in Deutschland*, 22 ZEITSCHRIFT FÜR AUSLÄNDERRECHT 54 (2002); Horst Steiner, *Schleusungskriminalität aus der Sicht des Revisionsgerichts*, *in* ILLEGALE MIGRATION UND SCHLEUSUNGSKRIMINALITÄT 141, 151 (Eric Minthe, ed., 2002).

[46] § 96 (1) no. 1 and 3 AufenthG. *See* Court of Appeal (Oberlandesgericht, OLG) Frankfurt, 1 Ws 106/00, judgment of 18 August 2000, 6 NStZ-RR 57 (2001); also also Court of Appeal (Kammergericht (KG)) Berlin, 1 Ss 198/01, judgment of 28 September 2001.

[47] § 96 (1) no. 1 and 3 AufenthG. Further acts come under the broadly defined concept of illegal entry and residence in § 95 AufenthG (breach of a prohibition to take up employment). Other forms of illegal stay may result from engaging in prohibited political activity (No. 4), active resistance to fingerprinting and photographing (No. 5), or membership in a secret association of foreigners (No. 7), *See* von Pollern, *Das spezielle Strafrecht für Ausländer, Asylbewerber und EU-Ausländer im Ausländergesetz, Asylverfahrensgesetz und EWG-Aufenthaltsgesetz*, 16 ZAR 175-76 (1996).

There is an aggravated offence[48] for repeated illegal entry or residence following a previous expulsion order. This offence is punishable by up to three years imprisonment, or a fine, or even deportation, which entails a prohibition on re-entering and residing.[49] Repeated breach, therefore, is considered to be especially harmful.

It also amounts to an aggravated offence to give or use false information to obtain a permit (such as a visa) for oneself *or another* to enter or reside.[50] Hence, in this case, acts of third parties are independently proscribed. The feigning of a regular marriage by both parties is subsumed under the provision of false information, so that marriages of convenience come under the scope of the prohibition.[51] A further example of giving false information is entry under the pretence of a tourist visit, when the intended purpose of the stay is to take up work (for example, as a prostitute).[52] It should be noted that there is an (albeit limited) exception to the offence for the provision of false or incomplete information in asylum procedures. The Residence Act[53] does not seek to punish asylum seekers who make false statements in order to gain entry into Germany and initiate asylum status proceedings. However, a third person who induces or assists an asylum seeker could be held liable.[54] Whereas the initial bill from the *Bundesrat* (Council of Federal States) provided for a parallel mechanism in asylum and immigration procedures[55] with severe sanctions for the asylum applicant himself or herself, the current provisions[56] of the Asylum Procedure Code (*AsylVfG – Asylverfahrensgesetz*)

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[48] It is a systematic feature of German criminal law to differentiate "normal", aggravated and less severe offences of the same basic offence by adding additional "elements" to it when formulating the statute. This is to be distinguished from sentencing, when aggravating and mitigating "circumstances" will be assessed.

[49] § 95 (2) AufenthG.

[50] *Id*.

[51] OLG Düsseldorf, 53 NJW 1280 (2000); GÜNTER RENNER, AUSLÄNDERRECHT. KOMMENTAR § 92 AuslG para. 18 (7th ed. 1999). Cases discussed by AURNHAMMER, *supra* note 42, at 67; Hans-Ingo von Pollern, *supra* note 47, at 177; DREIXLER, *supra* note 29 at 224.

[52] BGH, 53 NJW 1732, para. 19 (2000).

[53] § 95 (2) No. 2 AufenthG.

[54] *See* § 84 Asylum Procedure Act (Asylverfahrensgesetz, AsylVfG).

[55] § 96 AufenthG.

[56] §§ 84 – 86 AsylVfG.

are more lenient.[57] This exception serves to adhere to the intention of the Asylum Procedure Act and the constitutional importance attributed to the right of asylum in Art. 16a of the Constitution (*GG – Grundgesetz*).[58] From a practical perspective, if the provision of false information by an asylum seeker were proscribed, in order to convict, the judge would have to assess whether the accused *in fact* has a right to asylum because in that case, the sanctioning of illegal entry would be incompatible with this right. The criminal court, however, may not be the ideal forum for this assessment.[59] The prosecution of smugglers was a motivation for making *only* the accessory act of third persons punishable in the asylum context.[60] This is because, if asylum seekers were potentially liable for the provision of false information, the prosecution of smugglers and traffickers could be impaired due to the right of asylum seekers not to incriminate themselves.[61] It should be noted that assistance without economic motives rendered by friends and relatives was meant to be kept outside the scope of criminal sanctions.[62]

The *attempt* of (illegal) entry without the necessary permit or passport, and illegal re-entry after prior expulsion or deportation were proscribed by statutory amendment in 1997.[63] Thus, a perceived legal loophole was closed, allegedly to allow for punishment of (assisting) third persons as demonstrated by the following case: before 1997 the driver of a car who was discovered attempting to smuggle a person into Germany could not to be punished.[64] The other forms of illegal entry[65]

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[57] *See* RENNER, *supra* note 51, at § 84 AsylVfG, para. 3; AURNHAMMER, *supra* note 42, at 73 with further references.

[58] BGH, 52 NJW 333 (1997); Kay Hailbronner, Ausländerrecht. Kommentar, Heidelberg, up-to date 31st supplement, August 2002, A 1, § 92 AuslG, para. 55.

[59] *See* Recommendation of the Judicial Committee (Rechtsausschuss), BT Drs. 9/875, p. 26; but also German Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)), 2 BvR 397/02 of 6 March 2003, para. 34 ff.; Victor Pfaff, *Prüfungsumfang der Strafgerichte bei unerlaubtem Aufenthalt*, ZAR 148 (2003). For previous attempts to construe a justification for reasons of necessity, *see* Andrik Abramenko, *Unerlaubter Aufenthalt und rechtfertigender Notstand – Zur Anwendung von § 34 StGB auf ausländerrechtliche Strafvorschriften*, 21 NEUE ZEITSCHRIFT FÜR STRAFRECHT 71 (2001).

[60] Because of the right to refuse to give self-incriminatory evidence (§ 55 Criminal Procedure Code, Strafprozessordnung (StPO)), with regard to the smuggled person. Rechtsausschuss, BT Drs. 9/875, p. 26; AURNHAMMER, *supra* note 42, at 41, 34; von Pollern, *supra* note 47, at 180.

[61] AURNHAMMER, *supra* note 42, at 73.

[62] AURNHAMMER, *supra* note 42, at 41.

[63] § 95 (3) AufenthG.

[64] Bavarian Court of Justice (Bayerisches Oberstes Landesgericht (BayObLG)), 16 NStZ 287 (1996).

are not punishable if only attempted,[66] but most cases will come under the purview of attempted illegal entry lacking a necessary permit or passport.

In order to meet Germany's obligations under Art. 31 of the 1951 Geneva Convention Relating to the Status of Refugees,[67] the Residence Act[68] provides that punishment for entry or residence without the appropriate permit or visa is waived if the immigrant applies for refugee status without undue delay.[69] Similarly, for reasons of hierarchy of norms, the constitutional right to asylum under Art. 16a (1) GG may be a defense for the breach of the provisions of immigration law.[70] Therefore, refugees and asylum seekers must not be punished for illegal entry on the basis of a (lower-level) statute. The statute has to be interpreted and applied restrictively in line with the constitution. However, the scope of this constitutional exception has become limited to rare situations of direct entry from a persecuting state, which means *de facto* by air travel. When an asylum applicant enters Germany by crossing a land-border, the safe-country concepts,[71] introduced by constitutional amendment in 1993 to implement the Dublin Convention, prevent the claim of asylum.[72] The grant of asylum depends, therefore, on a binding decision of the Federal Office for the Recognition of Foreign Refugees that the safe-third-country rules are not applicable to the case. Thus, in practice, safe-country concepts prevent many applications of the right protected in Art. 31 of the Refugee Convention.[73]

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[65] Listed in § 95 AufenthG, *supra* text to note 45.

[66] Hailbronner, *supra* note 58, at A 1, § 92 AuslG, para. 61.

[67] Implemented by § 13 (3) AsylVfG.

[68] § 95 (5) AufenthG.

[69] BGH, 19 NStZ 408, 409 (1999); regional court (Amtsgericht (AG)) Landsberg, 2 Cs 103 Js 112199/00j, judgment of 21 August 2001, 2002 Informationsbrief Ausländerrecht (InfAuslR) 198 f.

[70] AURNHAMMER, *supra* note 42, at 163.

[71] Art. 16a (2) GG, §§ 26a, 31 (1) 2, 34a (1) AsylVfG, § 60 AufenthG. Held to be constitutional by the German Bundesverfassungsgericht, 94 BVerfGE 49 ff. and 115 ff. *See* however, European Court of Human Rights, App. No. 43844/98, T.I. v. UK; "Procedures Directive", Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2002) 326 final, Explanatory Memorandum to Art. 28 on the point of a non-rebuttable presumption of safety.

[72] Explicitly Bavarian Administrative Court of Appeal (Bayerischer Verwaltungsgerichtshof (BayVGH)), 44 Bayerische Verwaltungsblätter (BayVBl.) 119 (1998), quoting the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG), 89 BVerwGE 231, 234; Westphal & Stoppa, *supra* note 45, at 2138.

[73] *See* OLG Dresden, 19 STRAFVERTEIDIGER 259 (1999).

This is demonstrated by one case of Turkish Kurds who used smugglers in order to reach Germany and then claimed asylum.[74] The asylum seekers were stopped by German border guards while still in Belgium and convicted for attempted illegal entry. In line with several courts' rulings, the constitutional right to asylum under German law was precluded as a defense because, following the 1993 amendment, the right to asylum is curtailed where transit through a safe third-country has occurred.[75] The Court of Appeal (*OLG – Oberlandesgericht*) of Cologne has also ruled out an exclusion of punishment by Art. 31 of the Refugee Convention.[76] The court's argument was that illegal entry could only be justified by Art. 31 of the Refugee Convention where there were good reasons for entering illegally, such as a threat to life connected to legal entry, for example, if a visa could not be obtained in the state of origin. By using smugglers, the defendants had circumvented the mechanism of Art. 31 of the Refugee Convention, which required contact with the immigration authorities and an application for asylum at the border.[77] As an aside, when punishment is waived for the asylum seeker, it is at best uncertain whether Art. 31 of the Refugee Convention will also rule out punishment for the third person assisting with the illegal entry.[78]

II. INCHOATE OFFENCES OF INCITEMENT OR ASSISTANCE TO ILLEGAL ENTRY OR RESIDENCE

Third persons may be liable under the general rules of criminal law for inciting or assisting illegal migrants[79] as well as under the smuggling provisions. The inchoate offence of assistance to illegal entry or residence is of most practical relevance to the present context as the specialized separate provisions on smuggling are built on elements of the inchoate offence. Such an identical element is, for example, what amounts to assistance. *Assistance* to illegal entry or residence is interpreted widely

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[74] OLG Köln, NStZ-RR 24, 25 (2004).

[75] *See also* OLG Dresden, StV 259 (1999); RENNER, *supra* note 51, at § 13 AsylVfG, Rn. 20. Previously, mere transit was not considered as ending the flight of a refugee, *see* 78 BVerwGE 332 and 79 BVerwGE 347.

[76] In this respect BGH, 19 StV 382 (1999).

[77] OLG Köln, 9 NStZ-RR 24, 25 (2004); no criminal offence held by OLG Düsseldorf, 18 StV 139-40 (1998).

[78] To the negative: AURNHAMMER, *supra* note 42, at 159; Westphal & Stoppa, *supra* note 45, at 2144; however, LG Offenburg, order of 7 July 1994 – Qs 85/94 granted the waiver.

[79] § 95 AufenthG in conjunction with §§ 26 or 27 StGB. *See*, for example, BayObLG, 55 NJW 1663, 1664 (2002); KG Berlin, judgment of 4 July 2001, 1Ss 263/00; OLG Frankfurt, 13 NStZ 393 (1993); OLG Zweibrücken, 46 MONATSSCHRIFT DES DEUTSCHEN RECHTS 894 (1992); AURNHAMMER, *supra* note 42, at 152.

and includes any form of enabling, promotion, facilitation, intensification, securing or reinforcement of illegal entry or residence.[80] This wide interpretation opens up a broad number of potential perpetrators from the classical smuggler to the employer of illegal immigrants. The act of assistance need not relate directly to crossing the border as such. Any encouragement, facilitation, or enabling of the entry or residence is sufficient. Recruitment for illegal labor, providing information about travel routes to enter illegally, providing means of transport or accommodation, transferring financial means abroad,[81] arrangement and conclusion of marriages of convenience with illegal foreigners,[82] provision of translation services and even assistance to the transgression of an entry permit's territorial restriction[83] come under the purview of the prohibition.[84] Advising migrants to destroy their passports after entry could qualify as criminal incitement or assistance to residence without the required passport.[85]

In relation to the provision of accommodation, a critical distinction is drawn between a mere humanitarian act of "saving" persons from otherwise "inhumane conditions" and situations where providing accommodation encourages or facilitates illegal residence. In one case it was held that selecting "suitable" brothels and driving illegally-resident Thai women there to work was covered because these acts provided for the conditions in which the women could pursue prostitution.[86] By contrast, the provision of accommodation or employment to someone who is determined to stay under any circumstance, no matter what (*omnimodo facturus)*, has been held not to amount to providing assistance for illegal entry or residence because the act of assistance has no causal effect on the offence of the migrant.[87]

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[80] BGH, NJW 1435 (1989) – Philippine women (recruitment of women to be married in Germany). AURNHAMMER, *supra* note 42 at 75; BayObLG, 55 NJW 1663, 1664 (2002).

[81] LG Braunschweig, 36 KLs 806 Js 41519/98, judgment of 26 March 2002 (money transfer to Iraq for immigrant who had no permission to enter).

[82] BGH, 9 NStZ-RR 233 (2004); OLG Düsseldorf, 53 NJW 1280 (2000); LG Darmstadt, 2 NStZ-RR 30 (1998); OLG Frankfurt, 13 NStZ 394 (1993).

[83] BayObLG, 5 NStZ-RR 226 (2000).

[84] RENNER, *supra* note 51, at § 92a AuslG, para. 5; von Pollern, *supra* note 47, at 175.

[85] § 95 (1) no. 2, 3 AufenthG.

[86] BGH, 43 NJW 2207, 2208 (1990). *See also* OVG Lüneburg, 16 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 622 (1997) – smuggling by letting rooms with the purpose of enabling prostitution.

[87] BGH 43 NJW 2207, 2208 (1990); OLG Düsseldorf, StV 312 (2002); BayObLG, 55 NJW 1663, 1664 (2002); 20 StV 366 (2000); KG Berlin, 1 Ss 263/00 (195/00), order of 4 July 2001.

This being said, recently the Court of Appeal (*Oberlandesgericht*) of Cologne adopted a more restrictive approach, ruling out the intention of the immigrant as a potential defense.[88]

The wide scope of the concept of assistance was referred to in a Federal Court of Justice (*BGH – Bundesgerichtshof*) judgment in 1989. The defendant was accused of recruiting Philippino women, helping them to organize and finance their trip, and arranging marriages with interested German men. The Court held that this was covered by the prohibition although the defendant was not the archetypical smuggler in the context of organized crime. It was held that the facilitation of *taking up illegal employment* was not a necessary motive behind smuggling and thus, not a constitutive element of the offence. This was compatible with the wording of the statute but went beyond the legislators' expressed intention. The Court referred to the over-all intention to combat smuggling because of its seriousness in selfishly and gainfully exploiting the lack of knowledge and economic need or distress of foreigners who, for these reasons, may easily fall victim of the smuggler.[89] This reasoning is interesting in that it reveals the individual protective thrust inherent in the law against smuggling.[90] Assistance by providing so-called "church asylum" may fall into the scope of the prohibition.[91] The mere omission to intervene where illegal immigrants are known to be present (for example, prostitutes in a bar), however, does not amount to assistance. Publicans are not entrusted with and should not be required to exercise the public function of controlling the residence status of foreigners who frequent their establishment.[92]

It is not necessary that the migrant is actually punishable in order for third parties to be liable for an inchoate offence. For example, he or she may not be criminally responsible – as a child or because of mental insufficiencies. However, liability of

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[88] OLG Köln, 8 NStZ-RR 184, 185 (2003). *See also* criticism of the previous jurisprudence by Peter König, *Kann einem omnimodo facturus Beihilfe geleistet werden?*, 55 NJW 1623, 1624 (2002).

[89] BGH, 42 NJW 1435 (1989) referring to BT Drs. 9/800, p. 11 and 9/847 p. 12; *see also* examples mentioned by Bernd Walter, *Schlepper, Schleuser, Menschenhändler. Der grenzpolizeilichen Alltag an den deutschen Ostgrenzen*, KRIMINALISTIK 471, 474 (1998).

[90] *See also* AURNHAMMER, *supra* note 42, at 75; Claudius Geisler, *Bekämpfung der Schleuserkriminalität*, 34 ZEITSCHRIFT FÜR RECHTSPOLITIK 171 (2001).

[91] AURNHAMMER, *supra* note 42, at 181.

[92] OLG Oldenburg, 57 NJW 1748 (2004); *see also* VGH Mannheim, VERWALTUNGSBLÄTTER BADEN-WÜRTTEMBERG 404 (1995); critical annotation by Stefan Zeitler, *"Passkontrolle" durch den Bordellwirt?*, VBlBW 44 (1996).

the third person requires at least an intentional and illegal act of the migrant; in other words: an unlawful act not justified by a defense.[93]

III. THE CRIMINAL OFFENCE OF SMUGGLING FOREIGNERS

In addition to the basic inchoate offence of assisting illegal entry or residence outlined above, §§ 96, 97 AufenthG single out more severe forms of providing assistance for illegal entry or residence, both by adding additional elements to the offence and by "upgrading" the offence to the special, independent, aggravated offence of "smuggling" in its own right.[94] These aggravated offences allow for more differentiated and more severe punishment than does the basic offence of providing assistance for illegal entry.[95] By way of example, an accessory to another's illegal entry or residence can, at most, be punished in the same way as the principal offender (up to one year imprisonment).[96] By comparison, smuggling is punishable by imprisonment of up to five years. The offence is contingent on any intentional and illegal act of entry or residence[97] committed by the illegal immigrant himself. However, as previously indicated, it is not necessary that the smuggled person in fact be subject to punishment.[98]

The aggravating elements "upgrading" the assistance to the independent offence of smuggling are:

- pecuniary advantage received by the smuggler;
- repeat offending;
- acting for several foreigners;
- smuggling professionally; or
- gang-based repeat smuggling.

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[93] *See*, *e.g.*, OLG Köln, 8 NStZ-RR 184 (2003).

[94] "Einschleusen von Ausländern", §§ 96, 97 AufenthG. E.g. BGH, NStZ 45 (2004); OLG Köln, NStZ-RR 184 (2003); RENNER, *supra* note 51, at § 92a AuslG, para. 4. HOFMANN, *supra* note 26, at 34.

[95] Geisler, *supra* note 90, at 172.

[96] With a mandatory reduction of the punishment for "mere" assistance according to § 27 (2) StGB. This reduction does not apply to the smuggling offences which are independently codified forms of assistance to illegal entry, BGH, 24 NStZ 45 (2004).

[97] Under § 95 AufenthG.

[98] Geisler, *supra* note 90, at 172 for the case of smuggling of an infant under the age of criminal responsibility; *see*, however, *also* BayObLG, 8 NStZ-RR 275 (2003); BayObLG, 20 StV 366 (2000); Westphal & Stoppa, *supra* note 45, at 2143.

Pecuniary advantage is interpreted widely. The money need not be received from the smuggled person but can come from a third party, such as the potential husband of a smuggled woman. Thus, the Federal Court of Justice has included payment received for the brokering of marriages with German men. The organization of illegal entry and the later marriage brokering was considered to be one inseparable economic unit, as smuggling was seen as a means to achieve a financial benefit (through marriage brokering). Even the reimbursement of travel and other expenses incurred by the defendant was considered a financial benefit, as the defendant had borne the risk of non-recovery. [99]

The aggravated offence of smuggling *several* foreigners was the result of an amendment in 1997.[100] It has now been ruled that "several" means at least two smuggled persons.[101] The previous wording referred to more than five foreigners. It was originally formulated against the backdrop that the smuggling provisions should not catch-up assistance to illegal entry by family and friends or offered for reasons of humanity. The change will shift cases that were previously punishable only as assistance to illegal entry or residence into the ambit of the more serious provisions on smuggling.[102]

A further aggravation[103] provides for a compulsory prison sentence of a minimum of six months (maximum ten years) if smuggling is committed *individually as a profession* (in other words, repeated acts generating a more than transitory source of income)[104] *or* as a member of a *gang* intending to commit the offence *repeatedly*. In both cases mere attempt is punishable. Both of these aggravations place the offence in the context of organized crime. The aggravated offences may also result in "economic" sanctions provided by the Criminal Code to recoup gains made from offences in a context of organized crime. These include "extended confiscation" of

[99] BGH, 42 NJW 1435, 1436 (1989); BGH, 34 SAMMLUNG IN STRAFSACHEN 299, 303 = 40 NJW 1987 (1987); BayObLG, 42 NJW 1437 (1989) (formula of the judgment reprinted only).

[100] Statute of 29 October 1997, BGBl. I, p. 2584.

[101] BGH, 24 NStZ 45 (2004).

[102] Also critical comment by Edgar Stoppa, *in* HUBER, HANDBUCH DES AUSLÄNDERRECHTS, § 92a AuslG 100 B, para. 6.

[103] § 96 (2) AufenthG.

[104] BGH, 18 NStZ 305 (1998).

assets or profits which are presumed to have been obtained from the offence (without having to prove this link).[105]

Finally, the combination of receiving or being promised a pecuniary advantage, or repeated or multi-person smuggling with the professional activity of gang offences is classified as a "*crime*"[106] (rather than an offence).[107] This is the most severe case, punishable by a minimum of one-year imprisonment (maximum ten years). The special economic sanctions mentioned above are applicable in addition to imprisonment. As a "crime," even the mere agreement to commit offences becomes punishable.[108] Classifying some forms of smuggling as "crimes" has far-reaching effects on the exercise of German jurisdiction. German criminal law is generally only applicable to acts committed in Germany, except for cases where jurisdiction is specifically provided on other grounds, like the protective or universality principles.[109] Smuggling – other than trafficking of persons – does not fall into the latter category of jurisdiction. Accordingly, there is generally no German criminal jurisdiction where untruthful statements are made to a German Embassy abroad and there is no later territorial link for that person.[110] However, when at least parts of the actions (of gang members) amounting to an offence are committed within Germany, the whole activity is brought into the ambit of German criminal law.[111] By criminalizing mere preparatory acts, like the agreement and association to smuggle,[112] these are caught by German criminal law, even if entirely committed abroad.[113] Thus by classifying serious organized forms of smuggling as "crime,"

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[105] The regular sanction of the German Criminal Code is either a fine or imprisonment (§§ 38, 40 StGB). For certain categories of offences, additional sanctions apply, such as revocation of driver's license (§ 44 StGB) or extended forfeit/confiscation (§ 73d StGB).

[106] § 97 AufenthG.

[107] German criminal law is built on the distinction between offences and crimes (§ 12 (1) StGB), the latter entailing a minimum of one year imprisonment and automatic liability for attempt (§ 23 (1) StGB).

[108] § 30 (2) StGB.

[109] §§ 3, 5 – 7 StGB.

[110] BayObLG, 5 NStZ-RR 433, 345 (2000); OLG Köln, 20 NStZ 39, 40 (2000).

[111] § 9 StGB. For example, when the offence is committed by several persons jointly in a way that each person's individual action is attributable to the others, § 25 (2) StGB.

[112] Punishable under § 30 (2) StGB.

[113] 39 BGHSt 88, 89; Jörn Lorenz, *Die „Schreibtisch-Schleusung" – eine Einführung in das Ausländerstrafrecht*, 22 NStZ 640, 643 (2002).

they come under German jurisdiction at a much earlier stage in the smuggling process. This expansion of German criminal jurisdiction to the activities of smuggler gangs who are mainly active abroad does not seem to have been deliberated by the drafters of the bill.[114]

Not only smuggling into Germany is covered by the statute, but also cases where Germany is a *transit* country, for example for Kurds waiting to be eventually smuggled into Denmark or Sweden.[115] The decisive factor is the temporary illegal entry or residence in Germany, as opposed to breach of the immigration laws of a third country.[116] It should be noted that the breach of immigration laws of third states is only criminalized with regard to the area covered by the Schengen agreement.[117] The Federal Court of Justice has invoked the parliament's rationale such that the aim to combat the "dreadful [act of] smuggling" is independent of whether smuggling occurs into or through Germany. This is said to be motivated by two factors. First, smuggling is perceived as the driving force for illegal entry; and second, acknowledging the victim status of the smuggled person, smuggling is perceived as a highly reprehensible offence due to its exploitative nature.[118]

§ 96 (4) AufenthG implements obligations under the Schengen Agreement, extending the jurisdiction of Germany for the offence of smuggling *into other Member States of the Schengen area*, provided that these States maintain equivalent criminal sanctions for illegal entry and residence.[119] That means that smuggling into the territory of other Schengen States can be punished in Germany – a special case of extraterritorial jurisdiction. The Federal Court of Justice has held that this

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[114] BT Drs 12/5683, p. 8 (explanatory memorandum to the bill of the Bundesrat).

[115] 45 BGHSt 103-108 (NJW 2827 (1999)); BGH, 7 NStZ-RR 23 (2002); also OLG Zweibrücken, 1 Ss 22/95, judgment of 25 March 1995; LG Flensburg, 5 NStZ-RR 124 (2000). In this case the state of destination was not a Schengen state and illegal entry into Germany could not be proven, so § 92a (4) AuslG {§ 96 (4) AufenthG} did not apply, BGH, 7 NStZ-RR 23 (2002).

[116] *Cf.* BGH, 7 NStZ-RR 23 (2002), where the Federal Court of Justice held that where it could not be established that there was assistance to illegal stay in Germany, the "smuggling" out of Germany and into another country did not amount to an offence. Contradictorily, the ending of the judgment was considered to be a contribution to restore the law by ending an illegal residence (para. 3)!

[117] *See infra* note 119. BGH, 21 NStZ 157 (2001); 55 NJW 3642 (2002).

[118] 45 BGHSt 103 ff., para. 8.

[119] Hailbronner, *supra* note 58, at A 1, § 92a AuslG, para. 24 ff.

applies even when the smuggled person is lawfully staying in Germany, hence merely smuggling someone out of the country alone can be a criminal offence.[120]

It has already been mentioned that the provision of false or incomplete information in order to obtain residence status for *another* is punishable under the provisions criminalizing illegal entry.[121] Combined with the extra elements of smuggling like financial gain, this too will fulfill the more severe offence of smuggling.[122] The Asylum Procedure Act which exempts asylum seekers from criminal responsibility contains a parallel offence of inducing, encouraging or supporting a foreigner to make false or incomplete statements[123] in an asylum procedure (which is systematically not called "smuggling" but *enticing to lodge an abusive asylum application)*.[124] Thus, §§ 84 (2), 84a AsylVfG mirror the pattern of the smuggling provisions and include similar aggravated offences (financial gain, repeatedly, for several foreigners, professionalism, gang for repeated commission, etc.).

IV. The Dual Role of the Foreigner or Asylum Seeker as a Victim of the Smuggler: No Punishment for Inciting or Assisting the Smuggler

Unlike trafficking, smuggling is not normally committed against the will of the smuggled person[125] and therefore resembles a "crime without a victim": the border between victim and criminal is blurred.[126] It has therefore been debated whether a foreigner or asylum seeker could be convicted of incitement or assistance of the smuggler's offence where he or she is doing more than being the object of the smuggler (more than so-called "necessary participation"). A smuggled person may not only "suffer" smuggling and follow unsolicited advice given by the smuggler, but may actively seek out the smuggler, ask to be smuggled across the border, pay him or her and inquire into what kind of false information he or she would have to

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[120] BGH, 21 NStZ 157 (2001); For the temporal scope *see* BGH, 55 NJW 3642 (2002).

[121] Under § 95 (2) AufenthG.

[122] §§ § 96, 97 AufenthG.

[123] Marriages of convenience would be subsumed under this variant.

[124] "Verleitung zur missbräuchlichen Asylantragstellung", §§ 84, 84a AsylVfG.

[125] *See also* DREIXLER, *supra* note 29, at 256.

[126] *See* Edwin M. Schur, *Crimes Without Victims. Deviant Behaviour and Public Policy* 169 (1965); Hans-Jörg Albrecht, *Eine kriminologische Einführung zu Menschenschmuggel und Schleuserkriminalität, in* ILLEGALE MIGRATION UND SCHLEUSUNGSKRIMINALITÄT 29 48 (Eric Minthe ed., 2002).

provide immigration authorities or in an asylum procedure, etc.[127] In a technical sense, this would amount to incitement to smuggling.[128]

A restrictive interpretation, which would prevent such liability for smuggled persons, is more easily justifiable with respect to asylum seekers (under the Asylum Procedure Act). As discussed above, asylum seekers may not be punished for providing false information. The policy behind this law and the rationale of Art. 31 of the Refugee Convention would both be circumvented if asylum seekers could be punished for incitement of the smuggler. Furthermore, as mentioned earlier, potential punishment of asylum seekers for inchoate offences would endanger the prosecution of the smuggler because of the right of the asylum seeker not to incriminate him- or herself.[129] With regard to foreigners, an argument also can be made in favor of a restrictive interpretation: the punishment of foreigners for illegal entry or residence is less severe than the offences of the smuggler (up to one year for the former whereas the smuggler faces up to five years imprisonment[130]). Incitement to smuggling is punishable in the same way as smuggling itself (assistance is subject to a diminished punishment); if foreigners were punishable for inciting the smuggler, this would amount to a greater offence than their actual illegal entry or residence.

The underlying rationale of greater leniency towards asylum seekers and foreigners respects the fact that the actions of smugglers are more reprehensible, and sees the migrant also as a victim of the smuggler. However, as the individual protection of the victim is not the only purpose of criminalizing smuggling, this argument alone is not sufficient to plausibly justify the exception that common sense seems to demand. Criminalization is motivated by the strong public interest considerations in seeing the procedural rules of immigration law enforced[131] and in preventing illegal immigration. The overall context of combating organized crime reveals this even more flagrantly. However, it is possible to justify the restrictive application of

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[127] AURNHAMMER, *supra* note 42, at 160; Hailbronner, *supra* note 58, at A 1, § 92a AuslG, para. 33.

[128] § 96 (1) AufenthG or § 84 AsylVfG, in connection with §§ 26, 27 StGB AURNHAMMER, *supra* note 42, at 160; Claus Roxin, *in* LEIPZIGER KOMMENTAR Vor § 26 StGB, para. 35, (11 ed) assumes that the courts would come to the conclusion that the act is punishable; in the affirmative Hailbronner, *supra* note 58, at A 1, § 92a AuslG, para. 33.

[129] In the same vein *see* AURNHAMMER, *supra* note 42, at 161.

[130] § 96, 97 AufenthG.

[131] Von Pollern, *supra* note 47, at 175; Geisler, *supra* note 90, at 175; Lorenz, *supra* note 113, at 641; Hailbronner, *supra* note 58, at A 1, § 92a AuslG, para. 33.

the provisions on incitement and assistance out of consideration for proportionality, which all criminal law has to observe *(ultima ratio)*.[132] People smuggling is criminalized because of the threat to the public interest resulting from organized smuggling; peripheral punishment of the smuggled person seems beside the point.[133] This restrictive application can also be founded upon the principle of equality: if punishment of the smuggled person depended upon whether the smuggler approached the smuggled person first or vice versa, this could lead to arbitrary results.[134]

C. The Criminal Offence of Trafficking

I. TERMINOLOGY: TRAFFICKING OF HUMAN BEINGS AND TRAFFICKING FOR (SEXUAL) EXPLOITATION

Although the German legal system has been combating exploitative structures generally (most notably through labor regulations) under separate provisions of criminal law (for example: Robbing of Persons;[135] Stealing of Minors and Children;[136] Trafficking of Children;[137] Children Trafficking for Adoption, Adoption Placement Act [*Adoptionsvermittlungsgesetz*];[138] Organ Trafficking, Transplantation Act;[139]

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[132] 90 BVerfGE 145, 146, 173.

[133] AURNHAMMER, *supra* note 42, at 162; WALTER GROPP, DELIKTSTYPEN MIT SONDERBETEILIGUNG. UNTERSUCHUNGEN ZUR LEHRE DER „NOTWENDIGEN TEILNAHME" 207, 222, 235, 238, 300 (1992).

[134] Convincingly: AURNHAMMER, *supra* note 42, at 162.

[135] § 234 StGB. Seizure of a person by certain means (force, threat of appreciable harm or trickery) in order to abandon the victim in a helpless situation or force the victim into military service abroad, 39 BGHSt 214; HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH, § 234, para. 2 (51th ed. 2003).

[136] § 235 StGB. Removal or withholding children or minors from their parents or legal guardians, TRÖNDLE & FISCHER, *supra* note 135, at § 235, para. 10.

[137] § 236 StGB. To leave children under 14 years of age to a third person with the intent to enrich oneself or another in circumstances where the obligations of a parent or guardian to ensure the well-being of the child are neglected. Further, the provision of placement services for the adoption of minors or to the aim to take in a minor is criminal (up to five years or a fine), where there is an economic motive.

[138] Supplementary to § 236 StGB above. A number of prohibitions result in both administrative and criminal sanctions. For example, placement services can only be rendered by authorized state institutions (children's welfare authorities (Jugendamt, Landesjugendamt) via adoption offices or churches and welfare organizations), with the exception of relatives or where there is an individual case with no economic motive; administrative fines are also given for arranging "baby lifts" for later adoption outside the scope of the German law, while there is a criminal sanction for finding surrogate mothers. Acts on the demand side are not criminalized. Schur, *supra* note 126, at 174; DREIXLER, *supra* note 29, at 50, 66, and 278.

Illegal Employment – "Trafficking" of Illegal Workers[140]), the primary offence of trafficking in human beings up to February 2005 remained in the context of sexual offences.[141] The recent amendment of the Criminal Code brought the Code in line with the meaning which trafficking of human beings has acquired under the Palermo Protocol.[142]

Trafficking women is not a particular offence under German law, only trafficking human beings,[143] which was included under the highly complex[144] provisions of §§ 180b, 181[145] (previous version, now § 232) StGB in its section on offences against sexual self-determination. The amendment in § 232 StGB gives trafficking a broader context by systematically placing it into the section on offences against personal liberty. This move can be welcomed from a systematic point of view. From a practical point perspective it may be assumed that the impact with regard to offences outside the context of sexual exploitation will be not very far-reaching, as by substance these offences already existed, albeit in a dispersed manner. In practice, trafficking into sexual exploitation may well remain the most relevant of the trafficking provisions in practical terms, especially, since the amendment deals with some remaining problems and loopholes. Therefore, the following will largely deal with § 232 StGB. Although trafficking in human beings is formulated as gender-neutral ("whoever influences another person…"), the context of sexual offences and prostitution suggests that the victims will still mostly be women and more precisely, foreign women,[146] although men are not excluded from the scope of protection.

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[139] Prohibits the gainful trade in organs. DREIXLER, *supra* note 29, at 95.

[140] § 233 StGB (previously § 406, 407 SGB III). DREIXLER, *supra* note 29, at 132, and 254; Frank Kawelovski, Kriminelle Bausanierungen. Eine besonders brutale Art des Wirtschaftsgebarens, 2001 Kriminalistik 663 describes some practices in this context.

[141] *Cf.* however the above (text around note 22) mentioned amendment.

[142] *Supra* note 1.

[143] *See also* Schroeder, *supra* note 19, at 236 who refers to abduction to be placed in brothels abroad as the "archetypical" case of trafficking in women.

[144] This has widely been criticized, Schroeder, *supra* note 19; HOFMANN, *supra* note 26, at 381.

[145] "Menschenhandel".

[146] In 2002, 21 out of 203 trafficked women in the Land of Northrhine-Westphalia were German nationals, LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen, 13 (2002).

II. ELEMENTS OF TRAFFICKING INTO SEXUAL EXPLOITATION

1. Background

The aim of the offences of trafficking is to protect the sexual and more general self-determination of persons who are *especially vulnerable*, either because of their young age[147] or because of a special situation of vulnerability.[148] The gravity of the offence is reflected in the scope of jurisdiction asserted by the German Criminal Code. Trafficking is enumerated among the offences which are prosecuted under the universality principle, regardless of their place of commission or the nationality of the perpetrator.[149] The offence is a so-called "control offence," which means that it is normally brought to light by controls or informants in the milieu of prostitution and only rarely by reports made to the police.[150]

2. Vulnerability for Exploitation

The basic offence of trafficking[151] addresses two situations that make the victims more susceptible to potential trafficking: one is a situation of predicament; the other is vulnerability resulting from being in a foreign country. A *situation of predicament* can be assumed even when the victim's perception of her situation is erroneous.[152] It is irrelevant whether the victim has contributed to this situation,[153] be it economic need or personal emergency situations like lack of accommodation, illness, unemployment or divorce, all of which lower the victim's resistance to attacks against sexual self-determination.[154] It is debated whether generally bad social or economic conditions in the country of origin are sufficient to amount to a situation

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[147] Under 21 years of age, § 232 (1), 2nd sentence.

[148] Theodor Lenckner & Walter Perron, *in* ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH § 180b, para. 2 (25th ed. 1997); TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 2.

[149] § 6 No. 4 StGB.

[150] LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen 3 and 14 (2002).

[151] § 232 (1) StGB, previously § 180b (1) .

[152] Unless it is an over-exaggerated fear of general risk of life, Lenckner & Perron, *supra* note 148, at § 180b, para. 6.

[153] For example by drug addiction or as a consequence of fleeing from supervised living conditions, TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 5.

[154] 42 BGHSt 399; Lenckner & Perron, *supra* note 148, at § 180b, para. 12

of predicament.[155] Even if this is not the case, these situations will generally be covered by vulnerability resulting from being in a foreign country. Fear of expulsion and deportation of persons illegally in Germany is included in this category, as is fear of being shunned or ostracized if returned to the home country.[156]

Vulnerability resulting from being in a foreign country is interpreted narrowly and according to the concrete situation and capabilities of the victim. A situation of helplessness must result from being abroad, but need not already exist at the time when the perpetrator influences the victim in her home country. The potential for such a situation to arise in the new country is sufficient.[157] The victim's helplessness must reduce her resistance to pressures to engage in sexual activity because of the difficulties connected with being in a foreign country.[158] Lack of knowledge of the language can,[159] but need not be a sufficient factor. Dependency on the perpetrator for financial support, accommodation and subsistence will normally qualify, as will a lack of travel documents or passport.[160] However, it has been held that helplessness cannot be assumed when the woman has worked as a prostitute outside Germany or when she has worked outside prostitution within Germany, even though she was in 'dire straits' financially.[161]

3. Punishable Acts of the Trafficker

The perpetrator must *influence*[162] the victim in a way that incites her to take up a more intensive form of prostitution,[163] or to continue prostitution where she – even

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[155] TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 5; answering in the positive: Lenckner & Perron, *supra* note 148, at § 180b, para. 6; BT-Drs. 12/2046, p. 4.

[156] TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 5.

[157] BGH, 1997 JZ 153, 154 (= 42 BGHSt 179 ff.); TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 11; HOFMANN, *supra* note 26, at 363; BGH, judgment of 18 October 2001, 3 StR 247/01.

[158] BT Drs. 7/514, p. 10; BGH, 52 NJW 3276 (1999); 19 NStZ 349 (1999).

[159] BGH, 9 NStZ-RR 233 (2004).

[160] BGH, 19 NStZ 349 (1999); TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 10.

[161] BGH, 9 NStZ-RR 233 (2004).

[162] The new § 232 StGB lowers the threshold with regard to the intensity of the influence of the trafficker (from "bestimmen" in § 180b (old) to "dazu bringen", *see* BT Drs. 15/3045, p. 8.

[163] BGH, judgment of 27 May 2004, 3 StR 500/02; judgment of 20 June 2002, 3StR 135/01, p. 8 f.

only potentially – wants to give it up,[164] or to perform sexual acts by which the victim is exploited.[165] The influence must be of certain intensity; mere advice, offers or questions would not be sufficient.[166] However, an indirect influence by creating certain living conditions that make the victim susceptible to the influence may be sufficient.[167] The victim's resistance against influence is not necessary.[168]

The *aim* of the perpetrator must be to cause the victim to *take up or continue prostitution*.[169] The influence need not result in the actual taking up or continuing of prostitution.[170] By including continuing prostitution, the law aims to protect both women who have decided to quit prostitution, and those who are induced to engage in a more intensive form of prostitution.[171] The law also protects those who do not want to engage in prostitution at a given point in time or who do not want to do so anymore.[172] Influencing *to perform sexual acts* that remain below the level of prostitution is now in itself sufficient where these acts are exploitative in nature.[173] This is primarily intended to cover economic exploitation, such as in the production of pornography, peepshows and "marriage trade."[174]

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[164] BGH, 9 NStZ-RR 233 (2004); 45 BGHSt 158, 161 ff.

[165] § 232 (1) now puts these on an equal par with prostitution, *see* BT Drs. 15/3045, p. 8.

[166] BGH, 52 NJW 1044 (1999).

[167] TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 6.

[168] 45 BGHSt 158, 163; TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 17.

[169] TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 7.

[170] BGH, 20 NStZ 86 (2000).

[171] 33 BGHSt 353; BGH, 52 JZ 153, 155 (1997) (= 42 BGHSt 179 ff.); BGH, 3 StR 135/01, 20 June 2001; BT-Drs. 12/2589, p. 8; Wilfried Bottke, *Zur Einordnung einer fremdbestimmten Intensivierung einer Prostitutionsausübung unter die Tatbestände des StGB*, JURISTISCHE RUNDSCHAU 250 (1997); Friedrich Dencker, *Prostituierte als Opfer von Menschenhandel*, 9 NStZ 249 (1989); *see also* DREIXLER, *supra* note 29, at 215.

[172] Dencker, *supra* note 171.

[173] *See* BT Drs. 15/3045, p. 8

[174] BT Drs. 15/4048, p. 12.

From the case law it appears that these crucial two elements of the offence are difficult to prove.[175] Often it cannot be proven with sufficient probability that the victim did not voluntarily pursue prostitution, especially when the woman was already a prostitute.[176] The same difficulty applies with regard to continuing prostitution, as criminal convictions are largely dependent upon the state of mind of the prostitute. It would have to be proven that the prostitute was planning to abandon or reduce her activities.[177] Nevertheless, these cases may still be caught by laws against pimping, exploitation of prostitutes,[178] or smuggling, which regularly are committed alongside trafficking or trafficking-like situations.[179] Where it cannot be proven that the customer paid for the performance of sexual acts, the definition of prostitution is not satisfied. This is often the case for rape committed by traffickers or their accomplices, which might have been punished only as rape rather than trafficking.[180] In that respect, § 232 StGB is now broader, as it is not limited to sexual acts with third persons (prostitution) but includes sexual acts with the trafficker himself, reflecting the reformulated provision's thrust to protect from exploitation in a more general sense.[181] Also, influencing one to practice *a more intensive form* of prostitution, which in theory is sufficient to bring a greater number of actions under the provisions on trafficking, is difficult to prove. The boundaries between different forms of prostitution are not clear-cut. Does forcing a prostitute to perform sexual intercourse with overweight customers or to perform

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[175] This is especially problematic where statement stands against statement without any further evidence. It is exacerbated when there are inconsistencies in the witness statements, *Cf.* BGH, judgment of 30 May 2000, 4 StR 24/00; Birgit Thoma, *Rechtliche Problemstellungen*, *in* BARBARA KOELGES ET AL., PROBLEME DER STRAFVERFOLGUNG UND DES ZEUGINNENSCHUTZES IN MENSCHENHANDELSPROZESSEN 18, 24 (2002).

[176] BGH, 9 NStZ-RR 233 (2004); judgment of 20 June 2002, 3 StR 135/01. According to the statistics of trafficking victims in the Land of Northrhine-Westphalia in the year 2002, 22 women out of 203 victims in total already practiced prostitution in their home countries, *see* LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen,13, 18 (2002).

[177] BGH, 9 NStZ-RR 233 (2004).

[178] §§ 181a, 180a StGB.

[179] Thoma, *supra* note 175; *see* Koelges & Welter-Kaschub, *Auswertung der Prozessunterlagen*, *in* KOELGES. *Supra* note 175, at 66, 93 for examples of convictions for these "subsidiary" offences.

[180] As in BGH, judgment of 20 June 2002, 3StR 135/01.

[181] BT Drs. 15/3045, p. 8.

unprotected sexual intercourse amount to a more intensive form? What if the clients suffer from sexually transmitted diseases?[182]

The basic offence is now independent of the perpetrator acting in pursuit of some *financial gain.* This criterion was explicitly dropped by § 232 StGB. However, the acts to which the victim is induced are only caught by the provision if they are economically exploitative.[183] A financial benefit in any case was understood widely – the origin of such gain did not matter. For example, it could be the direct earnings of the prostitute or a commission or brokering fees.

Whereas the perpetrator previously had to act *knowingly* with regard to the facts from which the vulnerability results or with regard to the victim's subjective predisposition,[184] it is now sufficient that he *objectively* exploits a situation of predicament or vulnerability, thus broadening the scope of the trafficking provision.

In this basic form, trafficking is punishable by imprisonment of a minimum of six months (mandatory prison sentence) up to ten years,[185] bringing its minimum sanction in line with pimping.[186] The basic offence on the one hand is still less severe than other offences against personal liberty, for example, robbing persons,[187] or kidnapping or hostage taking entailing an element of extortion, which carries a minimum sentence of five years imprisonment.[188] On the other hand, the abduction of minors, or trafficking children are subject to lesser maximum sanctions.[189]

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[182] Discussion in BGH, judgment of 27 May 2004, 3 StR 500/03, but left open (tendency to answer in the negative as these acts were not considered to be sufficiently separate forms of prostitution to amount to more intensive forms, except in the case of sexually transmitted diseases).

[183] BT Drs. 15/4048, p. 12.

[184] A direct exploitative intent was not required, TRÖNDLE & FISCHER, *supra* note 135, at § 180b, para. 8.

[185] This means an increase in the sanction (previously up to five years of fine) which was at least influenced by the requirements of the EU Framework Decision to provide – under certain circumstances – for a maxium sanction of at least eight years imprisonment, *see* BT Drs. 15/4048, p. 12. As a consequence, there was no need anymore to separately codify aggravating circumstances which were previously contained in § 180b (2) StGB (old).

[186] Six months imprisonment minimum up to five years, § 181a StGB.

[187] § 234 StGB, crime, minimum of one year imprisonment (maximum ten years).

[188] §§ 239a, 239b StGB.

[189] §§ 235, 236 StGB, respectively. Note that trafficking of children into sexual exploitation is a crime subject to more severe sanctions under § 232 (3) no. 1 StGB.

4. The Crime of Trafficking of Persons[190]

Especially serious forms of trafficking are classified as "crimes" subjected to a minimum of one year imprisonment (maximum ten years), for example that of children into sexual exploitation, where the victim suffers severe physical abuse or where her life is endangered[191] or where the perpetrators act professionally (gainful activity) and as a gang.[192]

It is also a crime where the effort to influence one to commit exploitative sexual acts results from *physical violence, threat or trickery*.[193] Studies show that 54.9 % (2001) and 53.5 % (2002) of victims have been deceived about the real purpose of their entry into Germany.[194] A link to the crime of "robbing of persons" (§ 234 StGB) is made by making it a crime when a victim is "seized" (i.e placed under physical control) with physical violence, threat or trickery in order to bring the vicitm to commit exploitative sexual acts. Abduction[195] could amount to a preparatory act of seizure which is punishable as an attempted crime.[196]

However, a *lacuna* opens up when the perpetrators make money by recruiting women for commission, but are indifferent to their destiny. For example, when agents professionally recruit and provide brothel-keepers with women for the payment of a commission fee, their intent is to get the commission. They may be indifferent as to whether the women work as prostitutes or waitresses. In this circumstance, they lack the intent "to induce or bring" the women *to commit exploitative sexual acts,* which is a required condition of the offence because negligence is not made an offence in this context.[197] Because of this division of labor between traffickers and final exploiters, often only the offences of pimping or

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[190] § 181 StGB.

[191] Results from the EU Framework Decision, *see* BT Drs. 15/3045, p. 9.

[192] § 232 (3) StGB. *See* also DREIXLER, *supra* note 29, at 218.

[193] § 232 (4) StGB, § 181 (1) no. 1 & 2 (old).

[194] Data according to Federal Criminal Office (Bundeskriminalamt (BKA), Lagebild Menschenhandel 2001 and 2002, respectively, *available at* http://www.bka.de/lageberichte/ mh/2002/mh2002.pdf.

[195] A a change to a location where the victim is at the mercy of the perpetrator, BGH, 12 NStZ 43 (1992).

[196] §§ 232 (2), 23 (1) StGB.

[197] *See* § 15 StGB. HOFMANN, *supra* note 26, at 380.

exploitation of prostitutes will be fulfilled[198] (or indeed smuggling, as mentioned above).

The special economic sanction of "extended confiscation" is applicable to offences of trafficking when it is committed by a member of a gang and where the perpetrator acts professionally.[199] The application of this sanction is limited when the realization of claims for damages by the victim may be put in jeopardy.

III. PROMOTION OF TRAFFICKING IN HUMAN BEINGS

The new § 233a StGB inserted by the 2005 amendment of the Criminal Code further creates an independent offence of what amounts to promotion of and assistance to trafficking (recruitment, transportation, passing on, providing accommodation or taking in of trafficked persons) to close the gaps of the criminal law of mere preparatory acts of trafficking (not even an attempted offence) and attempted assistance.[200] Both were not punishable under German law before.[201] This provision is technically analogous to §§ 96, 97 AufenthG in the smuggling context. In order to implement the EU Framework Decision, aggravated cases[202] were created, raising the sanction from three month (maximum five years) in the basic offence to the required maximum of ten years.

D. Criminal Victims – Ways of Protection in the Light of the Dual Role of the Migrants

As described above, the liability of smugglers is often accessory to any offence of the victim. This is not the case with traffickers, even though frequently the trafficked person will also be an illegal resident. A discussion of how to protect victims of trafficking and how to alleviate their position with regard to immigration law, central to the consideration of victims of smuggling, is not necessary here. The reason for this disparity may be that, in contrast to trafficked persons, smuggled persons are not always perceived as victims, especially if they chose to be smuggled, notwithstanding additional circumstances and calamities. The view

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[198] §§ 180a, 181a StGB. HOFMANN, *supra* note 26, at 380.

[199] § 181c StGB.

[200] Punishability of attempted offence in § 233a (3) StGB.

[201] Only under the limited conditions of § 30 StGB.

[202] § 233 (2) StGB: victim a child, serious physical abuse/danger of death, violence/threat or professional or gang action.

therefore persists that victims of smuggling voluntarily expose themselves to the risk of exploitation, hence cutting off the line of causation to the smuggler by a more direct ground of attribution to the smuggled person. Smuggling as such does not occur against the smuggled person's but in line with his or her will. However, this does not completely remove smuggled persons from the protection of the law.[203] In most cases lack of knowledge of the risks undertaken in the process of smuggling or some situation of predicament or the superior knowledge of the smuggler will be sufficient to rule out any responsibility of the smuggled person.[204] The protection of the smuggled person is likely to be dependent on considerations of public interest, for example, his or her usefulness in combating the organized efforts to smuggle people.

From the point of view of the trafficked and smuggled person, the need for protection is threefold: First, protection from criminal prosecution for illegal entry or residence; second, protection by residence status, contingent on their importance as a witness or not; third, witness protection if they are assisting in the prosecution of their traffickers and smugglers.

I. Protection of Victims from Criminal Prosecution

1. Protection by Refugee Status

The Residence Act[205] proscribes illegal entry and residence notwithstanding Art. 31 (1) Geneva Refugee Convention. In the same way the higher normative rank of the constitutional right to asylum must be preserved. The severe limitations of these rights by safe third country concepts have already been discussed.[206]

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[203] In the sense of an unsanctioned act of self-endangerment, as Geisler, *supra* note 90, at 174 has shown convincingly; *see* DREIXLER, *supra* note 29, at 257, criticizing an underlying over-individualist conception of injustice. *See also* the unanimous agreement with the argument of van Essen, MdB, in the parliamentary debate on the amendment of the trafficking provisions, Deutscher Bundestag, Plenarprotokoll 15/109 of 7 May 2004, p. 9949.

[204] Geisler, *supra* note 90, at 175; DREIXLER, *supra* note 29, at 264.

[205] § 95 (5) AufenthG.

[206] *Supra*, note 69.

2. Protection by Discretion not to Prosecute

a) Expulsion in Lieu of Prosecution

There is discretion under the Criminal Procedure Code (*StPO – Strafprozessordnung*)[207] not to prosecute if the foreigner breaching immigration rules is to be expelled, deported or extradited. The blameworthiness in these cases is considered negligible. However, this is not the case for repeated breaches or longer illegal stays.[208] An exemplary study[209] examining the practice of the Office of the Public Prosecutor in Görlitz at the German-Polish border revealed gradually increasing enforcement by the prosecution authorities. It concluded that first-time offenders are normally expelled directly after recording the attempted illegal entry and are not prosecuted.[210] 85% of the cases belonged to this category. Second-time offenders are usually expelled but prosecuted under the abridged procedure of a penal order,[211] which is generally used for minor criminal offences. Although these orders are not enforceable abroad, and therefore the fines imposed are unlikely to be paid, they may serve as a deterrent to re-entry. After the third illegal entry, the prosecution tends to issue an arrest warrant and to bring charges. These cases normally result in short prison sentences, which are an exception in the criminal sanction system, but are deemed to be in the public interest in these cases.[212] When several instances of illegal entry occur in a short time, the staggered system might not work, as central recording takes some time, and each entry may be treated as a first-time offence.[213] However, with respect to the smugglers, as a rule prison sentences are handed down and enforced (not suspended) even for first time

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[207] § 154b (3) StPO.

[208] Hailbronner, *supra* note 58, at A 1, § 92 AuslG, para. 21.

[209] AURNHAMMER, *supra* note 42, at 57.

[210] VG Hamburg, 8 VG 3964/99, judgment of 11 January 2001, InfAuslR 218 (2001): breach of § 92 (1) No. 1 and 6 AuslG {now § 95 (1) no. 1, 3 AufenthG} justifies expulsion unless lack of blameworthiness is positively confirmed. When a criminal procedure is not initiated (and hence no finding of lack of blame occurs), there are heightened requirements of proportionality if the expulsion occurs for reasons of public interest (preventative deterrence).

[211] Strafbefehl, § 407 StPO.

[212] § 47 (1) StGB provides that short prison sentences of less than six months are the exception and need to be justified by special circumstances. The underlying rationale is that the harmful effect of being exposed to a prison environment outweighs any corrective effect of short sentences.

[213] AURNHAMMER, *supra* note 42, at 58.

offenders. This is deemed necessary for reasons of general deterrence from committing the offence.[214]

b) Victims of Offences

A further protection from criminal prosecution is not tied to the residence status but to the fact that someone may be a victim of another's offence (for example, smuggling or trafficking). The Criminal Procedure Code currently allows for discretion not to prosecute migrants who are also victims of somebody else's offence, when the victim has been threatened or blackmailed about potential disclosure of their illegal entry or residence by the smuggler or trafficker.[215] The amendment by statute of 11 February 2005 now extends this discretion to victims who report being smuggled or trafficked to the prosecutor, thereby disclosing their own offence (illegal entry or residence).[216] There is, however, no automatism regarding the granting of a residence permit.

II. Protection by Residence Status

Much of the plight of victims of trafficking and smuggling derives from their illegal residence status. To some extent, rather temporary permission to stay may be obtained under existing provisions of immigration or criminal procedure. Generally speaking, this is only the case where strong factors outweigh the interest of the state to end illegal residency. These factors may be based on individual humanitarian grounds or interests of the state that are prioritized over ending illegal residence (such as prosecution of the traffickers and smugglers).

1. Independent Residence Status of the Spouse: Duration of Marriages Rule

In the context of marriage brokering, there is not only enormous pressure on the women to find a husband within the three month term of their tourist visa,[217] but exploitation and vulnerability of these women persists after marriage.[218]

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[214] Eric Minthe, *Illegale Migration und Schleusungskriminalität*, *in* ILLEGALE MIGRATION UND SCHLEUSUNGSKRIMINALITÄT 17, 23 (Minthe ed., 2002); Kerstin Nowotny, *Schleusungskriminalität aus staatsanwaltlicher Sicht*, *in id.*, at 93, 102.

[215] §154c StPO.

[216] § 154 c (2) StPO

[217] DREIXLER, *supra* note 29, at 201.

[218] *Id.*, at 200.

Immigration law requires a minimum of two years marriage to a German partner before independent residence status is acquired.[219] The required duration was only recently (2000) reduced from four years.[220] There is a discretionary exception for circumstances in which this rule would lead to extraordinary hardship. In 2000, these grounds of hardship were expanded to include the fact that an exploitative marriage would have to be continued (in order to gain residence rights).[221] Abuse or exploitation by husbands has not been prevented but perhaps has been alleviated to some extent by relaxing the requirements for independent residency.

2. Discretionary Subsidiary Protection Status

a) Protection of the Victims of Trafficking – Delayed Expulsion

The effectiveness of criminal sanctions for people trafficking has been questioned. The "demand" side can hardly be discouraged by the current legal regime and is even promoted by restrictive immigration policies. Two antagonistic explanations may account for this law enforcement deficit: the incentive of very high profits, leading to organized criminal structures,[222] and the difficulties in long and complex investigations – the victims are therefore at the edge of society.[223] Moreover, the single-minded approach of the criminal law is problematic as the victim is caught in the tongs of Scylla and Charybdis – dependency on the exploiter and potential expulsion by the state.[224] A general administrative guideline (2000) expresses a rule that when a person is subject to trafficking, she should be granted at least four weeks to leave Germany voluntarily. This grace period should enable the victim to seek advice from special institutions and to sort out her personal affairs.[225] The public prosecutor is invited to give an opinion on whether the woman is needed as

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[219] § 31 AufenthG.

[220] BGBl. 2000 I, p. 742.

[221] § 31 (2), 2nd sentence AufenthG.

[222] Joachim Renzikowski, *Frauenhandel – Freiheit für die Täter, Abschiebung für die Opfer?*, 32 ZRP 53, 54 (1999).

[223] HOFMANN, *supra* note 26, at 350, 383, and 398 stresses the law-enforcement deficit; Schroeder, *supra* note 19, at 233: "symbolic criminal law".

[224] DREIXLER, *supra* note 29, at 231; HOFMANN, *supra* note 26, at 399.

[225] No. 42.3.2 of the Guidelines (Allgemeine Verwaltungsvorschriften zum Ausländerrecht), Bundesanzeiger, Beilage Nr. 188a of 6 October 2000.

a witness. Whereas this is already seen as an improvement, the frequency of the actual application of this provision in practice is still doubtful.[226]

b) "Tolerance" Permits[227]

When important personal, humanitarian or public interest reasons counter the deportation of a foreigner, the (weak) residence status[228] of a tolerance permit may be issued to stay the expulsion. The fact that the foreigner is required in a criminal investigation amounts to such a public interest reason only if a permission to enter temporarily from abroad[229] to give evidence in the proceedings is inadequate.[230] If the public prosecutor deems the presence of a witness necessary as a means of evidence against a trafficker or smuggler, the public interest is confirmed and the immigration authorities are required to grant the tolerance permit.[231] The immigration authorities may not replace the evaluation of the value of the witnesses' evidence by their own and may be criminally liable for attempting to obstruct punishment[232] by deporting a foreigner whose presence is deemed necessary by the public prosecutor.[233] Due to the conflicting public interests (repressive criminal prosecution versus preventive enforcement of immigration law), a shift in decision-making authority occurs: public prosecutors and to some extent criminal courts acquire authority to decide who may stay and who must leave. This may imply a prioritization of criminal law over immigration law.[234] The duration of a tolerance permit is normally limited to one year, being renewable when the public interest persists.[235] As a rule, the public interest ceases with the

[226] BKA, Lagebild Menschenhandel 2001, p. 21.

[227] "Duldung" under § 60a (2) AufenthG.

[228] Only a waiver of expulsion.

[229] § 11 (2) AufenthG.

[230] Thorsten Masuch, *in* Huber, B 100 § 55, para. 75; RENNER, *supra* note 51, at § 43, para. 719; § 20, para. 80; Renzikowski, *supra* note 222, at 55, FN 31 lists the Guidelines issued by the Länder.

[231] Under§ 60a (2) AufenthG. The discretion under this norm is said to be reduced to zero, Renzikowski, *supra* note 222, at 55, 58 (1999); HOFMANN, *supra* note 26, at 401; Thoma, *supra* note 175, at 26.

[232] § 258 StGB.

[233] Renzikowski, *supra* note 222, at 58.

[234] *Id.* Incidentally, it would make an interesting empirical study to find out how far the prosecution makes use of these special responsibilities.

[235] § 60a (3) AufenthG.

termination of criminal proceedings against the traffickers. In 2002, 16.3 % of the trafficked persons received permission to stay under a tolerance permit.[236] However, this does not reveal how long the victims stayed, or whether they were expelled later, left Germany voluntarily or received a different residence status. There is a new practice, following an order of the Federal Ministry of Labor and Social Affairs, to issue work permits to victims of trafficking who have been granted a tolerance permit, waiving the normal waiting period of one year, which may serve to alleviate the harsh conditions of the permits.[237]

The Federal Criminal Office[238] stresses the need for a temporary permission to stay to enable police investigations, whose success is contingent on the evidence of the victims.[239] This in turn depends largely upon establishing a relationship of trust with the victims, who are often traumatized. The positive effects of a short-term stay in Germany until the termination of the criminal proceedings against the traffickers are limited and there is often a considerable danger for the women returning to their country of origin, especially if organized criminal networks are in operation.[240] The case of a victim who gives evidence in criminal proceedings against her traffickers, who is then expelled and "welcomed" home by the defendants in the very same proceedings, resulting in abuse and subsequent further trafficking, is not completely uncommon.[241] One possibility in these cases is to rely on humanitarian grounds for a continued presence in Germany. The Guidelines to the Foreigners' (now Residence) Act allow for a tolerance permit to be issued where there is a concrete and individual danger following the giving of evidence in a German criminal procedure.[242] Also, the prosecuting authorities on the *Länder* (federal states) and federal levels have entered into cooperation agreements based

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[236] § 55 AuslG (old) - § 60a (2) AufenthG. Bundeskriminalamt, Lagebild Menschenhandel 16 (2002).

[237] *See also* Bundesamt für Arbeit, Erlass of 29 May 2001, Az. IIa7-51/45.

[238] Bundeskriminalamt, BKA, a federal police force.

[239] *See also* LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen 27 (2002).

[240] BKA, Lagebild Menschenhandel 21 (2001) The example is quoted of a woman who returned to Germany to give evidence who was seriously threatened and attacked.

[241] It may be added that she was prepared to act as witness in new criminal proceedings in spite of the likelihood of being expelled again afterwards, LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen 24, 29 (2002).

[242] No. 53.6.1 of the Guidelines (Allgemeine Verwaltungsvorschriften zum Ausländerrecht), Bundesanzeiger, Beilage Nr. 188a of 6 October 2000.

on recommendations of a Federal Working Group "Trafficking in Women,"[243] providing for various forms of protection, assistance and counseling of victim-witnesses, including help with the contact with immigration and social welfare authorities.[244] Problems arise as to the different levels of administration and local responsibilities to finance the stay under these witness arrangements. Local communities are generally responsible for the payment of social assistance, which is granted either as general social benefit or as an asylum applicant support benefit.[245] Apparently, the police encounter difficulties in finding communities who will accept their responsibility for social welfare benefits in these cases, as well as divergent practices in different states. It has been suggested that the costs be detached from the regional decision-making authorities under the Residence Act and that a general fund out of which these costs could be covered in full be introduced.[246]

Another possibility to stay expulsion may be to enter formal witness protection programs by which a new identity is given to the witness and she is moved to an assigned protected place, etc.[247] These measures have to be formally processed by public prosecutors and the courts. Not many women enter these formalized programs.[248] This may partly be due to the resultant interference with private life and the removal from the social contacts these women may have built up.

c) Independent Residence Status of Trafficked Persons – Permission to Stay on Humanitarian Grounds[249]

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[243] An interdepartmental working group which united representatives of several government departments, the Federal Criminal Office, the respective Länder departments and counselling organizations. It was founded in 1997 and convenes several times a year. *See also* JÖRG ALT & RALF FODOR, RECHTLOS? MENSCHEN OHNE PAPIERE 101 (2001); *see also* Koelges, *supra* note 175, at 36.

[244] *Cf.* Answer to a Parliamentary Question "Menschenhandel in Deutschland", BT-Drs. 15/2065, p. 4.

[245] *See* § 1 Asylum Applicants' Benefits Act (Asylbewerberleistungsgesetz), BGBl. 1997 I, p. 2022, providing that asylum applicants, foreigners under a tolerance permit, foreigners whose deportation has to be stayed for humanitarian reasons, spouses and minor children have a right to benefits, provided they to not have a right to stay longer than six months.

[246] BKA, Lagebild Menschenhandel 19, 22 (2001); 20 (2002); HOFMANN, *supra* note 26, at 402; *see* already in this respect Dagmar Heine-Wiedemann, *Konstruktion und Management von Menschenhandels-Fällen*, 75 MSCHRKRIM 121, 129 (1992).

[247] *See* Statute of 11 December 2001, BGBl. I 2001, p. 3510; Thoma, *supra* note 175, at 29.

[248] In the Land of Northrhine-Westphalia, eight women were placed in witness protection programmes in 2002, LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen 25 (2002).

[249] § 30 AuslG (old) - §§ 23a, 24 (4), 25, 60 AufenthG.

The tolerance permit is the weakest residence status available under German law and is often only used to provide a temporarily waiver of expulsion,[250] but not a fully legalized stay, for the duration of criminal proceedings. This may not be sufficient incentive for victims to come forward to initiate prosecution of their exploiters, as they will at the same time have to reveal their illegal residency and give up longer-term prospects to stay.[251] This decision is often only taken when the women have made up their minds to return to their home country anyway. The criminal law, therefore, remains to a large extent unenforceable due to the lack of complainants, evidence and witnesses.[252] One possible solution would be to grant a residence permit on humanitarian grounds.[253] Another, albeit weak, possibility is the mere staying of expulsion.[254] The provision of a residence permit on humanitarian grounds is currently favored by counseling agencies that attend to the women as a solution to threatened expulsion.[255] However, from a legal perspective it is subject to the criticism that the fact of having become a victim should not per se lead to an unlimited and undifferentiated right of residence for reasons of general deterrence of breaches of immigration law.[256] A tolerance permit[257] is seen as balancing the conflicting interests of prosecuting the trafficker and enforcing immigration law sufficiently.[258]

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[250] The duty to leave the country, in principle, persists.

[251] Renzikowski, *supra* note 222, at 54; Heine-Wiedemann, *supra* note 246.

[252] Schur, *supra* note 126, at 171.

[253] §§ 24 (4), 23a, 25, 60 AufenthG.

[254] § 60 (5) AufenthG.

[255] *See also* DREIXLER, *supra* note 29, at 234.

[256] Pointing to the conflict of interest Renzikowski, *supra* note 222, at 56, 59; Edzard Schmidt-Jortzig, *Bekämpfung von Sexualdelikten in Deutschland und auf internationaler Ebene*, 18 NStZ 441, 443 (1998); HOFMANN, *supra* note 26, at 414.

[257] According to § 60a (2) AufenthG.

[258] Renzikowski, *supra* note 222, at 56.

III. Victim and Witness Protection and its Limitations in Criminal Proceedings against Traffickers and Smugglers

1. Protection

The presence of victims of trafficking and smuggling can be relevant at various stages of the criminal procedure. The fact that a main witness has already been deported could in the extreme lead to a court's refusal to open criminal proceedings in the first place due to lack of sufficient evidence supporting the suspicion of having committed an offence.[259] The value of recorded evidence is considered weaker than evidence given in person. Decisions on the basis of recorded evidence, therefore, risk challenge by the defendant. Besides various ways of protecting witnesses in criminal proceedings, a right of stay during the proceedings may be achieved via the described tolerance permits or through formal witness protection programs.[260]

2. Legal (Procedural) and Factual Limitations

a) Opportunity Principle and Non-Prosecution

In principle, criminal prosecution is governed by the principle of legality, which mandates the investigation of potential offences when sufficient cause – initial suspicion of an offence – exists (§ 152 (2) StPO). Further, if, following the investigation, there is sufficient probability of proving the commission of an offence, the public prosecutor is obliged to prosecute the perpetrator by submitting a formal accusation to the court.[261] There are, however, exceptions to this rule, which are especially relevant for offences linked to foreign countries for which it is not considered opportune to prosecute in Germany. In these cases, there is discretion to terminate the investigations without prosecuting.[262] Of particular relevance is the possibility of dropping the charges if the suspect is expelled or deported from Germany.[263] As mentioned, this practice seems to be common for

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[259] § 203 StPO; Renzikowski, *supra* note 222, at 55.

[260] Zeugenschutz.

[261] § 170 (2) StPO. ROXIN, STRAFVERFAHRENSRECHT § 14 B II (25th ed. 1998); BEULKE, STRAFPROZESSRECHT para. 333 (2nd ed. 1996).

[262] §§ 153c, 154b StPO.

[263] § 154b (3) StPO.

first-time illegal immigration. This can amount to an obstacle in the prosecution of smugglers or traffickers.

b) Practice of Reading out Recorded Witness Statements

In principle, criminal procedure requires the witness to give statements in person.[264] Where the statement of a smuggled or trafficked person is crucial for the conviction of a smuggler or trafficker, the prosecutor's office, the police and the immigration authorities can ensure that the witness stays in Germany until after the procedure with a tolerance permit and witness protection.[265] However, it has been noted that in spite of the importance of their evidence, victims are often not allowed to stay in Germany until the end of the criminal proceedings.[266] In 2002, 16.3 % of trafficked persons[267] received permission to stay under a tolerance permit.[268] As mentioned, this is not indicative of the length of stay or whether they were allowed to stay until the end of the criminal proceedings against the traffickers. When there is a large number of witnesses, the prosecution may adopt a selective approach and only keep some in the country, allowing others to be expelled.

While written transcripts or witness statements can only exceptionally replace a direct statement, resort may be taken to this weaker form of evidence in order to follow through with an expulsion. Witness statements *made in front of and recorded by a judge* in the investigation phase may be read out in the criminal procedure under certain circumstances even *against or without the consent* of the accused and his defense:[269]

- if the witness has died or his whereabouts are not known;
- if there are long or uncertain impediments, like prolonged illness of the witness; or

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[264] Principle of immediacy, § 250 StPO.

[265] *Supra*, note 228.

[266] Renzikowski, *supra* note 222. For recent data, *see* BKA, Lagebild Menschenhandel 16 (2002), available online. Out of a total number of 811 victims of trafficking, 17 % where deported, 27.5% were expelled, 16.3 % received a tolerance permit, 23.9 % returned voluntarily, and 5.5 % entered a witness protection program. The whereabouts of 21.1 % was unknown; *see* also Thoma, *supra* note 175, at 27.

[267] §§ 180b, 181 StGB.

[268] § 60a (2) AufenthG; BKA, Lagebild Menschenhandel 16 (2002).

[269] § 251 (1) StPO; Thoma, *supra* note 175, at 27.

- if requiring the witness' presence imposes an unreasonable burden on her (for example, when she must travel a distance which is out of proportion to the importance of the statement).

This feature of the German Criminal Procedural Code might further the early expulsion of trafficked persons.

Statements not made in front of a judge can only be read out when the witness has died or is unavailable for an indefinite period.[270] This practice is especially problematic in trafficking cases: partly because evidence in person carries greater weight – the victim plays an important role in the criminal proceedings against the trafficker or smuggler and is needed to clarify issues arising in the course of the proceeding; partly because of the decreasing likelihood of witness cooperation and willingness to give evidence once victims have returned home. On the one hand, risking the absence of key witnesses might endanger the punishment of a trafficker and therefore, for the main prosecution witnesses, it is unlikely that travel to the court would be considered too burdensome in relation to the importance of the statement in order to justify the absence. On the other hand, summoning from abroad entails much effort. Victims are often not prepared to appear in court and give evidence, or cannot be found anymore, or have been subject to threats in connection with their giving evidence.[271] The dilemma is obvious: deportation of witnesses may lead to impunity of perpetrators, at least when no other evidence supports the recorded evidence.[272] The case-law regarding appeals on the ground that a conviction was based on inadmissible evidence (absent witnesses, read-out witness statements), however, suggests that criminal courts manage to get around the problem of absent witnesses when they can rely on other evidence, supporting the witness statements that were recorded.[273]

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[270] § 251 (2) StPO.

[271] Walter, *supra* note 89, at 476; HOFMANN, *supra* note 26, at 410.

[272] BGH, 9 NStZ-RR 233 (2004) dismissed an appeal on points of law. The appeal challenged a conviction on the grounds that absent witnesses, the whereabouts of whom were not known, were not heard. The court held that this did not vilify the conviction as the read-out statements were only used in so far as supported by other evidence. *See also* BGH, judgment of 2 July 2002, 1 StR 135/02; and judgment of 30 July 2002, 1 StR 82/02 in which a witness could not be found in Poland and a conviction for rape could not be obtained, especially since the original statement was not recorded and could only be introduced into the proceedings by summoning the original interviewer.

[273] BGH, 9 NStZ-RR 233 (2004) (*supra* note 272); BGH, judgment of 2 July 2002, 1 StR 135/02. *See*, however, in this context the case-law of the Eur. Ct. H.R., Lüdi v. Switzerland, judgment of 15 June 1992, Series A, No. 238, p. 21, para. 49; Birutis and others v. Lithuania, judgment of 28 March 2002, 2002 ECHR 350 in the context of the rights of defence under Art. 6 (1) ECHR.

The decision about expelling a witness is taken early in the investigative phase by the public prosecutor. It has been suggested that the court tactically should make greater use of the possibility to refuse requests for taking evidence[274] when the witness has to be summoned from abroad, to indirectly increase the likelihood of witnesses' staying in Germany in the first place. Incidentally, this may also be an adequate tool to prevent the delay of procedures through abusive requests by defendants for taking evidence of witnesses abroad.[275]

The Witness Protection Act 1998[276] created the further possibility to question a witness at a different location from which the statement would be filmed and transmitted real-time into the court room.

c) Witness Evidence taken by a Commissioned or Requested Judge[277]

In the context of international judicial assistance, it would be possible to take witnesses' evidence abroad. In one recent case, the Federal Court of Justice considered evidence given by Swiss investigation judges who interviewed Paraguayan victims because other evidence supported it, and the court could gain a first-hand impression of the Swiss judges who had taken the witness statements.[278] However, if the witness' evidence is crucial, this will not be sufficient for a conviction.

IV. RIGHT TO JOIN AS A PRIVATE ACCESSORY PLAINTIFF AND TO LINK RELATED TORT ACTION

According to the Criminal Procedure Code,[279] victims of trafficking[280] have the right to actively participate in criminal proceedings as private plaintiffs. This was

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[274] § 244 (5) 2nd sentence StPO.

[275] HOFMANN, *supra* note 26, at 411.

[276] § 247a StPO, Statute of 30 April 1998, BGBl. 1998 I, p. 820. *Cf.* BGH, judgment of 18 May 2000, StR 647/99, 46 BGHSt 73 = 53 NJW 2517 (2000); judgment of 23 March 2000, 1 StR 657/99, 20 NStZ 385 (2000).

[277] § 66b StPO.

[278] BGH, 9 NStZ-RR 233 (2004).

[279] § 395 StPO.

[280] §§ 180b, 181 StGB.

only included in 1998 by the Witness Protection Act.[281] This improves the procedural position of victims: as a consequence, they can apply early for legal assistance[282] and legal aid. The victim can also join a private law action for damages to the criminal proceedings and does not have to initiate a separate civil lawsuit.[283] In practice, this option is not often taken. The criminal courts still can refuse applications if they are not the most appropriate forum or if it delays criminal proceedings.[284] However, the basis for the claim may still be certified with only the exact amount of damages left to decide by the civil courts.[285] In any case, criminal conviction is prejudicial to the finding of a tort in a civil case.

V. Victim Compensation

It should be noted that the Federal Ministry of Labor and Social Affairs included victims of trafficking in the scope of the Victims' Compensation Act, via a Guideline of 5 March 2001.[286]

VI. Protection of Prostitutes

Although prostitution itself is not criminalized under German law, it is still considered to be immoral.[287] This is reflected by the fact that until recently, claims by prostitutes against their clients used to be both void and, consequently, unenforceable.[288] The general legal and social situation of prostitutes is characterized by discrimination (social security law, health insurance), and the

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[281] BGBl. 1998 I, p. 820.

[282] § 406g StPO.

[283] §§ 403 ff. StPO, so-called adhesion procedure.

[284] A statute (Second Victim Protection Act, BT-Drs. 15/814 of 8 April 2003) passed by the Bundesrat on 14 May 2004 is intended to make the compenzation of victims in criminal proceedings easier by restricting the possibilities to refuse such applications.

[285] *See, e.g.*, BGH, 9 NStZ-RR 233 (2004).

[286] Statute of 7 January 1985 as amended on 6 December 2000, BGBl. 1985 I, p. 1, 2000 I, p. 1676.

[287] § 138 BGB; DREIXLER, *supra* note 29, at 239.

[288] BGH, 45 NJW 2557 (1992); now departing from this in 55 NJW 1885 (2002), referring to a change in morality; Christian Armbrüster, *Zivilrechtliche Folgen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten*, 55 NJW 2763 (2002).

surrounding circumstances of prostitution are often criminalized,[289] resulting in a state of semi-illegality and exploitative dependence on brothel owners and pimps.[290] The Prostitution Act of 2001 has improved this situation to some degree. The Act recognizes the *enforceability* of claims by prostitutes against their clients as an (unsystematic) exception to the general rule that such claims are invalid for reasons of breach of morality.[291] It is, however, unlikely that the (mostly foreign) victims of trafficking will benefit from this situation, as their illegal residence status still serves as a lever for extortion and exploitation.

E. Conclusions

Contrary to the European, and to some degree the international level, German immigration law does not explicitly lay down one single rule resolving the conflict of breaches of immigration law by victims of smuggling or trafficking specifically. It has been shown, however, that at the intersection of German criminal and immigration law, there is a limited scope for the recognition of victim status. There are no special statutory provisions tailored for this intersection but more general provisions may be applicable. The combined use of criminal law and immigration law is largely governed by discretionary rules; hence the scope of protection of trafficking and smuggling victims (who are also law breakers) may vary in practice. A duty of authorities at least to consider whether residence status may be granted to victims may already have some beneficial effect. Currently, this depends very much on the individual decision-taker. The EU Directive on Short-Term Residence Permits may raise greater factual awareness about the options available under German law[292] up to a degree where non-consideration of this option could be considered to be a lack of exercise of discretionary powers and hence a reviewable procedural deficiency.

The victim role in criminal and procedure law may affect the application of immigration rules. However, this is controlled by a balancing act and not by according automatic preference to the victims' interests. Generally, victims are only protected in so far as there is public interest in their stay, for example to prosecute perpetra-

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[289] §§ 180a, 181a StGB; Schroeder, *supra* note 19, at 234; *Cf.* Erardo Cristoforo Rautenberg, *Prostitution: Das Ende der Heuchelei ist gekommen!*, 55 NJW 650, 651 (2002).

[290] *See, e.g.*, , Brigitte Kelker, *Die Situation von Prostituierten im Strafrecht und ein freiheitliches Rechtsverständnis*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR RECHTSWISSENSCHAFT 289 (1993).

[291] Heinrichs, *in* Palandt, § 138, Anh., para. 2; Armbrüster, 55 NJW 2763, 2764, and 2765 (2002); *Cf.* BGH, 55 NJW 1885 (2002); *see also* DREIXLER, *supra* note 29, at 238.

[292] *See supra*, notes 13, and 16.

tors who are linked to organized crime, outweighing the public interest in prosecuting immigration offences or ending illegal residence.[293] Victim protection therefore comes under the cloak of witness protection. This protection does not normally lead to a long-term residence permit, and therefore, does not seem to be a sufficient incentive for women to cooperate with the police and public prosecutors.[294] This causes severe problems for the prosecution, as the Federal and Länder Criminal Offices point out, because the evidence of witnesses is invaluable in these cases. The unusual case of a woman who was willing to act as a prime witness a second time after being expelled and then re-trafficked, in spite of the prospect of being expelled again must certainly be regarded as an exception.[295]

A more altruistic form of victim protection based on a more holistic analysis of the public interest in allowing victims of trafficking to escape from the milieu of organized crime does exist, mainly in civil society with some administrative cooperation. A holistic approach which would recognize and restore the agency and personhood of the women as an end in itself, and which would reduce victim/perpetrator dependency in the relevant milieu is, however, not currently systematically reflected in the law.[296]

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[293] Similar Alt/Fodor, p. 101 f.

[294] LKA NRW, Lagebild Menschenhandel Nordrhein-Westfalen, p. 29 (2002).

[295] *Id.*, at 24.

[296] For recent legislation in this direction, *see* the example of Italy. Claudia Pisanello, *Trafficking and Smuggling in Human Beings: The Italian Legal Perspective*, *in* Guild & Minderhoud, *supra* note ‡; Raffaela Puggioni, *Smuggling and Trafficking in Italy*, *in* Guild & Minderhoud, *supra* note ‡.