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Human trafficking in Germany: strengthening victim's human rights

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Veröffentlichungsversion / Published Version
Forschungsbericht / research report

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Empfohlene Zitierung / Suggested Citation:
Follmar-Otto, P., & Rabe, H. (2009). *Human trafficking in Germany: strengthening victim's human rights.* (Studie / Deutsches Institut für Menschenrechte). Berlin: Deutsches Institut für Menschenrechte. https://nbn-resolving.org/urn:nbn:de:0168-ssoar-316558

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Study

Human Trafficking in Germany

Strengthening Victim's Human Rights

Petra Follmar-Otto
Heike Rabe

German Institute for Human Rights

FOUNDATION EVZ
REMEMBRANCE · RESPONSIBILITY · FUTURE

Imprint

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Cover photograph:
Karen Robinson / Panos Pictures

Layout:
iserund**schmidt**
Kreativagentur für PublicRelations GmbH
Bonn – Berlin

September 2009
ISBN 978-3-937714-87-5 (PDF-Version)

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Preface by the Foundation "Remembrance, Responsibility and Future" (EVZ)

Slavery is illegal – but it still exists

At the Nuremberg War Crime Trials, the victorious Allied powers characterised the forced labour to which the Nazis deported millions of foreigners as slavery and a crime against humanity. Fritz Sauckel, the General Plenipotentiary for Labour Mobilization, was condemned and executed.

The people who had been forced labourers finally received public attention when the German Act on the Creation of a Foundation "Remembrance, Responsibility and Future" (EVZ) entered into force in August 2000, although most of them had already died. Still, the Foundation was the first attempt to pay compensation to victims of National Socialist slavery and, through that gesture, to recognize that they had suffered a grave injustice.

The Foundation "Remembrance, Responsibility and Future" continued after the payments ended in summer 2007, and it now funds projects to promote international understanding and human rights in remembrance of the victims of Nazi injustice.

The Foundation does this not only because it is part of the remit assigned to it by the Act adopted by the German Bundestag in 2000, but also because it considers its credibility to be at stake. The professor of education Micha Brumlik[A] writes of public commemoration in German society that if such commemoration of people who are personally unknown to us is to be taken seriously, it must be measured against our active solidarity today with those who are furthest from us and most foreign to us.

What could be more obvious for a foundation that for several years worked on behalf of former forced labourers for the Nazis than to look into forms of forced labour today?

With this publication, the Foundation "Remembrance, Responsibility and Future" is taking the next step in its cooperation with the German Institute for Human Rights in this area, which began in 2006 with a joint lecture series on the subject of "Slavery today".

The study "Compensation and remuneration for trafficked persons in Germany – Feasibility study for a legal aid fund" by Heike Rabe investigates the current situation of trafficked persons in Germany and ways to assist them. It is estimated that in Germany about 15,000 people have been trafficked into sex work, catering, the cleaning sector, domestic work, agriculture, the food industry, construction, fairground entertainment, and the transport sector. These trafficked persons come primarily from Bulgaria, Romania, the Russian Federation, Ukraine, Poland, the Czech Republic, and Slovakia, as well as Asia and Africa.

As Petra Follmar-Otto convincingly shows in her article, "A human rights approach against human trafficking – International obligations and the status of implementation in Germany", human trafficking does not simply amount to reducing organised crime, and also represents a human rights challenge for key state players.

Against that background, the Foundation "Remembrance, Responsibility and Future" will take up the suggestions developed in the feasibility study. It is funding a project of the German Institute for Human Rights which assists people who have been trafficked into

A Brumlik, Micha, Trauer und Solidarität. Zu einer Theorie öffentlichen Gedenkens. In: Brumlik, Micha und Kunik, Petra (ed.), Reichspogromnacht. Vergangenheitsbewältigung aus jüdischer Sicht. Frankfurt a. M. (2) 1988, pp. 111–119.

contemporary forms of forced labour in exercising their rights to wages and compensation. The primary objective is to use model processes to develop legal practices that will allow victims to exercise their rights, which in turn will have a preventive effect. As part of the project, training and information materials will be prepared for governmental and non-governmental organisations, advanced training will be given, and the people and organisations that work to combat human trafficking will be networked.

Slavery is illegal everywhere today. But, according to the International Labour Organisation, 12 million people worldwide are forced to work by being deprived of their liberty or through threats and often the direct use of violence. In the industrialised countries, most people who are in such situations similar to slavery have been trafficked. The people who are responsible for human trafficking and the associated exploitation conceal themselves on the margins between the legal and illegal economies, making it far more complex to combat this phenomenon effectively. Most victims of trafficking are defenceless and need our attention, advice, and assistance. The purpose of the legal aid fund that the Foundation "Remembrance, Responsibility and Future" and the German Institute for Human Rights will jointly create this year is to make it possible for them to assert their rights and therefore simultaneously to prevent the crime of human trafficking.

Berlin, June 2009

Dr. Martin Salm
Chairman of the Board of Directors
Foundation "Remembrance, Responsibility and Future"

Preface by the German Institute for Human Rights

The idea that human trafficking leads to contemporary forms of slavery and that it must be considered a human rights violation has now gained acceptance. At the same time, it can be said that combating human trafficking is still primarily understood and approached as a crime reduction issue. In that context, trafficked persons are seen as sources of information and potential witnesses in court proceedings. However, they play only a marginal role as subjects with their own legal rights. Although the law has long allowed victims to participate in criminal court proceedings as part of an accessory prosecution procedure *(Nebenklage)* and to claim wages, compensation, and damages for pain and suffering, a corresponding legal practice in Germany has not become established. Advisory services and assistance are lacking, and pragmatic ways to improve the chances of success in court have hardly been tested. This situation is unacceptable from the viewpoint of human rights.

Exercising legal rights goes beyond the hoped-for – and often desperately necessary – material compensation and also holds a great deal of symbolic importance for trafficked persons. This is a way for them to regain their sense of being independent subjects, often after having long experienced a total loss of self-determination over their own lives. Active advocacy for one's own rights offers an opportunity to restore and increase awareness of one's own self-worth. However, the chances of success are minimal without advice and assistance along this arduous path.

The first part of this publication identifies needed improvements in the way trafficked persons are treated and derives specific policy recommendations from them. The second part discusses options for the creation of a legal aid fund that can provide advisory services and assistance to trafficked persons to increase their willingness to exercise their legal rights and their prospects of success. Supporting measures such as education and information are also included. The German institute for Human Rights hopes that this publication will promote the progress of a human rights approach to combating human trafficking, particularly in German legal practice.

Berlin, June 2009

Prof. Heiner Bielefeldt, Frauke Seidensticker
Board of Directors
German Institute for Human Rights

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» *[National anti-trafficking policies] usually build on the model of three P's – Protection, Prevention and Prosecution (with great emphasis on prosecution) without adequate consideration for the three R's – Rehabilitation, Reintegration and Redress for victims.* «

JOY NGOZI EZEILO, SPECIAL RAPPORTEUR OF THE UNITED NATIONS ON TRAFFICKING IN PERSONS, BEFORE THE UN GENERAL ASSEMBLY ON 13 MAY 2009

A human rights approach against human trafficking

International obligations and the status of implementation in Germany

Petra Follmar-Otto

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1 Introduction

The previously marginalised phenomenon of human trafficking became a mainstream political issue more than ten years ago. Human trafficking is not only perceived as a severe form of transnational organised crime but is also denounced as a human rights violation. Many international, regional, and national initiatives and programmes have been created. The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings are specialised legal instruments that have led to legal changes at the regional and national levels.

In spite of these developments, human trafficking remains one of the most urgent human rights issues for Germany and other industrialised countries: first – in spite of the necessary scepticism about the data on human trafficking – there is every indication that the extent of human trafficking in Europe and worldwide remains very high. Second, victim's rights have made only marginal progress in spite of the attention human trafficking receives in Germany: the vast majority of trafficked persons are not identified as victims of human trafficking. In practice, even those who are so identified cannot assert rights to (temporary) residence, safe accommodation, material and psychosocial assistance, and remuneration and compensation unless they agree to appear as witnesses in criminal proceedings. Trafficked persons are not perceived as legal subjects, and there is a lack of legal clarity and legal certainty. Third, the prevention of human trafficking is not integrated into a way of organising (labour) migration that is generally oriented to human rights and aims to ensure that regular and irregular migrants never end up in situations of exploitation that are similar to slavery.

Announcements are often made to the public that enough has been said about human trafficking and that it is now time to act.[1] This is certainly right – but, given the steps that have already been taken, it is also necessary to review the underlying concepts and the effects that actions taken against human trafficking can have on human rights. Trafficked persons are caught in the competing political interests of fighting crime, migration policies, and human rights. In many countries, including Germany, actions that are taken and reforms of the law still emphasise criminal prosecution. A full human rights approach has not yet been developed. The specific international instruments on human trafficking are still far from covering all obligations under the core human rights treaties, such as the UN Covenant on Civil and Political Rights or the UN Convention for the Elimination of all Forms of Discrimination against Women (CEDAW). Measures against human trafficking can even lead to violations of the human rights of trafficked persons (or people who could potentially be trafficked) or other groups, such as migrants or sex workers. In some contexts, combating human trafficking is also used as a pretext for introducing restrictive and repressive measures into migration or security policies or the regulation of sex work. This study is therefore intended to contribute to the analysis of policies against human trafficking from the viewpoint of human rights.

In the public debate there is often uncertainty about how to describe this phenomenon, which makes it difficult to take effective, appropriate action against human trafficking. This study therefore begins with definitions, explains the necessary distinctions, and provides data and facts about human trafficking (section 2). The third section covers the causes of human trafficking and the various approaches to combating it and describes the status quo in Germany. The fourth section discusses in greater detail how the prohibition of human trafficking and the resulting state obliga-

1 For example, the titles of the Council of Europe's Convention on Action against Trafficking in Human Beings or the EU conference to mark the first Anti-Trafficking Day in 2007 (Trafficking in human beings – time for action!).

tions are anchored in human rights. The more recent specialised international agreements on human trafficking and law-making in the European Union are then presented (section 5). The emphasis is on the Council of Europe Convention, which professes to treat human trafficking in a human rights context. The final chapter summarizes elements of a human rights approach against human trafficking and makes recommendations for further development of policies.

This study concentrates on trafficking in adults. Women, who make up the vast majority of the trafficked persons in Europe, are in the forefront. The field of trafficking in children is not covered by this study. Where that issue is concerned, reference is made to a recently published study by the Fundamental Rights Agency (FRA) of the European Union, which investigates the legal framework and measures against trafficking in children in the EU Member States.

2 Human trafficking – Definitions, distinctions, and data

2.1 Definition

Human trafficking is a global phenomenon that disproportionately affects women and children. It includes very different cases – people are trafficked using diverse means of coercion and deception and for a myriad of exploitative and abusive purposes. Many perpetrators operate in large organised crime networks. But there are also cases in which the perpetrators come from the closer social environment of the trafficked persons. International marriage brokers or job placement agencies can also be involved in human trafficking.

For a long time there was no internationally recognised definition of human trafficking, so different concepts have been used as a basis. For example, it was questionable whether the term is to be understood only as human trafficking for the purpose of sexual or – more restrictively – commercial sexual exploitation or whether other forms of exploitation are also included. The limitation of the term to sexual exploitation placed the focus on women, so the phrase "trafficking in women" was often used as well. In addition, some definitions assumed that the victim crosses a border, while others also included human trafficking within a single country. The disputes about a definition took place against the background that human trafficking first became an issue primarily in the context of criminal law, with its particular requirements for legal certainty and for the clarity of the elements of an offence.[2]

It was realized that, in spite of the different manifestations of human trafficking throughout the world, it is possible to identify common core elements that can form the basis for a broad and yet specific definition: trafficked persons are removed from their familiar social or cultural environment; it is the change of location and not the crossing of borders that is the constituting element. Coercion, deception, or taking advantage of a position of power are used to force trafficked persons to work or live under conditions that are exploitative or even similar to slavery. Trafficked persons are deprived of free will and control over their own bodies. In spite of the many different purposes for which people are trafficked and the diverse contexts in which human trafficking takes place, almost all cases involve exploiting people economically, whether in the context of commercial sexual exploitation or forced labour in mining, using children to commit crimes, or the forced removal of organs.

These common core elements of human trafficking were included in the first legally-binding international definition, which is contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons of 15 November 2000 (Palermo Protocol), which supplements the UN Convention against Transnational Organised Crime. The Protocol requires the States Parties to criminalise human trafficking and to take measures to protect victims and prevent trafficking in persons.[3]

According to the definition in Article 3 of the Palermo Protocol, "trafficking in persons" comprises three elements:

- An objective action ("the recruitment, transportation, transfer, harbouring or receipt of persons"); it is not necessary for a border to have been crossed.
- Means, i.e., the thread or use of force or other forms of coercion ("of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability

2 The various concepts played an important role in the negotiations for the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons of 15 November 2000 (Palermo Protocol); see the Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, UN Doc. A/55/383. The controversy about the classification of prostitution also continues in the interpretation of the definition by the Assembly of States Parties; see Hahn, Kristina (2007), pp. 105–108. See Pearson (2005) p. 20 *et seq.* on the various definitions before the Palermo Protocol.

3 See section 5.1 below for more details on the Protocol.

or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person").
- The purpose of the exploitation ("exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs").[4]

This definition heavily influenced further legislation on human trafficking; it was for the most part included in the law-making of the European Union,[5] the Council of Europe,[6] and many national legal systems.[7] Germany, too, extensively reformed its criminal law in accordance with this definition in 2005 and included trafficking into labour exploitation in addition to trafficking into sexual exploitation, which was already punishable.[8]

2.2 Necessary distinctions

It often becomes clear in the public debate that there is a lack of clarity concerning the contours of the phenomenon of human trafficking. For example, human trafficking and human smuggling or illegal migration are confused, human trafficking is equated with forced prostitution and forced marriage, or human trafficking is positioned merely within the framework of organised crime. The above definition allows distinctions to be made. This clearly shows that both the element of limiting the right of self-determination and freedom of movement and choice on the one hand and the exploitative purpose on the other hand are material.

2.2.1 Human trafficking – Smuggling of migrants (illegal entry)

In contrast to human trafficking, in which the perpetrator uses coercion or deception to bring the trafficked persons into a situation of exploitation, the term smuggling means an arrangement to provide assistance to migrants in obtaining illegal entry.[9] However, the smuggling of migrants can in some cases lead to human trafficking when the trafficked persons, following an initial free decision to migrate using a smuggler, then lose control over their freedom of movement or choice, for example when their identity papers are taken away or they are forced to "work off" the smuggler's fee under his control in the country of destination.

Aside from the distinction related to the use of coercion or deception, it should also be remembered that human trafficking does not require illegal entry or even the crossing of a border. It is assumed that – similar to the movements by refugees or migrants in general – most human trafficking throughout the world takes place within national borders.[10] German citizens are also victims of human trafficking within Germany.[11] Moreover, about half of the foreign victims of human trafficking of which German officials become aware enter Germany legally.[12]

2.2.2 Human trafficking – Irregular migration

For similar reasons, human trafficking cannot be understood as a subset of irregular migration; there are only overlapping areas here, too. As is the case for the group of irregular migrants in general, trafficked persons often have legal status (such as tourist) when they enter Germany and do not become irregular until they have spent time in the country.

Illegality under the law on residence increases vulnerability to exploitation. However, human trafficking also

4 According to Article 3 c) of the Palermo Protocol, if children or adolescents are involved, any of the actions performed for the purpose of exploitation is considered to be "trafficking in persons," irrespective of whether fraud or other forms of coercion have been used.
5 EU, Council Framework Decision of 19 July 2002 on combating trafficking in human beings. (2002/629/JHAR), Article 1.
6 Council of Europe Convention on Action against Trafficking in Human Beings (ETS no. 197) of 16 May 2005, Article 4.
7 Synopsis of the legal situation in the EU Member States: Europol (2005).
8 Sections 232–233a StGB (German Criminal Code).
9 This difference was highlighted by adoption of a Protocol against the Smuggling of Migrants by Land, Sea and Air, the second protocol supplementing the United Nations Convention against Transnational Organised Crime.
10 U.S. Department of State (2008), p. 7. See 2.3 on the empirical problem of collecting data on human trafficking. See p. 85 *et seq.* of the United Nations Office on Drug and Crime (UNODC) (2006) on international and regional trade movements.
11 BKA (German Federal Criminal Police Office) (2007), p. 7: 27 percent. Further investigation would be required to determine whether there are differences in the number of reported cases involving German and non-German victims.
12 According to the BKA, between 47 and 70 percent of victims entered Germany legally between 2000 and 2004. There is no information on the legality of entry between 2005 and 2007.

takes place under a veneer of legality, for example in au pair positions, as domestic workers for diplomats, and under the cloak of marriage or subcontracting and seasonal work.[13] In those cases, dependence on the specific employment relationship due to the law on residence is problematic, because the affected persons are liable to being blackmailed due to the risk that leaving the exploitative relationship will cause them to drift into illegality.[14]

It becomes difficult to make a distinction when irregular migrants are forced to work under poor working conditions. When is a degree of exploitation and coercion reached that fulfils the prerequisites for definitions of human trafficking, forced labour, or conditions similar to slavery? Section 233 (1) StGB (German Criminal Code) has chosen, in addition to the reference to the terms slavery, servitude, and debt bondage, the constituent element of "working conditions which are in striking disproportion to the working conditions of other workers who do the same or a similar job."[15] According to case law on the criminal offence of usury under section 291 (1) no. 3 StGB, which contains the same phrase, there is a striking disproportion when remuneration is less than two-thirds of the usual pay.[16] Although the element appears on initial view to be broadly worded, interpretations appear to have been rather restrictive so far, which is presumably also due to the fact that few cases of human trafficking into labour exploitation have been identified as such.[17] The conclusions of a qualitative study of human trafficking and labour exploitation in Germany by Norbert Cyrus must also be taken into consideration: they point out that employment relationships that often are initially based on amicable agreements between the parties turn into situations of duress and coercion, making a clear distinction difficult.[18]

As a result of the focus by officials on illegal residence or illegal employment, for which the facts are easy to establish, victims of human trafficking are not identified. At the same time, the media portray an image of victims of human trafficking who have been kidnapped, abducted, and confined. However, in many cases the trafficked persons decide to migrate; it is not until the migration process that there is a loss of control that leads to circumstances of extreme dependency.[19] Cases in which the trafficked persons are completely isolated and, for example, confined around the clock, are certainly the exception in destination countries as well. More frequently, control is exercised through debt bondage, threats to family in the country of origin, or threats to report people to German officials or take away documents.[20] Therefore, it appears to be advisable when making the distinction to focus on the limitation of the right of self-determination: human trafficking exists when from the viewpoint of the trafficked person there is no real "exit option" for getting out of the exploitative situation.

2.2.3 Human trafficking – Organised crime

Human trafficking is often considered to be primarily a phenomenon of transnational organised crime, particularly smuggling of migrants in mafia-like structures. There is no doubt that perpetrators often operate in organised crime networks. At the same time, the state has a particular interest in the criminal prosecution of these groups.[21] The focus of police investigations is on these cases of human trafficking, so the most reliable data is available on them.[22] However, there are also cases in which perpetrators come from the closer social or even family environment of the trafficked persons, for example when relatives or acquaintances who have already migrated to the destination country procure the persons concerned into situations of dependency and profit from this economically.

2.2.4 Human trafficking – Forced prostitution

Trafficking women into prostitution and other branches of the sex industry accounts for the largest portion

13 Cyrus (2005), p. 15 *et seq.* on au pairs as domestic help, seasonal agricultural workers, and contract workers in the construction industry; Ban Ying e.V., Submission to the U.N. Women's Rights Committee on domestic help for diplomats. http://www.ban-ying.de/pageger/start.htm
14 Cyrus (2005), p. 77 *et seq.*; see Mentz (2001), p. 174 *et seq.*, on the legal situation before entry into force of the German Residence Act *(Aufenthaltsgesetz)*.
15 Tröndle/Fischer (2007), section 233 margin no. 2, are critical of the wording of this element ("linguistically unfortunate" and "systematically inappropriate").
16 Tröndle/Fischer (2007), section 291, margin no. 19.
17 A total of 92 cases under section 233 with 101 victims was recorded in police criminal statistics in 2006. BKA (2007), p. 11.
18 Cyrus (2005), p. 74 *et seq.*
19 Mentz (2001), p. 67 *et seq.*, Cyrus (2005), p. 70 *et seq.*
20 BKA (2004), p. 14 *et seq.*
21 See BKA (2005), p. 3.
22 See Europol (2006).

of human trafficking to Western Europe and in many cases is associated with serious violations of the right to sexual self-determination and with considerable violence.[23] As a result, some of the affected women are severely traumatised. However, the definition of human trafficking is broader than this and also includes trafficking for the purpose of economic exploitation in other sectors, as well as trafficking into marriage.

At the same time, because sex work is still an area of taboo, false assumptions are often made about it: sex workers who have migrated are frequently categorised across the board as victims of human trafficking or as forced prostitutes; this is what occurred in the discussion about forced prostitution in the context of the Football World Cup in Germany in 2006.[24] However, many regular and irregular women migrants in Europe voluntarily work in prostitution and other areas of the sex industry. Making the blanket statement that these women are victims who were forced into sex work would ignore their rights to self-determination. However – like the entire group of men and women migrants with precarious status – they are often forced to accept worse working conditions and lower pay, they may be more dependent on outsiders, and at least some types of sex work involve greater risk of violence by clients. These factors result in particular vulnerability to human trafficking and must therefore be taken into account in a preventive approach.

At the same time, there is a tendency to paint a picture of victims of trafficking in women which excludes those women who decide to do sex work in the destination country. A considerable portion of the victims of trafficking in women take a decision of this kind but are seriously misled about the working conditions and potential earnings or are placed in a coercive situation during the migration process as a result of debt bondage or violence.[25] Incorrect images of victims make it difficult to identify victims.

The common distinction between human trafficking into labour exploitation and into (commercial) sexual exploitation can also be misleading. What is characteristic in both cases is the massive limitation of self-determination with the aim of economic exploitation of the trafficked persons. The distinction can have the result that elements of the offence of human trafficking are interpreted differently in the two cases. Moreover, it hides the fact that the situation of the loss of control in which all victims of human trafficking find themselves strongly increases the risk of sexualized violence, particularly for women.

2.2.5 Human trafficking – Forced marriage

In some cases, forced marriage, which political discussions in Germany have dwelt on recently, is also considered to be a subset of human trafficking in the form of trafficking into marriage. Here, too, however, there are overlapping areas only when a person is forced to marry in the context of a migration movement.[26] There are cases of forced marriage without the change of location and removal from the social and cultural context which are constitutive for human trafficking; in those cases, marriage is used instead for control within the family and social context.[27] While those involved in forced marriage must marry against their will, many victims of trafficking into marriage have voluntarily decided to migrate by agreeing to marry. Misleading women about the background conditions for marrying to migrate and forcing them to stay in the marriage under untenable conditions are typical of trafficking into marriage. Both trafficking into marriage and forced marriage differ from cases of marriages arranged by relatives or agencies with partners in rich industrialised countries when those marriages are in accordance with the expectations of the partners and ensure mutual respect for self-determination, even if such marriages do not comply with the current Western ideal of marrying for love.[28]

2.3 Data and facts about human trafficking

2.3.1 The extent of human trafficking worldwide

Statements about the extent of human trafficking continue to be problematic. It is agreed that statistics on crime which reflect the number of known cases are not very informative. Estimates of the actual worldwide or regional extent of trafficking are often based on unclear definitions and methods. For example, some

23 See Follmar-Otto (2009).
24 Prasad / Rohner (2006).
25 BKA (2007), p. 10: Some 30 percent of the victims agreed to do sex work.
26 See Huda (2007) on the overlapping areas.
27 See articles in BMFSFJ (2007a).
28 Ruenkaew (2003).

numbers are based only on trafficking into sex work, while others include trafficking into other sectors. In some cases, a clear distinction is not made between human trafficking and human smuggling, which involves the illegal entry of migrants. Differences can also result depending on whether only transnational or domestic human trafficking is counted or if only cases in the context of international organised crime are included. It is not rare for certain data – often without detailed information about sources – to be cited and then for that citation to be cited again, with the result that they take on a separate reality without an empirical basis ever having been determined.[29] Information from the annual "Trafficking in Persons Report" of the U.S. Department of State is often cited.[30] According to it, approximately 800,000 victims are trafficked across borders each year, although no information is provided on the method of data collection. According to the Department of State, another one million people are trafficked within countries. Europol assumes that "hundreds of thousands" of victims are trafficked into the EU Member States each year for the purpose of sexual exploitation and labour exploitation and notes that the number of victims has increased considerably over the past few years.[31] The second report by the UN Office on Drugs and Crime (UNODC) compiles world data on human trafficking from criminal prosecution authorities but also states that more can be learned from this about the activities of the criminal prosecution authorities than about the real numbers of crimes and victims.[32]

The International Labour Organisation (ILO) did a large-scale study on the extent and form of forced labour throughout the world in an attempt to provide reliable data based on a recognised statistical method. The study concludes that 270,000 people are currently doing forced labour in industrialised countries as a result of human trafficking.[33] In contrast, the federal situation report *(Bundeslagebild)* on human trafficking in Germany in 2007 indicates that there were 790 victims of human trafficking in Germany.[34] Trafficking into marriage is not shown separately in any of the aforementioned statistics.

The data may be unreliable, but is seems clear that the extent of human trafficking at the very least remains at a high level and that human trafficking is also a sub-phenomenon of increased world migration in the wake of globalisation. Human trafficking is also among the most lucrative forms of organised crime, because the risks for perpetrators remain low while the potential gain is enormous.[35] The ILO assumes that the annual profit from people trafficked into forced labour is USD 31.6 billion, with almost USD 28 billion of that coming from commercial sexual exploitation.[36]

2.3.2 The gender dimension of human trafficking

In spite of the difficulty of making empirical statements about the extent of human trafficking, it has become clear that in the presumably vast majority of cases human trafficking is equivalent to trafficking in women and girls. The reference to the gender-neutral term "human trafficking" which is used in criminal law obscures the fact that, in addition to many push and pull factors, the fundamental causes of human trafficking lie in women being denied their elementary human rights and being subjected to massive, frequently multi-dimensional discrimination.[37] So far little attention has been paid to how homosexuals and transgender people are affected, both of whom are also subject to discrimination in their countries of origin.[38]

The term trafficking in women is frequently used in Germany, when trafficking into sex work is exclusively meant. This concept formation should not be allowed to hide the fact that boys, men, transsexuals, and transgender people can also be trafficked into the sex industry. Moreover, there are indications that women are also disproportionately affected by trafficking for the purpose of economic exploitation in other sectors. More precise information is again subject to the reser-

29 A summary of data from various sources is included in a UNESCO project, http://www.unescobkk.org/culture/our-projects/protection-of-endangered-and-minority-cultures/trafficking-and-hivaids-project/projects/trafficking-statistics-project/data-comparison-sheet/.
30 U.S. Department of State (2008), p. 7. This report has been issued annually since the Trafficking Victims Protection Act of 2000.
31 Europol (2008), p. 1.
32 UNODC (2009), pp. 14–19.
33 International Labour Organisation (2005); Belser / de Cock / Mehran (2005). The statistical method of double sampling was used for the estimate.
34 BKA (2007), pp. 8, 11.
35 UNODC (2006), p. 68 *et seq.*; Europol (2008), p. 6.
36 Belser (2005), p. 17.
37 UN Special Rapporteur on violence against women, Report, E/CN.4/2000/68, 29 February 2000.
38 EUROPAP/TAMPEP (1998), p. 35 *et seq.*

vation that there is a lack of a statistical basis. The ILO breaks down its data on the extent of forced labour throughout the world by gender and according to the form of forced labour that is imposed and concludes that, throughout the world, women and girls make up 98 percent of the people trafficked for the purpose of commercial sexual exploitation and 56 percent of those trafficked into labour exploitation.[39] According to the U.S. Department of State, 80 percent of the victims of transnational human trafficking are women.[40] According to the situation report of the BKA (German Federal Criminal Police Office), in Germany in 2007, 95 percent of the victims of human trafficking for sexual exploitation and 61 percent of the victims of human trafficking for labour exploitation were women.[41]

In contrast, most perpetrators are men. Women are increasingly being investigated as perpetrators who recruit victims and control trafficked persons in the transit and destination countries. They operate at lower hierarchical levels of the organisation.[42]

2.3.3 Countries of origin, transit, and destination

Human trafficking was recognized as a major problem in Germany and the European Union in the mid-1990s. The focus of attention was on trafficking of women from Central and Eastern European countries into commercial sexual exploitation, particularly in the context of organised crime. Human trafficking in and from Europe has increased considerably since 1990 due to dramatic changes in Central and Eastern Europe, poor social and economic conditions (particularly for women) in transitioning countries, cheaper and shorter transport routes, and political instability, particularly in south-eastern Europe.[43] However, some non-governmental organisations (NGOs) that advise migrant women had already observed the problem during earlier decades – women from Latin America, Southeast Asia, and Africa were trafficked into sex work, into marriage, and also into domestic employment without protection.[44] These regions of origin are still significant, although they receive less attention than the increase in the number of trafficked persons from Central and Eastern European countries.[45]

Clear classification of certain countries as origin, transit, and destination countries is not as simple as one might suppose. Many people are trafficked from economically poorer regions into wealthy industrial countries. But, as a result of economic and political trends, the countries of origin are shifting in the world's regions, so typical countries of origin can become countries of destination. Many countries are also origin, transit, and destination countries simultaneously; for example, this applies to the countries of Central and Eastern Europe.[46] At the same time, economic imbalances are not the only cause of human trafficking; the example of south-eastern Europe has clearly shown how, due to the post-conflict situation after the mid-1990s, the entire region became a trafficking hub, with women being trafficked into sex work within and across the different countries.[47] Almost all countries in the world are involved in human trafficking, and they frequently have overlapping functions as origin, transit, and destination countries.[48]

39 Belser/de Cock/Mehran (2005), p. 6; see also United Nations Office on Drug and Crime (UNODC) (2006), p. 77.
40 U.S. Department of State (2008), p. 7.
41 BKA (2007), pp. 8, 11.
42 Europol (2008), p. 4.; BKA (2004), p. 14.
43 Europol (2008), p. 1 *et seq.*; Europol (2006).
44 KOK (2009).
45 Europol (2004), p. 12; Europol (2008), p. 1.
46 UNODC (2006), p. 26 *et seq.*
47 Wölte (2004); Human Rights Watch (2002).
48 UNODC (2006), p. 17 *et seq.*

3 Causes of human trafficking and approaches to overcoming it

3.1 Causes of human trafficking

There are multiple causes of human trafficking. There is a close connection between human trafficking and migration, although not all victims of human trafficking are migrants. The primary cause is the economic imbalance between countries of origin and destination, as well as societal inequality within the countries of origin; additional factors include demand in destination countries, low risks, and immense profits for perpetrators. Traditional gender roles and cultural practices, corruption, armed conflicts, and post-conflict situations also play a role,[49] as do restrictive immigration policies in the destination countries. The perception of human trafficking as being solely the result of organised crime and illegal migration is therefore too narrow.

Human rights violations in the countries of origin are causal or contributing factors of decisions to migrate. There is discrimination against women in the countries of origin with regard to access to education, training, and the labour market. For example, in the Central and Eastern European transition countries, women are particularly affected by infringements of social rights and exposed to domestic violence and violence at the workplace. Trafficked persons frequently also belong to groups subject to multiple discrimination, such as women from ethnic minorities. Women thus often decide to migrate to protect their livelihood and that of their family. Those affected may also be refugees as defined in the Geneva Convention relating to the Status of Refugees, which means that they have been persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion. The conditions under which the specific risk of becoming a victim of human trafficking itself must be recognized as a form of gender-specific persecution has increasingly been discussed in recent years.[50]

3.2 Approaches to overcoming human trafficking

Political declarations and international legal instruments have recently reflected the realisation that multidimensional approaches to human trafficking are necessary. The UN Palermo Protocol coined the phrase "prevention, prosecution, and protection," which has influenced the language used in international documents since that time. In spite of this fundamental realisation, however, the approach taken by various key governmental and nongovernmental players is still very different because of the roles they play, and combating human trafficking is used in political discourse as a justification for certain measures, for example in the context of security policies, migration control, or the suppression of prostitution. Therefore, a more specific review of the concepts behind various measures against human trafficking and the weighting of the various approaches is needed. This type of assessment of national and regional policies remains a desideratum.[51]

3.2.1 Crime reduction

For a long time, human trafficking was primarily treated like a problem of crime that is difficult to control. The main cause is considered to be that the offence is highly lucrative and risk of detection low. The fundamental assumption is that with more crimes solved, tougher sentencing, and greater confiscation of profits by the state, the incentives for perpetrators will be reduced and the extent of human trafficking will decrease.

The crime reduction approach therefore relies on exposing networks of perpetrators (particularly in

49 Wölte (2004); Drinck/Gross (2006).
50 UNHCR (2006).
51 The manual prepared for the European Commission can provide guidance for such an assessment, Dottridge (2007 b).

organised crime), determining intersections with other forms of crime such as drug and arms trafficking, and discovering recruitment methods in countries of origin, transport routes in transit countries, and sectors and industries in which trafficked persons are exploited in the destination countries.[52] Cooperation with officials in the origin and transit countries is particularly important if these objectives are to be achieved. Improving the possibility for the criminal authorities to confiscate the profits of the perpetrators has also been considered important in past years.

Due to the clandestine situation of the victims and their lack of an exit option for various reasons, human trafficking is an offence that is rarely reported, and primarily depends on police investigations.[53] In addition, some offences are reported by third parties, for example clients of sex workers, as well as by counselling centres and street workers who come into contact with trafficked persons.[54] Providing evidence of the means used for coercion and deception proves to be problematic during criminal prosecution of the perpetrators, so criminal prosecution authorities have to rely to a great extent on the testimony of trafficked persons.[55] At the same time, the primary interest is to obtain a conviction; whether this is done on the basis of human trafficking elements or other elements such as smuggling of migrants or procuration is secondary from the viewpoint of the public prosecution authorities.[56]

This means that the affected people are at risk of being perceived only as instruments in their capacity as witnesses. At the same time, persons who are trafficked outside of criminal networks or in sectors that it is difficult for the police to penetrate, such as domestic work and home care, or who are trafficked into marriage, seldom come to the attention of the people responsible for crime reduction.

The issue of human trafficking intersects with organised crime and illegal migration, making it particularly appropriate for an alliance of women's rights activists and people who work in the area of security policy to call for stricter laws. In Germany and at the international level, NGOs dedicated to the rights of the victims of human trafficking certainly have tried an approach based on security policy interests. NGOs have emphasised the importance of effective criminal prosecution of human traffickers and also noted that successful criminal prosecution requires stable witnesses. This strategy was influenced by the experience of inadequate criminal proceedings and punishment of the traffickers, and it was also hoped that this was the way to meet the fundamental needs of trafficked persons for secure accommodation, health care and social services, advice, and assistance.

However, the interests of the criminal prosecution authorities and trafficked persons coincide only partially during the proceedings. For example, the victim may want to appear before the court as briefly as possible because of the perception that testifying is very stressful, but the prosecutors need a detailed and solid testimony that is free of contradictions. Or the trafficked persons would primarily like to obtain compensation from the perpetrators, while the criminal court is interested in a swift conclusion to the proceedings. After a verdict, the interest in criminal prosecution has been satisfied, but in many cases the trafficked persons are faced with serious existential concerns about their future.

3.2.2 Securing borders and combating illegal migration

Measures taken under the law on visas and actions by the border police are often justified in one breath as being intended to reduce human trafficking and illegal migration. Human trafficking is primarily considered to be a subset of irregular migration and the smuggling of migrants. However, this fails to take into consideration all of the cases in which the trafficked persons enter the country legally or in which people are trafficked within a single country. International instruments to combat human trafficking also contain provisions on border protection and the security of documents, which can be surprising in the case of the Council of Europe Convention, which is specifically described as a human rights instrument.[57]

Human trafficking is therefore used as a model justification for restrictive visa and border policies, even though the BKA has expressed doubts about prospects for the success of actions by the border police since most of the victims of which it has become aware

52 See research projects of UNICRI, http://www.unicri.it/wwd/emerging_crimes_anti_thb.php. Europol (2006).
53 Herz/Minthe (2006), p. 338.
54 Regione Emilia-Romagna (2002).
55 Herz/Minthe (2006), p. 256 *et seq.*
56 Herz/Minthe (2006), p. 292 *et seq.*
57 Articles 11–13 of the UN Palermo Protocol; Articles 7–9 of the Council of Europe Convention on Action against Trafficking in Human Beings.

entered the country legally.[58] In 2005, the Visa Fact-Finding Committee of the Bundestag (lower house of the German parliament) heatedly discussed the effects of visa policies on the extent of human trafficking, although no connection between the way visas are granted and cases of human trafficking in Germany could be proven.[59]

An irregular residence status can increase vulnerability to forced labour and conditions similar to slavery. Therefore, it makes sense to take steps to improve the identification of trafficked persons within the group of irregular migrants. Restrictive visa and entry policies can even have unintended consequences on human trafficking. If it impossible for people to organise their own migration, those who wish to do so must increasingly rely on criminal structures, which drives up the prices for human smuggling. Both of these factors increase the risk of dependency and vulnerability to exploitation.[60]

3.2.3 Prevention

Given the multiple causes of human trafficking and the limited capacity of reactive criminal prosecution, the importance of preventive measures has been emphasised. Considerable money has been spent on public awareness campaigns in the countries of origin as part of the work of development cooperation agencies, as well as international and regional organisations.[61] So far there are few findings about the effect of widespread campaigns. Given the lack of prospects in many countries of origin, many of those affected to migrate feel there is no alternative to the decision to migrate if they want to support themselves and their families.[62] A distinction must be made between campaigns of this kind, which often issue blanket warnings about the dangers of migration (when migration also appears to be the only prospect), and other preventive measures that aim to target information to potential migrants. Such measures can include the creation of specialised counselling centres for those who could potentially be trafficked[63] or the distribution of specific information, for example about migration and work opportunities in destination countries, contact points for the persons concerned, and their legal options. All of these preventive measures emphasise the importance of cooperation with NGOs.[64]

It is increasingly said that prevention must attack the root causes of human trafficking and be included in more comprehensive policies in countries of origin, for example in programmes to protect women against violence or in measures against the social exclusion of certain population groups.[65]

3.2.4 Orientation to demand, particularly frequenting sex workers

Over the past few years, the focus has shifted from the motivations of trafficked persons to the demand side, in other words to the users of the services provided by trafficked persons in countries of destination.[66] This is based on the consideration that human trafficking can be choked off by reducing demand. Potential concepts for the orientation to demand vary widely and include strategies related to the informal labour market, regulations under trade and industrial law, information and educational campaigns, and consequences under criminal law for those who use such services. Almost no comprehensive approaches have been developed or evaluated so far.

In actuality, the discussion about the demand side concentrates to a great extent on people who frequent sex workers. On the one hand, there is a tendency to curtail the demand for sex workers overall and/or to criminalise it. In some cases it is argued that all forms of sex work are a violation of human rights and equivalent to forced prostitution.[67] Sweden follows an approach of this kind by generally treating the clients of sex workers as criminals. The effects of this approach,

58 BKA (2004), p. 15.
59 German Bundestag, proposed resolution and report of the Second Fact-Finding Committee, Bundestag printed paper 15/5975, p. 278 *et seq.*, 286. In contrast, the dissenting opinion of the opposition parliamentary groups cites statements from two specialised counselling centres that suspect there is a connection; pp. 297, 316.
60 Mentz (2001); Explanatory Report, Council of Europe Convention on Action against Trafficking in Human Beings, item 105.
61 Kanics/Reiter/Uhl (2005).
62 It is assumed, for example, that in the Republic of Moldova, one of the main countries of origin for victims of human trafficking in Europe, as many as 25 percent of the total population spend time abroad as (primarily illegal) migrant workers. See Jandl (2003).
63 Such as the La Strada network in Central and Eastern Europe, http://www.lastradainternational.org/.
64 Article 9 (3) of the Palermo Protocol; Article 5 (6) of the Council of Europe Convention.
65 Kanics/Reiter/Uhl (2005).
66 See Article 6 of the Council of Europe Convention; Article 12 of the proposal of the European Commission for a new Framework Decision on preventing and combating trafficking in human beings, and protecting victims, COM (200) 136 final.
67 See the controversial Report of the U.N. Special Rapporteur on Trafficking in Persons, Huda (2006).

which Sweden believes should be integrated at the European and international levels, on coercive situations and other forms of dependency by sex workers are disputed. While those who favour it assume that sex work in general and forced prostitution will both decline, those who oppose it state that sex workers would be pushed into becoming invisible, which leads to greater dependence on outsiders to find clients and a higher risk of violence against sex workers.[68] On the other side are concepts that address clients' awareness of their own responsibility and attempt to convince them to respect the autonomy of sex workers.[69] The use of instruments of trade and industrial law to monitor brothels is also being tested.[70]

The governing coalition in Germany is currently attempting to find a happy medium in dealing with the demand side. On the one hand, punishability for clients of forced prostitutes (not for clients of sex workers in general) is to be introduced, and on the other hand the licensing of brothels under the law on trade and industry is aimed at making a distinction between sex work that is voluntary and sex work that is subject to coercion, and forced prostitution is to be more heavily prosecuted.[71] The coalition agreement of the Grand Coalition stated that criminal charges for clients of sex workers would be introduced.[72] A legislative bill of the Bundesrat (upper house of the German parliament) to that effect had not yet been debated in the Bundestag by June 2009.[73] The European Commission proposal for a new Framework Decision on preventing and combating trafficking in human beings, and protecting victims[74] contains a provision according to which the Member States should consider taking measures to establish as a criminal offence the use of services in the knowledge that human trafficking has occurred (Article 12 (3)). However, it does not make such criminalisation mandatory.

Tougher sanctioning of the employers of people who are being exploited for their labour is the aim of a new EU Directive. The Directive on sanctions against employers of illegally staying third-country nationals[75] contains a series of measures against employers. They include financial and criminal sanctions, facilitating claims for the back payment of wages by shifting the burden of proof, special procedures, and exclusion from public subsidies.

3.2.5 Strengthening the position of trafficked persons

In contrast to the approaches of crime reduction and migration control which are favoured by key governmental players, NGOs are focusing on empowering victims. Through information, psychosocial support, and strengthening of their legal position, trafficked persons will then be able to extricate themselves from the coercive situation and recover their right of self-determination. This approach to the situation in which trafficked persons find themselves is intended to overcome the limited scope of crime reduction as described above. It addresses the stabilisation of the person's situation under the law on residence, guarantees of protection and elementary necessities of life, access to work and training, and rights to restitution and rehabilitation.[76]

In a broader sense, this approach can also be based on the preventive effects of strengthening the legal position of people who could potentially be trafficked. Options to be considered include opening up legal possibilities for migration, the avoidance of conditions under laws on residence which structurally promote exploitation by employers, targeted information for migrant workers about laws in the country of residence, and improvements in the *de facto* ability to prevail with claims for wages and compensation against perpetrators can then be considered.

Such considerations for empowering trafficked persons or persons who could (potentially) be trafficked can be integrated into a human rights approach against human trafficking.

68 Mitrovic (2006), p. 99 *et seq.*; U.S. Department of State (2008), p. 29; Dottridge (2007 a), p. 17.
69 Howe (2005).
70 See Minzel (2006) on the "Dortmund model."
71 German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (2007b); 53 *et seq.*, 64 *et seq.*
72 Coalition agreement of the 16th legislative term, VIII.2, http://www.bundesregierung.de/Content/DE/StatischeSeiten/Breg/koalitionsvertrag-8.html#doc47280bodyText1
73 Bundestag printed paper 16/1343 of 26 April 2006: draft of an Act Amending Criminal Law – Human Trafficking *[Strafrechtsänderungsgesetz – Menschenhandel]*.
74 COM (2009), 136 final, 25 March 2009.
75 Directive of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, PE-CO_S 3612/09; Council Decision of 25 May 2009.
76 See Pearson (2002); Popova (2008); Apap / Medved (2003).

3.3 The current situation in Germany

3.3.1 Legal reforms

There have been major changes in the Criminal Code and Code of Criminal Procedure in Germany over the past decade. Human trafficking offences have been adapted to the broad definition of the Palermo Protocol, and the position of the victim in criminal proceedings has been improved by the additional possibilities offered by the *Nebenklage* (an accessory prosecution procedure that permits victims to participate through counsel in the main proceedings on nearly equal footing with the public prosecutor and the defence) and the witness assistant *(Zeugenbeistand)*.[77] Improvements to the law on residence, such as granting a four-week recovery and reflection period after the victim has been identified, and the granting of exceptional leave to remain in the country *(Duldung)* or other residence permits for the duration of the criminal proceedings in the German *Länder* (states) were long governed by soft law through decrees, instructions, and administrative regulations.[78] The 2007 Act Transposing the Residence and Asylum Directives of the European Union *(Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union)* included a reflection period of at least one month and a renewable residence permit for at least six months for victims who testify as witnesses during criminal proceedings.[79] The provision on residence therefore does not exceed the minimum European standard.

3.3.2 Cooperative structures

Improvements in the area of trafficking women and girls into sex work have been achieved in Germany thanks to cooperation between criminal prosecution officials, non-governmental counselling centres, and agencies and ministries with responsibility for women, foreigners, social affairs, and labour issues. In the Federation-*Länder* working party on trafficking in women, which was created in 1997, the relevant federal and *Land* ministries work with representatives of NGOs to find potential solutions.[80] Comparable working parties were also created in many German *Länder* or at the municipal level during the 1990s.[81]

The structures for cooperation have made an important contribution to progressively getting officials to change their viewpoints and not to see trafficked persons as perpetrators under criminal laws applicable to foreigners but rather as victims of trafficking in women. Improvements have been made in the areas of avoidance of deportation and detention and guaranteeing fundamental social rights such as secure accommodation, a livelihood, access to medical and psychological care and psychosocial support, and access to the labour market, compensation, and legal advice, even if implementation is often criticised as inadequate.[82] However, aside from the one-month reflection period, all of the aforementioned services are linked to willingness to cooperate in criminal proceedings.

Much of the practical progress has been made because, in the agencies responsible for foreigners and social affairs, responsibility for trafficked persons – contrary to the normal allocation of duties – has been assigned to individual employees who have been appropriately informed and sensitised to the issue. These soft forms of regulation have also made it possible to overcome concerns that improvements for the affected group could become a precedent for the treatment of irregular migrants or even a pull factor for irregular migration. The importance of the cooperation of all relevant governmental and non-governmental players in identifying and providing humane treatment to victims of human trafficking has been emphasised internationally[83] and is reflected in the corresponding international standards.[84] However, given the practical problems and also the lack of binding legal requirements, the provisions differ from one region to the next and are often implemented inadequately.[85] The structures for cooperation thus contribute to improvements in practice but they do not create legal certainty and legal clarity. That can be achieved only by establishing legal rights.

77 Post (2008), p. 214 *et seq.*
78 Mentz (2001), p. 252 *et seq.*
79 Section 50 (2 a) and section 25 (4a) in conjunction with the third sentence of section 26 (1) of the German Residence Act *(Aufenthaltsgesetz)*.
80 Information at http://www.bmfsfj.de/Politikbereiche/gleichstellung,did=73024.html
81 Senate Office for Economics, Women, and Labour (2005); Hesse *Land* government (2008).
82 Allianz von Frauenorganisationen Deutschlands (2008), p. 46 *et seq.*; Post (2008), p. 217 *et seq.*
83 Kröger/Malkoc/Uhl (2004).
84 See Article 5 (6), Article 12 (5), and Article 29 of the Council of Europe Convention.
85 Popova (2008).

3.3.3 Non-governmental support and advisory system for women who have been trafficked

The existence of a non-governmental system of support is of vital importance so that trafficked persons can be identified and receive advice and assistance. There are specialised non-governmental counselling centres dealing with trafficking in women – with different sources of funding, history and spheres of action – in all of the German *Länder.* Almost 40 specialised non-governmental counselling centres have been created throughout Germany to provide advice and assistance to those affected and support them during criminal proceedings and in asserting their rights.[86] The counselling centres have joined forces in KOK (Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess), which offers networking services and does advocacy work at the national and international levels.[87]

The importance of the specialised counselling centres in ensuring that trafficked persons can actually assert their rights is shown by the fact that, of the victims of human trafficking who are listed in the 2004 situation report of the BKA, those who were supported by the specialised counselling centres received exceptional leave to remain four times more often that those who had no contact with a counselling centre.[88]

Public financing for the work of KOK and the specialised counselling centres is not on a secure footing, however. Moreover, in most cases it is linked to services to victims who testify as witnesses in criminal proceedings, again showing how victims' rights are tied to their role in criminal proceedings.

3.3.4 Problems with identification

There is an obvious discrepancy between the low number of reported cases in Germany and estimates about the actual extent of the problem. Aside from the difficulties involved in determining the number of unreported cases, it is possible in any event to conclude that most victims of human trafficking into sexual exploitation in Germany are not identified. The unidentified victims cannot assert their rights to the recovery and reflection period, safe accommodation, medical care, and support and advisory services. Since they have no legal status in Germany, they are expelled as illegal migrants and under certain circumstances detained and deported if they are picked up by German authorities. In the international discussion, failure to identify trafficked persons is also said to be the decisive issue in combating human trafficking.[89] So far there has been insufficient knowledge in Germany about identification channels; it should also be investigated whether identification by counselling centres and clients of sex workers can be increased.[90]

3.3.5 No system to identify and assist trafficked persons outside of commercial sexual exploitation

There has not previously been a comparable specialised system for trafficked persons outside of sex work on the part of either the authorities or the NGOs, although forced labour and practices similar to slavery also represent a problem in other sectors.[91] Due to earlier requirements of criminal law, the criminal prosecution authorities are organisationally responsible for human trafficking – at least in the large cities in which special units are formed within the police force – in units for what is known as "red-light crime" or for organised crime. Therefore, investigations focus on forced prostitution. Other forms of human trafficking, such as forced labour in other parts of the informal sector or trafficking into marriage, already fulfilled the elements of a criminal offence – such as coercion, false imprisonment, bodily injury, and rape – under earlier laws. However, they remained hidden due to the clandestine situation of the trafficked persons and the lack of police attention due to structural reasons.

It is customs officials from the Department for the Investigation of Undeclared Work *(Finanzkontrolle Schwarzarbeit)* and not the police who encounter trafficked persons in sectors other than the sex industry, such as catering, construction, and cleaning. Therefore trafficked persons are at risk of being perceived solely as undeclared workers and migrants who are illegally staying in the country. Trafficked persons who work in the domestic sector find themselves in an even more clandestine situation.

86 KOK (2009).
87 http://www.kok-buero.de
88 BKA (2004), p. 18.
89 European Commission (2004), p. 101 *et seq.*; Kanics/Reiter/Uhl (2005), p. 53.
90 According to an Italian study, only 13.9 percent of victims are identified by the police; 40 percent are identified by counselling centres, local agencies, and hotlines, and 22 percent are identified by clients of sex workers or citizens. See Regione Emilia-Romagna (2002), p. 88 *et seq.*
91 See the study by Rabe in this volume.

A specialised system of non-governmental counselling centres does not yet exist. At present some regional counselling services are being developed out of both the specialised counselling centres on trafficking in women and self-help initiatives offer counselling for migrants, and the trade unions. The German Federal Ministry of Labour and Social Affairs assumed responsibility for the issue of human trafficking into labour exploitation during the 16th legislative term.

4 Human trafficking as a human rights violation

In the public discussion in Germany and internationally, it is repeatedly said that trafficking in human beings is a violation of human rights.[92] When considering this statement, a distinction must be made among different levels of meaning. In everyday language, it is presumably understood to mean that human trafficking is a particularly grave and dehumanizing form of crime. The state's duty of effective criminal prosecution is then derived from this.[93] However, one can also go much further and interpret this statement to mean that trafficking in human beings, because it systematically takes place all over the world, triggers direct obligations of the state as the addressee of human rights.

The last reading can first be confirmed by explicit codification of the state's responsibility for human rights vis-à-vis trafficked persons. Second, it can be derived from the further development of the understanding of human rights over the past few decades. It will be shown that inclusion in the system of protection for human rights leads beyond the understanding based on criminal law.

4.1 Explicit codification of the prohibition of trafficking in human beings

The human rights obligation to "suppress all forms of traffic in women" is clearly specified in Article 6 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979[94] and affirmed in the 1993 Declaration on the Elimination of Violence against Women.[95] With regard to trafficking in children, the Convention on the Rights of the Child and its Optional Protocol contain requirements for protection and guarantees concerning the sale of children, child prostitution, and child pornography.

In the last decade, international criminal law, which is intended to establish individual responsibility for the most serious human rights violations, has also recognized forms of sexualized and gender-specific violence as crimes under international law. Consequently, the Rome Statute of the International Criminal Court classifies enslavement, sexual slavery, and forced prostitution as crimes against humanity and war crimes.[96]

92 Preamble of the Council of Europe Convention on Action Against Trafficking in Human Beings: "(...) Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being (...)." Introduction of the EU Council Framework Decision of 19 July 2002 on combating trafficking in human beings – 2002/629 JI: "(...) (3) Trafficking in human beings comprises serious violations of fundamental human rights and human dignity (...)." Brussels declaration on preventing and combating trafficking in human beings (final declaration of the European Conference on Preventing and Combating Trafficking in Human Beings in 2002): "Trafficking in human beings is an abhorrent and worrying phenomenon involving coercive sexual exploitation, labour exploitation in conditions akin to slavery, exploitation in begging and juvenile delinquency as well as domestic servitude. These practices constitute serious violations of the victims' human rights as enshrined in international law and the EU Charter on Fundamental Rights" (p. 2 of the Declaration). During his opening remarks at the "Europe Against Trafficking In Persons" joint conference of the OSCE and the German Foreign Office in Berlin in October 2001, Foreign Minister Fischer described trafficking in human beings as "a particularly brutal and abhorrent violation of human rights."

93 See Obokata (2006), p. 121 *et seq.*

94 Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979.

95 Declaration of the U.N. General Assembly on the Elimination of Violence Against Women of 20 December 1993. U.N. document A/RES/48/104.

96 See in detail Obokata (2006), p.133 *et seq.*

The community of states has also recently developed specific instruments against human trafficking such as the aforementioned UN Palermo Protocol and the new Council of Europe Convention on Action against Trafficking in Human Beings.[97] The obligations of the states under those conventions are analyzed in further detail below. The prohibition of trafficking in human beings has been explicitly enshrined in the Charter of Fundamental Rights of the European Union.[98] The prohibition of slavery, forced labour, and trafficking in human beings is already part of European protection of fundamental rights, resulting in the duties to protect which are incumbent on the Union and the Member States.[99]

4.2 Classification in the context of prohibitions of slavery and forced labour

In many cases, the exploitation of trafficked persons results in forced labour[100] and practices similar to slavery, such as debt bondage[101] and servitude or serfdom.[102] Therefore, reference is also often made to trafficking in human beings as one of the main contemporary forms of *de facto* slavery.[103] This classification makes the character of trafficking in human beings as a human rights violation particularly clear: slavery reifies people and treats them like commodities, thereby negating their free self-determination. The prohibition of slavery is therefore among the non-derogable human rights[104] and is a peremptory norm *(ius cogens)*.[105]

The classification of human trafficking as a form of *de facto* slavery is contradicted by some, who criticise, among other things, the fact that considering it to be equivalent to the historical transatlantic slave trade is a way to negate the voluntary decision of many of the affected persons to migrate and to blur the lines between human trafficking and voluntary irregular migration, particularly of women, into sex work.[106] Ultimately it is feared that combating human trafficking will become an instrument that is used to limit women's freedom of movement and right of self-determination.[107]

These fears can be understood in light of earlier international documents and conventions on human trafficking and so-called "white slavery."[108] At the end of the 19th century, a movement against "white slavery" took shape which led to adoption of the aforementioned documents and was associated with an abolitionist position on prostitution. The term "white slavery" included forms of voluntary and forced migration of women, primarily from European countries, to locations overseas – particularly when the women did sex work there. The corresponding documents do not clearly distinguish between voluntary and involuntary prostitution.[109] The movement against "white slavery" was described as anti-emancipatory and also had racist connotations because it was aimed at prohibiting sexual acts between "white" women and "non-white" men or else stigmatised certain groups of migrant women (such as Asian migrant women in the United States in the late 19th century) as particularly "immoral."[110]

97 Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 (ETS no. 197).
98 Article 5(3) of the Charter of Fundamental Rights of the European Union.
99 Heselhaus/Nowak (2006), section 13, margin nos. 18, 24.
100 Forced labour means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily; this is the definition contained in Article 2 of Convention no. 29 concerning forced labour of 1930. Typology of current forms of forced labour of the International Labour Organisation, Geneva (2005), p. 6.
101 Debt bondage means that, in order to liquidate a debt, a person is obliged to provide services whose nature and length are not defined; see the definition contained in Article 1 a) of the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. People who are trafficked are often held in debt bondage if they are deeply indebted to traffickers for transportation or falsified documents and must "work off" those debts, while the amount is constantly increased by additional debt, for example for lodging, food, the provision of customers, or "protection" from the police; Scarpa (2008) p. 19.
102 Serfdom means the requirement to live and labour on land belonging to another person without being free to change that status; see the definition contained in Article 1 b) of the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.
103 Scarpa (2008), Miers (2001), pp. 415–438; Weisbrodt/Slavery International (2002), pp. 60–92; Bales (2001).
104 Article 8 (1), (2) in conjunction with Article 4 (2) of the International Pact relating to Civil Rights and Political Rights.
105 Judgment of the International Court of Justice, ICJ Reports, 1070, p. 32. Some contend that the prohibition of trafficking in human beings, as part of the prohibition of slavery, should also be classified as *ius cogens*; see Scarpa (2008), p. 78 *et seq.*
106 Kempadoo (2005), p. XIX *et seq.*
107 See articles in GATTW (2007) and Kempadoo (ed.) (2005).
108 International Agreement for the Suppression of the White Slave Traffic, 1904; International Convention for the Suppression of the White Slave Traffic, 1910; International Convention for the Suppression of the Traffic in Women of Full Age, 1933; U.N. Convention on Suppression of Trafficking and Exploitation of Prostitution, 1949.
109 Pearson (2005), p. 20 *et seq.*
110 Coomaraswamy (2000), no. 18 *et seq.*; Kempadoo (2005), p. X *et seq.*

In spite of these concerns based on historical and political considerations, it is appropriate to classify human trafficking in the context of *de facto* slavery and practices similar to slavery even if at the same time the different dimensions, mechanisms, and historical context must be made clear, not least in order to avoid relativising the historical transatlantic and African slave trade. In contrast to the narrow traditional concept of slavery from the Convention, which requires exercising the power attaching to the right of ownership of a person, the additional concept of *de facto* slavery or institutions and practices similar to slavery also includes situations in which people's right of self-determination is severely limited, for example as a result of debt bondage, forced marriage, and other forms of coercion.[111]

The limitation or exclusion of the right of self-determination is decisive precisely for understanding the distinction between voluntary – if perhaps also illegal – migration or sex work on the one hand and human trafficking on the other. The concepts of debt bondage or servitude are important indicators for the coercive situation caused by human trafficking, even if the term "exploitation" in the definition of the Palermo Protocol goes beyond these practices similar to slavery. Therefore, the 1926 Slavery Convention and its Supplementary Convention of 1956[112] are also important for countries in their work to combat human trafficking. In a judgment of 2005, the European Court of Human Rights (ECtHR) described the case of a "maid of all work" as forced labour and servitude as defined in Article 4 of the European Convention on Human Rights (ECHR) and for the first time found the existence of positive state obligations under Article 4.[113]

Over the past few years, the International Labour Organization (ILO), a special organisation of the United Nations that is responsible for drawing up and overseeing international labour and social security standards, has also devoted more of its efforts to human trafficking as a catalyst for forced labour. The prohibition of forced labour is one of the core labour standards and is specified in the ILO Conventions on forced labour (nos. 29 and 105) and child labour (no. 182). It does not just apply to state-imposed forced labour, an extreme form of which was heavily used by totalitarian regimes, such as forced labour under the Nazis or in the Stalinist Soviet Union. The ILO definition includes all cases in which the labour is demanded under threat of punishment and is performed involuntarily.[114]

Through the reference to the prohibition of forced labour, the topic of human trafficking is positioned in the area of rights at work, as also codified in Article 7 of the UN Social Convention and other human rights standards. This is also helpful for understanding the phenomenon of human trafficking: trafficked persons' rights at work – for example the free choice of a workplace, healthy and safe working conditions, and reasonable pay – are violated. Consequently, ensuring the actual exercise of rights at work also represents a preventive approach to human trafficking.[115]

4.3 Continued development of the understanding of human rights

In addition to these specific standards for the prohibition of human trafficking, slavery, and forced labour, trafficked persons can obviously also invoke general guarantees pursuant to human rights, as enshrined in the core human rights agreements of the United Nations,[116] the European Convention on Human Rights, or national constitutions. Examples include the rights to personal freedom, to work, and to physical integrity, as well as the prohibition of discrimination. The UN treaty bodies also base their activities on these general guarantees, for example within the framework of the state reporting procedure, when addressing the problematic area of human trafficking and trafficking in women.[117] The office of the UN Special Rapporteur on trafficking in persons, especially in women and chil-

111 See the definitions of slavery in Article 1 (1) of the 1926 Slavery Convention and of practices and institutions similar to slavery in Article 1 of the Supplementary Convention of 1956.
112 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956.
113 ECtHR, Siliadin v. France, appl. no. 73316/01, judgment of 26 July 2005; for more details see Post (2007), p. 114 *et seq.*
114 International Labour Office (2005), p. 1 *et seq.*
115 International Labour Office (2005), p. 79 *et seq.*
116 These include the International Covenant on Economic, Social and Cultural Rights (Social Covenant), the International Covenant on Civil and Political Rights (Civil Covenant), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Convention on the Rights of Persons with Disabilities.
117 See Scarpa (2008), pp. 83–124 on handling of the issue of human trafficking by U.N. treaty bodies and special mechanisms.

dren, has existed since 2004. In 2002, based on the human rights obligations of the states, the UN High Commissioner for Human Rights issued a comprehensive set of principles and guidelines on human rights and human trafficking,[118] to which the current Special Rapporteur extensively refers in her first report.[119]

The reference to general human rights guarantees was, however, in no way self-evident. That is because the rights of victims of human trafficking are initially violated by private criminal acts – by physical, emotional, and sexual violence, denial of the right of self-determination and control over one's own body, pressure to work under unsafe and unhealthy conditions, or the refusal to pay a reasonable wage. The realisation that these violations also result in obligations for the state as the addressee of human rights is associated with the continued development of the understanding of human rights over the past few decades. Two major elements of that development are strengthening the human rights of women and formulation of three different types of obligations: to respect, protect, fulfil.

4.3.1 Strengthening the human rights of women

The worldwide women's movements during the second half of the 20th century criticised the traditional liberal understanding of human rights.[120] It was said that the individualistic concept of human rights as defensive rights against the state construed the holder of these rights to be the white male citizen, who was protected against infringements by the state of his rights in the public sphere. Human rights infringements against women could not be adequately addressed within this construct. The understanding of human rights therefore had to be expanded so that the relevance of human rights was also recognized to include the sphere that had formerly been considered private. Moreover, contrary to a strictly individualistic perspective, it had to be recognized that certain groups of people were already prevented by structural discrimination, for example due to their gender or ethnic group, from access to exercising their human rights.

The traditional division into a public sector that is relevant to human rights and an irrelevant private sector has the result that women are far less able to claim and exercise their rights, because women's rights are often violated in the sphere that is defined as private (such as domestic violence), and even assaults against women in the "public" sector are interpreted as private acts (such as sexualized violence in prisons or armed conflicts). The concept of women's human rights focuses on the different life realities of women and men and shows that women and men are the victims of different human rights violations or can be affected by violations in different ways. It also becomes clear that women are dis-proportionately the victims of human rights violations.

In this context, violence against women is both a manifestation of the historically unequal power relationships between men and women and one of the crucial social mechanisms by which women are forced into a subordinate position in relation to men.[121] Violence against women has not been and still is not sufficiently prosecuted under criminal law anywhere in the world. The reasons for this can be inadequate legislation, hesitation by the police to investigate domestic violence, and discriminatory practices by public prosecutors and the judiciary, and they can also be organisational due to a lack of specialised units. The effects of patriarchal patterns of thought and explanations can play a major role at all of these levels. Therefore, the principle of due diligence is emphasised: the states must exercise due diligence to prevent, investigate and punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.[122] In view of structural discrimination, the states are formulating obligations going beyond the normal obligations to protect and guarantee, particularly the obligation to empower trafficked persons to exercise their rights.[123]

The expansion of the human rights responsibility of the states which is pursued with the women's human rights concept is relevant to trafficked persons in two respects. On the one hand, human trafficking is a form of systematic violence and violation of the law within

118 UNHCR: Recommended Principles and Guidelines on Human Rights and Human Trafficking, UN doc. E/2002/68/Add.1.
119 Report of the Special Rapporteur Joy Ngozi Ezeilo: UN doc. A/HRC/10/16, 20 February 2009, no. 39.
120 See Cook (1994); Peters/Wolper (1995); Gabriel (2001) about this controversy.
121 Declaration of the UN General Assembly on the Elimination of Violence against Women of 20 December 1993, Preamble, para. 6.
122 Declaration of the UN General Assembly on the Elimination of Violence against Women of 20 December 1993, Article 4 c); UNHCHR, Principle no. 2; Coomaraswamy (2000), nos. 51–53.
123 See the obligations in Articles 4 c) to l) of the Declaration on the Elimination of Violence against Women of 1993 and the Report by the Special Rapporteur on Violence against Women, UN doc. E/CN.4/2000/68, 29 February 2000, nos. 49–53.

the private sphere which triggers the human rights obligations of the states to prevent trafficking, effectively prosecute perpetrators, and ensure restitution for trafficked persons. On the other hand, most trafficked persons, as women and migrants with an often-precarious status, are doubly removed from the "white male citizen" as the typical holder of rights under the classical liberal understanding of human rights. Therefore, the emphasis on the obligation to overcome structural discrimination is particularly significant for them.

4.3.2 Human rights obligations: respect, protect, and fulfil

Based on the universality and indivisibility of human rights, a new understanding of the state's responsibility for human rights also developed in parallel to the aforementioned influences of the women's rights movements. There was a move away from traditional categories of "defensive" or "negative" rights (against intrusion by the state) and "positive" rights (i.e. requiring the state to take action to fulfil them), which were equated with civil and political rights on the one hand and economic, social, and cultural rights on the other hand. Instead, it was now emphasised that all human rights equally develop different dimensions of state obligations that can briefly be described as the obligations to respect, protect, and fulfil.[124] As a result, on the one hand the state's responsibility for systematic forms of violations of rights by private persons was emphasised,[125] which supported the aforementioned women's rights position of also recognizing the relevance of human rights in the private sphere. On the other hand, enhancing social and economic rights and singling out the prohibition of discrimination also underlined the question of unequal access to economic and social goods and therefore the unequal possibility of actually exercising all human rights.

The three types of human rights commits the states as addressees of human rights to respect the human rights of trafficked persons, to protect them against violations, including by private persons, and to guarantee a framework of institutions and procedures so that trafficked persons can assert and actually exercise their rights. The prohibition of slavery and forced labour and the rights to personal freedom, freedom of movement, privacy, and self-determination, as well as physical and mental integrity, therefore develop a multiplicity of obligations at those three levels in the context of human trafficking.

4.3.3 Human trafficking as an expression of racial discrimination

Human trafficking – to the extent women and girls are involved – represents a form of violence against women and discrimination based on gender. Moreover, since the Third World Conference against Racism in Durban, South Africa in 2001, human trafficking has also increasingly been discussed in the context of racial discrimination. In the international system of human rights protection, increased attention has been paid in recent years to racial discrimination when states deal with non-citizens.[126] The right of sovereign states to regulate migration and control their borders is recognised. However, the states may not exercise these rights in a discriminatory way and must ensure that non-citizens are not prevented from actually exercising their human rights, including rights at work and the right to health.

The Durban Declaration and Programme of Action emphasise that racial discrimination in countries of origin, often intertwined with discrimination based on gender, is one of the fundamental causes of human trafficking. At the same time, exploitative situations and situations similar to slavery in the destination countries are placed in the context of inadequate exercise of the rights of migrant workers. Trafficked persons are also affected by direct and structural forms of racial discrimination in countries of destination, frequently again inter-twined with gender-based discrimination. Trafficking in women is then rightly recognised as the expression of multi-dimensional structural discrimination.[127]

124 Nowak (2002), p. 62 *et seq.* On the understanding within the framework of the ECHR: Grabenwarther (2005), p. 118 *et seq.*; see also the general remarks of the Committee for Economic, Social and Cultural Rights, particularly in no.12 (right to food), margin no. 14 *et seq.*; no. 13 (right to education), margin no. 43 *et seq.*; no. 14 (right to health), margin no. 30 *et seq.*

125 Wiesbrock (1999).

126 See Durban Declaration and Programme of Action; UN Antiracism Committee CERD: General Comment no. XXX: Non-Citizens (2004); UN Women's Rights Committee CEDAW: General Recommendation no. 26: Women Migrant Workers (2008).

127 Durban Declaration, no. 30; Durban Programme of Action, nos. 37, 38, 63, 64, 67–69, 88, 105, and 139; Outcome Document of the Durban Review Conference, nos. 79, 90, and 93.

5 Specialised treaties and standards related to human trafficking

Many international and multilateral political, legal, and practical initiatives against human trafficking have been developed as awareness of the problem of human trafficking increased over the past decade. Human trafficking has "moved from the margins to the mainstream of international political discourse."[128] Human trafficking is high on the political agenda of the United Nations, the OSCE, the European Union, and the Council of Europe. Programmes, action plans, and special working areas have been created by the OSCE, the Stability Pact for South Eastern Europe, the ILO, the International Organization for Migration (IOM), and the EU. By the time the UN Palermo Protocol was adopted, it was customary internationally to base work against human trafficking on the three pillars of prevention, prosecution, and protection of victims.

International and European law-making are presented below in reference to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol), the Council of Europe Convention on Action against Trafficking in Human Beings, and the legal acts of the European Union. The relationship between criminal law and laws on migration on the one hand and prevention, the protection of victims, and victims' rights on the other hand is of particular interest from the viewpoint of human rights. So is the question of whether the specialised treaties and agreements fully assume the obligations of the states under the core human rights treaties or whether they must be complemented by such standards.

5.1 UN Palermo Protocol on Human Trafficking

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime of 2000 – the Palermo Protocol – was developed in the context of crime reduction and criminal justice, not the protection of human rights. It was negotiated and is implemented with the support of the United Nations Office on Drugs and Crime (UNODC), which was created in Vienna in 1997 as part of the UN Secretariat.[129] The Protocol has been ratified by 128 States Parties, including the European Union.[130]

5.1.1 Summary of the content of the Palermo Protocol

As described above, the Parties agreed for the first time within the framework of the Palermo Protocol to a legally binding international definition of trafficking that currently influences law-making and policies. However, the scope of the Protocol is limited to transnational organised crime.[131]

The first part of the Protocol contains general provisions, particularly definitions (Article 3) and the obligation of the Parties to criminalise the relevant offences, including attempts to commit an offence and participating as an accomplice (Article 5).[132]

128 Gallagher (2006), p. 163
129 www.unodc.org
130 As of 1 May 2009.
131 Articles 1 and 4 of the Palermo Protocol.
132 See UNODC (2004); Obokata (2006), p. 164 on obligations under the Protocol.

The second part contains provisions on the protection of victims; many of them give the Parties broad discretion. The most binding are the obligation to provide information to victims on relevant court and administrative proceedings (Article 6 (2a)), to support victims appearing in criminal proceedings (Article 6 (2b)), and to ensure the existence of measures that offer victims of trafficking the possibility of obtaining compensation from perpetrators (Article 6 (6)). Provisions on the protection of the victim's privacy (Article 6 (1)) and physical safety (Article 6 (5)); appropriate housing; counselling; medical, psychological, and material assistance; and employment, educational, and training opportunities (Article 6 (3)) are subject to broad discretion and in some cases to the limitations of domestic law. The same applies to the granting of temporary or permanent residence permits (Article 7). Article 8 governs the cooperation of countries of origin and destination in repatriating trafficked persons; repatriation "shall be preferably voluntary" (Article 8 (2)).

The third part is entitled "Prevention, cooperation and other measures." The Parties undertake to establish comprehensive policies and programmes to prevent trafficking in persons (Article 9 (1)); they are also to take into consideration the causes of human trafficking such as poverty, underdevelopment, and lack of equal opportunity (Article 9 (4)), as well as demand (Article 9 (5)). Article 10 governs the exchange of information among authorities in the States Parties in the area of law enforcement and the requirement to train the relevant officials.

The other articles in this section relate to border control and the security of documents; some of these provisions also contain direct obligations.

Consequently, the protection offered to victims by the Palermo Protocol is weak, while obligations in the areas of law enforcement and migration control are more extensive. However, a saving clause (Article 14) accords priority to human rights law, agreements on refugees, and the prohibition of discrimination. The Protocol does not establish a body to monitor implementation by the Parties and to which the Parties must report. Such a monitoring role can at most be played by the Conference of Parties.[133] The UNODC tracks implementation of the Convention through research and reports, but cannot make recommendations to specific Parties.[134]

5.1.2 Implementation in Germany

Germany ratified the Palermo Protocol in 2006. Prior to that time, to implement the requirement to criminalise, the element of trafficking into sexual exploitation was revised and the elements of trafficking into labour exploitation and the promotion of human trafficking were added (sections 232, 233, and 233a StGB (German Criminal Code). No further legislative steps, particularly with regard to victims' rights, have been taken to implement the Protocol.

5.2 Council of Europe Convention on Action against Trafficking in Human Beings

5.2.1 History

Given the weaknesses of the Palermo Protocol, particularly the failure to make victims' rights binding, the Council of Europe decided to create its own Convention on Action against Trafficking in Human Beings. The Convention entered into force on 1 February 2008; it has been ratified by 24 states and signed by 17 other states, including Germany.[135] The Convention is also open for ratification or accession by the European Union and states that are not members of the Council of Europe (Articles 42 and 43).

When developing the Convention, the stated objective was to focus on the human rights of victims.[136] This is reflected in the Preamble, which describes trafficking in human beings as a violation of human rights, notes that it may result in slavery, and emphasises that respect for victims' rights, protection of victims, and action to combat trafficking in human beings must be the paramount objectives. The Preamble also establishes a connection to the human rights obligations under the European Convention on Human Rights.

Only some of these objectives could be achieved when negotiating the Convention. From the viewpoint of

133 See Gallagher (2006), p. 186, footnote 116, for more details.
134 See UNODC (2004), (2006), and (2009).
135 As of 1 May 2009.
136 Declarations of Foreign Ministers at the 113th and 114th meetings of the Committee of Ministers; Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, no. 46.

observers of the negotiation process, an agreement on stricter standards was prevented in many areas by the negotiating position of the European Union – which has had a majority position in the Council of Europe since the 2004 enlargement – which prevented an improvement beyond the current standard under European law.[137] This is particularly applicable to laws on residence. The Parliamentary Assembly was unable to prevail with many proposed changes to improve victims' rights[138] and explicitly criticised the position of the representative of the EU Commission.[139] Nonetheless, the Convention has made progress in a number of areas compared with both the UN Palermo Protocol and the legal situation in the EU.

5.2.2 Summary of the content of the Convention

The first chapter of the Convention contains general provisions. The Convention uses the definitions from the Palermo Protocol (Article 4). However, its scope is broader than that of the Protocol and includes all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime (Article 2). By expanding the scope, the Convention takes an important step away from the dominance of the criminal prosecution approach. Article 3 explicitly contains a prohibition of discrimination when implementing all provisions of the Convention by listing grounds for discrimination which correspond to Article 14 of the ECHR. This is also a human rights element that goes beyond the Palermo Protocol. Moreover, there is a consistent gender-resonant and child-sensitive approach that, by mainstreaming all material guarantees, promotes an approach that is oriented to gender equality and the best interests of the child.[140] The guarantee of gender equality goes beyond a prohibition of un-equal treatment and calls for positive measures to establish actual equality of women and men.[141] The method of gender mainstreaming is specified for measures in the area of victims' rights (Article 17).

Chapter II contains provisions on prevention and cooperation, along with border controls and document security. The provisions include a broad range of preventive measures. Research, information, campaigns, social initiatives, and training for persons vulnerable to trafficking and for specific professional groups are required to follow an approach based on human rights and gender mainstreaming which is also child-sensitive.[142]

Article 5 (4), which requires the Parties, as a form of prevention, to enable migration to take place legally and to disseminate information on conditions for legal migration, should be emphasised. The Parties thereby recognize that allowing safe, legal migration is a strategy for preventing human trafficking, even though the provision does not impose any specific forms of legal migration; that is left to the Parties' discretion. The emphasis on the dissemination of information is in line with more recent human rights treaties, such as the UN Convention on Rights of the Child and the UN Migrant Workers Convention.[143] It is difficult for migrants to gain access to information about their rights, but information about possibilities for migration and rights at work can offer important protection against exploitation.[144]

Measures to reduce demand are also included as one element of a prevention strategy (Article 6). While this article relates to research, work with the media and civil society, information campaigns, and educational programmes on gender equality, Article 19 also addresses criminalisation of the use of services of a victim of trafficking in human beings. However, the introduction of corresponding criminal offences remains at the discretion of the Parties.

Articles 7 to 9 of the Convention, which deal with border controls and document security, for the most part have the same wording as Articles 11 to 13 of the Palermo Protocol, with the exception that some provisions do not grant discretion to the States Parties where the Palermo Protocol does.[145]

137 Scarpa (2008), p. 145.
138 Council of Europe (Parl. Ass.): Draft Council of Europe Convention on Action against Trafficking in Human Beings, Opinion no. 253 (2005).
139 Council of Europe (Parl. Ass.): Draft Council of Europe Convention on Action against Trafficking in Human Beings, Rec. 1695 (2005).
140 See Article 1 a); Article 5 (3) and (5); Article 10 (1), (3), and (4); Article 16 (7); and Article 17.
141 Explanatory Report, no. 54.
142 Article 5 (2) and (3).
143 Spiess (2007), p. 33.
144 Explanatory Report, no. 105.
145 Article 7 (5) and (6); Article 8 of the Council of Europe Convention.

Chapter III contains provisions on protecting and promoting victims' rights. Article 10, which requires the Parties to identify victims, represents major progress. This is very important simply because the failure to identify victims, particularly of human trafficking into labour exploitation, will likely lead to a denial of the rights of the vast majority of trafficked persons.[146] This article contains organisational requirements, such as inter-institutional cooperation and training of staff. However, some other provisions can develop direct entitlements for individuals, such as the prohibition on removal from the territory before the identification process has been completed (second sentence of Article 10 (2)), the right to assistance measures during the identification procedure under Article 12, and specific rights for children (Article 10 (3) and (4)).

Article 12 (1) sets a minimum standard for services to assist victims independent of their residence status:[147] these include appropriate and secure accommodation, material assistance, psychological assistance, emergency medical treatment, translation and interpretation services, counselling and information in a language victims can understand, legal aid, and access to education for children. Victims who are lawfully resident in the respective State Party – among other things under a residence permit as a victim of human trafficking pursuant to Article 14 of the Convention – have further rights to the necessary medical treatment going beyond emergency treatment, and within the framework of the respective national law with respect to access to the labour market and to vocational training and education. All services must be provided on a consensual and informed basis (Article 12 (7)), which means that trafficked persons may not be placed in special programmes for trafficked persons without their consent. If they refuse a specific programme, the claims under 12 continue to exist and must be fulfilled in another form by the respective State Party.

Issues related to residence are governed by Articles 13 and 14. The Parties are required to introduce a recovery and reflection period of at least 30 days when there are reasonable grounds to believe that the person concerned is a victim of human trafficking.[148] The State Party must allow the person to remain in its territory during that period. This provision was less than expected by the NGOs, which had requested the introduction of a reflection period of at least three months, which is already available in some European countries. It should be noted that extended protection against removal from the territory may be available in individual cases under Article 10 (2) if the identification procedure cannot be completed within 30 days. Article 14, which contains the conditions for issuance of a renewable residence permit for trafficking victims who have been identified, is also weak. No minimum duration of the permit is specified, and it is still possible to make the permit subject to the trafficked person's willingness to cooperate in criminal proceedings.

Article 15 contains the rights of trafficked persons to legal assistance, free legal aid, and compensation, as well as the associated rights to information.[149]

Where the provisions on repatriation and return of trafficked persons (Article 16) are concerned, a comparison with corresponding provisions of the Palermo Protocol is of interest. In addition to the safety of trafficked persons, the Convention also mentions their rights and dignity as criteria for the return processes of countries of both origin and destination. This ensures observance of general human rights obligations that may result from the prohibition of torture and inhuman or degrading treatment, the protection of private and family life, the protection of a person's identity, and the best interests of the child.[150] The case law of the European Court of Human Rights on the scope of protection offered by Article 3 of the ECHR, which also offers protection against removal from the territory in cases when the threat comes from non-governmental actors, is particularly applicable in that regard.[151]

Contrary to the Palermo Protocol, the Parties to the Convention are also required to create repatriation programmes with the objective of avoiding re victimisation. The configuration of the programmes is at the discretion of the Parties, although the Convention specifies other objectives, such as reintegration into

146 Also according to Gallagher (2006), p. 176.
147 Explanatory report, no. 146.
148 Article 13 (3) allows exceptions to this rule for reasons of public order or if the status of victim has been wrongfully claimed. The latter provision is inconsistent with the provision in para. 1, according to which reasonable grounds for believing that the person is a victim are sufficient for granting the reflection period. It must therefore be interpreted very restrictively. The reference to the concept of public order, which is not clearly defined, is also problematic, and this could be used to exclude trafficked persons who continue to do sex work from the right to a reflection period.
149 See the study by Heike Rabe in this volume for more details.
150 Explanatory Report, no. 202.
151 ECtHR, D. v. UK, Judgment of 2 May 1997, Comp. of judgments 1997-III.

the educational system and the labour market. The requirement for the Parties to provide information with respect to repatriation is also specified (Article 16 (6)).

Chapter IV contains provisions on substantive criminal law which are more detailed than those of the Palermo Protocol. The provisions on procedural law and institutions in Chapter V are also much more extensive. Chapter VI contains requirements for international co-operation and co operation with civil society.[152]

The creation of a treaty body to monitor the implementation of the Convention by the Parties (known as the GRETA mechanism) is generally considered to represent considerable progress.[153] Its composition and area of authority are governed by Chapter VII of the Convention. The group of experts on action against trafficking in human beings, which is composed of ten to fifteen independent experts, monitors the implementation of obligations under the Convention.

The Convention gives GRETA broad leeway in determining its evaluation procedure (Article 38). GRETA may address a questionnaire to all Parties, request information from civil society, and organise country visits. A questionnaire may be adopted for each evaluation round. However, like other human rights institutions of the Council of Europe – and in contrast to the UN treaty bodies – the reports and conclusions do pass through a political filter by first being sent to the Party concerned for comment, and only the Committee of the Parties can make direct recommendations to the Parties.[154] GRETA, which is currently made up to 13 independent experts, is doing its first evaluation round in 2009.[155] It hopes to present its rules of procedure for the evaluation of the Parties at its second meeting in June 2009.[156]

5.2.3 Evaluation of the Convention

Even if the Council of Europe did not achieve its stated objective of developing a comprehensive human rights document on human trafficking, progress in standards can be observed in many areas, particularly compared with the Palermo Protocol.[157] The Convention leaves the framework of crime reduction and specifies rights of victims – although at a low level – and follows a gender-resonant and child-centred approach throughout. The lack of success in separating victims' rights from cooperation in criminal proceedings is regrettable. The Convention contains interesting approaches in many areas, for example with respect to the concept of safe migration, the emphasis on rights to information, and requirements to identify victims and exercise rights to compensation. Thanks to the establishment of GRETA, measures taken by the Parties against human trafficking are subject to independent monitoring for the first time. With its work, GRETA can also contribute to the interpretation and specification of obligations under the Convention with regard to general human rights obligations under the ECHR.

The Council of Europe Convention cannot be considered to be a definitive document on human rights obligations to trafficked persons; rather, it must be positioned in the context of human rights treaties. Some aspects of it embody the obligations they contain for the specific area of human trafficking, for example with respect to preventive measures and education. In many other areas, particularly with respect to victims' rights, it will be necessary to use the extensive obligations under the general human rights treaties, which are further specified by the responsible treaty committees in General Comments and Recommendations in the state reporting procedure.

5.2.4 Ratification and implementation in Germany

Ratification of the Convention was promised for the 16th legislative term; however, a bill to that effect had not been submitted to the Bundestag by May 2009. According to information from the responsible Federal Ministry of Family Affairs, Senior Citizens, Women, and Youth, the German federal government sees no further need for transposition by legislators now that there is a statutory provision on a one-month reflection period for trafficked persons in section 50 (2a) of the German Residence Act within the framework of the 2007 Directive Transposition Act *(Richtlinienumsetzungsgesetz)*.

152 See Scarpa (2008), p. 153 *et seq.*, on Chapters IV to VI.
153 Scarpa (2008), p. 157 *et seq.*; Gallagher (2006), p. 186.
154 The Committee of the Parties is composed of the representatives on the Committee of Ministers of the Council of Europe of the Member States Parties to the Convention and representatives of the Parties to the Convention which are not members of the Council of Europe.
155 http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Monitoring/GRETA_en.asp
156 http://www.coe.int/t/dghl/monitoring/trafficking/default_EN.asp, 02 May 2009.
157 Gallagher (2006), p. 174 *et seq.*; Scarpa (2008), p. 144 *et seq.*

5.3 Law-making in the European Union

5.3.1 Current legal situation

Many political and legal measures against human trafficking have been taken in the EU since the 1990s.[158] The development of the Palermo Protocol was followed by a series of Community legal acts based on the results of the Protocol within the framework of the third and first pillars. Provisions on criminalisation were included with very few changes in the Framework Decision on Combating Trafficking in Human Beings and defined in greater detail with regard to the punitive framework, elements of the offence, and sanctions.[159] The scope of the Framework Decision is not limited to organised crime.

The rights of victims of human trafficking with respect to residence, protection, social services, and health care were included in the "Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings" of 2004.[160] However, it lagged far behind the legal situation in many Member States of the Union.[161] In many areas, the Directive does not even set minimum standards, but instead relies on national law, for example with regard to the length of the reflection period (Article 6 of the Directive), the provision of free legal aid (Article 7 (4)), and access to the labour market, vocational training, and education (Article 11). The Directive provides for issuance of a residence permit only to trafficked persons who have clearly declared their intention to cooperate with criminal prosecution authorities. The permit is issued at the discretion of the authorities, who consider the opportunity presented by prolonging a stay for the investigations or the judicial proceedings (Article 8). If the Member State offers special programmes for integration or preparation for return, the Directive specifically allows the residence permit to be made conditional upon participation in the programme (Article 12).

Other legal acts that may be relevant for trafficked persons are the Framework Decision on the position of victims in criminal proceedings[162] and the Directive relating to compensation to crime victims.[163]

5.3.2 Developments in the legal situation

In March 2009 the European Commission presented a proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing the 2002 Framework Decision.[164] The new text refers to the Council of Europe Convention and draws conclusions from the partially inadequate transposition of the old Framework Decision by the Member States. It contains a slightly different definition of the criminal acts, a minimum sentence of six years[165] for the basic offence, and a longer minimum sentence for aggravated forms of the offence. The Member States will be required to provide for the possibility of decriminalisation of victims. Provisions on the coordination of criminal prosecution among the Member States are included.

It can be considered a success for the Council of Europe Convention that new provisions include victims' rights, with regard to both the protection of victims in criminal proceedings to avoid secondary victimisation and appropriate assistance to victims so that they can actually exercise their rights, as well as measures to ensure that victims are identified. A provision on granting the necessary assistance is included which overlaps with provisions of the Directive on residence permits and to some extent supplements them. The proposal would also require the Member States to establish national rapporteurs or similar mechanisms to counter human trafficking.

A further development in European legislation is the aforementioned Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.[166] It contains a series of measures aimed at employers on the demand side and empowers employees to actually exercise their rights. Because it is not aimed at a narrow

158 See Scarpa (2008), p. 171 *et seq.*; Askola (2007); Gallagher (2006), p. 166 *et seq.*; Mentz (2001), p. 91 *et seq.*
159 Council Framework Decision on Combating Trafficking in Human Beings of 19 July 2002, OJ L 203/1 of 01 August 2002.
160 Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with authorities. OJ L261/19 of 06 August 2004.
161 Gallagher (2006), 167 *et seq.*
162 Council Framework Decision of 15 March 2001 on the position of victims in criminal proceedings, OJ L 82/1 of 22 March 2001.
163 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. OJ L 261/15 of 06 August 2004.
164 Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA. COM (2009), 136 final.
165 The Framework Decision of 2002 called merely for effective, appropriate, and dissuasive penalties in the abstract.
166 Directive of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, PE-CO_S 3612/09; Council Decision of 25 May 2009.

group of persons who have been trafficked or subjected to forced labour, but rather at irregular migrants, it also covers grey areas by strengthening rights at work.

The Commission's programme of work for 2009 also includes a Framework Decision on assistance to victims in criminal proceedings, which is to replace the 2001 Framework Decision on the standing of victims in criminal proceedings, as well as an amendment to the Directive relating to compensation to crime victims. To implement the Council of Europe Convention, it is also necessary to revise the Directive on the residence permit, at least by imposing stricter requirements for the reflection period. However, that has not yet been announced.

6 Conclusions and recommendations

6.1 Elements of a human rights approach against human trafficking

Human rights are relevant throughout the entire process of human trafficking. Human rights violations are among the causes of human trafficking, and the criminal act of human trafficking is marked by the most serious violations of fundamental rights. Human rights require the state to ensure that criminal prosecution is effective and also establish benchmarks for how victims of human trafficking are treated. Human rights develop positive obligations for the state while also establishing limits for possible approaches to combating it. Therefore, it is necessary for the origin, transit, and destination countries involved in human trafficking to base their approach on human rights.

In 2002 the UN High Commissioner issued non-binding "Recommended Principles and Guidelines on Human Rights and Human Trafficking." They emphasise the primacy of human rights and derive from them specifications for prevention, protection and assistance for trafficked persons, and punishment and redress. The Report of the EU Experts Group on Trafficking in Human Beings, which was published in 2004, also described human rights as a paramount issue.[167] The report mentions the principle of non-discrimination, government accountability, recognition of trafficked persons as holders of rights, participation, and integration of a gender and ethnic perspective as aspects of a human rights approach.[168]

Human rights obligations result both from the conventions against human trafficking which are described above and from general human rights treaties.[169] Obligations to respect, protect, and fulfil, as well as the principle of non-discrimination, come from the legal sources as a structural element of all human rights. In that regard, the different degree of obligation must be taken into account: whereas direct legal claims of the persons concerned can result from the obligation to respect and the principle of non-discrimination, the states still have discretion in fulfilling their obligations to protect and fulfil. That discretion relates only to the choice of means and not to the human rights objective to be achieved.[170] The prohibition of slavery, forced labour, and human trafficking results in an obligation to protect and fulfil as a matter of principle: the state must do everything within its power to prevent a situation similar to slavery from being created and, if it is unsuccessful, must do everything to provide to the victim the exit option of which he or she has been deprived.

Based on the legal framework defined in the preceding sections, elements of a human rights approach against human trafficking are summarised below.

6.1.1 Prevention in countries of origin

A human rights approach to human trafficking must first take into consideration the fact that human rights violations are among the causes of human trafficking. If efforts at prevention in countries of origin are to be effective, they must appropriately take these causes into account and be integrated into the context of measures to promote human rights in countries of origin. Measures to achieve rights to education and access to the labour market, to protect women against violence, and to reduce discrimination against women and ethnic and sexual minorities may be particularly relevant.

167 European Commission (2004), p. 60.
168 European Commission (2004), pp.137–143.
169 See Scarpa (2008), pp. 84–134; Obokata (2006), pp. 147–172.
170 See Schneider (2004), p. 31 *et seq.* on the justiciability of human rights.

6.1.2 Shaping migration processes

Human trafficking takes place primarily if not exclusively within the context of migration movements. As a matter of principle, the decision to admit migrants into a country's territory lies within the sovereignty of the states. However, this does not mean that the state's migration policies are not subject to an assessment based on human rights.[171] Migration policies must ensure that migrants can actually exercise their human rights. Their specific situation and particular vulnerability must be taken into account.

The human rights prohibition of human trafficking results in obligations for the states to protect. Consequently, laws on residence which facilitate human trafficking by making it easier for perpetrators to put people in a situation of dependency must be avoided. This can be the case, for example, if a residence permit is subject to the existence of a specific employment relationship.[172] Other possibilities include regulatory requirements for private parties, such as the requirement for international marriage brokers or job placement agencies to provide information.

According to the Council of Europe Convention, states should prevent human trafficking by taking appropriate measures to enable workers to migrate legally.[173] It is also important for the persons concerned to be informed back in their countries of origin about conditions enabling legal entry and employment in destination countries and about the available assistance and counselling for persons who have been trafficked into forced labour, in order to allow migrants to make informed decisions and to protect them against misinformation provided by traffickers. The new Council of Europe Convention therefore contains corresponding obligations for the States to disseminate information.[174]

Measures to regulate migration, such as border controls, should not have discriminatory effects on specific groups like young women.[175] The freedom of movement and the freedom to leave one's own country may be violated by measures that in the name of preventing human trafficking prevent emigration by a specific group of persons or make it considerably more difficult.[176]

6.1.3 Empowering trafficked persons to fully exercise their rights, particularly rights at work

Human rights as rights of self-determined freedom also include the concept of empowerment. The aim of a human rights approach must therefore be to make it possible for trafficked persons to know and assert their own rights. The point of departure for all measures must be for the affected persons to be legal subjects and not objects of state action. Trafficked persons must be informed of their rights and their options for action must be expanded in order to give them real exit options so they can escape limitations to their right of self-determination. For example, *de facto* barriers to the assertion of claims for wages and compensation must be eliminated.[177] Improving the exercise of migrants' rights at work, independent of their residence status, can contribute to ensuring that situations of dependency are never created.

6.1.4 Criminal prosecution and the protection of victims during criminal proceedings

Human rights also obligate the state, within the framework of its duty to protect, to protect individuals against violations of rights by third parties, to prosecute those violations, and to ensure restitution for the victims. The result is also a human rights obligation to ensure that the criminal prosecution of human traffickers is effective.[178] The states must use the necessary care

171 See Weisbrodt (2008) and the work of the UN treaty bodies: CERD (Anti-Racism Committee), General Comment No XXX: Discrimination of Non-Citizens, http://www.unhchr.ch/tbs/doc.nsf/ (Symbol)/e3980a673769e229c1256f8d0057cd3d?Open document; CEDAW (Women's Rights Committee), General Recommendation no. 26: Women Migrant Workers, http://www2.ohchr.org/english/bodies/cedaw/comments.htm
172 Follmar-Otto (2007), p. 8.
173 See section 5.2.2.
174 Article 5 (4) of the Council of Europe Convention.
175 Article 3 of the Council of Europe Convention.
176 Kempadoo (2005). One example, certainly extreme, is a Belarusian government decree from 2005 that includes requirements for granting of an exit permit to certain groups that are at risk of human trafficking, thereby massively limiting freedom of movement and the right to leave any country, including one's own country. Decree of the President of the Republic of Belarus no. 3 of 9 March 2005 on Certain Measures to Combat Trafficking in Persons. See provisional expert opinion of OSCE-ODIHR, August 2005, http://www.legislationline.org//lawreviews/34/1d/8f0db4d2b6cefd8b33bfbbbdeceb.pdf
177 See the study by Rabe in this volume.
178 Obokata (2006), p.148 *et seq.*; ECtHR, Siliadin v. France, Appl. no. 73316/01, judgment of 26 July 2005.

when investigating and punishing (principle of due diligence).[179] Under human rights, the criminal prosecution authorities are subject to the same obligation to investigate all forms of human trafficking, independent of whether or not it takes place within the framework of organised crime.

Human rights requirements also apply to how criminal proceedings are structured. First, the procedural rights of the accused must be protected, as shown by the fair trial principle of Article 6 of the ECHR. Limits also result from the requirement for specificity in formulating elements of an offence. Investigation methods must remain within the limits of rights to privacy and self-determination of information.[180]

At the same time, criminal proceedings must be designed to protect the rights of trafficked persons. In that regard, as part of the state's duty to respect, protective measures must be taken during criminal proceedings to prevent secondary victimisation.[181]

6.1.5 Independent victims' rights

Trafficked persons – like all residents of a state – are entitled to political, economic, social, and cultural human rights and to access to justice. These rights are independent of whether they have the status of legal resident.[182] Fundamental rights such as the right to health and the right to physical and mental integrity, compliance with strict human rights requirements pertaining to the deprivation of liberty, or the right of access to legal remedies and compensation therefore should not be subject to willingness to cooperate as a witness in criminal proceedings. Nonetheless, at present in Germany (in accordance with the minimum standard under European legislation), any right of residence beyond the one-month reflection period is linked to the willingness of trafficked persons to cooperate in criminal proceedings. Other specific victims' rights are in turn linked to possession of a residence permit. This results in a limitation that is not admissible under human rights.

Human rights also require not just the granting of entitlements to rights, but also the *de facto* guarantee of rights. This means that the affected persons are informed of their rights and that it is also possible for them to exercise their rights. The non-governmental system for providing assistance plays an important role in this.

Principles of the rule of law must also be observed: legal clarity and legal certainty can be achieved by including victims' rights in the law.

6.1.6 Programmes for the integration, protection, and repatriation of trafficked persons

Programmes for the integration, protection, and repatriation of trafficked persons must preserve the human rights of the persons concerned. They may not have a discriminatory effect or the effect of a quasi-deprivation of liberty. The exercise of human rights, for example access to health care, may not be linked to participation in such programmes. The state must also guarantee compliance with these standards when dealing with trafficked persons if it entrusts housing, counselling, and accompanying victims of trafficking when they are repatriated to private or intergovernmental organisations.

6.1.7 Human rights in the context of return and repatriation

"Voluntary return" of trafficked persons is the method used in many destination countries and is also specified in the specialised international agreements against human trafficking.[183] It must be ensured that this objective is not used to undermine rights to remain in the country of destination, for example under the Geneva Convention Relating to the Status of Refugees, under the prohibition of "refoulement" pursuant to Article 3 of the ECHR, or under the right to family and private life pursuant to Article 8 of the ECHR, by pressuring trafficked persons into voluntary return programmes without giving them sufficient information about their rights and access to formal review proceedings in programmes for voluntary repatriation.[184]

179 Declaration of the UN General Assembly on the Elimination of Violence against Women of 20 December 1993, Article 4 c); UNHCHR, Principle no. 2; Coomaraswamy (2000), nos. 51–53. Additional references in Obokata (2006), p. 150 *et seq.*
180 Human trafficking is often used as a pretext for expanding investigation methods; see speech by German Federal Minister of the Interior Schäuble on 11 March 2006: Neue Herausforderungen für die Rechtspolitik in einer globalisierten Welt, http://www.bmi.bund.de/Internet/Content/Nachrichten/ Reden/2006/03/BM__Rechtspolitischer__Kongress.html.
181 See Article 9 of the proposal for a Council Framework Decision on trafficking in human beings, (fn. 159).
182 See Weisbrodt (2008), p. 34 *et seq.*; Spiess (2007), p. 45 *et seq.*
183 Article 8 (2) of the Palermo Protocol; Article 16 (2) of the Council of Europe Convention.
184 See Sölkner/Uhl (2007).

6.2 Recommendations for further development of policies in Germany

6.2.1 Ratification and implementation of the Council of Europe Convention

The long-promised ratification of the Council of Europe Convention on Action against Trafficking in Human Beings should take place as soon as possible. The human rights obligations of the states have not been completely incorporated into the Council of Europe Convention, but it contains many interesting approaches, for example with regard to a gender-resonant and child-centred approach, the concept of safe migration, the emphasis on rights to information, and requirements to identify victims and exercise rights to compensation.

Human trafficking, particularly trafficking of women into sex work, has made its way onto the political agenda in Germany over the past decade, and practical improvements have been achieved for trafficked persons, thanks in particular to the dedicated work of cooperative structures and the establishment of a non-governmental structure for counselling and assistance. Ratification of the Council of Europe Convention in Germany should now be taken as an opportunity to put policies on human trafficking to the test. The German Institute for Human Rights recommends that efforts to do so should be oriented to the aforementioned elements of a human rights approach against human trafficking and the following political lines.

6.2.2 Move from an emphasis on criminal prosecution to a human rights approach to (labour) migration

The focus in efforts to combat human trafficking in Germany is still on the criminal prosecution of perpetrators, particularly in the area of commercial sexual exploitation. This can be seen both from legal developments, which are occurring almost exclusively in the area of criminal law, and from the common practice of linking victims' rights to their willingness to cooperate in criminal proceedings. However, criminal prosecution is only one of the necessary components of a comprehensive strategy against human trafficking. Criminal law is naturally reactive and can cover only a portion of the actual cases (the vast majority of victims are not identified) and cannot affect the grey areas in which employment relationships based on an arrangement between the parties turn into situations of duress and coercion. Concentrating the political discussion on criminal law – for example, the pros and cons of punishing the clients of sex workers – therefore does not lead in the right direction.

Action against human trafficking into both commercial sexual exploitation and labour exploitation should be integrated into an overall human rights concept for dealing with legal and illegal labour migration. As a result, empowering trafficked persons to assert their rights simultaneously moves to centre stage. This also helps to avoid an artificial separation into human trafficking into sexual exploitation on the one hand and labour exploitation on the other.

Existing laws on residence and work permits should be reviewed to determine whether they help create situations of coercion and exploitation. Greater consideration should be given to opening up the possibility for legal migration. Trafficked persons should be empowered to exercise their rights at work through information, procedural relief, and exclusion of the requirement for the labour courts to report to the immigration authorities. Implementation of the EU Directive on sanctions against employers of illegally staying third-country nationals[185] should be used as an opportunity for legislators to do this.

6.2.3 Separate victims' rights and criminal prosecution

It is necessary from a human rights viewpoint to separate victims' rights from the willingness of trafficked persons to testify as witnesses in criminal proceedings. The fact that this separation was not included in the Council of Europe Convention can be seen as the greatest defeat when negotiating the Convention. However, neither the Convention nor European legislation prohibit the states from surpassing this standard and providing for a corresponding domestic provision.

To do this in Germany, the requirements for temporary residence for trafficked persons pursuant to section 25 (4a) of the German Residence Act *(Aufenthaltsgesetz)* should be eased and residence for trafficked persons should also be allowed for other purposes, such as the assertion of claims to wages and compensation or rehabilitation for trauma cases. This could also end the practice of limiting access to special services to victims who testify as witnesses, which is questionable in

185 See section 5.3.2.

terms of human rights. Accordingly, public financing of non-governmental specialised counselling centres should no longer be limited to services to female victims who testify as witnesses.

6.2.4 Human rights monitoring and evaluation of measures against human trafficking

Human rights do not just require states to take measures against human trafficking. It must also be possible for those measures to be assessed in terms of human rights: they may not have a discriminatory effect or violate the human rights of trafficked persons (or other groups). They must also ensure that the affected people have *de facto* and well as *de jure* access to their rights. This includes establishing legal clarity and legal certainty, providing appropriate information to trafficked persons about their rights, and dismantling barriers to the full exercise of rights.

In consultation with non-governmental organisations, Germany should evaluate progress that has been made so far based on these human rights principles. The adequacy of the path that has already been taken, which is to achieve practical improvements for the affected people through cooperative structures and soft-law instruments, should also be assessed[186]. Such an evaluation of the status quo could serve as the basis for development of a national plan of action against human trafficking[187] or for the work of a National Rapporteur.[188]

186 See section 3.3.2.
187 Report of the Special Rapporteur against human trafficking, p. 26; UN DOC A/HRC/10/16, 20 February 2009; Outcome Document of the Durban Review Conference, no. 91.
188 See Article 29 (4) of the Council of Europe Convention and Article13 of the proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHAR COM (2009) 136 final.

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B

Compensation and remuneration for trafficked persons in Germany

Feasibility study for a legal aid fund

Heike Rabe

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1 Introduction

This study investigates how a legal aid fund in Germany can assist trafficked persons in asserting their claims against perpetrators for compensation and remuneration and their claims against the state for compensation. The legal framework, particularly wage and compensation claims, is analysed and impediments to their practical implementation are shown. Key players from the state and civil society who come into contact with trafficked persons are identified, along with the need for advanced training and potential partners for cooperation.

The results are based on interviews with experts in the area of work against human trafficking and labour exploitation in Germany. They deserve particular thanks for their time and for their willingness to share their knowledge.

An overview of the background conditions against which trafficked persons exercise their legal rights is provided below. It is followed by a discussion of how claims for remuneration and compensation are currently handled in Germany, along with recommendations about how this should be done in the future.

1.1 Current situation

The topic of human trafficking arises in the complex field of tension among issues of crime reduction, guaranteeing human rights, protecting victims, immigration and employment policies in the countries of destination, and development and economic policies directed at the countries of origin. Since the 1990s, legislative discussions of human rights have primarily focused on the target group of persons who have been trafficked into sexual exploitation and on the objective of crime reduction. A legally binding international definition of human trafficking was enshrined in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol)[1] for the first time in 2000. By positioning the Protocol in the area of reducing international organised crime, the focus on the criminal law approach continued. Victims' rights were formulated and granted for the purpose and from the viewpoint of criminal prosecution of perpetrators, and implementation was for the most part left to the broad discretion[2] of the states.[3]

Based on obligations under the Palermo Protocol, human trafficking for the purpose of labour exploitation has been included as an element of a criminal offence in many countries – including in the German Criminal Code *(Strafgesetzbuch)* in 2005. It was not until that time that the phenomenon slowly began to attract public attention.

In the field of social work appeals have been made for victims' rights to be based on a human rights approach with regard to appropriate medical and psychological care, secure accommodation, and a legal right to residence beyond the criminal proceedings.[4]

In contrast to these elaborate demands, the issue of ensuring regular compensation and remuneration for trafficked persons as a human right is only slowly beginning to develop.[5]

1 Supplementing the United Nations Convention against Transnational Organized Crime.
2 For example, according to Article 6 (3), each State Party "shall consider" implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.
3 See the comprehensive overview of additional international legal instruments against human trafficking in Follmar-Otto (2007) and Koopmann-Aleksin (2007).
4 See the opinion of KOK (Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt gegen Frauen im Migrationsprozess) on the draft of an Act Transposing the Residence and Asylum Directives of the European Union *(Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union)* of 5 June 2007.
5 See the study by OSCE/ODIHR on Compensation for Trafficked and Exploited Persons in the OSCE Region of August 2008.

One important element of human rights is empowerment: the state must guarantee that people who have been trafficked can assert their rights themselves. This means, first, that they must be informed about their rights and, second, it must be ensured that they can actually exercise their rights (such as those to compensation or wages). The result of the human rights obligations to protect and guarantee is that structures that promote human trafficking must be eliminated since they make it easier for perpetrators to put people in a situation of dependency. This also includes the elimination of *de jure* and *de facto* barriers to exercising existing claims to wages and compensation.[6] This aspect is also increasingly being addressed at the international level.

For example, the right of trafficked persons to compensation is specified and affirmed by the Council of Europe Convention on Action Against Trafficking in Human Beings,[7] whose ratification by Germany is currently in preparation.[8] In contrast to the Palermo Protocol, the Convention has a broad scope covering all forms of human trafficking, including those that are not connected with organised crime, and it establishes an independent monitoring mechanism – GRETA – that has broad powers of investigation.[9] Article 15 (3) and (4) of the Convention governs the rights of trafficked persons to compensation from perpetrators as well as from the state under its internal law. It results from the two paragraphs together that the Convention requires the Parties both to provide for the legal prerequisites for compensation and to adopt measures to ensure that trafficked persons can also actually exercise their rights. A state fund for victim compensation is specifically mentioned as one possibility for implementation, although the provision does give the Parties broad discretion in implementation. The expansion of infrastructure for asserting claims to compensation is also emphasised. In that regard, the Parties must ensure that trafficked persons receive information about their rights as early as possible in a language that they can understand, as well as free legal aid.

The European Commission submitted a proposal for a new Framework Decision on preventing and combating trafficking in human beings, and protecting victims, in March 2009.[10] The new text draws conclusions from the sometimes inadequate implementation of the earlier Framework Decision by the Member States. In reference to the Council of Europe Convention, it places the emphasis on victims' rights within the framework of criminal prosecution, in contrast to the earlier Framework Decision. The new Framework Decision does not go beyond the provisions of the Council of Europe Convention where compensation is concerned. In that regard, it focuses on the group of victims who are considered to be particularly vulnerable. According to Article 9, the Member States are to put special protective measures in place for this group during criminal proceedings. In that context, item 6 also mentions access to free legal advice and applications for compensation.

The 2004 Report of the EU Experts Group on Trafficking in Human Beings, an independent advisory body of the Commission, also made extensive recommendations on the issue of compensation for victims. They range from evaluation of existing possibilities for free legal assistance and the creation of appropriate mechanisms and procedures to enable trafficked persons to claim compensation. According to the Group, the discussion about compensation is so important that it should be opened at the highest political level.[11]

Generally speaking, the topic of compensation for victims is increasingly being raised as a human rights issue. For example, the EU Council placed "compensation of victims" on the agenda as an area of emphasis within the five-year framework for the work of the new EU Fundamental Rights Agency.[12]

This study has been carried out based on that existing situation. It draws on three statements:

1. There has not previously been a regular practice for obtaining compensation and remuneration for trafficked persons in Germany.

2. Under German national law, trafficked persons have under certain conditions a substantive right to com-

6 See Follmar-Otto, chapter 4 of this volume, on the human rights approach in detail.
7 Council of Europe Convention on Action Against Trafficking in Human Beings (ETS no. 197) entered into force on 1 January 2008.
8 See Follmar-Otto, chapter 5 of this volume, on the details of the Council of Europe Convention.
9 Article 38. For example, GRETA may request information from civil society, organise country visits, and take over individual complaint procedures. GRETA began its work at its first meeting from 24 to 27 February 2009.
10 Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA. COM (2009) final; Council doc. 8151/09.
11 European Commission (2004), pp. 128–129.
12 Council Decision of 28 February 2008 implementing Regulation (EC) no. 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007–2012 (2008/203/EC).

pensation and remuneration from perpetrators or employers, as well as a claim against the state for compensation. Human rights obligate the state to guarantee the actual ability to exercise these rights.

Article 6 (6) of the Palermo Protocol formulates the obligation for each State Party to ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered. This is in turn repeated and specified by the Council of Europe Convention on Action against Trafficking in Human Beings (see above). Various conventions of the International Labour Organisation (ILO) codify rights at work[13] and the protection of wages.[14] At the European level, the European Social Charter governs the right to safe and healthy working conditions[15] and fair remuneration.[16]

3. Compensation and remuneration can be instruments of empowerment. They can give trafficked persons the experience of having received justice and reflect society's disapproval of the offence. Trafficked persons can use the payments to build a new life in their countries of origin, helping to ensure that the same people do not simply get caught up again in the cycle of human trafficking.

1.2 Method and scope

Thus far cases in which trafficked persons in Germany have received Compensation and remuneration have not been statistically recorded or regularly documented. For example, the criminal prosecution statistics on sentences for perpetrators do not separately show data on the compensation of victims during criminal proceedings. The specialised counselling centres for trafficked persons do not document this aspect in their annual reports.

The following results and conclusions are therefore primarily based on interviews and research in the literature conducted between November 2007 and July 2008. Information about what is done in practice and the type and extent of compensation payments and remuneration was obtained through 32 personal and 14 telephone interviews with employees of specialised counselling centres for trafficked persons, lawyers, and representatives of public prosecutors' offices, the police, ministries, pension and benefits offices *(Versorgungsämter)*, as well as lobbying associations.

Data on the extent and amount of compensation payments and remuneration is often based on estimates. Samples of data were collected in a total of six German federal states. The experience of existing legal aid and compensation funds was also used as a basis.

The information provided by respondents is often based on their different understandings of human trafficking. This differentiation is reflected in the broad range of terminology used. It distinguishes between human trafficking into sexual exploitation and into labour exploitation and also ranges from forced labour through modern slavery all the way to wage slavery. Behind these different terms, the descriptions of individual cases reveal fundamental commonalities that are manifested in different ways: women, men, and children are being economically exploited. They receive only a small portion of what the equivalent value of their work should be. The starting point for being able to exploit them is major limitations to their abilities to take decisions and to act. Those limitations are frequently attributable to *de jure* and *de facto* circumstances associated with migration or to individual situations of distress, and third parties deliberately take advantage of them.

A definition of trafficking was not provided during questioning. The study itself refers to human trafficking into sexual exploitation and human trafficking into labour exploitation. It is thus oriented to the prevailing linguistic usage in the field, which frequently distinguishes between exploitation into or due to sex work and exploitation in the context of other economic sectors.

No interviews were conducted with trafficked persons. Assessment and opinions of trafficked persons are therefore presented primarily from the viewpoint of the system for providing assistance. The extent to which the attribution of one's own expectations played a role could not be clarified in the framework of this study. Data on trafficking of children was not included. Individual interviews with experts have shown that the issue of compensating children in Germany has not been addressed at all.

13 For example, ILO Convention 130 on medical care and sickness benefits and ILO Convention 132 on holidays with pay.
14 ILO Convention 95.
15 These include reasonable working hours, paid holidays, paid leave, and healthy working conditions.
16 See Spiess (2007), pp.46–50, for the details of rights at work within the framework of international and European treaties and agreements.

2 Field of investigation

The phenomena of human trafficking into sexual exploitation and into labour exploitation are presented separately below. This is in accordance with the areas emphasised in discussions by the public, the division into two separate elements of a criminal offence, and the current configuration of the system for providing assistance.

These phenomena certainly do overlap in practice. Sexual exploitation and labour exploitation can take place simultaneously, particularly when trafficked persons work and sometimes live in proximity to employers, for example, when doing domestic work. The two forms of exploitation cannot always be sharply divided where brothels are concerned, either. Women are forced to provide sexual services and do other work there. A considerable portion of them are willing to do sex work but are not in agreement with the working conditions. Despite the legal possibility of constitute sex work as an employment relationship that is subject to compulsory social insurance since 2002,[17] professionals who are engaged in efforts to combat forced sex work have been reluctant to speak of it as labour exploitation.

2.1 Human trafficking for the purpose of sexual exploitation

Comprehensive knowledge has been developed in Germany about the causes; trade channels; origin, transit, and destination countries as well as workplaces involved in human trafficking into sexual exploitation over the past ten to 15 years through experience and reports in the field, as well as research.[18]

2.1.1 Description of the phenomenon

Experts describe four principal ways in which adult and minor women are forced into sex work.

They assume that only a portion of women are violently forced to migrate and do sex work, although that image of human trafficking is frequently portrayed in the media.

The second way is related to the need to make a living and/or the motivation to better one's own prospects for employment. Promises are made to women about the income they can earn as domestic workers or carers, in the catering sector, or as dancers. Once they arrive, they are already ´in debt´ as a result of the journey, due to travel costs, meals, and the expense of obtaining visas and passports. They are required to pay for room and board, and in combination with physical or emotional abuse are forced into doing sex work.

A third group of women are explicitly recruited for voluntary sex work in their countries of origin or organise their own migration. They agree to working conditions that do not reflect what they face in Germany. They receive only a small fraction of the money they earn and cannot freely determine their working hours, choice of customers, or sexual practices. Violations of a discriminatory, arbitrary, and unilateral system of control are subject to ´fines´ and make the women financially dependent. They are threatened with disclosure of their real activity in their countries of origin, they are obliged to keep doing sex work by threats of injury to their family members, or they find that they can still earn more as sex workers in Germany than in

17 The second sentence of section 1 of the German Act Regulating the Legal Status of Prostitutes *(Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten)*, which entered into force on 1 January 2002, provides for the ability to sue for remuneration within the framework of an employment relationship. Section 3 adds that the limited right to issue instructions within the framework of a dependent activity does not prevent the presumption of employment within the meaning of the law on social insurance.

18 See KOK (2008), chapter 4: *Praxis*, pp. 65–106.

their countries of origin, even under conditions of exploitation.[19] According to estimates by specialised counselling centres, the group of women who knowingly migrate to the segment of sex work has further increased since the EU's latest expansion to the east. The BKA (German Federal Criminal Police Office) 2007 situation report states that "more than one-third"[20] of trafficked persons identified by the police were willing to do sex work at the time they were recruited; 25 percent were misled about the reason for their entry into Germany.[21]

Another common way in which women migrants from non-EU countries are trafficked into sex work is fictitious marriage with a German national. The pressure exerted in this scenario is the residence status[22] of the woman, which is legally tight to the husband's German nationality and is therefore contingent upon his willingness to stay in the marriage at least for 2 years.[23] There are mixed forms and overlaps among the methods described above. Once the women and girls have arrived in Germany, they do sex work in various segments. Women who are identified by the police as having been trafficked are usually found in bars and brothels, as well as in private residences.[24]

2.1.2 Scope

There is no reliable German or international data about the scale on which people are trafficked.[25] The number of cases known to the police is shown in the police criminal statistics on which the annual situation report of the BKA is based. It does not allow any conclusions to be drawn about the number of unknown cases and is less an indication of the actual extent of the phenomenon than an indicator of personnel / technical resources and the priorities of police work.[26]

It is generally agreed that human trafficking is a lucrative business,[27] that when making estimates the term "human trafficking" is frequently used as a synonym for trafficking in women, and that there are overlaps in the number of people affected by organised crime, illegal migration, and the phenomenon of smuggling of migrants into exploitation as sex workers.

Trafficked persons
Current estimates are based on different calculations, methods, and underlying definitions of the group of trafficked persons.

The International Labour Organisation (ILO) stated in 2005 in connection with a study on the forms and extent of forced labour that at the time of the survey a total of 270,000 people in industrialised countries had performed forced labour as a result of human trafficking.[28] This information includes human trafficking into both sexual and labour exploitation. An ILO press release in 2007[29] concerning the situation in Germany, which referred to the author of a study on human trafficking and labour exploitation which was done in Germany in 2006,[30] put the number of cases at 15,000. The study itself does not contain that estimate. Other estimates assume between 10,000[31] and 30,000[32] people are trafficked just into sex work in Germany every year. Neither statement provides the basis or the calculation method. This is a good example of how, particularly when estimating the number of cases that are unknown to the police, figures arise and are quoted; their validity must be considered low and they can at most be interpreted as rough approximations.

The low number of victims identified as such in police investigations is in stark contrast to the high estimates of human trafficking. The BKA 2007 situation report[33] shows the number of people identified nationally as

19 Rudat (2007), p. 2.
20 BKA (2007), p. 10.
21 BKA (2007), p. 10.
22 The right to remain in the country is linked to the lawful existence of the marriage. If the marital community is dissolved, pursuant to section 31 of the German Residence Act *(Aufenthaltsgesetz)* the spouse's residence permit will be extended for one year as a right of residence that is independent of family reunion *(Familiennachzug)* only if the marriage has existed for two years, among other requirements.
23 Prasad (2008a), p. 69.
24 BKA (2007), p. 10.
25 Commission of the European Communities. Communication from the Commission to the European Parliament and the Council. Fighting trafficking in human beings – an integrated approach and proposals for an action plan (2005), footnote 66: "Neither the Commission nor Europol nor any other EU mechanism (...) is able to publish precise figures about the EU-wide extent of trafficking in human beings".
26 Herz (2006), p. 291.
27 See Menz (2000), p. 45, with various references.
28 ILO (ed.) (2005), p. 21.
29 http://www.ilo.org/public/german/region/europro/bonn/_globalreport.htm.
30 Cyrus (2005).
31 International Organisation for Migration (1998), p. 1, cited according to Post (2008), footnote 598.
32 Friedrich Ebert Foundation (1999), p. 12, cited according to Post (2008), footnote 599.
33 The situation report for 2008 was not available at the time of final reporting.

victims during police investigations. According to it, the criminal prosecution authorities in Germany completed 454 investigations of human trafficking for the purpose of sexual exploitation and identified a total of 689 trafficked persons in that context.[34] This information therefore does not show the number of trafficked persons who were identified in one year, and instead combines trafficked persons who became known during investigations that in some cases lasted several years.

Additional references to the number of trafficked persons in Germany are contained in the statistics published by the specialised counselling centres for trafficked persons. These data are also only approximate and cannot be compared with each other or with the data gathered by the police. The individual manner in which the statistics are collected depends upon the requirements of the various funding organisations and – to extent that statistics are even published in annual reports of counselling centres – is based on public relations requirements. The representations of the statistics are inconsistent with regard to the distinction between labour exploitation and sexual exploitation, manner in which contacts with clients are recorded, and the difference between human trafficking, trafficking into marriage, and forced marriage. However, due to the number of clients served by the counselling centres, it is clear that groups of trafficked persons who have not been identified by the police are receiving advice and services. The exact number of people who have been dealt with both by the police and counselling centres remains unclear. Overall, there are currently 50 specialised counselling centres in Germany that either serve only women who have been trafficked or that place work against human trafficking in an overall context of counselling services for women or migrants. Information from some of the larger specialised counselling centres is provided here as an example.

A Bavarian organisation with three counselling centres, defines the target group for its activity as women and girls who have been "victims of international trafficking in women for the purposes of sexual exploitation or labour exploitation." It served a total of 94 women in 2007.[35] This number includes people affected by trafficking in women, labour exploitation, exploitive au pair placements, and forced marriage.

Another Central Coordination and Advisory Centre for Victims of Trafficking, is located in Hanover and provides services and assistance to "victims of human trafficking and victims of trafficking into marriage and forced marriage" in Lower Saxony.[36] It served a total of 173 women and girls in 2007, of whom 78 were identified as first contacts during the reporting year, most of whom had been trafficked.[37] Smaller organisations generally serve fewer women.

Specialised counselling centres often estimate that they serve approximately four times more women than the number known to the police. This does not allow a reliable conclusion to be reached about the number of known cases, either. For one thing, the definition of human trafficking used in the specialised counselling centres is not necessarily identical to that used by the police, and, for another, some trafficked persons known to the police are not served by the specialised counselling centres.

Perpetrators

Trafficked persons have different claims against perpetrators to compensation and wages (see section 3.1). The decisive factor for obtaining compensation for victims is as a minimum an investigation and in some cases also conviction of the perpetrators. The BKA situation report showed a total of 664 suspected perpetrators for the investigations that were concluded in 2006.[38] Comparing that number with the criminal prosecution statistics of the German Federal Statistical Office *(Statistisches Bundesamt)* shows that a total of 175 suspects were charged and 138 were convicted during the same year.[39] It must be remembered that the two sets of statistics are not harmonised with regard to either the underlying data collection methods or the form of presentation. Nonetheless, the comparison offers some indication of the great discrepancy between the number of suspects and the number of convictions. This may be due to the fact that law enforcement agencies and courts base their work on different definitions of human trafficking or that in some cases an initial suspicion cannot be confirmed. However, it also indicates the difficulties of proving human trafficking in criminal prosecutions and clearly shows how few perpetrators are ultimately available to trafficked persons who seek compensation.

34 BKA (2007), pp. 5, 8.
35 Jadwiga (2007), pp. 3, 5.
36 Kobra (2007), p. 1.
37 Kobra (2007), p. 5.
38 BKA human trafficking situation report (2006), p. 5.
39 German Statistical Office, Ausgewählte Zahlen für die Rechtspflege, Fachserie 10 Reihe 1 (2007), chapter 3.2.

2.1.3 Structure for providing assistance

It must be assumed that trafficked persons who do not receive assistance will rarely be in a position to assert their claims for compensation and wages before the authorities or in court. A lack of information, language barriers, costs, and psychological stress are only some of the impediments that must be overcome with the help of the counselling centres.

State intervention as well as legal and psychosocial assistance for trafficked persons have previously emphasized trafficking into sexual exploitation and trafficking of women and girls into sex work or related sectors. There are now some 50 specialised counselling centres in Germany for women who have been trafficked; they identify trafficked women and provide counselling and services against the background of their different funding organisations, orientations, and affiliations. Their activity substantially includes accommodation for women in shelters, support services during criminal proceedings, psychosocial counselling, and guidance and assistance for retraining. So far there are no mandatory standards for such work; the specialised counselling centres or their funding organisations independently determine the emphasis and orientation of their work.

All specialised counselling centres are now organised in an umbrella organisation, KOK (German nationwide activist coordination group combating trafficking in women and violence against women in the process of migration). It handles national coordination of the specialised counselling centres, national and international networking, and public relations work on the issue of human trafficking into sexual exploitation.

Representatives of German federal and state ministries as well as non-governmental organisations (NGOs) comprise the Joint federal and state-government working group on trafficking in women which was founded in 1997 to monitor national trends in human trafficking in Germany, analyse weak areas, and provide an impetus for changes in practice, for instance through advanced training materials.

Over the past few years, inter-institutional cooperative alliances at the federal state and municipal levels have made important contributions to improving weak areas in how trafficked persons are treated. They have worked with the responsible authorities to solve problems with identifying trafficked persons, avoiding the expulsion and deportation of witnesses, granting a reflection period, and appropriate access to medical care, psychosocial counselling, and legal advice.

It can generally be said that Germany has a complex infrastructure to provide assistance to women who have been trafficked into sexual exploitation. Not much value has been placed on regular compensation and remuneration for clients of that infrastructure. Independent of individual cases, this issue has previously been raised systematically only in relation to state compensation.[40]

2.2 Human trafficking for the purpose of labour exploitation

The extreme form of labour exploitation has received increased attention in Europe and in Germany, in some cases under the heading of human trafficking for the purpose of labour exploitation. Some fundamental research about the affected groups, extent, and segments of forced labour was done following ratification of the Palermo Protocol and translation of its requirements into national elements of an offense.[41]

For example, in 2005 the International Labour Organisation (ILO) issued a report[42] that contained an international overview of the types and extent of forced labour. In 2006, Antislavery International[43] conducted a study on forced labour that concentrated on Europe and investigated the phenomenon in four selected countries. Cyrus carried out a study on human trafficking and labour exploitation in Germany[44] in 2005 for the ILO which contained a comprehensive casebook and an analysis of the situation in Germany. Some of these studies base their conclusions on different legal requirements and terminology and use different terms

40 For example, in 2007 the Federation-*Länder* working party on trafficking in women issued a brochure on practical aspects of asserting claims against the state for compensation based on the German Crime Victims' Compensation Act *(Opferentschädigungsgesetz)*; KOK had a compilation of financial options for victims of human trafficking prepared.
41 Human trafficking for the purpose of labour exploitation, section 233 StGB (German Criminal Code) entered into force on 19 February 2005 in connection with the 37th Act Amending Criminal Law *(Strafrechtsänderungsgesetz)*.
42 International Labour Organisation (2005), A global alliance against forced labour.
43 Antislavery (2006), Trafficking for Forced Labour in Europe – Report on a study in the UK, Ireland, Czech Republic and Portugal.
44 Cyrus (2005), Menschenhandel und Arbeitsausbeutng in Deutschland.

for a phenomenon whose definition is still not clear and about whose scope there is still a great lack of clarity in the field. For example, Antislavery focuses on "forced labour in industries other than the sex industry."[45] The ILO distinguishes in its different chapters between "trafficking for forced labour exploitation, trafficking and forced sexual exploitation."[46] Within the framework of the study, forced prostitution is then consistently understood to be a subset of human trafficking into labour exploitation. Cyrus bases his study on a definition of "human trafficking into forced labour",[47] combines human trafficking and labour exploitation, considers them primarily from the viewpoint of labour exploitation, and places trafficking in women, as exploitation in the sex industry, in a series with other economic sectors.[48]

Earlier studies tended to present these forms of labour exploitation from the viewpoint of the general situation of irregular migration[49] or under the heading of trafficking in women with an emphasis on violations of criminal law.[50]

The current variety of terms and definitions that are used and the shifts in terminology reflect trends and problems in the field. The phrase "human trafficking into labour exploitation" *(Menschenhandel zur Arbeitsausbeutung)* is increasingly being used. The legal element is new and is currently still being used inconsistently by the criminal prosecution authorities, who tend to interpret it restrictively. It is particularly the distinction between work that is done voluntarily under poor conditions and forced work which causes difficulties.

In contrast, providers of assistance currently work with cases that at times do not fall under the current interpretation of the element of human trafficking but do represent severe forms of labour exploitation, for which there is no adequate terminology.

Introduction of the term "human trafficking into labour exploitation" could prompt the beginning of a shift in outlook and serve as a starting point for connecting the issue of human trafficking more with a focus on the violation of rights at work. This could also reinforce the discussion about wages and compensation to people who have been trafficked in any form.

2.2.1 Description of the phenomenon

Experts estimate that some 15,000 people in Germany are affected by human trafficking or extreme forms of labour exploitation (see section 2.1.2); the basis for this estimate is completely unclear and is not explained.

Official figures that document the number of known cases of human trafficking for the purpose of labour exploitation in Germany have been kept in police criminal statistics since this element was introduced in 2005. The police criminal statistics show a total of 92 police investigations for 2007, up 18 percent from the previous year. During those investigations, 101 trafficked persons were identified: 39 men and 62 women. This is a reversal in the ratio of the genders compared with the previous year. In 2006 the police identified 61 men and 22 women as trafficked persons. During both years, most of the people concerned had been exploited as domestic help and in the catering sector.[51] The increase in numbers and the fundamental shifts in the perpetrator and victim profiles say nothing about the extent and manifestations of human trafficking. Instead, they show an approach to a phenomenon which is still being tested. Due to the still-new element of the criminal offence and the associated lack of experience among law enforcement agencies with identifying trafficked persons, definitions of operative elements of the offence, it must be assumed that the profile of perpetrators/victims and the way in which the crime is committed in Germany will continue to change in coming years.

The specialised counselling centres for trafficked persons are starting to discuss the subject of the labour exploitation of women more often in their annual reports. For example, Jadwiga in Munich assisted 27 cases in the area of "slave labour" in 2006. In 2007, eight women were affected by "labour exploitation," and in another six cases there were overlaps with sexual exploitation.[52] The specialised counselling centres generally

45 Antislavery (2005), p. 9.
46 ILO (2005), p. 5.
47 Cyrus (2005), p. 10.
48 The element of human trafficking for labour exploitation did not yet exist at the time of the study.
49 For example Alt (1999), Illegal in Deutschland. Forschungsprojekt zur Lebenssituation illegaler Immigranten ausgehend von der Situation in Leipzig; Alscher, Münz, Öczan (2001), Illegal Anwesende und illegal beschäftigte Ausländer und Ausländerinnen in Berlin. Lebensverhältnisse, Problemlagen, Empfehlungen; Anderson (2003), ...dass sie uns nicht vergessen. Menschen in der Illegalität in München.
50 See for example Geisler (2005), Gehandelte Frauen. Menschenhandel zum Zweck der Prostitution mit Frauen aus Osteuropa.
51 BKA human trafficking situation report (2007), p. 11.
52 Jadwiga (2007), p. 4.

described an increase in the number of cases over the past few years and view this as a trend. Other organisations reported labour exploitation surrounding sex work, catering, and the cleaning sector, as well as in private households, where the centres' clients work as au pairs, carers, domestic help, or child minders.[53] Overlaps between labour and sexual exploitation and violence are particularly frequent in connection with employment in private households.

In his study, Cyrus compiled a total of 42 individual cases from various sectors of the economy and, in addition to the aforementioned sectors, observed human trafficking and labour exploitation in agriculture, the food processing, construction, fairground entertainment, and transport sectors.[54]

Thus far most studies have been based on the analysis of individual cases. As a result, special points of emphasis or even typologies with respect to sectors of economy, countries of origin or the manner in which crimes are committed can only be determined where specialised counselling centres exist that cater to particular groups of victims. One focus of the work by counselling centres for trafficked persons and counselling centres for women migrants has for years been assistance in combating the exploitation of women in private households. For example, the situation and specific problems of domestic workers for diplomats has become familiar.[55] Their residence status is linked to employment in the household of a specific diplomat, where the women generally work and live. The employers enjoy diplomatic immunity, so they are not subject to German jurisdiction.[56] There are sometimes massive violations of labour laws within the context of legal dependency and confinement. Independent of these special legal conditions, it can generally be said that the proximity in which employers and employees live promotes situations of dependency and labour exploitation.

Other specialised services offered by projects or organisations have made different affected groups more visible. According to the European Migrant Workers Union,[57] from 2005 to 2007 it provided advice on labour law to about 500 employees, primarily seasonal workers, posted workers, and agency workers from Eastern Europe. The services offered and the languages in which they were available were the main factors that determined who took advantage of the assistance. According to the Union, approximately ten percent of the cases that it handled could be classified as human trafficking or extreme forms of labour exploitation, primarily in the construction industry.

Due to the practical difficulties of distinguishing between coercion and voluntarily taking up employment and of determining acceptance of working conditions, two organisations have developed circumstances[58] and indicators[59] based on individual cases to make it easier to recognize human trafficking into labour exploitation. Both lists contain similar items with differing degrees of specificity and are oriented to the physical and mental condition of the person, the extent of freedom of movement, proximity to the employer, and the person's ability to dispose of his or her own working papers, residence permits, and funds.

As in the early days of efforts to combat human trafficking into sexual exploitation, work is beginning in the area of labour exploitation to translate life circumstances into legal elements of an offence.

2.2.2 Structure for providing assistance

There has previously been no special system to provide assistance to people who have been trafficked into labour exploitation. The infrastructure that has been established in the area of sexual exploitation is of limited usefulness.

Because they provide advisory services to migrants, some of the existing specialised counselling centres against trafficking in women have many years of experience with the labour exploitation of migrant women. Others have been increasingly confronted with the phenomenon since entry into force of section 233 Ger-

53 See also Schwarze (2007), p. 20.
54 Cyrus (2005), pp. 13–45.
55 Prasad (2008b), pp. 95–101.
56 For more information, see www.ban-ying.de.
57 The European Migrant Workers Union was founded by the German trade union IG BAU in 2005 and through late 2007 primarily represented Eastern European posted workers in the industries in which IG BAU operates in negotiations with employers as an independent professional association and also provided financial support and advisory services in court proceedings. The Union in that form was dissolved in 2008, and its tasks were transferred to the existing organisational structures of IG BAU.
58 ILO (2005a), pp. 28, 29. The ILO has identified and defined six circumstances in which forced labour occurs.
59 Developed by the Ban Ying coordination centre of Berlin as part of advanced training for the police. See http://gegen-menschenhandel.de/fileadmin/user_upload/Indikatoren-Gastgewerbe.pdf.

man Criminal Code (StGB). Most individual experience with the assertion of wage claims against perpetrators has been limited to the area of exploitation of female domestic workers.

The Joint federal and state-government working group on trafficking in women, which is financed by the German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth, stated at the time of the study that it specifically opposed expanding its area of authority and that the German Federal Ministry of Labour and Social Affairs was responsible. The working group will continue to focus exclusively on weak points in governmental and non-governmental activities related to human trafficking into sexual exploitation.

Cooperative structures against human trafficking at the federal state and municipal level are beginning to integrate the subject of labour exploitation into their agreements. Due to the small number of cases, there has hardly been any experience with implementation so far.

General counselling centres for migrants rarely work with an explicit emphasis on assistance in exercising rights at work in this area. They often concentrate on initial advisory services for regular migrants with the aim of "integrating new immigrants," on advisory services for refugees with an emphasis on advice about laws on asylum and immigration laws, and on advisory services for ethnic Germans being resettled in the Federal Republic *(Aussiedler)*.

German trade unions have launched individual initiatives to deal with labour exploitation of both regular and irregular migrants. For example, the counselling centre for foreigners run by the trade union confederation DGB in Berlin advises workers of all nationalities, independent of union affiliation, on how to get answers to their questions about labour laws and social legislation. The European Migrant Workers Union, which is described above, a national contact point for undocumented workers *(Anlaufstelle für Papierlose)* in Hamburg, and an "undocumented work" *(Undokumentierte Arbeit)* network in Berlin[60] concentrate on assisting migrants in exercising their rights at work. These individual initiatives can serve as a driving force for the establishment of a structure for providing assistance. Due to limited resources, they have not yet become permanent, and some have even been cut back[61] or have been able to help only in specific cases due to very limited hours and staffing.

2.3 Legal background conditions for trafficked persons

Basic questions about safe housing, subsistence, and residence must often be resolved before asserting claims to wages and/or compensation. Legal background conditions for trafficked persons are currently determined primarily by their nationality and residence status and are closely linked to their willingness to cooperate with criminal prosecution authorities.

2.3.1 The context of the law on residence

Some third-country nationals enter Germany unlawfully using falsified or manipulated identity documents or visas, enter without papers or marry for the express purpose of staying in the country legally.[62] In many cases they enter legally using visas for different purposes, such as taking up employment or travelling. If there is no further right to residence in connection with posted work or agency work, the right to stay in Germany often ends when the visa expires after three months.

Third-country nationals who are identified as trafficked persons are entitled to at least one month to leave the country,[63] during which time they may decide to cooperate with German criminal prosecution authorities. Pursuant to section 25 (4a) no. 3 of the German Residence Act *(Aufenthaltsgesetz)*, the granting and length of any subsequent temporary residence permit is at the discretion of the immigration authorities and depends on the willingness of trafficked persons to testify during the investigation and criminal proceedings.[64] The residence permit is therefore linked exclusively to the purpose of the criminal prosecution of perpetrators. If the trafficked persons decide for various reasons – such as threats or psychological stress – not to testify or if it is discovered during questioning by the police that they do not have any information that can be used in court, they must leave after the four-week period ends and are removed from the territory.

60 These are initiatives of IG BAU and Ver.di.
61 See footnote 53.
62 See German Federal Ministry of the Interior and German Federal Ministry of Justice (2001), p. 333 *et seq.*
63 Section 50 (2a) of the Residence Act.
64 Section 25 (4a) of the Residence Act.

Other possibilities for obtaining a residence permit in Germany are recognition of eligibility for asylum, as a refugee, or as a `hardship case.´[65] Threats to trafficked persons by traffickers if they return to their countries of origin can establish an impediment to removal from the territory and therefore a right to a residence permit.[66] These options are available only in special individual cases and are generally achieved at great expense to the system for providing legal and psychosocial assistance.[67]

EU nationals[68] who want to stay in Germany to look for work have a right to residence based on general freedom of movement for citizens of the European Union. They are entitled to what is known as an EU residence permit.[69]

2.3.2 Social welfare benefits

Third-country nationals who are identified as trafficked persons and are willing to testify are entitled to state payments under the German Asylum Seekers' Benefits Act *(Asylbewerberleistungsgesetz)*.[70] This guarantees only emergency support, because the intention is to ensure that there is no incentive for recipients of benefits to request permanent residence in Germany. The monthly support is less than the rate for social assistance and, based on the priority of the principle of benefits in kind, is paid in some cases in the form of vouchers and monthly pocket money depending on the different municipal administrations. The law requires trafficked persons who receive payment under German Asylum Seekers´ Benefits Act to be housed in group accommodation or homes for asylum seekers. Pursuant to agreements among regional or municipal cooperative alliances, this is not done much any more, and housing for women who have been trafficked is organised by the specialised counselling centres. Recipients of benefits are eligible for medical care only in emergencies and in the case of acute illnesses.[71] Recognition of the costs of interpretation and translation, which are particularly necessary for the exercise of rights, is subject to very strict requirements pursuant to section 6 of the Asylum Seekers' Benefits Act, and people in the field say that this occurs only in exceptional cases as a "miscellaneous payment."

Citizens of most of the countries that acceded to the EU in 2004 and 2007[72] face an unusual situation in several respects. Due to limitations to the free movement of workers, they have subsidiary access to the German labour market,[73] and there is also uncertainty about their entitlement to benefits under the German Social Code II (known as SGB II or "Hartz IV"), which provides unemployment benefits for job seekers, or Social Code XII, which provides social welfare benefits.[74] This phase of general harmonisation between the interpretation of national social legislation and the right to freedom of movement for EU nationals also has obvious effects on the situation of trafficked persons. There is no uniform legal opinion or practice with regard to the support payments to which trafficked persons are entitled. At the time that the study was conducted, the outcomes ranged from temporary refusal of social benefits for witnesses in investigation procedures pending clarification of the issues by the municipality to the granting of unemployment benefits for job seekers or social welfare benefits.

65 Section 25 (1), (2), and (4) of the Residence Act.
66 Section 25 (3) of the Residence Act.
67 For example, in 2007 only 1.1 percent of all applicants were recognised as eligible for asylum. *Bundesamt für Migration und Flüchtlinge* (German Federal Office for Migration and Refugees) (2007), p. 40.
68 Nationals of the EFTA countries Iceland, Liechtenstein, and Norway may also enter without a visa and are not subject to the requirement for a residence permit.
69 Section 5 of the Freedom of Movement Act/EU *(Freizügigkeitsgesetz/EU)* (2005).
70 Section 1 (1) no. 3 of the German Asylum Seekers' Benefits Act.
71 Section 4 (1) of the German Asylum Seekers' Benefits Act.
72 Czech Republic, Poland, Slovakia, Hungary, Estonia, Latvia, Lithuania, Slovenia, Romania, and Bulgaria.
73 The limitation was initially specified until the end of 2009. The "Action programme of the German federal government – Contribution of labour migration to securing the availability of qualified workers in Germany" is initially adhering to that. The current transitional provisions have been extended for EU 8 (third phase: 1 May 2009 to 30 April 2011) and Bulgaria and Romania (second phase: 1 January 2009 to 31 December 2011).
74 For example, various *Land* social courts have already expressed different views about the interpretation of section 7 of German Social Code II, which establishes a claim to payments for job-seekers. According to section 7 (1), second sentence, no. 2, "Foreigners whose right to residence results solely from seeking employment are excluded from the payment of benefits". The 19th Division of the Berlin-Brandenburg Social Court, referring to the prohibition of discrimination under EU Community law, considers exclusion of payments for more than three months to be unlawful, while the Hesse *Land* Social Court, for example, has affirmed an exclusion of benefits. For more details, see Schmitt (2009), pp. 5, 6, with additional references.

3 Compensation and remuneration

There are various ways for trafficked persons to claim wages and compensation from perpetrators or from the state, based on various fields of law.

This chapter describes the legal possibilities for obtaining compensation and wages, as well as the ways they have been implemented in practice using various procedural approaches.

3.1 Claims and procedural paths

Claims

Claims for damages against perpetrators:

Pursuant to section 823 (1) German Civil Code (BGB), trafficked persons have the right to assert civil claims for compensation against perpetrators when their "body, health, freedom, [or] property" have been intentionally injured. Section 823 (2) BGB states that "a person who commits a breach of a statute that is intended to protect another person" is required to pay compensation.

Coercive and exploitative relationships in sex work and other economic sectors are frequently established and maintained through multiple violations of objects of legal protection, such as physical integrity, and violations of protective laws, such as threats, coercion, or fraud, so there will generally be a claim against perpetrators for damages.

The claim under section 823 BGB is comprehensive and includes compensation for material damage and immaterial damage.

The purpose of compensation for material damage is to create the economic condition that would exist without the damaging event, in this case the offence.

In the area of human trafficking, it is therefore possible to claim multiple items on the basis of different offences:

- Curative treatment costs, as well as other costs, such as for rehabilitation, care, or treatment at a health resort,[75] can be claimed for treatment of physical injuries and damage to health.
- Generally speaking, trafficked persons receive only a portion of the money that they should have earned from the forced labour. They are entitled to the full amount that they would have earned after deducting the usual costs (rent, subsistence, etc.).
- Excessive migration costs that are claimed by perpetrators after the fact and that must be worked off by the trafficked persons can be taken into account.

Immaterial damage, damages for pain and suffering, is determined by the extent of injuries that have been suffered. This can involve both physical and mental impairment. Aspects such as the type and extent of injuries, the resulting pain and suffering, or the course of the illness are taken into account when calculating the amount.[76] Tables of damages for pain and suffering provide guidance about the amount of the claim based on lists of comparable cases that have already been tried in court. The tables do not yet include the category of human trafficking.

Claims for wages against perpetrators:

Pursuant to section 611 BGB, trafficked persons may be entitled to claim wages from perpetrators. The basis for the claim is an employment relationship. This is established either by an effective contract or when the employee actually does the work with the consent of the employer side.[77] The amount of the wage claim is based on the contractual agreement. As a matter of principle there is an individual freedom of contract, which may be limited by the provisions of collective

75 Palandt (2008), section 249, no. 10.
76 Palandt (2008), section 249, no. 14.
77 Palandt (2008), preliminary remarks to section 611, no. 29.

agreements and works council agreements. The number of hours worked, as well as special payments and compensation for entitlement to leave, must be included in the calculation. If there is no specific agreement, the amount is based on the usual remuneration for the work done.

Claims for compensation against the state:
In certain cases, trafficked persons are entitled to claim compensation from the state. This is based on the idea that the state, as holder of the monopoly on the legitimate use of force, is responsible for providing protection against violence and damage by criminal acts. If it cannot live up to that responsibility in individual cases, it is obligated to redress the injury.

The claim to compensation results from section 1 of the German Crime Victims' Compensation Act *(Opferentschädigungsgesetz)*. Its primary objective is to restore the physical and mental health of trafficked persons to the extent possible, thereby allowing participation in society and work. This claim includes curative treatment of the injury, payment of a pension that is independent of income and based on persistent effects of the injury, and income-based payments to replace lost wages. In contrast to claims for damages against perpetrators, this claim does not include either damages for pain and suffering or compensation for damage to property or financial losses.

All claims are potentially available to people who have been trafficked for either sexual exploitation or labour exploitation.

Procedural paths
There are several ways in which trafficked persons can assert claims for damages against perpetrators.

- The claim can be made in criminal court during the criminal proceedings for human trafficking in the so called adhesion procedure.
- Civil claims are also an option, independent of whether criminal proceedings are conducted. The Local Court *(Amtsgericht)* has jurisdiction when the amount at issue is up to € 5,000. The action must be brought in the Regional Court *(Landgericht)* when the amount at issue is over € 5,000.
- If the damage is related to an employment relationship, the claim can also be asserted in connection with the claim for payment of wages before the Labour Court *(Arbeitsgericht)*.

Trafficked persons can assert their claims to payment of wages before the Labour Courts. Claims for compensation from the state are handled by the pension and benefits offices *(Versorgungsämter)*.

The table below provides a summary of claims for compensation and wages under the German legal system. Distinctions are made according to the type, addressee, scope of payment, and procedural path of the claims. Legal claims based on human trafficking into both sexual exploitation and labour exploitation are combined. In that respect, the previous dual structure is being abandoned. However, practice has shown that the two phenomena – human trafficking into labour exploitation and sexual exploitation – similarly continue to be treated in parallel when exercising rights to compensation and remuneration. In the context of human trafficking into sexual exploitation, the emphasis is on the assertion of claims for damages. The issue of claiming wages that have been withheld has hardly been raised in this area. The practice for human trafficking into labour exploitation has tended to be to sue for back wages. Issues of compensation for material and immaterial damages have not previously played much of a role in this area.

3.2 Compensation from perpetrators in criminal proceedings

Trafficked persons often have a claim to compensation against perpetrators due to unlawful actions under section 823 BGB (German Civil Code). It is possible for them to be compensated in various ways in criminal proceedings.

Adhesion procedure
In general claims for damages under civil law are directed against the party that caused the damage and can be asserted as part of criminal proceedings using the "adhesion procedure" *(Adhäsionsverfahren)* to institute an ancillary civil action under sections 403 *et seq.* German Code of Criminal Procedure (StPO).

The adhesion procedure offers some advantages to trafficked persons. They only need to conduct one court procedure, in which the perpetrators are ideally convicted and they can receive compensation to the full extent. The damage that is subject to compensation includes all major material and immaterial (pain and suffering) items (see above). The court has already determined the criminal offence, the party who committed the offence, and the consequences of the injury for the criminal conviction, so the trafficked persons themselves often need not prove any further facts for the claim under civil law. The application for damages is made to the criminal court that also handles the proceedings on human trafficking. However, the court need not necessarily take a decision. This is one of the

Table 1: Compensation and wages

Claim against	Perpetrators	Perpetrators	Perpetrators	Perpetrators	State
Procedural path	Criminal proceedings Adhesion procedure Local Court/ Regional Court depending on offence and penalty	Civil proceedings Local Court/ Regional Court if action over € 5,000	Labour Court proceedings Labour Court	Außergerichtliche Verhandlung	Official proceedings Pension and benefits office
Scope of payments	Damages*: a) Immaterial damage, damages for pain and suffering b) Material damage, for example lost wages, costs for curative treatment and medical treatment, damage to property	Damages*: a) Immaterial damage, damages for pain and suffering b) Material damage, for example lost wages, costs for curative treatment and medical treatment, damage to property	Wages Damages*: a) Immaterial damage, damages for pain and suffering b) Material damage (see civil proceedings)	Wages Damages*: a) Immaterial damage: Damages for pain and suffering b) Material damage (see civil proceedings)	Compensation:** Limited matrial damage: For example, costs of curative and medical treatment, treatment at a health resort, pension, therapy

* The claim for damages is oriented to restoration of the situation as it existed before the occurrence of damage to the injured party. The scope depends on the type and extent of the damage.

** The claim against the state for compensation is oriented only to restoration of the physical and mental integrity of the injured party. For example, it does not include damages for pain and suffering.

*** The claim against the employer for damages is subject to an exclusion of liability for the employer if the injury was due to negligence or it was work related.

weaknesses of the statutory structure of the adhesion procedure for trafficked persons. If the application for material damages is not appropriate for the criminal proceedings, for example because it would markedly delay the proceedings, the court can refuse to rule on it. The situation is different when only damages for pain and suffering are being claimed as part of the total damages. Then the court must generally at least make a finding on the claim based on the merits of the case. This means that it decides whether the trafficked person fundamentally has a claim against the perpetrators (section 406 (1) StPO). The trafficked persons must then have the amount of the claim determined in ancillary civil proceedings.

Other ways to obtain compensation

During criminal proceedings, perpetrators may also offer money to trafficked persons as a compensation payment, which is generally favourably taken into consideration when determining the sentence. Another option is to make the compensation payment a condition of probation. This assumes that the perpetrator is sentenced to imprisonment, and it has the advantage that the court with jurisdiction over enforcement monitors whether payment is actually made. This relieves trafficked persons of the need to have to see to actual payment of the funds themselves, under certain circumstances with the assistance of a lawyer.

3.2.1 Current practice – type, scope, and extent of compensation payments

There has not yet been a systematic survey of how compensation is obtained for trafficked persons. Some indications of the current situation are contained in a survey by KOK (German nationwide activist coordination group combating trafficking in women and violence against women in the process of migration), which sent questionnaires to its member organisations as part of the shadow reporting under Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), from 2000.[78] The design of the questionnaire clearly shows that compensation of trafficked persons was neither a focus of the work done by the counselling centres nor a constant

78 The results are based on information from the 25 specialised counselling centres that were known to KOK at the time. A total of 18 responded. Ten counselling centres provided information about their experience with compensation for trafficked persons.

in the discussion about combating human trafficking.[79] The results indicate that, at the time of the survey, trafficked persons virtually never received compensation. Six of the specialised counselling centres that were surveyed stated that the adhesion procedure had never been used to apply for compensation to the victims of human trafficking whom they assisted, and four estimated that this would rarely occur. The assessment of actual practice for obtaining compensation in criminal proceedings was correspondingly negative. Eight specialised counselling centres stated that trafficked persons had never been awarded damages for pain and suffering, and two centres stated that this was rarely the case.[80]

This situation had hardly changed by the time of the study, eight years later. Previous experience has been based solely on criminal proceedings for human trafficking of women into sexual exploitation. There have been some proceedings for trafficking into labour exploitation involving men since entry into force of the element of the criminal offence in 2005, but no information was provided about compensation payments in those proceedings. Therefore, the discussion below relates to claims to compensation by women who had been trafficked.

Compensation payments

Hardly any adhesion proceedings were conducted in connection with criminal proceedings for human trafficking. Most compensation is currently paid in the framework of negotiations with perpetrators. In that regard, compensation payments in criminal proceedings are positioned in various ways in the proceedings. Through their legal counsel, perpetrators offer a full admission of guilt and payment of compensation. This can spare the trafficked persons from having to testify during the trial and result in a reduced sentence for the perpetrators. The compensation is integrated as an object that is taken into consideration for reduction of the sentence, as a condition for probation, or in connection with restorative justice.

Breadth and levels of compensation

Close cooperation between counselling centres and specialist lawyers has developed over the years as they work to combat human trafficking into sexual exploitation. Representing trafficked persons as witnesses in court is only a very small part of the professional activity of the individual lawyers. Depending on the region and cooperative structure, they may represent between one and eight women each year. Individual lawyers may represent the clients of several counselling centres. One lawyer stated that in 2007 she served some 30 new clients who were classified as victims of human trafficking into sexual exploitation, and she also represented clients in a *Nebenklage* (an accessory prosecution procedure that permits victims to participate through counsel in the main proceedings on nearly equal footing with the public prosecutor and the defence) 12 times. She estimated that about 30 percent of the women whom she represented in court received compensation during criminal proceedings.

This discrepancy between the number of witnesses and the number of people who receive compensation is also confirmed by information from the counselling centres. One counselling centre from the southern part of Germany stated that in 2006 the social workers assisted 34 women who testified at criminal trials, but only "a couple of them" received compensation. One specialised counselling centre from another part of Germany assisted a total of 124 clients in 2007. Two of them received compensation during criminal court proceedings. A small counselling centre that assisted a smaller number of clients (22 in 2007) stated that two of them received compensation.

The amount of the compensation payments was not determined by the amount of the damages claimed by trafficked persons but rather by the assets of the perpetrators and by the law enforcement agencies' technical expertise in the seizure of profits and their dedication. In a few isolated cases, women were awarded between €12,000 and €30,000. Most of the compensation, however, was between €1,000 and €4,000. A glance at the tables of damages for pain and suffering that are used by the courts as the basis for determining compensation payments will show first that there are not yet any representative cases of human trafficking and therefore there are no reference values. Moreover, it is clear that these payments are far less than what is generally promised in other cases, for example to women who have been raped. An evaluation of selected case law related to this criminal offence showed that damages for pain and suffering in the amount of €12,500 were frequently recognised for rape without further violence. The courts usually considered €25,000 to €30,000 to be appropriate for brutal, degrading attacks or particularly serious consequences.[81]

79 There is only one question on compensation, which relates exclusively to claiming compensation for pain and suffering in adhesion procedures and civil proceedings.
80 Arbeitsgemeinschaft Schattenbericht (2000), questions C 4 a) and b).
81 See the current summary of compensation for pain and suffering in the case of sexual offences in Lörsch (2007), p. 152 *et seq.*

With this approach, it is deliberately accepted that the perpetrators determine the amount of the payments and that the trafficked persons can obtain only a small portion of the damages to which they are entitled. Generally speaking, the women also provided sexual services for a certain number of clients over a certain time period, for which they received only a low level of remuneration. In some cases they invested a great deal of money in organising their migration. It is not rare for perpetrators to claim that they have incurred debts of between € 40,000 and € 50,000 as a basis for demanding payment for the trip from African countries to Europe, which the women then work off. It must be presumed that these amounts are higher than the actual costs of helping someone migrate. The extent to which such payments can be conclusively shown when claiming damages during proceedings must be tested in legal practice. Moreover, very little experience or routine is being developed in the context of claims for damages by trafficked persons, for example those who have provided services in the various segments of sex work.

3.2.2 Primary factors that influence how compensation is obtained during criminal proceedings

There were various reasons for these inconsistencies in obtaining compensation.

Few criminal proceedings

Based on estimates of the number of trafficking cases not known to the police, it must be assumed that many trafficked persons are not compensated because there are simply no proceedings against the perpetrators. Only a portion of the women concerned are even identified by the police as victims of human trafficking. And the court institutes criminal proceedings against only a portion of suspects who have been investigated.

The counselling centres also serve women who do not wish to lodge a complaint. They worry about the possibility of remaining in the country, are fearful of the perpetrators, do not see any benefit for themselves from lengthy criminal proceedings, or want to return to their countries of origin as soon as possible. Of the group of women who do lodge complaints, charges are sometimes not filed because the perpetrators cannot be determined or because a conviction is unlikely based on information provided by the women.[82]

This is also shown by the statistics about cases known to the police. As discussed in section 2.1.2 above, the number of convictions for human trafficking is much lower than the number of suspects investigated by the police.

Information from the counselling centres also indicates an obvious discrepancy between the number of trafficked persons and the number of witnesses. For example, one specialised counselling centre stated that in 2006 it served 86 clients as part of its victim protection programme. Of those, 34 women testified during the criminal proceedings. One specialised counselling centre from another part of Germany served a total of 124 clients in 2007. About 40 percent of the women had contact with the police. About half of them were willing to testify. A smaller counselling centre that served fewer clients (22 in 2007) assisted four women in connection with court proceedings.

Lack of access to perpetrators' assets

Trafficked persons can assert claims for damages only if assets are accessible to them. In actuality, that is frequently not the case, and the lawyers who were surveyed repeatedly mentioned this as a serious problem, attributing it to practical and legal difficulties.

In some cases, the law enforcement agencies could investigate only perpetrators at the lower levels of the hierarchy, and it was obvious that judgments against them amounting to tens of thousands of euros over the next few years could not be enforced. Lawyers can see from the files relating to the investigation whether there are any assets confiscated by the police. That was how they decided whether claiming damages was worthwhile.

It also depends on the work done by the law enforcement agencies whether assets are even shown in the investigation files. Sections 73, 73a, and 73d StGB (German Criminal Code) and section 111b (5) and section 111d StPO (German Code of Criminal Procedure) provide legal tools for proceedings on human trafficking so that the assets of perpetrators can be secured for the benefit of the state or trafficked persons. According to section 73 (1) StGB, the court must order forfeiture of an asset if it was acquired as a result of an unlawful act. The purpose of this provision is to prevent the unlawful enrichment of perpetrators.[83] Any assets that are seized will benefit the state if the persons affected by the crime do not claim damages. In

82 Some of the women are unable to say where the brothels in which they had to work are located or do not know the names of the perpetrators, or the criminal prosecution authorities do not find their statements credible.

83 BGHSt (Federal Court of Justice criminal decisions) 31, 145.

that case, their claims have priority and forfeiture as specified in the second sentence of section 73 (1) StGB is not possible.

To secure the claims of trafficked persons in such cases in spite of this, the criminal prosecution authorities can temporarily secure the assets through confiscation or attachment within the framework of assistance with recovery *(Rückgewinnungshilfe)*. The trafficked persons would then have a maximum of three months within which to assert their claims. Practical difficulties arise here, too. The BKA human trafficking situation reports indicate that over the past four years investigators in proceedings on human trafficking into sexual exploitation have been able to secure assets in only three to seven percent of investigations[84]. It remains unclear why that rate is so low. Insolvent perpetrators, a lack of resources for the police or public prosecutors, as well as specialisations could play a role. A comparison with the situation report on organised crime will show that the seizure of assets has a different status there. For one thing, the report provides a separate chapter on the issue and, for another, the percentage of procedures in which measures were taken to secure assets was much higher. During reporting year 2007 the rate was about 29 percent, slightly above the level for previous years (2006: 25.9 percent; 2005: 25.4 percent; 2004: 24.2 percent; 2003: 25.3 percent).[85] Because human trafficking is often attributed to segments of organised crime, where enormous profits can always be presumed, the great difference between the importance of securing assets from the two types of crime is astonishing.

Respondents mentioned the expulsion and removal of non-German perpetrators as another impediment.

In addition there is still little experience with the enforcement of claims outside of Germany. Provisions on enforcement differ in the individual European countries. There may be additional costs for service, translation, or legal counsel in the various countries. The introduction of the European order for payment procedure[86] and the European enforcement order[87] is intended to make cross-border assertion of undisputed claims simpler and less expensive, but so far there has been no experience with the enforcement of claims for damages in the area of human trafficking.

Lack of experience with the adhesion procedure

According to the lawyers surveyed, there is still some hesitation by the courts to use the adhesion procedure or the right of trafficked persons to compensation is not regularly taken into consideration when structuring the criminal proceedings. According to respondents, some of the courts are still relatively unfamiliar with this legal institution. Other courts are unwilling to handle applications as part of the adhesion procedure and make this perfectly clear to the participants. Lawyers report that they have therefore decided in some cases to refrain from making the application due to tactical considerations.

In addition, some respondents described judges who do decide on an application but only rarely go above the mandatory amount prescribed by law according to the decision on the merits about the right to damages for pain and suffering (see section 3.2.1). Trafficked persons would then have to make their claims about the amount of the damages for pain and suffering and for material damages during subsequent civil proceedings before the Local Court or Regional Court.

"Settlements" as part of criminal proceedings also cause difficulties for the assertion of claims. In the experience of respondents, these arrangements now also frequently occur in proceedings for human trafficking. They take very different forms. In one approach that is said to be common, perpetrators make an admission of guilt early on which shortens or ends the proceedings. A proposal on a framework for sentencing is negotiated out of court among the defence, the public prosecutor, and the court. Counsel for the *Nebenklage* is not regularly involved in the negotiations and is not informed about a possible outcome until the trial. The settlement reduces the time needed for the proceedings. There is no additional collection of evidence about the precise amount of damages which might prolong the proceedings.

Some lawyers report that, based on their individual legal specialties, they have little experience with the adhesion procedure in proceedings on human trafficking. Those who had little experience with legal representation in civil cases hesitated, like the judges, when calculating claims to damages. In isolated cases, they went so far as to specifically refuse such claims, referring to

84 BKA situation report on human trafficking (2004–2007).
85 BKA situation report on organised crime (2007), p. 10.
86 Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ EU L 399/01 of 31 December 2006; entered into force on 12 December 2008.
87 Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ EU L no. 143/15; entered into force on 21 October 2005.

the difficulties and time involved. Other lawyers considered the adhesion procedure to be fundamentally unsuitable for proceedings for human trafficking. They preferred to negotiate compensation payments for their clients. This had the advantage that in some cases trafficked persons were spared from testifying. Neither was it necessary to calculate the specific amount of the claim for damages for pain and suffering under civil law. It could be estimated. This avoided any difficulties related to calculating and proving lost earnings in sex work, for example, such as the number of customers and the level of prices. In addition, according to the lawyers, the situation offered the advantage that perpetrators still have the prospect of a reduction in their sentences, so the greatest possible pressure could be put on them. If payment of the amount that had been negotiated was then ordered as a condition for probation, the enforcement division was responsible for compliance. This relieved trafficked persons from enforcement of their own claims.

These strategies often allowed trafficked persons to obtain only a small portion of the damages they claimed. They also led to stagnation in use of the adhesion procedure. If, contrary to the statutory requirement, it is not actively introduced into the proceedings by the judge or the lawyers, that consolidates the status quo and prevents debate and further development of the adhesion procedure in legal practice. On the other hand, in the framework of a less confrontational and more negotiation-oriented approach, the aspect of lessening the burden on trafficked persons is particularly attractive. Not having to testify in court spares them from have to recount what they have been through again after repeated questioning by the police. They can avoid meeting the perpetrators and receive the compensation payment relatively soon. So far there has been no further discussion about the advantages and disadvantages of both approaches in the field.

The specialised counselling centres that were surveyed also place a different emphasis on compensation to their clients when they advise them. Those that consider compensation to their clients to be important retained dedicated legal counsel, informed their clients, and encouraged them to insist on their rights. Others, however, considered the main aim of their work to be to stabilise clients for criminal proceedings and to organise travel back to their countries of origin. The decision in favour of the subject area orientation, emphasis of work, and services offered to clients by the counselling centres therefore depends on the individual people or counselling centres, given the lack of mandatory standards. For example, some counselling centres define information about claiming damages for their clients as a standard part of the counselling they provide and consider compensation to be very important. Others assumed that compensation was not a relevant issue for their clients. Given the amount of information that must be provided to witnesses in particular, compensation was considered to be of little or no importance.

3.3 Compensation from perpetrators in civil proceedings

Pursuant to section 823 BGB (German Civil Code), trafficked persons may assert a comprehensive claim for damages against perpetrators in civil court, legally independent of any criminal proceedings being conducted (see section 3.1). As plaintiffs, they bear the burden of proving the type and extent of the damage and showing that it was caused by the perpetrators.

3.3.1 Initial situation

Trafficked persons rarely claimed damages in civil courts. Most of the specialised counselling centres and lawyers that were questioned had no previous experience with it. There were specific reports of only four proceedings instituted by people who had been trafficked into sexual exploitation. The amount of the compensation payments that were awarded is unknown. Any proceedings instituted in civil court followed earlier criminal proceedings. According to the lawyers, the requirements for proving the basis for and amount of claims for damages in civil proceedings would not have been fulfilled without the findings from the criminal proceedings.

Lost earnings from sex work could be successfully claimed only when there was evidence from the investigation. For example, this could be based on extensive telephone monitoring of the perpetrators or the testimony of witnesses who could provide information about the number of customers or the prices charged. In one case brought in civil court by a trafficked person at the time of the survey, she also asked for lost earnings from sex work, for which she was exploited over a prolonged period along with her sister. The lawyer considered this situation to be an absolute exception. In another case, the civil proceedings were based on an earlier criminal conviction of the perpetrator for human trafficking and damages awarded on the merits during the adhesion procedure.

3.3.2 Primary factors influencing current practice

Respondents rated the frequent insolvency of the perpetrators in conjunction with the emotional and time pressures on their clients due to a second court procedure as the main reason for their decision against civil proceedings. The argument of insolvency was more of a consideration when trafficked persons were considering subsequent civil proceedings than in the case of criminal proceedings. The prospect of conducting additional court proceedings to get "only" an award that could not be obtained in case of doubt was not motivating when considering additional court proceedings.

Third-country nationals are generally no longer in a position to institute civil proceedings due to their obligation to leave the country at the latest after conclusion of the criminal proceedings.

For some trafficked persons, the cost risk was decisive for deciding against assertion of their rights. In some cases, the trafficked persons were slightly above the statutory limit for income and assets and were not considered to be financially needy, so they were not entitled to legal aid. They could not afford to and did not wish to invest in proceedings with an uncertain outcome. In some cases, lawyers report that the courts delay a decision about legal aid, so that fees are incurred without a promise that they will be covered. If the request for legal aid is then denied because there is no prospect of success, the party has to bear the costs that have occurred. Some women did not want to run that risk.

3.4 Seeking claims for wages

Pursuant to section 611 BGB (German Civil Code), trafficked persons can claim payment of wages from an employment relationship independent of their legality under laws on residence or labour laws. Even without a legally effective employment contract, based on what is known as the *de facto* employment relationship, it has been the constant case law of the German Federal Labour Court that work that has been done is subject to remuneration.[88] If the employer is based in Germany, the German Labour Court has jurisdiction (section 12 *et seq.* ZPO [Code of Civil Procedure]). Depending on the subject of the action, tight deadlines may have to be met when the action is brought. These exclusionary deadlines for the assertion of wage claims in court can result from individual employment contracts or collective agreements. After the action has been brought, the Labour Court first holds a conciliation hearing. If the parties are unwilling or unable to reach an amicable agreement there, a judgment is handed down at a later hearing. The affected persons bear the burden of proving the facts establishing the claim, such as the existence of an employment relationship, the length of time worked, or the amount of the wage.

There are specific requirements for certain sectors in which trafficked persons are presumed to work in more than isolated cases. For example, based on the German Posting of Workers Act *(Arbeitnehmer-Entsendegesetz)*, minimum standards for wages (minimum wage), the entitlement to leave, and contributions to a holiday fund have been specified for the main construction and secondary contracting sectors. Pursuant to section 1a of the Act, the general contractor's liability applies to net pay. Employers are subject to extensive controls and reporting requirements.[89] This makes it easier for the affected people to provide documentation, at least in reference to the amount of the hourly wage. In addition, the general contractor can be sued when there is a confusing structure involving multiple subcontractors.

There are also indications of human trafficking in the context of seasonal work,[90] which is particularly important for agriculture and forestry. Minimum wages may be specified for seasonal work. Non-German workers are considered to be employees just like German seasonal workers, so they are as a matter of principle subject to statutory requirements for sickness, long-term care, and unemployment insurance and are entitled to the same pay. In the area of worker housing, there are minimum requirements for the size, furnishing, and

88 See, for example, BAG (German Federal Labour Court) 15 January 1986 – 5 AZR 237/84. *De facto* employment relationship in the event of continued employment in spite of effective termination.

89 After inclusion in the Posting of Workers Act, all employers in the sector concerned are required to record the beginning, end, and length of the employee's daily working time (by the end of a shift at the latest) and to retain those records for at least two years. Employers must be able to provide the necessary documents for auditing of compliance with working conditions under the Act (employment contract or documents that must be prepared under the German Act on Documentation of Conditions Governing an Employment Relationship time sheets, payslips, and documentation of wage payments).

90 Workers from non-EU countries and those from the new EU Member States whose freedom of movement is limited can obtain a work permit for seasonal employment in Germany under certain conditions if they are not employed for more than four months a year and if they work in certain sectors: agriculture, forestry, the hotel and catering sector, fruit and vegetable processing, and sawmills.

use of kitchens and living and sleeping rooms, as well as the reasonableness of rental payments.[91]

Since entry into force of the German Prostitution Act *(Prostitutionsgesetz)* in early 2004, sex workers can also enter into legally effective contracts, such as employment contracts subject to compulsory social insurance, with operators of brothels and similar establishments and claim wage payments under those contracts.

3.4.1 Initial situation

Trafficked persons have previously asserted wage claims against perpetrators only in isolated cases. The cases that were discovered by the study related exclusively to the area of human trafficking into labour exploitation.

The specialised counselling centres reported on individual cases of labour exploitation in private households in which women were able to sue or negotiate payment of wages that had been withheld. For example, payment for two years of back wages totalling €22,500 to a domestic worker was obtained through out-of-court negotiations between the advising specialised counselling centre and the Yemeni embassy. That amount was only a portion of the claim calculated by the lawyer. The diplomatic immunity of the employer prevented further steps under criminal or civil law.[92] In another case, a counselling centre for migrants in Hamburg claimed wages totalling €47,000 from the employer of a domestic worker who had been employed under the cloak of an au pair relationship within the framework of mediation through the Labour Court in 2008.[93] In cases of this type, the affected persons generally received payment only for the regular weekly working hours in the respective service sector. No compensation was obtained for the work that was actually done, for entitlement to leave, or for physical illness attributable to the working conditions.

From 1997 to 2004, the ZAPO[94] project provided assistance to workers from Eastern Europe in exercising their rights at work and also gained experience with the assertion of wage claims in court by irregular migrants.[95]

In addition, most of the experience of the European Migrant Workers' Union was in assisting regular Eastern European migrants in out-of-court negotiations with employers to obtain payment of wages and wage components and the transfer of social insurance contributions to the workers' countries of origin. These were primarily workers in the construction sector.

3.4.2 Primary factors influencing the practice for claiming wages

Failure to identify and assist the affected persons

The main problem in establishing a practice for obtaining remuneration has been that people who have been trafficked into labour exploitation are rarely identified due to the lack of specialised knowledge on the part of the investigating authorities and gaps in the structure for providing assistance (see section 2.2.2).

The responsibility of the police sometimes differs with respect to the two elements of the offence of human trafficking. For example, the BKA (Federal Criminal Police Office) and the federal state criminal police offices have established parallel areas of authority over the past few years, with the consequence that specific knowledge must be developed in the departments that fight human trafficking into labour exploitation. Where existing special police units took on cases under section 233 German Criminal Code (trafficking into labour exploitation), the focus is on trafficking in women and on sex work.

The authority to monitor fields of activity and workplaces[96] outside of sex work, as well as to independently conduct any subsequent investigations[97] was given to officials in the customs administration when the German Act on Combating Undeclared Work *(Gesetz zur Bekämpfung der Schwarzarbeit)* entered into force. People who have potentially been trafficked now encounter customs agents from the Department

91 BA (German Federal Employment Agency) (2008): Merkblatt für die Vermittlung und Beschäftigung ausländischer Saisonarbeitnehmer und Schaustellergehilfen.
92 See Prasad (2008b), pp. 98, 99.
93 The amount paid is not known. The parties signed a confidentiality agreement.
94 ZAPO, the German acronym for the Central Contact Centre for Commuters from Eastern Europe, was a project under the aegis of the Polish Social Council. Its funding was terminated in 2004.
95 The experiences and difficulties of this project are included in a guide that years later still contains information that is relevant for current practice: http://www.labournet.de/diskussion/wipo/migration/zapo.html.
96 Section 3 *et seq.* of the Undeclared Work Act.
97 Section 14 of the Undeclared Work Act.

for the Investigation of Undeclared Work *(Finanzkontrolle Schwarzarbeit)* on construction sites or in commercial kitchens. The agents' role, in combination with a lack of awareness of the issue of human trafficking, has in the view of experts led to the trafficked persons being perceived primarily as persons without a lawful residence status and/or work permit and to their rights as workers being neglected.[98]

Moreover, trafficked persons generally do not know their rights and are often kept in social isolation by their employers and also deliberately kept in the dark about their rights. Trafficked persons obtain information only when specialised counselling centres are active, particularly when they work proactively or seek out the persons concerned. In the case of seasonal work and posted work,[99] the work permit can be requested by the employer, so trafficked persons do not necessarily come into contact with government officials. There are no state requirements to provide information. The investigating authorities apparently do not consider it to be their job to provide information to trafficked persons.[100]

It became apparent during the interviews that, similar to the area of human trafficking into sexual exploitation, people who are exploited for their labour in sectors outside of sex work have a great need for assistance and sometimes for housing. Workers on construction sites or farms generally live near their jobs in housing provided by the employer, for example in portable buildings. When they institute proceedings under labour or criminal laws, they must quickly move to new lodging. There are serious shortcomings in this area, particularly for men. At the same time, there is a need for language services, legal advice, and support services for the affected people.

Very little of the existing structure for providing assistance is oriented to this. With a few exceptions, the specialised counselling centres against trafficking in women do not have a plan for advising this group of people with their specific needs related to exercising their rights at work, and for most of them counselling men is not within their remit.

Moreover, in many regions there is no established form of cooperation between counselling centres and lawyers who specialise in rights at work. Respondents attributed this to the early development of this subject area. It was also explained by the fact that this field of work is unprofitable. Language difficulties, the need for a high level of support services, in some cases low amounts at issue, and a low rate of state aid for advisory services make the amount of work that must be done appear unattractive in light of the payment received.

Reporting requirements

Migrants without residence or work permits rightly fear negative consequences when they come into contact with government officials. They run the risk that steps to end their stay will be instituted unless they are identified as trafficked persons, which currently does not happen very often. Bringing an action before the labour courts involves the risk that they will be reported to the immigration authorities, with the same consequences. Pursuant to section 87 (2) of the German Residence Act *(Aufenthaltsgesetz)*, the courts are required to report an irregular residence status if they become aware of it "in performance of their duties." There is some disagreement[101] about the interpretation of this legal term, which has led to different ways of doing things and also causes considerable legal uncertainty for the affected persons, which legal advisors and counselling centres must point out.

Because legality of residence is immaterial for the existence of a wage claim, illegal residence need not necessarily immediately become known to the court. A counselling centre can be designated as the address for service. It is up to the court whether the plaintiff is required to appear personally. Nonetheless, the remaining incalculable risk represents a major impediment for the people concerned. Therefore, counselling centres and legal advisors have little experience in this area due to the low number of cases.

Difficulties in providing evidence

If trafficked persons do decide to bring an action, they must first bear the cost risk. In the Labour Court procedure, the parties each pay the costs of their own legal representation in the court of first instance. Approval of legal aid for court costs depends on the prospect that the action will be successful, which is assessed by the court, as well as the financial need of the persons concerned. In some cases it is difficult for them to submit the documentation of their personal and economic circumstances which is required for the application.

98 Cyrus (2005), p. 80.
99 These are primarily workers who are posted to Germany by employers in other countries to provide cross-border services, primarily in the main construction and secondary contracting sectors, under the German Posting of Workers Act.
100 Spiess (2007), p. 52; Schwarze (2007), p. 24.
101 See Spiess (2007), pp. 51, 52, with additional references.

During the proceedings, there are often problems with providing evidence about the type and amount of work done and the length of the employment relationship. When the people concerned work under formal employment relationships, they may be pressured, for example, to sign time sheets that are filled out by the employer. If they are taken by collective transport to multiple work places and then picked up, they often have trouble stating specifically where the work was done and what work was involved. It is difficult to prove the number of hours worked above and beyond the usual working time, particularly in the sector of domestic work, where the affected people live in the employer's home and in some cases must be available to do any work that arises.

3.5 Compensation by the state – the German Crime Victims' Compensation Act

The right to social compensation contains a larger number of elements on the basis of which the Federal Republic of Germany pays benefits to various groups who have suffered injury to their health.[102] "Victims of violent acts" are under certain circumstances entitled to payments under the German Crime Victims' Compensation Act *(Opferentschädigungsgesetz)*.[103] The liability of the state is independent of the obligation of perpetrators to pay damages.

The Crime Victims' Compensation Act in conjunction with the German War Victims' Relief Act *(Bundesversorgungsgesetz)* grants the affected people only a small portion of their claims for damages against perpetrators. The purpose of benefits under the Act is the physical and emotional restoration of the victim after an act of violence. The list of benefits is structured accordingly. It includes curative treatment of the injury; pension payments based on lingering effects of the injury, which are independent of income; and income-based payments to replace wages. The claim does not provide for compensation for pain and suffering or for property damage and financial losses. The Crime Victims' Compensation Act is helpful to trafficked persons, for example, if they have no health insurance, when they require treatment or a visit to a health resort to restore their health, or if they require ongoing support, such as a pension, due to an injury. Generally speaking, the Crime Victims' Compensation Act is rarely applied.[104]

3.5.1 Initial situation

The Joint federal and state-government working group on trafficking in women responded to the fundamental difficulties of financial and medical support for the affected people under the German Asylum Seekers' Benefits Act in 2007 after a survey of the member organisations of KOK indicated that applications were still relatively rare and were often rejected. The result of that work is a brochure on the assertion of claims for benefits under the Victims' Compensation Act by victims of human trafficking into sexual exploitation,[105] which is intended to offer comprehensive practical guidelines for both the counselling centres and the pension and benefits offices *(Versorgungsämter)*. It generally takes quite some time before new materials are implemented in practice. There was still no reference to this material in the survey of lawyers and employees of counselling centres on which this study is based.

3.5.2 Amount of state compensation

There has not yet been any systematic documentation of cases of state compensation to trafficked persons in the counselling centres or pension and benefits offices. A victims' rights organisation Weisser Ring keeps annual statistics about compensation paid by the state. But it distinguishes only according to the payments made; there is no break-down by type of crime or affected group.

It is still not routine for compensation to be paid by the pension and benefits offices to people who are trafficked into sexual exploitation. Such payments are still an exception. For example, employees of the responsible pension and benefits offices in two federal states

102 For example, war victims, people injured as a result of military and civilian service, people injured by vaccinations, prisoners, and people who were imprisoned based on an unjust verdict under the SED party in the former East Germany and as a result are still suffering from persistent impairments to health.

103 The main idea behind the Act is the state's responsibility to protect its citizens against violence and injuries as a result of criminal acts, because it is the holder of the monopoly on the legitimate use of force and the prevention and suppression of crime. If that protection fails, the state is responsible to the victim subject to the requirements of the Crime Victims' Compensation Act.

104 Statistics from the victims' rights association Weisser Ring for 2006 indicate that of around 215,000 cases recorded under the heading of violent crime, only about ten percent of the people entitled to make a claim submitted an application. This is often attributed to a lack of familiarity and the scope of the Act, particularly in the counselling centres and law firms.

105 Federation-*Länder* working group on trafficking in women (2007).

with active specialised counselling centres report that they have not paid compensation to any trafficked persons over the past ten years. One said that two applications were submitted during that period, while the other had received no applications. Seven to ten women have received compensation over the past seven years in another federal state, where the specialised counselling centre rates cooperation with the pension and benefits office as good.

Compensation was paid to women who had been trafficked for the purpose of sexual exploitation, who testified in criminal proceedings, and whose residence in Germany following the conclusion of the proceedings was secure. Compensation was frequently paid for physical injuries. Payments and benefits by the pension and benefits offices included small pensions of between € 130 and € 300 per month, therapies, and dental prostheses or other medical services.

3.5.3 Primary factors influencing payment of compensation by the state

Key players have little experience

Only a few of the lawyers who were surveyed reported any experience with the German Crime Victims' Compensation Act in connection with trafficked persons. Because most of them specialise in criminal and immigration law, some of them also said that they had little experience with claims for compensation under social legislation. Some of them considered assistance and supporting services for requesting compensation to be the responsibility of the counselling centres. One aspect that was frequently mentioned was the relationship between working hours/work done and compensation.

The pension and benefits offices have therefore not handled very many claims for compensation by this group of people, so they have developed almost no specific knowledge about human trafficking, the dynamics of violence, and the like.

The interviews indicated that the provision of compensation improved when the "responsibility" for requesting compensation was clearly defined as part of the joint work done by a counselling centre and a lawyer, when a relationship of cooperation was developed with the pension and benefits office, and when important legal assessments by the authorities were reviewed by the courts.

Narrow scope of the Act

The Crime Victims' Compensation Act, with its individual requirements for elements and reasons for denial, also proved to be problematic.

Section 1 (1) of the Act requires an unlawful violent attack that, with a few specific exceptions, occurred on German territory and caused an injury to health. This can be physical or mental. A violent attack means any action aimed with hostile intent directly at the body of another person.[106] An attack includes physical injuries, sexual offences, and, based on a few special cases that have been developed in recent case law, extreme neglect of an infant.[107] Mere threats of violence are not sufficient. This narrow definition of an attack on the body in some cases poses problems for trafficked persons. Specifically, women who were forced into sex work were unable to plead a violent attack when the perpetrators had 'only' threatened to harm their children or other relatives in their countries of origin. In some cases the physical violence took place in the country of origin or while travelling to Germany. Once the women arrived in Germany, they were 'only' threatened with more violence. In the view of some pension and benefits offices, this was insufficient to establish the claim to compensation from the state.

This problem generally occurs in types of crimes in which perpetrators' methods involve emotional violence, threats, or extortion. Legislators have adopted standards whose legal consequences are based on the use of emotional violence[108] over the past few years as awareness has increased that victims of such violence are being excluded from the current law, and because those methods have consequences that can be just as serious for such victims as the use of physical violence. In contrast, there have not been any noteworthy changes at the normative level for this target group since entry into force of the Crime Victims'

106 Kunz/Zellner (1999), para. 1, no. 7.
107 See letter from the German Federal Ministry of Labour and Social Affairs IV c 2 – 62030 of 13 February 2002 referring to the applicability of the Crime Victims' Compensation Act to this group of cases.
108 For example, the Act on Civil Law Protection against Violent Acts and Stalking *(Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen)*, also known as the Protection against Violence Act, which entered into force on 1 January 2002, in which threats of violence also establish a claim for the victim. A separate element of stalking (section 238 of the German Criminal Code) entered into force on 31 March 2007 after years of discussion. It was ultimately based, among other things, on recognition of the effects of emotional violence.

Compensation Act in 1976. There have been public complaints about the failure to adapt this legislation, particularly to include stalking.[109] Some decisions by the social courts have already come to grips with reconciling stalking and the requirement for a violent attack to have occurred. For example, the Social Court of Lower Saxony-Bremen found in a decision that all facts must be used as a basis in cases involving multiple offences that represented a physical injury and for which no benefits could be expected individually under the Crime Victims' Compensation Act.[110] Accordingly, stalking cases must be viewed in their entirety with respect to their eligibility for compensation under the Act. This is not directly applicable to the problem of individual trafficked persons at present, because there were also physical injuries in the described case. However, this does show how individual rulings can adapt the Act to societal changes through interpretation of the elements of the offence. The problem for trafficked persons has not yet been raised as proactively.

Benefits that are paid under the Crime Victims' Compensation Act must be denied pursuant to section 2 of the Act if the applicant contributed to the injury or if it would be inequitable to pay compensation for other reasons. This causes a problem for women who came to Germany to do sex work and who then experience violence in connection with structures of coercion and exploitation. Moral reservations about voluntary sex work or about migration that under certain circumstances may have been illegal motivate some pension and benefits offices to deny the claim on the grounds of having contributed to the injury to health.[111]

Payments may also be denied under section 2 (2) of the Crime Victims' Compensation Act if the injured party has failed to do everything possible to contribute to clarification of the facts and prosecution of the perpetrator, particularly lodging a complaint with the officials responsible for criminal prosecution without undue delay. This is at the discretion of the individual authorities. In some cases this requirement is waived when the trafficked persons are not in a condition for questioning or need time to seek advice.[112] Trafficked persons often need a prolonged stabilisation phase before disclosing the offence.

To a great extent, the granting of benefits requires the person making the request to have been staying in Germany lawfully at the time of the offence. In some cases, third-country nationals are not entitled to residence due to human trafficking. The German Federal Ministry of Labour and Social Affairs responded to this problem back in 2001 with a circular letter that instructs the pension and benefits offices to determine the lawfulness of the residence of victims of human trafficking based on the time when the request for compensation is submitted to the pension and benefits offices.[113] These instructions from the Ministry are not binding on the pension and benefits offices. Implementation requires awareness of them throughout the country. Moreover, there is some question about what will be done if, for example, the plea is switched to a different offence due to problems with evidence during criminal proceedings, which is not uncommon in trafficking cases.[114]

Furthermore, the amount of the claim is based on the length of residence. Trafficked persons who are not German or EU citizens have the same status as those groups only after at least three years of legal residence. Residence up to six months allows only a one-time hardship payment. Trafficked persons who have lived continuously on German territory for a period ranging from six months to three years are granted the non-income-based benefits that are allowed under the Crime Victims' Compensation Act.

Ability to prove the requirements for the elements of the offence

The person who submitted the application must prove that the element of an injury to health has occurred, as well as the context in which it occurred. This examination is generally done by the medical service of the pension and benefits office. This poses particular problems for trafficked persons when they are claiming injury to mental health. It is difficult to prove a clear causal connection due to their entire experience, not only with the perpetrator to whom the violent attack is attributed, but also with violent customers and under certain circumstances difficult family histories and migration processes. In some cases, therefore, the counselling centres advise against expecting a psycho-

109 For example, see http://www.pechstaedt.de/kanzlei/stalking.htm.
110 For example, the *Land* Social Court of Lower Saxony-Bremen in its judgment of 22 June 2006 (L 13 VG 07/05).
111 For the details of other reasons for refusal, see Popova (2007), pp. 27 28, who also lists proximity to organised crime or organisations that commit violent acts, as a problem for women in the environment of sex work.
112 Popova (2006), p. 27.
113 Circular letter from the German Federal Ministry of Labour and Social Affairs dated 5 March 2001. It argues that the unlawful residence is the result of a criminal offence (human trafficking or smuggling of migrants) and therefore was not established voluntarily.
114 See Herz (2005), p. 33.

logical report to be obtained on the women. There seems to have been no changes in practice, in spite of a circular letter from the Federal Ministry of Labour and Social Affairs in 2006 supporting recognition of emotional damage for trafficked persons within the framework of the Crime Victims' Compensation Act.[115]

Close connection to criminal proceedings

Another impediment to compensation to trafficked persons is the close connection between the procedure before the pension and benefits offices and the conclusion of the criminal proceedings. At the legal level, the two can be conducted independently. In practice, however, the pension and benefits offices generally wait for the outcome of the criminal proceedings. The court's findings establish the offence, the consequences, and the causality for approval of state compensation payments. As a result, no alternative approach to state compensation has developed independent of criminal proceedings. As shown above, only a small portion of trafficked persons can or are willing to institute criminal proceedings.

The link to the criminal proceedings also means that the procedure at the pension and benefits offices often takes a long time. It has been reported from the field that it is not infrequent for a decision to take one to two years. In some cases three or four years pass before a decision is taken. Costs have already been incurred during that time if the trafficked persons do not have health insurance, for example, or if they have to wait a long time for supportive or curative measures, such as treatments or visits to a health resort. The benefits offered by the Crime Victims' Compensation Act are therefore unattractive in relation to the effort of applying for them. Therefore, it is certainly not surprising that in the regions in which there have been reports of a certain routine in dealing with the Crime Victims' Compensation Act, most requests are for a pension for trafficked persons.

No experience with cross-border compensation

So far there has been no experience with the situation in which trafficked persons leave the country and make claims after they have returned to their countries of origin.

If the people who have suffered acts of violence are EU citizens, they are as a matter of principle entitled to equal treatment with German nationals. They may claim the same benefits, independent of their place of residence in the European Union. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims establishes a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations. The Directive requires the Member States to include victims' compensation in their national legislation and to designate assisting authorities with responsibility for receiving and processing applications for state compensation by 1 July 2005. Persons who have been the victim of violent crimes in a Member State other than the one where they have their usual place of residence may apply to an authority in their country of residence in order to obtain the information that is necessary for submitting an application. The authority in that Member State of residence is responsible for forwarding the application to the authority in the Member State in whose territory the crime was committed, which is responsible for reviewing the application and paying the compensation. The responsible authority in Germany is the Federal Ministry of Labour and Social Affairs.

There have not yet been any legal claims to state compensation of trafficked persons after leaving Germany, so the capabilities for and limits of implementation have not yet been explored. Questions must still be answered about the assumption of costs for the translation of documents, travel expenses, language services, or medical/psychological reports in the case of injuries due to human trafficking.

3.6 Aspects related to multiple procedures

The general impediments or particularities of the affected group which must be taken into account proved to be independent of the individual procedural paths.

3.6.1 Asserting claims for compensation and remuneration from the country of origin

Trafficked persons who have returned to their countries of origin can also claim compensation or wages before the German civil or labour courts. There was hardly any experience with this in the specialised system for assis-

115 Circular letter from the German Federal Ministry of Labour and Social Affairs dated 9 May 2006. It refers to a 2003 judgment of the German Federal Social Court *(Bundessozialgericht)* (B9 VG 1/02 R), in which the court stated that a causal connection between the damaging event and the mental damage must be assumed when, according to medical knowledge, an action is likely, to a significantly high degree, to cause a specific mental illness.

tance. Neither the counselling centres nor the lawyers have been oriented to cross-border work.

Some descriptions of individual cases in the area of human trafficking into sexual exploitation are based either on a situation in which the trafficked persons asserted claims after returning to their countries of origin and needed documentation from Germany of having been victimised, or the women left after the action was brought against the perpetrators, promising to return to testify at trial. For example, one woman who had been trafficked into sexual exploitation and who was seriously injured by a client in Germany consulted a German specialised counselling centre eight years after she had returned to her country of origin. To apply for a state pension, she needed official documentation of the attack from the German criminal prosecution authorities. In another case, a trafficked person made claims for compensation against recruiters in her country of origin and needed the testimony of German accomplices.

According to information from the counselling centres, there has been an increase in recent years in the group of EU nationals who seek work within Europe and, having no way of earning a living or other prospects, are not willing to make themselves available in Germany for criminal proceedings against the perpetrators for two or three years. The official structure for providing assistance has begun to develop plans for this new situation. Efforts are being made to further intensify cross-border support services to ensure that regular contact with the centres' clients continues after they leave Germany. The sentencing of perpetrators and in some cases also a promise of compensation have been mentioned as a way to motivate women to travel to Germany for criminal proceedings. This could be a starting point for more systematic encouragement of trafficked persons to return and exercise their rights.

3.6.2 The wishes/intent of the injured parties

Some representatives of the specialised counselling centres for trafficking in women stated that, due to psychological stress, people who have been trafficked into sexual exploitation often have no resources for exercising their rights. It remained unclear how many of their clients this applied to. This assessment was not consistent among the centres, either.

Trafficked persons have not yet been questioned about this. The public debate often distinguishes between labour exploitation on the one hand and sexual exploitation on the other hand. In connection with human trafficking for sexual exploitation, the primary focus is on the element of the criminal offence, and the counselling concept emphasises psychosocial care, support services, and assistance with retraining. The organisations that provide assistance clearly defined people who had been trafficked into labour exploitation as labour migrants whose primary interest is in receiving remuneration for their work. The assistance offered by both existing and new projects is in line with that, so they concentrate their counselling services on the assertion of rights at work. The reason for this dichotomy cannot be definitively determined. The fact that criminal law was solely oriented to sexual exploitation until 2005, the associated focus of some state-financed counselling centres on stabilisation of trafficked persons as witnesses, the attribution of needs and motives based on gender, some prevailing images of victims, and different needs no doubt play a role in this.

The actual needs of the trafficked persons may in some cases take the back seat. The dichotomy also makes unprejudiced consideration of all legal claims by the people concerned more difficult and appears to be too much of a sweeping generalisation for several reasons. Most trafficked persons are labour migrants who come to Western Europe to earn a living and develop new employment opportunities. Compensation or remuneration for the work they did would help them achieve that objective. Trafficked persons are not a homogeneous group. They have experienced different levels of violence, threats, and fraud. The duration and background conditions of their forced sex work differ, as do their personal histories and individual resources. Accordingly, their motivation and the possibility of asserting their rights will not be homogeneous.

Asserting claims for compensation and wages in court incurs costs, takes time, and is stressful for the people concerned. The decision by people who have been trafficked into sexual exploitation about whether to assert their claims will – particularly in the case of women migrants with few language skills and little knowledge about rights and procedures – generally depend on the importance attributed to that issue when counselling them and what potential assistance and prospects of success can be presented to them. In addition a compensation mechanism must be developed for the group of people who, in spite of optimum assistance, cannot pursue legal remedies.

3.6.3 Existing legal aid structures for trafficked persons

Under certain circumstances, trafficked persons can receive financial assistance from officials and courts for exercising their rights.

State legal aid – Entitlements and gaps

The purpose of state legal aid, which is based on the principle of equal treatment under the law, is to ensure that all people, independent of financial resources, have access to exercising their legal rights.

Aid for obtaining legal advice and for court costs is granted based on financial need. Aid for obtaining legal advice is intended to cover the costs of obtaining advice from a lawyer and out-of-court representation for clients. Remuneration is based on a schedule of fees that is much lower than the one used outside the context of aid for obtaining legal advice. For example, a total charge of € 40[116] may be billed[117] for an oral consultation with trafficked persons, independent of time, scope, and legal subject area. The first legal consultation for this group takes a great deal of time, because it must often be translated. It generally includes complex facts about the person's life and as a result touches on different areas of the law.

Aid for court costs may be requested on the basis of sections 114 *et seq.* ZPO (German Code of Civil Procedure) in the event of financial need and if proceedings to obtain compensation or wages before the civil or labour courts or the adhesion procedure in the criminal courts appear sufficiently promising. Some respondents indicated that a decision on aid for court costs may not be taken until a later stage. Until then, it remains unclear whether costs that have already been incurred will be paid with state funds. Until the court takes a decision on the request for court costs, the trafficked persons bear the cost risk, or else it is borne by the lawyers if they have not requested an advance on costs based on the German Lawyers' Fees Act *(Rechtsanwaltsvergütungsgesetz)*. If there are criminal proceedings for human trafficking, legal representation is appointed for the trafficked persons in the *Nebenklage* (an accessory prosecution procedure that permits victims to participate through counsel in the main proceedings on nearly equal footing with the public prosecutor and the defence), with costs covered by the states. This includes work done in preparation for the proceedings, representation during the trial, and interpretation costs.

There are gaps in state legal aid for trafficked persons, some of which are offset by the work of the specialised counselling centres or very poorly paid work by lawyers. For example, the specialised counselling centres provide interpreters for the legal consultation, assist trafficked persons, or, as part of their work, offer them legal advice, which is provided by the lawyers and financed by the counselling centre. These services are not available to groups of trafficked persons who are not part of the target group of the specialised counselling centres. Language services and assistance must be organised and financed.

If there are no criminal proceedings because the person concerned decides not to testify or the public prosecutor terminates the proceedings for other reasons, the legal advice and representation, including interpretation costs, must be financed by the small amount of state aid for legal advice. Other work, such as repeated discussions to clarify the matter or accompanying the person to police questioning, must be paid for by the women themselves, or else the legal counsel works without pay.

Some counselling services regularly go to the immigration removal centres. If it appears that people there could be victims of human trafficking, a lawyer must often be consulted immediately to clarify issues related to residence and whether the person is willing and able to testify in criminal proceedings. However, this can be financed only in some cases. At this stage, it is still very unclear whether the criminal prosecution authorities will accept the charge of human trafficking and whether trafficked persons will decide to testify. The way in which the administrative courts take their decisions on aid for court costs in proceedings on residence is described as restrictive. Decisions are often taken late in the proceedings. The risk that legal representatives will work without pay in the area of immigration law is high.

As a matter of principle, aid for court costs is granted only when the matter has prospects of success. That cannot be foreseen for proceedings with which there is little experience and which in some cases are breaking new ground.

116 RWG-VV (schedule of fees under the German Lawyers' Fees Act), no. 2601.
117 In contrast, the upper limit for the fee for a consultation to obtain legal advice outside the scope of aid is around € 190.

Special payments to victims of human trafficking – North Rhine-Westphalia Ministry of Generations, Family, Women and Integration

The Ministry of Generations, Family, Women and Integration in the federal state of North Rhine-Westphalia has been making special payments to victims of human trafficking into sexual exploitation for several years which exceed the benefits paid by the municipalities. The total budget for these special funds fluctuates each year and so far has been around €330,000. The purpose of these measures is to provide adequate accommodation and advisory services to victims of human trafficking, which cannot be ensured with the municipal benefits. Costs of secure housing (which is more expensive), interpretation costs, and the costs of legal advice are covered. The eight specialised counselling centres financed by the Ministry are eligible to request the funding. The centres request a lump sum for their clients once each year, independent of whether they are willing or able to testify.

The funds that are provided specifically for obtaining legal advice total about €30,000 annually. Government aid for obtaining legal advice and aid for court costs and an application for appointment of a witness assistant *(Zeugenbeistand)* and the *Nebenklage* are primarily for the legal advisor and legal representative. As a matter of principle, the funds can be paid to ensure that clients receive legal advice and representation for all legal issues related to their status as victims.

The telephone survey of all eight specialised counselling centres in North-Rhine Westphalia which are financed by the Ministry showed that in actuality most of the funds are used for work done by lawyers in preparation for criminal proceedings, extra work done by lawyers which is not covered by remunaration for the *Nebenklage*, and clarification of issues under the law on residence. In individual cases, the special funds are also used to cover the difference between the fee for appointed defence counsel and the average fee for freely-selected defence counsel under the German Lawyers' Fees Act.

Therefore, the specialised counselling centres accord priority to using the special payments to make up for shortcomings or gaps in state legal aid. A change in the practice of obtaining compensation to trafficked persons cannot be brought about by this type of legal aid, whose stated goal is not very specific.

3.7 Enactment of laws

There are currently several legislative bills that, when they enter into force and are implemented, could influence different areas related to the assertion of claims for compensation and wages by trafficked persons. They involve the codification of "plea bargains," "settlements," or "deals"[118] in connection with criminal proceedings and legislation to make provisions on legal aid for court costs stricter and to increase the rights of victims and witnesses in criminal proceedings. At the European level there is a Directive to combat illegal migration, which includes both sanctions against employers of "illegally staying" persons and provisions on assistance to employees.

The draft legislation is presented below only in relation to aspects that are relevant to trafficked persons.

3.7.1 Act Governing Settlements in Criminal Proceedings *(Gesetz zur Regelung der Verständigung im Strafverfahren)*

For more than 20 years it has been common practice in criminal proceedings for the parties to attempt to reach agreement on the further course and legal consequences of the proceedings.[119] The primary aim of this approach is a quick resolution of the proceedings, thereby relieving the pressure on court capacities. The German Federal Court of Justice *(Bundesgerichtshof)* has repeatedly specified guidelines for this practice in various judgments on individual questions related to the permissible structuring of the content and consequences of these agreements, and most recently found in a 2005 judgment (GSSt 1/04) that the courts had reached the limits of legal development and that it was now up to legislators to face this challenge.[120] In response, several bills "governing settlements[121] or agreements[122]

118 German Bundestag – Research Services no. 27/09 of 25 March 2009.
119 German Bundestag – Research Services no. 27/09 of 25 March 2009.
120 Bundestag printed paper 16/12310, p. 1.
121 Bill of the Federal Government: Bundestag printed paper 16/12310, which is identical to the bill of the coalition groups: Bundestag printed paper 16/11736.
122 Bill of the Bundesrat: Bundestag printed paper 16/4197.

in criminal proceedings" have been submitted which fundamentally codify the guidelines of the Federal Court of Justice. The German Federal Parliament passed the government's bill on 28 May 2009.[123]

The key provision of the Government's bill[124] is the introduction of a new section 257c into the German Code of Criminal Procedure (StPO). It states that in appropriate cases, as part of the main proceedings, the court may enter into a settlement with the parties concerning the further course and conclusion of the proceedings. Paragraph 2 states that only the legal consequences and other procedural measures can be the subject of the settlement. An admission of guilt must be part of any settlement. The court must announce the content of any settlement during the trial and specify an upper and lower limit for the sentence.

The explanatory memorandum of the Act describes the potential content of a settlement and mentions, among other things, the promise by the accused to pay compensation.[125] The inclusion of the aspect of compensation in the explanatory memorandum has already received some criticism. Therefore, comments to the Committee on Legal Affairs called for the inclusion of compensation in the text of the Act. This would send a signal that the interests of victims would be given a recognizable status in addition to the interests of defendants in having their sentences reduced and of the court in obtaining relief from workload. Inclusion in the text of the Act would be "legislative encouragement" to "enrich" settlements whenever possible by including the aspect of compemsation.[126] The motion by Saarland, which was defeated during the plenary session of the Bundesrat (upper house of the German parliament), contains a proposed section 257c (2a) to that effect, stating that "the subject of the settlement can also be compensation upon request by the *Nebenklage*" (an accessory prosecution procedure that permits victims to participate through counsel in the main proceedings on nearly equal footing with the public prosecutor and the defence).[127] The motion by Saarland goes even further and, in the interests of victim protection, is intended to strengthen the adhesion procedure *(Adhäsionsverfahren)* to institute an ancillary civil action, an "instrument that is rarely used in the daily practice of the courts,"[128] by having the requirements of the adhesion procedure apply to a settlement that includes compensation.

Various sides also criticized the position of the plaintiff in the *Nebenklage* as being too weak within the framework of developing a settlement. According to section 257c (3) of the Government's draft StPO, if the court announces a possible settlement during the trial, the parties are given a chance to comment and the settlement is finalised only if the accused and the public prosecutor agree with the proposal by the court (paragraph 3). The views of the plaintiff in the *Nebenklage* are irrelevant in this context. In contrast, the literature[129] has called for the plaintiff in the *Nebenklage* to occupy a position having equal rights. This planned position was described as a "spectator role,"[130] and, according to the motion by Saarland, the person entitled to institute a *Nebenklage* would have to approve any settlement in criminal proceedings for crimes against physical integrity, personal freedom, or sexual self-determination.[131] The aforementioned critical points and suggestions were not included in either the resolution recommended by the Legal Affairs Committee or in the Act.[132]

The bill would also promote communication by the parties to the proceedings among themselves outside of the main proceedings and allow preparation for a settlement during the investigation and opening pro-

123 Press release of the Federal Ministry of Justice dated 28 May 2009 at http://www.bmj.bund.de/enid/8e8c2359e8a240faa2aecd1566ed4b0a,c25684636f6e5f694092d093539333093a095f7472636964092d0932343736//Pressemitteilungen_58.html.
124 The text is still based on the government's bill, because the Act was not yet publicly accessible at the time of publication. The complete press release of the Federal Ministry of Justice dated 28 May 2009 about the Act does indicate, however, that the aspects relevant to trafficked persons were adopted without change.
125 Bundestag printed paper 16/12310, under B Article 1, on no. 8.
126 Lange (2009), p. 9.
127 Bundesrat printed paper 65/3/09, p. 1.
128 Bundesrat printed paper 65/3/09, p. 2.
129 Landau / Bünger (2005), pp. 268, 271.
130 Lange (2009), p. 9.
131 Bundesrat printed paper 65/3/09, p. 1.
132 See printed paper 16/13095 on the resolution recommended by the Legal Affairs Committee. For the content of the Act, see the press release of the Federal Ministry of Justice dated 28 May 2009. The press release discusses the position of the plaintiffs in the *Nebenklage* and rejects their participation in reaching a plea bargain. This would correspond to the current Code of Criminal Procedure. According to it, the person who is entitled to institute a *Nebenklage* may not dispute the verdict solely due to the legal consequences. However, the plea bargain relates exclusively to the legal consequences. The response to this argument during the legislative procedure was that this limitation applies when full criminal proceedings are held, but they are in fact to be shortened by the instrument of the plea bargain.

ceedings. Sections 160b and 202a of the draft StPO allow discussion of the progress of proceedings, either by the public prosecutor during the investigation or by the court before the decision to order the case to go to trial. The position of the plaintiff in the *Nebenklage* is also questionable in this context. According to section 395 (1) StPO, the injured party does not institute the *Nebenklage* until public criminal charges are brought, in other words after the investigation ends. Until that time, the injured party does not have the formal status of a party to the proceedings. The explanatory memorandum to the Act subsumes the person entitled to institute a *Nebenklage* at the time of the investigation under the parties to the proceedings and, as justification, refers to the importance of that phase for influencing a settlement. Excluding the plaintiff in the *Nebenklage* would "unreasonably" restrict his or her position in the proceedings.[133] This means that legislators have again placed the emphasis on a legally non-binding and therefore weak position.

The bill in question does serve the interests of victims by sparing trafficked persons from repeated distressing questioning and/or testimony during the main proceedings and therefore from a confrontation with perpetrators. Although the entire procedure, particularly the trial phase, has been shortened, thereby reducing the ability of the *Nebenklage* to influence a settlement, no more extensive influence or defined participation in development of a settlement is being considered.

In this context, there are no major indications that the current version of the bill will remedy the shortcomings in how compensation is provided in criminal proceedings, as discussed under section 3.2. The weak position of the person entitled to institute a *Nebenklage*, particularly prior to the trial, and the avoidance of the adhesion procedure which has been reported in practice, have not yet been dealt with. It must be assumed that the current common practice of entry into procedural arrangements will be further increased by codifying them. The detailed determination of the facts in relation to claims for damages will likely conflict with the effort to make proceedings shorter in the interest of procedural economy.

3.7.2 Draft Act to Strengthen the Rights of Injured Parties and Witnesses in Criminal Proceedings (Second Victims' Rights Reform Act)

The draft Victims' Rights Reform Act *(Opferrechtsreformgesetz)* responds to criticism and suggestions from the victims' associations and is intended to appropriately expand the existing rights of crime victims and witnesses in criminal proceedings and to promote consistent exercise of such existing rights.[134] Various bills have been submitted for this. A public hearing of nine experts was held in the Legal Affairs Committee on 13 May to discuss the drafts of the coalition groups, the federal government,[135] and the German Federal Council[136]. The proposal of the Federal Council, in its opinion dated 3 April 2009,[137] includes some major changes, so the extent to which consultations are necessary and whether the Second Victim's Rights Reform Act will enter into force during this legislative term cannot be determined at this time.

Major changes to the proposals include expanding the rights of the *Nebenklage* (an accessory prosecution procedure that permits victims to participate through counsel in the main proceedings on nearly equal footing with the public prosecutor and the defence) and the victims' rights to information.

The bills reconfigure the list of cases eligible for the *Nebenklage*. Trafficking of children and serious cases of coercion are to be included in section 395 (1) StPO (Code of Criminal Procedure). The proposals do not agree on what other groups of offences should be included, what crimes that are already eligible for the *Nebenklage* should be deleted from the list, and whether a catch-all element should be included. This involves groups of offences such as bodily injury and robbery or extortionate robbery which could also be relevant for trafficked persons.

One group of measures increases the rights of the victims to information. Section 406h of the draft StPO states that injured parties must be informed in writing about specific rights as soon as possible and then regularly thereafter. In that regard, the provision specifically mentions the possibility of assistance from the counselling organisations and the right to compensation under the German Crime Victims' Compensation

133 Bundestag printed paper 16/12310, B Article 1, on no. 4.
134 Bundestag printed paper 16/12098, A.
135 Bundestag printed paper 16/12098 and Bundesrat printed paper 178/09.
136 Bundestag printed paper 16/7617, Bundestag printed paper 16/9448.
137 Bundesrat printed paper 178/09.

Act. However, the draft calls for this information to be provided in a language that is understandable to the injured person only to the extent possible. It remains to be seen what this will mean for the group of trafficked persons, most of whom are migrants. Plaintiffs in the *Nebenklage* also have the right to view files. The bill of indictment must also be sent to them upon request. Counsel in the *Nebenklage* must also be informed about the date of the trial.

Overall, the requirement in the bill for the law enforcement agencies to provide information does show a direct reference to compensation of the group of trafficked persons. It also strengthens the position of persons who are entitled to institute a *Nebenklage*.

3.7.3 Act Limiting Aid for Court Costs (draft)

Amendments have been proposed to laws in the area of aid for court costs and the cost of obtaining legal advice which, if they enter into force, would also affect trafficked persons. The Bundesrat submitted a draft Act Limiting Aid for Court Costs *(Prozesskostenhilfebegrenzungsgesetz)* in June 2006.

The aim of this bill is a swift and lasting limitation to the "explosive increase"[138] in spending on court costs and the cost of obtaining legal advice, which, it is said, the budgets of the federal states can no longer cope with. The explanatory memorandum states that the constitutional right to access to the exercise of rights are not to be limited as a result,[139] although the initial critical opinions express some doubt about that.[140]

The planned new provisions on aid for court costs emphasise a change in the requirements for approval, an increased personal contribution by the applicant, and procedural improvements. Only the specific changes that could particularly affect trafficked persons will be explored here. For example, several radical changes are combined under the heading of the increased personal contribution. Exemptions for the applicant's income will be adjusted to the minimum subsistence level under social legislation, which means they will be reduced from their current level (section 115 of the draft ZPO). Anyone whose income is above these very low exemptions will have to pay court costs in instalments.

In future, applicants will be required to pay any money awarded to them in the proceedings to cover court costs. Like a party with assets, they will be able to claim the amount that has been awarded only after court costs have been deducted (section 120a of the draft ZPO). This could mean that trafficked persons, for whom court proceedings against perpetrators are very burdensome, would receive very little compensation, depending on the amount awarded by the court and the amount that can actually be collected, after the court costs paid by the state have been deducted.

Moreover, a lump sum of € 50 for processing the application for assistance for court costs is to be charged to people whose financial means exceed the subsistence level by at least the amount of the fee.

The future of the bill is currently unclear. The Legal Affairs Committee of the Bundestag held a hearing of experts on 14 November 2007 to discuss the bill. Constitutional concerns were expressed at that time, particularly about whether equality before the law (Article 3 (1) of the German Basic Law) is ensured by certain measures[141] and about the interaction of individual proposals.[142] It is likely that the bill will be amended further and that it will not enter into force during this legislative term.[143]

3.7.4 Directive of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

A recent initiative of European legislation could improve the situation of illegalised non-EU nationals as described in section 3.4.2 with regard to exercising their rights from employment relationships. It allows the persons concerned to obtain rights to residence, creates a procedure with few barriers for making complaints against employers, and establishes the obligation to inform the persons concerned about all of their rights before they are required to leave the country.

138 Bundestag printed paper 16/1994, p. 15.
139 Bundestag printed paper 16/1994, p. 15.
140 See, for example, the declaration by the judges' association Neue Richtervereinigung (NRV) at http://www.scribd.com/full/13070265?access_key=key-1m5atqjr5y03kxm4aw9t.
141 See Hillbgruber at http://www.bundestag.de/ausschuesse/a06/anhoerungen/Archiv/25_PKHBegrenzG/04_Stellungnahmen/Stellungnahme_Hillgruber.pdf.
142 Bundestag printed paper 16/1994, p. 38.
143 Based on the discontinuity principle, all bills, motions, and inquiries automatically become void when the legislative term ends and must be submitted again to the next Bundestag.

The European Parliament adopted the proposed Directive providing for sanctions against employers of illegally staying third-country nationals on 19 February 2009.[144] It was adopted by the Council of Ministers on 25 May 2009.[145] The Member States have 24 months to transpose the Directive into national legislation.

The aim of the Directive is to combat illegal immigration. It assumes that targeted action against the possibility of illegally obtaining work in Europe will counter the "pull factor" for illegal immigration and employment without the required legal status. The Directive contains sanctions against both employers and employees, requirements for the Member States to carry out inspections, and elements of assistance on the employee side.

The employment of illegally staying third-country nationals is prohibited (Article 3 (1)). Member States must ensure that an intentional infringement of this prohibition constitutes a criminal offence when, among other things, it is accompanied by particularly exploitative working conditions (Article 9 (1)).

Sanctions such as financial sanctions, whose amount may vary according to the number of third-country nationals who are illegally employed, must be imposed on employees who infringe this prohibition. Employers must also contribute to the cost of returning third-country nationals. Other sanctions, such as exclusion from public benefits, aids, or subsidies, including EU funding managed by the Member States, are specified for up to five years.

The Directive contains some articles relating to employees and therefore potentially to trafficked persons which could turn out to be advantageous for development of a practice extending the assertion of claims for wages. Employers are as a matter of principle required to retrospectively pay social security contributions, taxes, and wages in accordance with established practice in the relevant occupational branches (Article 6 (1) (a) and (b).

To facilitate the assertion of these claims, the Directive in some cases addresses difficulties experienced by third-country nationals without legal residence based on reports from the field. These include a lack of information, difficulty in documenting for the court any work that has been done, gaps related to cross-border procedures, and excessively high barriers for complaint procedures. Article 6 (2) (b) initially provides for "systematically and objectively" informing workers about their rights before enforcement of any return decision. This explicitly relates both to legal claims and to how they are asserted.

If rights are then asserted, an employment relationship of at least three months' duration is to be presumed unless proven otherwise by the employer (Article 6 (3)).

The Directive also contains procedural provisions that are intended to promote the actual exercise of rights. Member States must ensure that third-party nationals may call on a competent authority to start procedures for them without the need for them to introduce a claim. Article 13 is also intended to facilitate the lodging of complaints. Accordingly, Member States must ensure that there are effective mechanisms through which third-country nationals may lodge complaints against their employers, either directly or through third parties designated by Member States. Trade unions or other associations are mentioned as examples of "third parties." Both articles require national legislation to include these possibilities. In that context, Article 13 (3) states that providing assistance to third-country nationals to lodge complaints shall not be considered as facilitation of unauthorised residence. The Directive thus raises an aspect that people in the system for providing assistance often mention as an impediment to their work with illegalised persons, but resolves the general problem only selectively in reference to one specific type of assistance.

The problem of the irregular residence status of persons who wish to assert their rights under an employment relationship is not raised. The incentive to institute proceedings against employers only to then have to cope with being required to leave the country is no doubt minimal in many cases. According to Article 13 (4), the Member States must define only the conditions under which, in serious cases, they may grant to illegal workers, on a case-by-case basis, residence permits that are limited to the length of criminal proceedings. How these residence permits are granted is completely at the discretion of the Member States, and the preamble includes references to Directive 2004/81/EC. As in the case of proceedings for human trafficking into sexual exploitation, the granting of a residence permit

144 Text of the Directive in the version of 4 February 2009: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0043&language=DE&ring=A6-2009-0026#def_1_1.

145 Directive of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, PE-CO_S 3621/09, Council Decision of 25 May 2009.

is again linked exclusively to conducting criminal proceedings. The conditions for a residence permit must among other things be defined for the group of people who were employed under particularly exploitative working conditions. This phrase is defined in Article 2 (i) as working conditions where there is a striking discrepancy with the terms of employment of legally employed workers which, for example, affects workers' health and safety, and which offends against human dignity. This definition goes beyond the current definition of human trafficking into labour exploitation in section 233 StGB (Criminal Code). In this case it is at least possible to expand the group of people who receive a residence permit in connection with criminal proceedings and therefore to actually enable them to make claims for wages. Serious forms of labour exploitation that do not come under section 233 StGB or are not subsumed under it by the law enforcement agencies could be covered by this. In addition, Article 6 (5), which refers to Article 13, provides for the possibility of extending the duration of the residence permit until the person concerned has received any remuneration that has been "recovered."

4 Summary and recommendations

4.1 Inconsistent provision of compensation and remuneration to trafficked persons

Under German law, people who have been trafficked into sexual exploitation and labour exploitation are entitled to claim damages from perpetrators, either as part of criminal proceedings or, independent of that, in civil proceedings. The state is also obligated to compensate victims of violence. Claims for wages and damages can also be made against employers in the labour courts.

In spite of those possibilities, compensation is currently provided to only a small group of trafficked persons in Germany. Mainly women who had been trafficked into sexual exploitation have received compensation from perpetrators in criminal proceedings. Experts assumed that no more than one-third of women testified in criminal proceedings. What frequently occurred during criminal proceedings is that perpetrators, through their legal counsel, offered a full admission of guilt and payment of compensation that was generally between € 1,000 and € 4,000, far less than what the trafficked persons would have been entitled to. Most compensation was paid as damages for pain and suffering. Other items in the claim for damages, such as lost earnings of the trafficked persons, were often ignored.

A few women in the same group also received state compensation payments under the German Crime Victims' Compensation Act *(Opferentschädigungsgesetz)*. Even in regions with active specialised counselling centres for trafficked persons, only a few trafficked persons have applied for state benefits over the past few years. The procedure before the pension and benefits offices *(Versorgungsämter)* took an average of three years. The pension and benefits offices generally waited for the outcome of the criminal proceedings. The court's findings establish the offence, the consequences, and the causality for approval of state compensation, which generally involved a small pension of between € 130 and € 300 per month or took the form of therapies, dental prostheses, or other medical services.

There are still almost no claims for damages in the civil courts. The possibility of asserting the rights of trafficked persons after they return to their countries of origin has also been ignored. Because most trafficked persons come from Eastern and Central Europe and do not remain in Germany permanently, it is also a challenge to contact this group after they have returned home.

Employees are as a matter of principle entitled to exercise rights before the labour courts under their employment relationship, independent of their legality under laws on residence or labour laws. However, the extent to which people who have been exploited for their labour assert their rights to wages and continued payment of wages in the event of illness and the like is still unknown. Reports from the system for providing assistance and previous research on human trafficking and labour exploitation revealed only isolated cases. They became visible when trafficked persons could be provided with language services, information, and assistance that were tailored to their needs. For example, a few women, with the assistance of counselling centres, have claimed wages due to sometimes very serious exploitation as domestic help, either in court or out of court. Men from Central and Eastern European countries, primarily Poland and Romania, have been able to claim back wages for work they did as posted workers in the construction industry or seasonal work in the agricultural sector or fairground entertainment sector.

The amount of the wages being claimed was known only in isolated cases. The amounts that were claimed and received for labour exploitation were much higher than the damages paid for sexual exploitation. Particularly in the most recent proceedings, amounts received for forced labour in the field of domestic, included € 22,500 for two years of work, while in another case € 47,000 was claimed. In cases of this type, the

affected persons generally received payment only for the regular weekly working hours. No compensation was obtained for the work that was actually done, for entitlement to leave, or for physical illness attributable to the working conditions.

4.2 Causes of the inconsistent payment of compensation

The study investigated the causes of shortcomings in how compensation and remuneration are obtained for trafficked persons and determined the barriers at different levels. In that regard, major structural differences were identified between the areas of sexual exploitation and labour exploitation.

Barriers in the provision of assistance

State intervention, legal advice, and psychosocial counselling for trafficked persons have previously been oriented to human trafficking into sexual exploitation, which means trafficking of women and girls into sex work or related sectors. A complex network of different specialised counselling centres, an umbrella organisation, and a Joint federal and state-government working group have been working on the issue of trafficking in women at the individual and structural levels for about ten years. Nonetheless, with some exceptions there has been almost no systematic thinking about how to improve the practice for obtaining compensation. How can this issue be formally integrated into criminal prosecution and the practice of the courts? Can other useful ways of obtaining compensation outside of criminal proceedings be found? How can claims by clients be safeguarded after they return to their countries of origin? These questions have hardly been raised in the discussion. At present there is no comprehensive concept for legal advice and psychosocial counselling services which can be used as a basis for further expansion of the provision of compensation to victims of human trafficking.

The main impediments to the assertion of claims for compensation and wages by people who are trafficked into labour exploitation are located much further upstream. Trafficked persons have previously been rarely identified due to the lack of specialised knowledge on the part of inspection authorities, and the emphasis has been placed on their status as irregular migrants or people without work permits. Moreover, trafficked persons generally do not know their rights and are often socially isolated by their employers, who also deliberately keep them in the dark about their rights. There is currently no specialised system to provide assistance to this group. The usefulness of the infrastructure established for the area of sexual exploitation, with its focus on trafficking in women, must be determined.

The number of people who are being exploited for their labour in Germany is therefore completely unclear at this time. The experience of some counselling centres and unions has shown, however, that trafficked persons become visible as soon as they are addressed in a way that is appropriate for this target group and when their interests are represented.

Barriers in the courts and before authorities

The police, public prosecutors, and criminal courts primarily view trafficked persons as witnesses in connection with the criminal prosecution of perpetrators or as people who are accused of staying in the country illegally. Assistance for trafficked persons in exercising their rights is the focus of law enforcement agencies only when this is a prerequisite or motivation for their willingness and ability to testify. It has previously been the view of law enforcement agencies that the right to compensation or the payment of wages does not promote this objective.

The assertion of claims for damages was resisted by the criminal courts when, for example, claims for damages as part of the adhesion procedure *(Adhäsionsverfahren)* for institution of an ancillary civil action prolonged the criminal proceedings or required additional technical knowledge.

Specialised counselling centres and lawyers repeatedly stated that a lack of assets on the part of the perpetrators was a serious impediment to obtaining compensation to their clients. This was attributed to the fact that the law enforcement agencies often investigate only perpetrators at the lower levels of the hierarchy. In addition, both the police and law enforcement agencies are understaffed, and they lack the specific technical knowledge and experience to be able to seize assets gained from crimes, thereby securing them for the trafficked persons.

Labour migrants without a residence and/or work permit rightly fear negative consequences when they come into contact with government officials. If the law enforcement agencies become aware of them, they run the risk of being required to leave the country unless they are identified as trafficked persons, which seldom happens at present. For them, bringing an action in the civil or labour courts is associated with the risk of being

reported to the immigration authorities, with the same consequence.

The pension and benefits offices that deal with the claims for state compensation have previously had to handle very few claims for state compensation by trafficked persons and have developed almost no specific knowledge about structures of exploitation and coercive relationships, as well as the dynamics of violence. Employees' moral reservations about voluntarily doing sex work or migration which under certain circumstances is illegal in some cases led them to assume that the trafficked persons partially contributed to the injury and therefore to refuse compensation.

The structure of and requirements for official and court proceedings in Germany conflict in some cases with the situation of trafficked persons. The procedural paths involve many formal steps and require official documentation or evidence that trafficked persons in some cases are unable to provide. There are also problems with standards for their credibility and the burden of proving the offence and the damage suffered. Repeatedly making statements to the police and public prosecutors, in court, and in some cases again at the pension and benefits offices is very distressing for them.

Barriers on the part of trafficked persons

The assertion of claims for compensation and wages in court is expensive and time-consuming and is stressful for trafficked persons. This is particularly the case when the disadvantages of official or court proceedings outweigh the financial or immaterial advantages of compensation and remuneration. The willingness and ability of trafficked persons to go through proceedings in some cases depends on the importance accorded to that subject when advising trafficked persons and what possibilities for assistance and prospects of success can be presented to the persons concerned.

Barriers due to the legal basis

Access to compensation provided by the state under the German Crime Victims' Compensation Act has turned out to be problematic for trafficked persons in several respects. The requirement of a violent attack in Germany under section 1 of the Act currently excludes trafficked persons from compensation if perpetrators have forced them into the situation of exploitation or kept them there "only" through threats to their children or relatives or if the violence against them was committed only in their countries of origin.

One reason for refusal of benefits under section 2 (2) of the Crime Victims' Compensation Act can be that the injured party failed to lodge a complaint with the authority responsible for criminal prosecution without undue delay. Trafficked persons often need a prolonged stabilisation phase before they can report an offence. In some cases they can extricate themselves from the situation and it is only much later that they decide, with assistance from the counselling centres, to report the offence.

Generally speaking, the way in which human trafficking is carried out does not correspond to the image of a single violent act on which the Crime Victims' Compensation Act is based. Human trafficking often crosses borders and the phase of forced labour – whether on a construction site or in a brothel – often lasts months or years. It is sometimes difficult to attribute any impairment to health, particularly emotional problems, caused during this period to a specific criminal attack. Moreover, the offences are characterised by illegality, situations of dependency, acts that in some cases are extremely violent, and the person's own intention to migrate, making it difficult to confront perpetrators immediately and to provide accurate information that will establish claims.

With respect to legal advice and representation for trafficked persons, state legal aid is inconsistent and problem-ridden. The low rate of legal aid paid by the state frequently does not cover the actual costs of language services and the clarification of complex legal issues. If an action for human trafficking is not brought, no funds are available beyond aid for obtaining legal advice, for example to accompany trafficked persons to police questioning or to attend multiple counselling meetings.

There will be a cost gap if aid for court costs is not granted for court proceedings. In addition, it is often urgently necessary for trafficked persons to clarify their residence status and make claims for accommodation or subsistence before claiming compensation and wages. Most legal services and representation for trafficked persons are currently provided in relation to criminal proceedings for trafficking of women in the form of information, language services, or assistance from the counselling centres and reduced-charge work by specialist lawyers.

Legal aid for court costs is granted only when the case has prospects of success. That cannot be foreseen in proceedings with which there is little experience and which in some cases are breaking new ground.

4.3 Recommendations

An integrated concept for promoting the consistent provision of compensation and remuneration must be effective at multiple levels and take into account the fact that combating human trafficking into sexual exploitation and into labour exploitation are at different stages of development. At the same time, dealing with the two areas separately should be avoided in order to ensure that the experience of both groups of trafficked persons in asserting claims for wages or compensation will be useful to each of them.

The results of the study lead to recommendations in various areas of activity, which could be the first step toward changing the way things are done:

At the level of the system for providing assistance
In the area of the system for providing assistance to persons who have been trafficked into sexual exploitation, it will be necessary to examine the extent to which the services offered in its various segments – housing, legal advice, psychosocial counselling, and support services during court proceedings – are appropriate for assisting people who have been exploited for their labour or whether they should be expanded. This applies particularly to men who have been trafficked.

The issue of wages and compensation should be expanded within the structure for providing assistance to trafficked persons by facilitating an exchange of information and providing advanced training for counselling centres and specialist lawyers. Specialised counselling centres that do not have one should develop and test a plan for providing advice and assistance to trafficked persons in asserting wage claims.

Based on current experience with compensation to women who have been trafficked, methods for obtaining compensation and remuneration independent of testifying in criminal proceedings should be developed and tested.

Based on current and anticipated experience, a discussion about successful methods to be used for the various types of procedures and procedural paths in Germany should be organised.

At the level of exercising rights
Trafficked persons should be granted model financial assistance in cases where state legal aid falls short so that individuals can exercise their rights in the short term and so that the issue of compensation and remuneration for contemporary forced labour can be developed and integrated into legal practice.

Legal aid should be targeted to include both the assertion of claims for compensation and remuneration in court proceedings and out-of-court negotiations with employers or perpetrators. It should also cover the costs that are incurred, before claims for wages and compensation are asserted, to clarify fundamental legal issues that have been the subject of disagreements among social welfare and immigration authorities and trafficked persons for years.

Most current knowledge about procedures for obtaining compensation and remuneration is based on description of individual cases in the system for providing assistance. Experience with compensation and wage claims throughout Germany should be compiled to generate more in-depth knowledge.

On that basis, best and worst practices could then be identified and analysed to pinpoint additional weak areas in exercising rights.

At the level of networking
The networking structure has proven successful in the area of human trafficking into sexual exploitation. Therefore, existing approaches should be used to combat labour exploitation and should be further expanded and accorded preference over new structures whenever possible.

As has already been done in some of the German federal states, existing regional cooperative structures that work to combat human trafficking should be expanded to include key governmental and non-governmental players in the area of labour exploitation, such as trade unions, employers' associations, inspection authorities, specialised organisational units of the police and public prosecutors' offices, employment agencies, and migrant organisations throughout the country.

The Joint federal and state-government working group on trafficking in women should expand its area of authority to include all types of human trafficking.

Bilateral cooperative relationships between specialised counselling centres and specialist lawyers should be expanded to include regular cooperation with lawyers who specialise in labour law and social legislation throughout the country.

A model coordinating organisation should be established in a selected region to make it possible to move

beyond current anecdotal knowledge about individual cases to solid knowledge about the extent and manifestations of human trafficking into labour exploitation and to develop strategies for needs-based assistance to trafficked persons. This will be jointly run by governmental and non-governmental organisations and among other things will develop model regional strategies for the effective assertion of claims to wages and compensation.

Experience in Germany with claims for wages and compensation by trafficked persons should be communicated to the networks concerned with this issue which are taking shape at the European level and should be compared with experience in other countries. Positive experience in other European countries must be reviewed to see if it is applicable to Germany and can be used there.

The advanced training that is provided to law enforcement agencies and courts as part of regional cooperative structures should include the issue of wages and compensation to trafficked persons.

At the political level

Germany should proceed with ratification and implementation of the Council of Europe Convention on Action against Trafficking in Human Beings.

To transpose the EU Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, provisions should be developed to improve the ability to assert wage claims in accordance with the Directive, such as the granting of rights of residence subject to time limits. This will offer at least the possibility of expanding the group of people who receive a residence permit in connection with criminal proceedings and are therefore in a position to assert their wage claims. Serious forms of labour exploitation that are not covered by section 233 StGB (German Criminal Code) could be included in this.

When transposing the Directive, a concept should be developed in conjunction with the system for providing assistance which will effectively implement the requirement for the Member States to provide regular information to everyone concerned about their rights under the employment relationship before enforcement of their return.

Against the background of the insurmountable difficulties of some trafficked persons in asserting their claims, a state fund for direct compensation in hardship cases should be considered.

Given trafficked persons' limited access to state compensation, the scope of the German Crime Victims' Compensation Act should be reviewed, particularly in light of the requirement to provide compensation which is repeated in the Council of Europe Convention on Action Against Trafficking in Human Beings.

Given the rarity with which the adhesion procedure (procedure in which the civil claim for compensation can be made in criminal court during the criminal proceedings), incentive systems for increased use of this procedure should be established in the courts.

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Abbreviations

AEntG	Arbeitnehmer-Entsendegesetz (Posting of Workers Act)
AsylbLG	Asylbewerberleistungsgesetz (Asylum Seekers' Benefits Act)
AufentG	Aufenthaltsgesetz (Residence Act)
BGB	Bürgerliches Gesetzbuch (Civil Code
BGH	Bundesgerichtshof (Federal Court of Justice)
BKA	Bundeskriminalamt (Federal Criminal Police Office)
BMFSFJ	Bundesministerium für Familie, Senioren, Frauen und Jugend (Federal Ministry of Family Affairs, Senior Citizens, Women and Youth)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DGB	Deutscher Gewerkschaftsbund (Confederation of German Trade Unions)
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
EU	European Union
Europol	European Police Office
FBS	Fachberatungsstellen gegen Menschenhandel (specialised counselling centres against human trafficking)
GG	Grundgesetz (Basic Law)
GRETA	Group of Experts on Action against Trafficking in Human Beings
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ILO	International Labour Organisation
IOM	International Organisation for Migration
Kobra	Central Coordination and Advisory Centre for Victims of Trafficking
KOK	Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt gegen Frauen im Migrationsprozess (German nationwide activist coordination group combating trafficking in women and violence against women in the process of migration)
NGO	Non-governmental organisation
NRW	North Rhine-Westphalia
OEG	Opferentschädigungsgesetz (Crime Victims' Compensation Act)
OSCE	Organisation for Security and Cooperation in Europe
PKH	Prozesskostenhilfe (aid for court costs)
PKS	Polizeiliche Kriminalstatistik (police criminal statistics)
RVG	Rechtsanwaltsvergütungsgesetz (Lawyers' Fees Act)
SchwarzArbG	Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung (Act on Combating Undeclared Work)

SGB	Sozialgesetzbuch (Social Code)
StGB	Strafgesetzbuch (Criminal Code)
StPO	Strafprozessordnung (Code of Criminal Procedure)
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNODC	United Nations Office on Drugs and Crime
ver.di	Vereinte Dienstleistungsgewerkschaft
ZAPO	Central Contact Centre for Commuters from Eastern Europe
ZPO	Zivilprozessordnung (Code of Civil Procedure)

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