AWARENESS-RAISING OF JUDICIAL AUTHORITIES CONCERNING TRAFFICKING IN HUMAN BEINGS

COUNTRY REPORT

GERMANY

2005

Researcher:

Marian Amy Jane Benbow

IOM International Organization for Migration

IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental body, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration; advance understanding of migration issues; encourage social and economic development through migration; and uphold the human dignity and well-being of migrants.

The project as coordinated and implemented by IOM in the Netherlands was financed by the European Commission, the Netherlands Ministries of Justice and Foreign Affairs and IOM.

Publisher: International Organization for Migration
Mission in the Netherlands
P.O.Box 10796
2501 HT The Hague
The Netherlands
Tel.: +31.70.318 15 00
Fax: +31.70.338 54 54
E-mail: Missionthehague@iom.int
Internet: http://www.iom-nederland.nl

Opinions expressed in this work are those of the authors and do not necessarily reflect the view of IOM or co-funders.

TABLE OF CONTENTS

1. APPLICABLE NATIONAL LEGISLATION

When discussing the current relevant national legislation concerning trafficking in human beings, the most important provisions are the penal provisions in the Criminal Code (Strafgesetzbuch, StGB)[1] dealing explicitly with trafficking in human beings. Formerly contained in sections 180 b and 181 StGB, and focussing exclusively on sexual exploitation, the criminal provisions on THB have recently been expanded (see below, chapter 1.1.1). This report will nonetheless mostly discuss trafficking in human beings for the purpose of sexual exploitation, since the legal developments concerning other forms of trafficking[2] are too new to present an objective picture[3]. Other provisions of the StGB may also be referred to in the context of trafficking in human beings (see below, chapter 1.1.2). Since victims are often brought into Germany under violation of immigration laws and regulations, a thorough analysis of applicable national legislation must also deal with German Law of Residence (Aufenthaltsgesetz, AufenthG)[4] and the distinction made in German Law between trafficking in human beings and smuggling human beings (section 1.1.3). A look at the policy and law concerning prostitution (section 1.1.4.) also serves to better understand the background of THB and the surroundings in which it takes place.
In addition, such a survey must also focus on rules governing transnational cooperation on issues concerning counter-trafficking measures (section 1.2.)

1.1 Applicable legislation on trafficking in human beings

1.1.1 Relevant provisions in the German Criminal Code with explicit reference to trafficking in human beings

1.1.1.1 The Law until 19 February 2005

The relevant penal provisions concerning trafficking in human beings used to be secs. 180b ("Trafficking in Human Beings")[5] and 181 ("Serious Trafficking in Human Beings") [6] StGB.[7]

[1] Strafgesetzbuch, newly announced 13.11.1998, Federal Law Gazette (Bundesgesetzblatt, BGBl. I 3322); last amended through Art. 2, Law of 24. 3.2005 (BGBl. I 969).
[2] Due to the fact that legal provisions on THB focussed exclusively on THB for sexual exploitation in the past, interviewed public prosecutors' and judges' awareness for other forms of THB was not very well developed. This picture was slightly different for the police officers interviewed, as the police focus in North Rhine-Westphalia (hereinafter NRW), especially in crime analysis, has also been on other forms of THB. Cases concerning Chinese nationals forced to work in Chinese restaurants, or concerning Bulgarian nationals forced to beg in Germany which were previously punished as smuggling will in future fall under the term 'THB'.
[3] Sec. 2 StGB provides that the criminal provision which was in force at the time an act was committed determines whether such an act constitutes a criminal offence, and the penalty for such an offence. Hence, it will take some time until the first judgements will be passed on the basis of the new legal provisions.
[4] Formerly 'Foreigner's Law', with entry into force of the 2004 Immigration Law (BGBl. I 1950) on 01.01.2005, the provisions governing foreigners' legal status and containing special criminal provisions concerning illegal entry and abode in Germany have been revised and given the new name 'Law of Residency'.
[5] Cf. Annex II, 1.3.
[6] Cf. Annex II, 1.4.

Under these provisions, which were part of chapter thirteen of the StGB with the official title 'Crimes against Sexual Self-determination', trafficking in human beings meant conduct aimed, usually in pursuit of profit, at bringing another person, through trickery, threats or force or by exploiting a difficult personal situation, to engage in sexual acts, and particularly to take up or continue prostitution in a foreign country. Other forms of exploitation, such as exploitation through forced labour, were not part of the definition of trafficking in human beings under German law. Certain aspects of the crime of THB were, however, punishable under other legal provisions. These are discussed below (section 1.1.2. and 1.1.3.).

1.1.1.2 The Law as of 19 February 2005

The lack of penalization of THB for reasons other than sexual exploitation has recently been remedied with entry into force of the 37th Criminal Law Reform Act on February 19, 2005. The StGB was amended in order to implement the Framework Decision of the European Union on Trafficking in Human Beings and the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children[8]. The Federal Republic of Germany is currently making preparations for the ratification of the latter.

While the legislative proposal contains explicit references to Germany's international obligations in regard to the aforementioned international documents, it makes no reference to relevant documents drafted under the auspices of the Council of Europe.

Former secs. 180 b and 181 StGB have been relocated in the StGB's Chapter Eighteen 'Crimes Against Personal Freedom', and have been merged with parts of the former sec. 234 StGB on kidnapping. The reform act has expanded the definition of trafficking in human beings to comprise not only sexual exploitation of victims (sec. 232 StGB[9]), but also exploitation through forced labour (sec. 233 StGB[10]).

A new sec. 233a StGB[11] punishes accessory actions, and sec. 233b StGB provides a possibility for the court to order that the future conduct of a perpetrator of THB may be supervised (supervision of conduct, 'Führungsaufsicht'), and that his proceeds from THB be confiscated and fall to the state treasury (extended forfeiture, 'erweiterter Verfall').

The provisions sec. 232 to 233a StGB are enumerated among the offences that fall under the principle of universal jurisdiction and may be prosecuted regardless of where they were committed and which nationality the perpetrator had[12].

1.1.1.2.1 Sec. 232 par. 1 StGB: 'simple' THB in cases of sexual exploitation

Sec. 232 par. 1 StGB contains the basic provision for trafficking in human beings with the purpose of sexual exploitation of the victim[13].

The elements of crime that must be fulfilled in the 1st sentence are to (1) take advantage of a predicament or helplessness associated with the person's stay in a foreign country; (2) bring

---

[7] Both provisions were amended by the 26th Criminal Law Reform Act (Trafficking in Human Beings), which came into force on 22 July 1992, in response to the marked increase in the commercial exploitation of human beings and the new forms in which it was manifesting itself at the time.

[8] EU Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings (OJ L 203, 01.08.2002); 2000 UN Trafficking Protocol of 15 November 2000, signed by Germany on 12 December 2000, not yet ratified.

[9] Cf. Annex II, 1.6.

[10] Cf. Annex II, 1.7.

[11] Cf. Annex II, 1.8.

[12] Cf. sec. 6 no. 4 StGB.

[13] Proceedings of the German Bundestag (Bundestagsdrucksache, BT-Drs.) 15/4048, p.12.

another person to either (3) take up or continue prostitution or (4) carry out sexual acts that exploit the person on or in front of the perpetrator or a third person or have such acts committed by the perpetrator or a third person on herself[14].

The requirement of '**taking advantage of a predicament or helplessness associated with the person's stay in a foreign country**' is an objective criterion. It has replaced the former subjective criterion of 'knowledge of a coercive situation or helplessness associated with the person's stay in a foreign country'.

Since the requirement of a '**predicament**' was already contained in sec. 180b par. 1, 1st sentence under the old law, it is suggested that the same definition shall also apply under the new provision. Hence, predicament means a situation of personal or economic distress to the victim[15]. This precondition is met if the victim is in a situation of serious financial or personal distress that entails a significant limitation of her capacity to judge and act, and harbours the danger of limiting her capacity to resist assaults on her sexual self-defence[16]. It is irrelevant whether the offender actively created such a situation or whether he only used an already existing situation to his end[17].

It does not matter whether the victim is actually objectively in such a situation. A predicament felt by the victim (mental/subjective exigency) is sufficient[18]. If the victim is, however, merely over dramatizing general risks of life that apply to anybody, this image does not meet the necessary threshold for 'felt' exigency[19].

Likewise, the requirement of a predicament is even met where the victim is to blame for bringing the situation upon her herself[20]. Hence, persons who took insensible decisions, which led to their exigency, are also protected. Moreover, while the bad social situation in which a victim may find herself in her country of origin does not meet the criterion of a predicament without additional distressing elements, the fear an illegal immigrant has of being deported or socially stigmatised when returned to her own country is considered sufficient[21].

The alternative precondition '**helplessness associated with the person's stay in another country**' is also taken from the former provisions[22]. The helplessness must be based on the fact that the victim is in a country that is foreign to her, or, if she were not already in such a country, would hypothetically be in such a situation of helplessness if she were to be taken to a foreign country[23]. It is to be noted that not every country is a foreign country in the above sense. Only in such instances where the legal systems and the general living conditions in the country of origin and the country where the victim is or is to be taken are incomparable can there be talk of a foreign country in the above sense[24]. Whether the victim is indeed helpless will always depend on her concrete situation and on her personal abilities[25]. Helplessness will usually exist where the

[14] N.B. Throughout this paper, the female pronoun has been used when referring to trafficked victims or witnesses – this is simply for grammatical ease and is not intended to exclude male victims or witnesses of trafficking in human beings.
[15] Mü-Ko/*Renzikowski*, § 180 b recital 31.
[16] Cf. BGHSt. 42, p. 399.
[17] Mü-Ko/*Renzikowski*, § 180 b recital 32.
[18] Tröndle/ Fischer, § 180 b recital 5; Mü-Ko/*Renzikowski*, § 180 b recital 32.
[19] Tröndle/ Fischer, § 180 b recital 5.
[20] Laubenthal, recital 642.
[21] Tröndle/ Fischer, § 180 b recital 5.
[22] Sec. 180 b par. 1, 2nd sentence; par. 2 1st sentence StGB (old version).
[23] Laubenthal, recital 653.
[24] Laubenthal, recital 654.
[25] Tröndle/ Fischer, § 180 b recital 10.

victim does not want to carry out sexual acts, but is no longer able to resist requests for such acts due to being in a foreign country where she does not know the language, the way of life or the means to acquire legal protection[26]. If the victim lacks sufficient financial funds, especially petty cash, or is dependent on the offender to provide for her accommodation and food, this may be further circumstantial evidence for such helplessness[27].

The element to '**bring**' another person to one of the further acts was formerly contained both in sec. 180b par. 1, 2nd sentence and 180 b par. 2. There, it could either pertain to a case in which the perpetrator exerted his influence and at the same time intended his actions to be causal for the proposed end[28] (i.e. the victim did not actually have to take up the act of prostitution), or to an instance where the victim actually became involved in prostitution or continued to be involved in prostitution[29] because of the offender's acts. Here, the perpetrator was only punishable if his act actually led to the victim becoming or remaining a prostitute.

Due to the wording of the new sec. 232 par. 1, the only possible future interpretation of this clause will be in second sense. Hence, an offender will be punishable under this provision when an action he undertakes is causal for the prostitution or other sexual act of the victim. However, he will no longer be punishable for THB the moment he exerts influence on the victim with the aim of moving her to take up a further act. Instead, punishment will only be possible where the perpetrator's actions in fact lead to a further act described below. Actions of an offender intended to get the victim to perform a sexual act or (further) engage in prostitution, that do not lead to the victim doing so, are, however, illegal, and may be punishable as attempted THB under sec. 232 par. 2 StGB.

The clause '**take up or continue prostitution**' has remained unchanged from its former wording in sec. 180 b par. 1, 1st sentence, apart from the fact that the legislator has added other sexual acts in order to clarify that prostitution is only one of various kinds of sexual act.

Prostitution has been legally defined by courts and in the Law on Prostitution[30]. It is carried out wherever someone repeatedly performs sexual acts with varying partners in return for remuneration over a certain length of time, which need not necessarily be a long period of time[31]. It is of no concern where and how the partners are recruited and who collects the money[32].

'**Take up**' applies when the victim is not prostituting herself at the time of the offender's act[33]. Hence, both victims who have never worked as prostitutes before, and women who have previously done so, but not at the time of the offender's act, fall within the protection of this clause. A sexual act need not actually take place. Instead, prostitution is taken up once the victim performs the first act that aims at such a sexual act against payment[34]. Due to conflicting jurisprudence, it remains unclear how closely this first act, which paves the way for the following sexual acts, must be connected to the subsequent sexual acts. It seems clear that there must be some direct geographical and temporal connection between the preparatory action and

[26] Laubenthal, recital 652.
[27] BGH NStZ 1999, p. 349.
[28] Laubenthal, recital 657; this wording was formerly held to apply concerning former sec. 180 b par. 1, 2nd sentence StGB.
[29] Laubenthal, recital 664.
[30] Cf. sec. 1 Law on Prostitution of 20.12.2001, entry into force 01.01.2002, BGBl. I 2001, p. 3983.
[31] Constantly ruled by courts; cf. f.ex. BGHSt NStZ 2000, 86; BGHSt NStZ 2000, 368, 369; BGH 3 StR 135/01 – order of 20.06.2001, p. 8, viewable at www.bundesgerichtshof.de.
[32] BT-Drs. 6/1552, p.25; Tröndle/Fischer § 180 b Rn. 3.
[33] Laubenthal, recital 645.
[34] BGH NStZ 2000, 86, 87; BGH 3 StR 135/01 – order of 20.06.2001, p. 8, viewable at www.bundesgerichtshof.de.

the planned sexual contact[35]. Hence, it was ruled that prostitution has been taken up the moment the victim offers her 'services' in return for payment for the first time, for example at a bar or on the streets[36]. However, while a telephone conversation in which it was agreed that the victim was to 'visit' a suitor at his house was held to constitute 'taking up' prostitution[37], negotiations with the owner of the bordello were held to be insufficient, as these are not aimed immediately at taking up prostitution[38].

'**Continue**' applies where a person is actively involved in prostitution at the time of the offender's act. Three distinct constellations are conceivable under this alternative, which is intended to protect prostitutes from becoming more caught up in the 'business'[39]: Either (1) the prostitute wants to quit prostitution entirely, or (2) she wishes to practice a less intensive form of prostitution[40], and in each case is prevented from doing so, or (3) she is brought to engage in a more intensive form of prostitution against her will[41]. This last constellation is fulfilled when the victim is brought to take further actions that intensify her previous dependency and the degree of organisation in a significant manner[42]. It is not fulfilled, however, where the prostitute is brought to practice prostitution in a manner that does not differ from her former occupation in a negative way[43], i.e. where she is not placed in a worse situation than before. Examples for such a change in prostitution which does not constitute 'continuation' in the above sense would be changing the place where the prostitution should take place, or forcing the victim to hand over her earnings, because these acts in themselves do not influence the actual sexual acts demanded of her as a prostitute. Forcing a prostitute to have sexual intercourse with over-weight clients may also not suffice to fulfil the criterion[44]. On the other hand, the highest Federal Criminal Court has ruled *obiter dictum* that forcing a victim to have unprotected sexual intercourse with a suitor who has a venereal disease may constitute a qualitatively different form of prostitution.

Under the former provision, the offender was also punishable for completed THB when he mistakenly thought the victim wished to stop prostituting herself, though she had no such current wish in reality. The new provision requires that the victim actually 'continue' prostitution. Hence, sec. 232 Par. 1 is not applicable. Instead, such a case may constitute an attempt of THB under sec. 232 par. 2 StGB.

'**Carry out sexual acts that exploit the person on or in front of the perpetrator or a third person or have such acts committed by the perpetrator or a third person on him/ herself**'. Most notably, the new law expanded the wording of this clause, which did not use to include sexual acts committed with the perpetrator. The former requirement that the offender act for his own material benefit has been removed. Instead, the new provision now requires that the sexual acts **exploit** the victim. With regard to the framework decision on trafficking in human beings[45], exploitation, a term also known to other provisions of the StGB[46], first and foremost means

[35] Mü-Ko/*Renzikowski*, § 180 a recital 22.
[36] BVerfG NJW 1985, p. 1767; BGHSt. 23, p. 167 (173); BayOLG JZ 1989, p. 51 f.
[37] BayOLG JZ 1989, 51 f.
[38] BGH NStZ-RR 1997, 294.
[39] BayOLG NJW 1999, S. 3275.
[40] BGH NJW 1996, 2875.
[41] BGH NJW 1982, 454; Laubenthal, recital 646.
[42] SK-Horn, 1998, § 180b, recital. 6.
[43] Laubenthal, recital 648.
[44] BGH 3 StR 500/03 – decision of 27.05.2003, viewable at www.bundesgerichtshof.de.
[45] See above, note 8.
[46] Sections 180 par. 2 no. 2; 181 par. 1 no.1; 291 StGB.

economic exploitation[47]. It was the legislator's intent to punish sexual acts committed in order to produce pornographic publications, and exploitation of women in peep shows and in the so-called marriage trade. At the same time, the provision was not meant to exclude other relationships that exploit the victim in a similar manner[48]. It shall remain for the courts to fill this term with further meaning.

As regards the **subjective elements of crime**, the offender must have the necessary criminal intent. His *mens rea* must encompass all objective elements of crime as stated above. This means that the offender must intend to bring another person to take up or continue prostitution or an exploitative sexual act. The offender must be aware of the circumstances that lead to the victim's helplessness or predicament, and must intend to take advantage of them.

The meaning of sec. **232 par. 1, 2nd sentence StGB**[49] is to protect persons under the age of 21 years[50] from being subjected to prostitution or other sexual acts mentioned in the 1st sentence. In contrast to the 1st sentence, this alternative does not require that the persons under the age of 21 be exploited. In terms of preconditions concerning criminal intent, the offender must merely know that his victim is under the age of 21. If he falsely thinks the victim is under 21, he may be punishable for an attempt of sec. 232, par. 1, 2nd sentence StGB under sec. 232 par. 2 StGB. In turn, if he is unaware that the victim is under 21, he may not be punished under this provision.

1.1.1.2.2 'Aggravated' cases of THB for sexual exploitation

Sec. 232 par. 3 describes qualifications of sec. 232 par. 1 StGB[51] and raises possible punishment to imprisonment from one year to ten years. Hence, this provision is considered a serious criminal offence under German law, the attempt of which is punishable without express provision. It is fashioned along the lines of article 3 par. 2 of the Council Framework Decision (CFD) on Combating Trafficking in Human Beings[52]. [53]

Sec. 232 par. 3 no. 2, 2nd alternative reflects article 3 par. 2 (a) CFD by stipulating that an offender who through the act exposes the victim to a danger of death faces more severe punishment of up to 10 years imprisonment.

Art. 3 par. 2 (b) CFD is reflected by **sec. 232 par. 3 no. 1**, that makes provisions for protecting children under the age of fourteen, which is the age of sexual majority under German law.

Art. 3 par. 2 (c), 2nd alternative CFD is implemented in **sec. 232 par. 3 no. 2, 1st alternative**. This provision describes cases in which the offender causes severe physical maltreatment to the victim whilst committing the act.

Last not least, **sec. 232 par. 3 no. 2** implements art. 3 par. 2 (d) CFD, which punishes any offence 'that has been committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA (…)'. The wording in German law is 'commits the offence professionally or as a member of a gang that has banded together to continually commit such

[47] BT-Drs. 15/4048, p. 12.
[48] BT-Drs. 15/4048, p. 12.
[49] This provision corresponds to former sec. 180 b par. 2 no. 2 (old version of the StGB).
[50] As stated in BT-Drs. 15/4048, p.12, different experts pointed out that young grown up females are the most targeted group of victims and therefore require special criminal protection. Therefore, the old age limit was retained, even though it does not fit into the over-all system of German criminal law and exceeds the obligations laid out under public international law.
[51] BT-Drs. 15/4048, p. 12.
[52] See above, note 8.
[53] BT-Drs. 15/4048, p. 13.

acts'. An offender acts '**professionally**' if he has the intention to create a source of income of certain extent both time and quantity wise by repeatedly committing such acts[54]. The first act committed with this intent must already be considered to be professional, even if - contrary to the offender's intention - further acts never follow[55]. Jurisprudence has defined '**gang**' as an association of at least three persons[56] who have grouped together in order to commit several autonomous offences, which need not yet have taken an exact shape. It is not necessary that members of such a gang act together in the commission of THB in order for this provision to apply[57]. Instead, it is already applicable when one member acts alone or in association with other persons from outside the gang, provided that the gang member is acting within the scope of the gang agreement or with the presumed agreement of the other gang members in order to further the aims of the gang.

Sec. 232 par. 4 contains further qualifications of sec. 232 par. 1. **no. 1** implements Art. 3 par. 2 CFD by providing for more severe punishment in such cases where the offence has been committed by use of serious violence. At the same time, it has adopted the wording of former sec. 181 par. 1 no. 1 StGB. The offender must use the relevant means to bring the victim to take up or continue prostitution or another sexual act as described above for sec. 233 par. 1.
Force and **threat of an appreciable harm** are terms that stem from the German criminal provision dealing with coercion (sec. 240).
Criminal law uses different degrees of **force** in different provisions, depending for the most part on whether the individual provision contains the additional phrase 'treat of an appreciable harm' or not. Force in the sense of coercion, and hence also in the sense of sec. 233 par. 4 StGB, means a constraint which works physically by applying strength, or a physical effect that is suitable and intended to eliminate or impede another person's freedom of decision or capacity to use his will[58]. This term comprises both force that completely disables the victim's capacity to freely make up her own mind (e.g. by giving the victim anaesthetics) and force used to make the victim take a certain decision.
Threat of an appreciable harm must be seen in the context of the force also contained in this provision. Hence, a threat is the announcement of a future harm. The person uttering this announcement must claim to have an influence on the future harm in order to intimidate the victim. Harm is any disadvantage or loss of values. It is appreciable if it is suitable to bring a levelheaded, sensible person to behave in the manner wanted by the perpetrator.
Trickery pertains to behaviour with which the offender means to achieve his aims whilst deliberately and cleverly hiding his true intentions or circumstances[59]. The decisive issue here is whether the offender hides his aim – that is to achieve that the victim prostitutes herself – through his deceitful actions.

Sec. 232 par. 4 no. 2 is fashioned along the lines of former sec. 234 StGB. Here, the offender must seize the victim through one of the means discussed above in the context of sec. 232 par. 4 no. 1. In contrast to that provision, it is not necessary that the victim actually takes up or

[54] BGH NStZ 1995, 85.
[55] BGH NJW 1998, 2913, 2914; BGH NStZ 1995, 85; 2004, 265, 266
[56] BGHSt 46, 321.
[57] Cf. Tröndle/ Fischer, § 260 recital 3, regarding sec. 260 StGB, where the same rule applies due to the like wording of both provisions.
[58] BGHSt 41, 182; BGH NJW 1995, 2862.
[59] BGHSt 32, 269; BGH NStZ 1996, 276; Küper 1999, 207.

continues prostitution or another sexual act in the sense described above for sec. 232 par. 1. The offender must merely act with the intent of bringing the victim to do so.
Seize means to gain the physical control over the victim[60]. This criterion is met if the victim is prevented from freely deciding her own destiny, e.g. by a rope that is slung around the victim's neck. It is not necessary that the victim be moved to a new location.

Finally, **sec. 232 Par. 5** contains rules concerning punishment for less severe cases of simple and aggravated cases of THB, and allows for a mitigation of the sentence. The court applies these rules when discerning the exact sentence after it has come to the conclusion that the accused is guilty of THB. The court must look at the whole picture of the offence, including the motives and the offender's personality. It may only apply this provision if, based on this assessment, the case is a special case which justifies the mitigation.

1.1.1.2.3. THB by exploiting labour

Sec. 233 aims to improve the existing sanctions for trafficking in human beings in cases where the victim was forced to accept inhumane working conditions by taking advantage of her exigency or helplessness due to being in a foreign country, by threatening or deceiving the person.
The phrases '**slavery**' and '**serfdom**' are taken from the former version of sec. 234, par. 1. Therefore, slavery is defined as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'[61]. It describes a situation in which the owner can treat the victim as an object that he may arbitrarily dispose of as he wishes[62]. The slave trade 'includes all acts involved in the capture, acquisition or disposal of a person with an intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves'[63].
Serfdom means 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status'[64].
Under the old legal regime, acts that were offences according to former secs. 180b par. 2 and 181 StGB could not be subsumed under the above definitions in former sec. 234 StGB, despite the fact that the offender factually possessed comprehensive powers to dispense of the victim as he wished[65]. This was because the offender had to have the intent to subject the victim to a legal system that recognized or at least factually tolerated the legal position of slaves and serfs[66], and such a legal position does not exist in Germany and is not tolerated, either. Under the new provisions, the interpretation must be less restrictive: A factual situation of slavery or serfdom must suffice; otherwise, the legislative changes would be merely symbolic and not serve to penalize THB for exploitation of labour.

---

[60] Tröndle/ Fischer, § 234 recital 2.
[61] This is the definition found in Art. 1 no. 1 of the 1926 Slavery Convention, entry into force 9.3.1927.
[62] BGH NJW 1993, 2252 (2253).
[63] Cf. Art. 1 no. 2 Slavery Convention.
[64] Cf. Sec. I, Art. 1 lit. b) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956; entry into force 30 April 1957.
[65] Cf. Tröndle/ Fischer § 234 recital 6; BGH 39, 214.
[66] Mü-Ko/*Wieck-Noodt,* § 234 recital 50.

Debt bondage (‚Schuldknechtschaft') is a newly inserted term. It describes a dependent relationship in which a creditor exploits the debtor's labour for years or even decades with the aim of paying off actual or alleged debts[67].
The rest of the provision describes slave-like relationships concerning employment at unfavourable terms of labour[68].
The elements **predicament** and **helplessness** are the same as in sec. 232.

1.1.1.2.4 Punishability of attempts

Under general rules of criminal law in Germany, attempts of serious offences are always punishable, attempts of less serious offences only where the law expressly states so[69]. Serious offences are those offences that provide for imprisonment of no less than one year. As they constitute serious crimes, attempts of acts contained in secs. 232 par. 3 to 5, as well as sec. 233 par. 3, are punishable. Sec. 232 par. 2 and sec. 233 par. 2 clarify that attempts of the less serious crimes contained in the 1st par. of each sec. are also punishable.
An attempt is punishable under the precondition that the offender intended to meet all physical and additional mental elements of crime and was just about to commit the offence by meeting these elements of crime, but did not fulfil (at least) one of the physical elements of crime. It is not difficult to conclude that an attempt has been made when the perpetrator has already begun with the execution of the punishable action (e.g. the perpetrator shoots at the victim intending to kill her, but misses). Where this is not the case, however, it is very difficult to make a distinction between a (punishable) attempt and a mere act of preparation, which is usually not punishable. According to jurisprudence, the perpetrator must mentally have passed the threshold to "Here we go!" and objectively have begun to carry through an act that meets the physical elements of crime[70]. In essence, therefore, according to the perpetrator's plan, the victim must have been acutely subjected to the danger foreseen in the perpetrator's plan.

1.1.1.2.5 Co-Perpetration, accessoryship and incitement

The Bundestag was of the opinion that the actions of THB contained in article 1 par. 1 CFD are sufficiently penalized in German Law under secs. 232 and 233 StGB in connection with the general provisions on co-perpetration (sec. 25 StGB), incitement (sec. 26 StGB) and accessories (sec. 27 StGB).
There are three types of **perpetrators** under German criminal law: Perpetrators acting on their own (sec. 25 par. 1, 1st alternative), perpetrators acting through another person (sec. 25 par. 1, 2nd alternative), and co-perpetrators (sec. 25 par. 2 StGB).
Co-perpetrators consciously and intentionally collaborate in committing an offence. Each person involved in the commission of an offence is an equal partner, and as such carries the mutual decision to commit the offence and to jointly realize the elements of crime. The individual contributions to the offence amount to a homogeneous whole, and the success is attributable to each participant[71]. Hence, in order to co-perpetrate a crime, each participant must make a contribution to its commission. Acts committed by each participant are then criminally attributed to the other participants. It is, however, not strictly necessary that all perpetrators act together at

[67] BT-DRs. 15/3045, p. 9.
[68] BT-Drs. 15/3045, p. 9/10. This definition is based on labour regulations formerly contained in secs. 406 par. 1 SGB III (Third Code on Social Law) and 15a par. 1 AÜG (Law on Transferring Employees).
[69] Cf. sec. 23 par. 1 in connection with sec. 12 StGB.
[70] BGH wistra 2000, p. 379.
[71] BGHSt 24, p. 286; 34, p. 124; 37, p. 289.

the scene of crime. A smaller role in the actual commission of the offence may be offset by a larger role in the planning of the crime. Hence, the criminal mastermind who does not act at the scene of crime, but whose impact in the planning phase is so profound that the offence must be considered as 'his deed' may be punished as a co-perpetrator[72].
Perpetrators acting through another person, or indirect perpetrators, commit an offence by making use of a 'defect' of the person acting for them. This defect can be that the person acting is unaware of an element of crime, is justified in committing the act, or is without blame. Due to this defect, the person behind the offence, the 'brains' behind the operation, controls the whole of the events through his will or superior knowledge, and wilfully steers the acts of the acting person according to his plans.

Concerning **participation**, German criminal law knows two different kinds of actors: Inciters and accessories. One must bear in mind that both forms of participation are accessory to a main act, which must have been committed in an intentional and illicit manner. The attempt of such a main act is sufficient. It is not, however, necessary that the main act be committed in a culpable manner. Hence, where no offence was committed, or an act that would otherwise constitute a punishable offence was committed without the necessary intent or with a sufficient justification, there can be no participation.
Whoever determines that another person shall intentionally commit an illicit act is an **inciter** and punishable in a like manner as a perpetrator[73]. In terms of physical elements of crime, an inciter must determine another person to commit such an act, meaning that he must cause another person to decide to commit such an act. The inciter's intent must comprise two elements: Firstly, the inciter must intend to cause the decision to act in another person. Secondly, the inciter must be aware that a certain offence which is outlined in general terms will be committed by a particular perpetrator or group of people[74].
Whoever intentionally aids another person in his commission of an intentional and illicit act is punishable as an **accessory**. His punishment will be based on the sentence for the main act, but will be reduced. To 'aid' in this context means any contribution that makes the main act possible or easier to carry out, or which makes a violation of a legal good by the main perpetrator more severe. According to the jurisprudence, any act of supporting the main act may suffice and constitute an act of accessoryship. It is not necessary that the aid granted was directly conditional for the main act[75]. Furthermore, besides physical help in the perpetrator's main act, psychological help is also recognized as 'aid' in the above sense. An accessory's intent must comprise the actual act of aiding, as well as the knowledge that the person aided will commit a certain intentional, illicit act.

In order to complement the above general rules on participation and attempts in cases of THB, **sec. 233a StGB** was inserted into the criminal code. This provision should act as an umbrella clause and lead to criminal punishment in cases of THB where *lacunae* would otherwise exist. Hence, sec. 233a establishes a distinct provision that prohibits aiding and abetting of THB in cases where there is no main act, and, therefore, the general rules in sec. 27 StGB do not apply ('selbständiger Beihilfetatbestand').
Sec. 233a par. 2 StGB contains the same qualifications as sec. 232 par. 3 StGB.

[72] BGHSt 33, p. 50 (53).
[73] Cf. Sec. 26 StGB.
[74] BGHSt 6, p. 359; 15, p. 276.
[75] BGH NStZ 1985, p. 318.

1.1.1.2.6 Further discussions

Further modifications concerning criminal sanctions for acts connected to trafficking in human beings are being discussed:

There have been suggestions to include sanctions for suitors who deliberately or negligently 'make use' of victims of THB. A suggestion to this end by the Bundesrat[76] was not taken up in the new legislative act, but is to be further discussed. Concerns about implementation of such a rule focus on the current system of sexual offences, which does not penalise negligent acts, as well as possible difficulties in collecting sufficient evidence to prove deliberate acts on behalf of a suitor. However, as the Bundesrat pointed out, it is the suitors who provide a basis for the traffickers' criminal operations. They create a demand by taking advantage of the victims' situation, and supply the financial gains for the traffickers, thus contributing to the sexual exploitation.

Further, the Bundesrat criticized that no provision addresses the actual criminal act implicit in the German word for trafficking 'Menschenhandel', which can be translated as trading in human beings. In accordance with this implied meaning, the 'selling' of people and the degrading affect that it goes hand in hand with should, in the opinion of the Bundesrat, be punishable under a special criminal provision[77].

Further criticism concerned the changed legal situation after the entry into force of the Prostitution Law[78] (see below, section 1.1.4.).

In addition, concerning the new provision sec. 233 b StGB, which enables the court to order extended forfeiture in cases of trafficking under the new provisions, the Bundesrat criticised that the limitation to gangs and persons acting professionally already included in the old provision had been held on to, stating that a more liberal application of extended forfeiture would enable a more effective prevention of THB[79].

1.1.1.3 Provisions dealing with trafficking in children

Firstly, victimizing a child under the age of fourteen, as seen above, qualifies an offence for more severe punishment. Secondly, whether or not there is an element of exploitation, bringing a victim under the age of 21 to take up or continue prostitution or other sexual acts is always considered THB.

Already in force before the recent amendments in the StGB, there are provisions nominally concerning trafficking in children contained in the Criminal Code in sec. 235 (Child Stealing)[80], and especially in sec. 236 (Trafficking in Children)[81] StGB.

Both provisions serve to protect the undisturbed bodily and mental development either of persons under the age of 18, or of children up to the age of 14.

Sec. 235 additionally protects the parental or other right to custody of the victim. Potential victims are persons under the age of 18 in the cases of sec. 235 Par. 1 no. 1, par. 4 and par. 5, otherwise children.

Perpetrators can either be relatives of the victim, especially parents (sec. 235 par. 1 no. 1), or third persons from outside the victim's family. The punishable acts are either withdrawing or withholding the victim.

---

[76] BT-Drs. 15/4380, p. 3.
[77] BT-Drs. 15/4380, p. 2.
[78] Cf. note 30, above.
[79] BT-Drs. 15/4380, p. 6.
[80] Cf. Annex II, at 1.11.
[81] Cf. Annex II, at 1.12.

Withdrawing applies when the exercise of the right of custody of a victim is either completely prevented or seriously impeded for more than an insignificant amount of time by creating a spatial separation of the victim and her custodian[82]. The exact amount of time the minor must be separated from the custodian to constitute such a withdrawal depends on the minor's age and need for care[83]. With very small children, a separation of very few hours will suffice, while elder children will have to be withdrawn for a longer period[84].
Withholding applies when the victim is not returned to the custodian, or such return is made difficult, e.g. by influencing the victim, by concealing her whereabouts, or by accommodating her in a new place, not, however, if the minor is merely fed and housed.
Par. 1 no. 1 further requires that the perpetrator use a certain means of acting, i.e. force, threat of an appreciable harm or cunning.
Par. 2 penalizes withdrawing a child in order to take it abroad or withholding a child that is abroad.
It is to be noted that this provision only penalizes an impediment to the right of custody that has been exercised on the territory of Germany[85]. Hence, this prohibition may not apply to cases of trafficking in which the minors were previously living abroad and are trafficked into Germany.
The following qualifications in sec. 235 par. 4, albeit with the limitation just discussed, are especially relevant to cases of THB: Firstly, sec. 4 no. 1 names acts by which the minor's bodily or mental development is endangered in a severe manner. This is the case where the act is committed in order to carry out sexual acts on the victim, or to incite the victim to take up such acts[86]. Secondly, par. 4 no. 2 orders a more severe punishment in cases where the act is committed in return for remuneration or with the intent of enrichment.

Sec. 236 prohibits trade with children in par. 1, and penalizes illicit adoption of persons under the age of 18 in its par. 2.
'Trade' as used in par. 1 means buying and selling, or swapping a child. Under the 1st sentence, it is only parents or other persons charged with a child's custody that can be perpetrators. Third persons can only be subject to criminal punishment under sec. 235, under sec. 236 par. 2, when an illicit adoption is at stake, or for participating in the offence of a perpetrator under no. 1 as accessory or inciter.
In order to fulfil this offence, the perpetrator must leave his child to another person for a lengthy period of time, thereby violating his obligations to care for the child and raise it. Furthermore, he must act in order to enrich himself or a third person, or in return for remuneration.
Under the 2nd sentence, the persons receiving the child against remuneration are also subject to criminal liability. Punishment under this provision is, however, dependant on the commission of an act covered by the 1st sentence. As the criminal liability hinges on the receiver's knowledge that the parent or other custodian acted in order to receive remuneration or for enrichment, he may easily evade punishment by claiming that he did not know of this motive. He will go free of punishment if he claims that he merely wanted to help the parents in their plight or get the child out of its desperate situation.
Under par. 2, victims are persons under the age of 18. Perpetrators are persons who, without possessing a relevant permission, either arrange adoptions of victims, or act with an aim of

[82] BGHSt 1, 199; 16, 58; BGH NStZ 96, 333.
[83] Mü-Ko/*Wieck-Noodt*, § 235 recital 41.
[84] Mü-Ko/*Wieck-Noodt*, § 235 recital 44.
[85] Mü-Ko/*Wieck-Noodt*, § 235 recital 57.
[86] Mü-Ko/*Wieck-Noodt*, § 235 recital 80.

allowing third persons to take up victims for a lengthy period of time. The perpetrator must act for the same motives as the custodian in par. 1.
The 2nd sentence imposes a more severe punishment if the victim is taken into a society other than her own.
Par. 4 contains the same kind of qualifications as sec. 235 par. 4. In addition to these, a perpetrator will also face more severe punishment if he acts out of greed. This term is interpreted as an increase of business sense to an unusual, unhealthy and morally indecent level[87], and must be understood in a much stricter sense than the intent of enrichment in the sense of paragraphs 1 and 2 in order to justify the significantly higher punishment provided for under par. 4.

1.1.2 Other relevant criminal provisions

Under the UN Protocol definition, **trafficking in organs** is a form of THB. In German Law, sec. 17 Transplantation Law[88] contains a prohibition of trading in human organs and removing such organs. Secs. 18 and 19 Transplantation Law[89] penalize such trafficking or removal of organs.
Specific aspects of **trafficking in children** may be punishable under secs. 58 and 59 Youth Labour Protection Act (Jugendarbeitsschutzgesetz). As a general rule, it is prohibited to employ children under the age of 15 in Germany. Under very strict conditions, exceptions may be possible. Adolescents of age 15 or above may be employed, but an employer must abide by strict rules concerning their protection. Where a risk is created to a protected individual's health or labour through an intentional act, this constitutes a criminal offence punishable with imprisonment of up to one year or a fine. If such a risk is created through negligence, punishment may be a fine or imprisonment of up to half a year.
Even before certain aspects of former sec. 234 StGB[90] became part of the new sec. 233 StGB, they criminalized certain aspects of **THB for exploitation of labour** without explicit mention of THB. Other provisions penalizing certain aspects of this crime were formerly contained in the Social Law Code 3 (Sozialgesetzbuch III, secs. 406 and 407, now contained in sec. 233 StGB), as well as the Law on cession of employees (secs. 15 and 15 a 'Arbeitnehmerüberlassungsgesetz').

Other sections of the StGB may also apply in cases with a nexus to human trafficking. These provisions do not constitute trafficking, but punish certain aspects of the crime, or constitute offences that often occur together with THB.
Sec. 240 StGB punishes coercion[91]. This offence is committed when a perpetrator makes another person - the victim - adopt a certain behaviour the victim does not wish to adopt by means either of force or of a threat of an appreciable harm.
Both terms have already been explained above. The coercion must reach its intended aim in that the victim must behave - against her will - in the way the perpetrator wishes her to. Moreover, on the level of justifications, a court must always examine whether the act of coercion is especially objectionable. Under the new legislative act, forced marriages are now punishable as grave cases of coercion (sec. 240, par. 4, 2nd sentence, no. 1 StGB); already punishable as cases of coercion before the legislative reform, the occurrences of forced marriage in Germany called for a

[87] BGHSt 1, 388; BGH GA 53, 154.
[88] Cf. Annex II, at 2.1.
[89] Cf. Annex II, at 2.2 and 2.3, respectively.
[90] Cf. Annex II, at 1.9.
[91] Cf. Annex II, at 1.14.

highlighting of the special wrong by inserting forced marriages in the list of especially serious occurrences of coercion[92].
Sec. 239 StGB (deprivation of liberty)[93], sec. 177 StGB (rape)[94], sec. 180 a StGB (exploiting prostitutes)[95], and sec. 181 a StGB (pimping)[96] have a similar threat of punishment and may also be applied in cases of THB, especially for sexual exploitation. As many of these provisions are also more easily proved than THB, the accusation concerning THB may be dropped in favour of punishment under these other provisions[97].
Sec. 126 StGB (Disturbance of the Public Peace by Threatening to Commit Crimes) and sec. 138 StGB (Failure to Report Planned Crimes) complete the criminal provisions dealing with THB by penalizing acts in the run-up to THB. Persons who fail to report certain crimes, amongst them the serious offences of THB under secs. 232 par. 3 to 5 and 233 par. 3, or threaten to commit such serious offences, are liable to prosecution.
Finally, sec. 140 StGB (Rewarding and Approving Crimes) and sec. 261 StGB (Money laundering, Disguising of unlawfully obtained property assets) complete the penal provisions that are applicable in the aftermath of an offence of THB. Whoever rewards or publicly approves a serious offence of THB under secs. 232 par. 3 to 5 and 233 par. 3 StGB, or an attempt of such an offence, may face imprisonment of up to three years or a fine under sec. 140 StGB. Sec. 261 StGB provides that it is a punishable offence to disguise objects obtained through any act of THB, thereby obstructing or hindering the investigation of its origin, its being found, its forfeiture, its confiscation or its being taken into custody, or to procure such objects or keep them safe or use them for oneself or a third person.

1.1.3 Relevant criminal provisions contained in the AufenthG

Formally, German law makes a clear distinction between trafficking and smuggling. Whereas smuggling in human beings violates the territorial integrity and sovereignty of a state, i.e. the state is the victim, trafficking in human beings targets individuals and violates their human rights. This distinction is also expressed in the fact that THB and smuggling are contained in different legal codes, the StGB and the AufenthG, respectively.
At the outset, sec. 95 AufenthG[98] penalizes a foreigner's illegal entry into or remainder in Germany. A third person who assists in such an act or incites the foreigner to commit such an act may be liable for punishment under the general rules for incitement and accessoryship (sec. 26 and 27 StGB)[99].
In contrast, the independent offence of 'smuggling' in the sense of sec. 96 AufenthG[100] requires that the perpetrator not merely render aid or incite a foreigner to illegally enter or remain in Germany in the sense of sec. 95 AufenthG, but additionally fulfil an aggravating element. It is this aggravating element that upgrades an accessory act of aiding or inciting to the independent offence of smuggling. Such aggravating elements exist where the smuggler receives a pecuniary

[92] BT Drs. 15/3045, p.10.
[93] Cf. Annex II, at 1.13.
[94] Cf. Annex II, at 1.1.
[95] Cf. Annex II, at 1.2.
[96] Cf. Annex II, at 1.5.
[97] **See below, section**
2.3.4 Discontinuance or dismissal of THB accusations
[98] Cf. Annex II, at 3.1.
[99] As already discussed above in section 1.1.1.2.5., such punishment is dependent on a main act that was committed intentionally and without justification. Without such an act, there can be no punishment under secs. 26 and 27 StGB.
[100] Cf. Annex II, at 3.2.

advantage, commits the offence repeatedly or acts for several foreigners (sec. 96 par. 1 AufenthG). In this case, an offender is punishable by imprisonment of up to 5 years or a fine. If the perpetrator smuggles professionally or repeatedly acts as a member of a gang, carries a weapon when committing the act, or exposes the smuggled person to a treatment that threatens his life, is inhumane or degrading or to the danger of a serious health damage, he may be punished with imprisonment between six months and ten years (sec. 96 par. 2 AufenthG).
Sec. 97 AufenthG[101] contains aggravated cases of smuggling. As most severely punished form of smuggling, an offender who receives a pecuniary advantage, commits the offence repeatedly or acts for several foreigners, and, in addition, causes the death of the smuggled person shall be punished with imprisonment of no less than three years (sec. 97 par. 1 AufenthG). Finally, an offender who combines an act described under sec. 96 par. 1 AufenthG and professional gang activities is liable for punishment in the form of imprisonment of between one and ten years (sec. 97 par. 2 AufenthG).
Despite the clear distinction in law, factually, the distinction is not as clear-cut, and instances of THB may remain unrecorded, or instead appear as 'smuggling' in terms of the AufenthG.[102]

1.1.4 The policy regards Prostitution

The law and policy in Germany regards prostitution is based on the role model of a voluntary and self-determined prostitute. Hence, provided prostitution is carried out of the prostitute's own free will, it is a legal profession in Germany. Prostitutes will not face criminal charges for working in this profession[103].
Until 2002, though prostitution was not illegal, civil courts generally ruled that any agreement between a prostitute and a suitor in which the prostitute offered sexual acts in return for payment was nil and void, since such an act was considered to be immoral. Hence, the agreement being void, she had no claim on which to base her demand, and, lacking a legal title, was not able to sue her suitor for payment. Moreover, though her occupation was not illegal, a prostitute could not receive social security benefits, or take out state health or unemployment insurances, as she was not recognized as an employee. Finally, any act going beyond offering a prostitute accommodation, lodging or a place to stay could be subsumed under the elements of crime of the offence 'promoting prostitution'[104]. Hence, anyone who made efforts to ensure that a prostitute was able to work in acceptable conditions, for example by upholding hygienic conditions, was committing a criminal offence.
With the declared intent of improving the legal position of prostitutes and in so doing limiting the possibilities for criminals who exploit the prostitutes' vulnerable legal position, often with a substantive link to organized crime, the 2002 Prostitution Law[105] was enacted. The law attempted to improve the rights of prostitutes without at the same time benefiting suitors, bordello owners and others[106].
Today, by law, prostitution is no longer considered to be immoral. Prostitutes can sue their suitors for payment of the sum agreed upon. As a result, victims of THB for sexual exploitation

[101] Cf. Annex II, at 3.3.
[102] Hofmann, p. 93. This is, in part, a result of the limitation of THB to sexual exploitation. Additionally, as smuggling relies on factual elements (e.g. illegal entry) to a far higher degree than trafficking, it will often be easier to subsume a case under smuggling than under THB.
[103] They may, however, face charges for other offences, such as violations of the AufenthG, or breaches of taxation laws.
[104] Sec. 180 a par. 1 StGB (old version).
[105] Cf. note 30 above.
[106] BT-Drs. 14/5958, p. 4.

and prostitutes exploited by their pimps may sue the offenders for damages[107]. Moreover, prostitutes are now recognized as employees, and are entitled to receive social benefits and acquire health insurance. These measures were intended to make it easier for a prostitute to separate from this field of work and build a livelihood based on a different occupation[108].

While it is too early to tell whether the Prostitution Law has achieved its high goals, there is already much criticism of it. This focuses on its impact on the relationship between a prostitute and her pimp on the one hand, and on the other hand on possible adverse effects the changes may have had on the efficiency of criminal prosecution of various sex crimes, including THB.

It has been claimed that the heightened prerequisites concerning the offence 'exploiting prostitution' have narrowed the possibilities for police and public prosecutors to monitor the red light district and uncover relevant offences, especially exploitation of prostitutes and THB for sexual exploitation[109]. In an attempt to sever the ties between prostitution and elements of organized crime, the Prostitution Law limited the offence 'promoting prostitution' (former sec. 180a par. 1 no. 2 StGB) to cases in which the prostitute is exploited or subjected to undue influence. Before this change, any aid given to prostitutes could be punishable under this provision. Apparently, after the changes, the prosecuting authorities do not have a starting point for initial investigations to infiltrate into these areas and protect victims of trafficking in human beings effectively. However, it has also quite convincingly been argued that the initial bases for investigations and controls in the red light area have not vanished, but must merely be sought in areas other than classic criminal law[110]: Bordello owners are now obliged to pay income tax, and make contributions to pension schemes, as well as health and unemployment insurances for the prostitutes who are working for them. If they don't do so, they are breaking the law and committing regulatory offences. Albeit, this argument does concede that such prosecution does not lie in the sole responsibility of the police and would require improved cooperation with other authorities.

More critically, in the light of the changed political climate, there have been proposals in NRW to delete a provision in the Police Law that currently allows for police to enter dwellings in which prostitution takes place at any time to avert grave and imminent dangers.[111] This would be detrimental to the protection of victims of THB, and would also seriously hamper uncovering potential cases of THB.

Moreover, the fact that a distinction must now be made between voluntary prostitution and forced prostitution creates additional difficulties: In effect, it has become a lot more difficult to convict perpetrators of THB, as it is a lot more complicated to prove beyond reasonable doubt that prostitution is not being exercised on a voluntary basis.

[107] See below, section 3.1.1.2.

[108] The majority of the interview partners saw this as a very positive development.

[109] Schmidbauer, NJW 2005, p. 871 (872); see also the criticism of the Bundesrat and the opposition in BT-Drs. 15/4380, p. 2.

[110] Renzikowski, SOLWODI Rundbrief Nr. 63, available at http://www.solwodi.de/seiten/rundbrief/rb_63/art_rb_63-05.html

[111] The relevant provision is section 41 par. 3 no. 2 PolG NRW.

1.2 Applicable legislation on criminal cooperation

The legal sources governing criminal cooperation in Germany are the Law on International Criminal Cooperation (Internationales Rechtshilfegesetz, IRG), a set of administrative orders that clarify the rules in the IRG called 'RiVASt' (Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten, Guidelines for relations with foreign countries in criminal matters)[112], and international treaties, both bilateral and multilateral.

1.2.1 International agreements

The 1990 Schengen Convention Implementing the Schengen Agreement and other legal instruments under the auspices of the European Union apply in the relationship between Germany and other Member States of the European Union. The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)[113] and the Council Framework Decision on Combating Trafficking in Human Beings[114] may serve as such examples. These instruments have made the procedures for criminal cooperation, which used to be highly formalistic, much easier to handle. The broad and often vague terminology frequently used in such instruments may, however, result in problems when implementing such instruments into German law. Therefore, such implementation may be limited by constitutional necessities.

In criminal cooperation with non-EU accession states, instruments adopted by the CoE are of high relevance. Germany has ratified the 1959 European Convention on Mutual Assistance in Criminal Matters[115], and the Additional Protocol 1978[116]. The Second Additional Protocol[117] has been signed, but not ratified so far[118]. Moreover, Germany has ratified the European Convention on Extradition[119] and the Second Additional Protocol to the European Convention on Extradition[120]. Germany has not, however, signed the Additional Protocol to the European Convention on Extradition[121].

Such instruments adopted by the CoE also remain applicable in the relationship between EU Member States, despite EU instruments that supersede these, to the extent that they go beyond the objectives of the EU instrument, contribute to simplifying or facilitating the procedures, and to the extent that the Member state concerned also continues to apply them[122].

---

[112] Available (in German) on the homepage of the German Federal Ministry of Justice, http://www.bmj.de/enid/cfbf7ee1e53c6eb774f386134125a843,0/Service/RiVASt_lr.html.
[113] OJ L 190, 18.7.2002, p. 1.
[114] See above, note 8.
[115] CETS no.: 030, signed 20/4/1959, ratified 2/10/1976, entry into force 1/1/1977.
[116] CETS no.: 099; signed 8/11/1985, ratified 8/3/1991, entry into force 6/6/1991.
[117] CETS no.: 182.
[118] Signed 8/11/2001.
[119] CETS no.: 024; Signed 13/12/1957, ratified 2/10/1976, entry into force 1/1/1977.
[120] CETS no.: 098; signed 8/11/1985 ratified 8/3/1991, entry into force 6/6/1991.
[121] CETS no.: 086 – not signed by Germany.
[122] Cf. e.g. German Declaration concerning Art. 28 European Convention on Extradition, available at http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=024&CM=&DF=&CL=ger&VL=1.

1.2.2 Bilateral police and judicial cooperation treaties

Such treaties are in place with all Germany's neighbouring states[123]. They are directly applicable and precede the rules contained in the IRG, which are subsidiary.

The treaties with Austria (10.11.2003) and the Netherlands (02.03.2005) are particularly noteworthy, as they are the treaties granting the most possibilities for police cooperation. Under these treaties, police personnel from one state can be deployed in the other state. More importantly, the treaties provide a basis for **mutual** police cooperation. Police personnel from one state are subordinate to the police forces in the other state and may exercise certain sovereign duties there. The treaties allow for joint patrols, as well as jointly staffed control, evaluation and observation teams.

These treaties also provide for spontaneous transmissions of relevant criminal information from one state to the other. When transmitting such information, the offices of the public prosecutor need no longer obtain letters rogatory. Therefore, they are now able to hand on such information to their colleagues quickly and unbureaucratically when they have ground to believe that the information may be relevant in a criminal procedure led in the other country.

1.2.3 Law on International Criminal Cooperation (IRG)

The IRG is subsidiary to the rules contained in treaties of public international law, provided these have become directly applicable in Germany[124]. It forms the framework in which criminal cooperation takes place in Germany, and mainly deals with incoming requests from abroad. Formally, an incoming request should be decided upon by the federal ministry of justice or another federal ministry whose area of responsibility encompasses the act requested (sec. 74 par. 1 IRG). In practice, however, the decision has been delegated to the governments of the Länder, who have in turn delegated these duties to the relevant courts and Chief Offices of the Public Prosecutor[125], and, where a request concerns police cooperation, to the State Criminal Police Offices (Landeskriminalämter, LKAs)[126]. In recent years, there has been a further tendency to hand these powers on to those authorities that execute the request after such a decision has been made at a regional level.

Sec. 77 IRG stipulates that, unless otherwise stated in the IRG, the rules of the Criminal Procedural Code (Strafprozessordnung, StPO)[127] are applicable by analogy when dealing with incoming requests for international criminal cooperation.

The main problem identified by interview partners in international criminal cooperation is the fact that letters rogatory – if dealt with at all – are only acted upon with great delays[128]. Further problems arise through the formalistic procedure and the lack of possibilities to directly contact the counterparts responsible for deciding and acting in the relevant countries. These issues often lead to great delays in investigations and to long criminal proceedings, which usually play into the hands of the perpetrators, either because the witness's recollection of events has dimmed, or

---

[123] See the homepage of the Federal Ministry of the Interior, at http://www.bmi.bund.de/cln_012/nn_175818/Internet/Content/Themen/Polizei/DatenundFakten/Bilaterale__Polizeiabkommen__Id__94635__de.html

[124] Hackner (*et al.*), recital 19.

[125] The Chief Offices of the Public Prosecutor are also the focal points for cooperation and coordination within the European Judicial Network, discussed below.

[126] Hackner (*et al.*), recital 32.

[127] Strafprozessordnung, newly announced 7.4.1987 (BGBl. I 1074, 1319); last amended by Art. 6 Law of 22.3.2005 (BGBl. I 837).

[128] Cf. also Schmidbauer, NJW 2005, p. 871 (872).

because the long duration of the procedure must be taken into consideration in the sentence, and leads to a less strict punishment.
In this regard, the European Judicial Network allows for swift identification of the responsible counterparts and clarification of the relevant procedural and legal prerequisites for international criminal cooperation. In Germany, the Chief Offices of the Public Prosecutor are the focal points within the European Judicial Network.

2. PROSECUTION OF TRAFFICKING CASES

2.1. Facts and Figures

The interview partners consistently described Germany as a destination country for victims of THB. Some of them also identified Germany as being a transit country, but to a lesser degree, and most of them reported that in some cases, victims are transferred from Germany to neighbouring countries. With regard to THB for exploitation of labour, it was suggested that Germany is more of a transit country, victims leaving for Holland, England, Scandinavian countries, or even the U.S.A. None of the interview partners held Germany to be a country of origin for victims of THB, albeit, some knew of cases of Germans who became THB victims in Germany.

This shows that both cases of domestic and of transnational THB occur in Germany. As to the frequency of THB in Germany, the most recent data pertaining to criminal investigations of THB for sexual exploitation published by the German Federal Criminal Police Office (Bundeskriminalamt, BKA)[129] shows that 431 such investigations against 1110 suspects were initiated in 2003. The investigations concerned 1235 victims. Practically all victims of THB victims are women[130], and less than 5% of the victims were minors. Of the 1235 victims in 2003, 1108 were not German. In fact, 346 investigations against a total of 933 suspects concerned non-German victims. In 2002, 289 criminal investigations against 821 suspects covering 811 (non-German) victims took place, while 273 investigations concerning 987 victims were instigated against 747 suspects in 2001. While the vast majority of victims came from Central and Eastern European States[131], the majority of suspects were German nationals (around 40 %)[132], followed by suspects from the CEE-states (between 30 and 35%)[133]. The second largest group of suspects from a single country, however, at around 10 %, were Turkish nationals[134].

The figures available for criminal sentences passed on THB in 2003[135] offer a somewhat contrasting picture on the outcome of criminal proceedings[136]. According to this source, court

[129] Lagebild Menschenhandel 2001; Lagebild Menschenhandel 2002, Lagebild Menschenhandel 2003, all available in German online at www.bka.de/lageberichte/mh.html. Data reproduced in this chapter stems from that source, and pertains only to THB for sexual exploitation, unless expressly stated otherwise.

[130] In 2003, 8 victims of THB were male, and the gender of a further 9 victims was not reported; it is to be notet that the BKA data only pertains to THB for sexual exploitation.

[131] Of the non-German victims whose nationality could be established, 90.8 % (2003), 88.9% (2002), and 82.2% (2001) were from CEE-States. In the BKA-statistics, the following states are listed as CEE-States: Belarus, Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Republic of Moldova, Poland, Russia, Slovakia, Slovenia, Ukraine, Republic of Yugoslavia.

[132] 2003: 39.4%; 2002: 39.6%; 2001: 40.0 %.

[133] 2003: 30.6%; 2002: 35.0%; 2001: 32.1%.

[134] 2003: 13.4%; 2002: 10.2%; 2001: 8.7%.

[135] Cf. Statistisches Bundesamt Wiesbaden, Fachserie 10 Rechtspflege, Reihe 3 Strafverfolgung 2003, published in November 2004, and available at http://www.destatis.de/shop.

[136] Albeit, one must bare in mind that the BKA figures for criminal investigations cover the whole of Germany, while the available data on criminal sentences only include the numbers for former Western Germany and the whole of Berlin.

decisions pertaining to THB were reached against a total of 176 individuals. There were 152 convictions (sec. 180b par. 1: 3; sec. 180b par. 2: 54; sec. 181: 95), 18 cases in which court action was abandoned (sec. 180b par. 1: 1; sec. 180b par. 2: 9; sec. 181: 8), and 6 acquittals (sec. 180b par. 1: 1; sec. 180b par. 2: 2; sec. 181: 3). The interviews identified the following actors: Recruiters in the home country of the victim, who mostly had the same nationality, and were sometimes known to the victim before the recruitment; pimps and bordello owners in Germany, who were occasionally also the persons who issued threats or used violence, and guarded the victim; other persons involved in using these measures against the victims, amongst them other prostitutes/ victims of THB who had gained the perpetrators' trust; persons involved in the victims' transport and accommodation.

As to the way victims are recruited, the 2003 BKA report contains statements of 933 out of the 1235 victims whose cases were investigated[137]. 420 women claimed to have been tricked about the real reason for coming to Germany. 283 women had been recruited professionally, and fallen for artist or model agencies and newspaper ads. Force had been used against 81 women in order to recruit them. 301 victims consented to being prostituted. Of the 580 women who answered the question, 136 stated that they had been working as prostitutes before being recruited. This corresponds with the picture acquired in the interviews: Apparently, in the recruitment phase, the predominant method is to use elements of deceit. Women are lured to Germany under promises of a legal, lucrative job, love, or marriage. In some instances, the women know that they will work as prostitutes in Germany, may in fact have worked as prostitutes previously, but are, at the least, unaware of the conditions they will be subjected to. There were also reports of threats, force, and violence against victims in the recruitment phase, but use of these means in the recruitment phase seems to be the exception.

The 2003 BKA report further quotes statements of 827 women on whether they had been subjected to physical or psychological force in order to make them resume or take up their work as prostitutes. 437 women confirmed this. In the interviews it became apparent that threats (in combination with the dire situation the victims are in) are often sufficient, but that violence (beatings, rape) and force (especially locking the victims up and guarding them when they do leave the building) may also be used. The threats range from hidden, sublime hints, to open threats with severe violence against the victims or their relatives at home. In almost all cases reported, the victims' travel documents are taken off them. Fears are raised concerning the victims' illegal status, and they are cautioned that the police will imprison and deport them if they seek help there, and that their relatives at home will be told 'what they have been up to' in Germany. Often, the victims are pressurized with debts allegedly run up for transporting them to Germany, and for the 'transfer' sum paid to the recruiters. More severe threats of violence, like beatings or rape, or of killing the victims, of being sold off to other 'owners' who are even worse, complete the picture.

The BKA reports state that 993 victims supplied information on their legal status when entering Germany in 2003. 580 of them claimed to have entered Germany legally, and 413 maintained that they had entered illegally. A total number of 886 women gave details about their means of transport into Germany. 531 claimed to have used busses or trains, 273 claimed to have come by car, and 53 stated that they had travelled to Germany by aeroplane. The interviews showed that the most frequent routes to Germany seem to be direct land routes. Victims predominantly enter Germany via neighbouring states to the east (Polish and Czech borders).

[137] Please note: multiple answers were possible.

Finally, in 2003, 177 of the 592 statements given on this issue confirmed that victims had been threatened in order to influence their testimony before the police.

2.2 Organisational conditions

The various Länder in Germany each have their own legal and organizational conditions for prosecuting crimes. Therefore, this section of the report will mainly focus on the organizational conditions in North Rhine-Westphalia. This federal state serves as a good example, not only due to the relatively high numbers of victims found there[138]. It is densely populated and borders Belgium and the Netherlands. Moreover, because of its comprehensive approach to THB issues, it can be seen as a leader and pioneer for the other German Federal States. In 1989, NRW was the first Federal State to react to the difficulties arising due to premature deportation of witnesses when the MOI enacted an administrative decree[139] permitting the foreigner's offices to grant an exceptional leave to remain to victims of trafficking needed as witnesses in criminal proceedings concerning trafficking[140].

2.2.1 Data Collection

There is no National Rapporteur for trafficking in human beings in Germany. Regional and national surveys on investigation into trafficking in human beings are compiled by the LKAs[141] and the BKA[142]. Also, local police offices may undertake background analyses to discern whether there are instances of THB in their area of responsibility. These are for internal use only, as they contain highly sensitive information and are used to plan future investigative actions by the investigation authorities.

Further, the Federal Statistical Office compiles statistics on the outcome of criminal cases dealing with THB[143].

Data collection is also carried through by NGOs specialized on assisting victims of THB. There is a wide network of various specialized NGOs in Germany. They are organized in an umbrella organisation (KOK[144]).

In 1997, the Federal Family Ministry established a national working group on Trafficking in Women. All federal and state ministries, as well as representatives of KOK and two major NGOs active in this field (Agisra and SOLWODI) are involved. The regular meetings serve to address problems arising in the protection of THB victims, and to develop legal and administrative tools aimed at suppressing the crime of THB.

2.2.2 Brief overview over the German Criminal Procedure

In order to understand the organizational structures of police, public prosecutors and courts in Germany, it is necessary to have an overview of the criminal procedure, as different authorities have different roles and powers in the various stages of the procedure. The state has a monopoly

[138] In 2003, 208 of the 1108 non-German victims were investigated in NRW, cf. LKA NRW, Lagebild Menschenhandel 2003, http://www.lka.nrw.de/lagebilder/menschenhandel2003.pdf.
[139] Erlaß des Innenministeriums v. 25.4.1989; Runderlaß v. 11.4.1994.
[140] Renzikowski, ZRP 1999, 53 (at 55).
[141] Some of these regional surveys are available on the Internet, e.g. the surveys compiled by the LKA NRW for 2001, 2002 and 2003, available at http://www.lka.nrw.de/lagebilder.htm.
[142] See above, note 129.
[143] But see above, notes 135 and 136.
[144] Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess e.V., Federal Association against Traffic in Women and Violence against Women in the Migration Process.

on criminal punishment. This is discerned and implemented by means of the criminal procedure, which has three distinct phases, the preliminary proceedings, the intermediate proceedings, and the main proceedings.
The first phase in every criminal proceeding is also known as the preliminary proceeding. It is directed by the offices of the public prosecutors, which are located at every regional court (Landgericht). It is in this first phase that the actual criminal investigations take place. The public prosecutors are responsible for these investigations and hence take the lead role in them, and are assisted in the actual investigation work by the local police, occasionally also by the Criminal Police Offices (LKA) of the Länder, and the Federal Criminal Police Office (BKA).
Such investigations are taken up when the investigative authorities obtain an initial suspicion that a crime has taken place (so-called 'Anfangsverdacht', or: "adequate indications based on facts", sec. 152 par. 2 StPO). This initial suspicion must, based on criminal experience, make it seem likely that an offence that can be prosecuted has taken place[145]. With this initial suspicion, investigations stand and fall. Without it, no criminal inquiries may take place. In turn, if such a suspicion comes to the attention of the investigative authorities, an investigation must take place[146].
The office of the public prosecutors must collect all evidence relevant to the case, be it incriminating or exonerating[147]. If the evidence collected arouses a 'sufficient suspicion' ('hinreichender Tatverdacht') that a suspect has committed a criminal offence, the office must file a bill of indictment with the criminal court that has the competence to adjudge the relevant crime[148].
In the intermediate phase, which follows the filing of such a bill of indictment, the court decides whether to issue an order opening the main procedure. The court will only do so if it is of the opinion that the evidence presented casts a sufficient suspicion that the accused has committed the offence(s) described in the bill of indictment[149]. Otherwise, it will provisionally terminate the proceedings (sec. 205 StPO) or refrain from issuing a court order opening the main procedure (sec. 204 par. 1 StPO). From this stage onwards, it is the court that leads the criminal proceedings, and no longer the office of the public prosecutor.
The main procedure begins upon issuance of the court order opening the main procedure. Here, an agent of the office of the public prosecutor, not necessarily the public prosecutor who directed the investigations and wrote the bill of indictment, will represent the prosecution in the court proceedings. For a perpetrator to be convicted, his guilt must be proven. Until such guilt has been proven, the defendant is presumed innocent. In order to convict the accused, now called the defendant, the court must be convinced of his guilt. If it isn't, it must acquit the defendant. For a conviction, the perpetrator must have fulfilled both the objective and subjective criteria of a provision, and must have acted with the proscribed criminal intent (mens rea).

2.2.3 Police Organization

The police in Germany have two areas of responsibility: On the one hand, the police investigate in the initial stage of the criminal procedure. Here, the police must cooperate with and are subordinate to the offices of the public prosecutor. On the other hand, the police are responsible for preventing the realization of dangers to the state, the legal order and individual legal goods.

[145] Kleinknecht/ Meyer-Goßner, § 152 recital 4.
[146] Principle of Legality, cf. sections 152 par. 2 and 160 StPO.
[147] Cf. sections 160 and 163 StPO for the Offices of the Public Prosecutor, and the police, respectively.
[148] Cf. section 170 par. 1 StPO, which is also an expression of the principle of legality.
[149] Cf. section 203 StPO.

When acting in this preventive capacity, the police act of their own initiative, and the offices of the public prosecutor may not intervene. The legal basis for such preventive operations is contained in the various Police Laws of the individual Länder. Such actions are relevant to THB for two reasons: Firstly, such actions may lead to initial suspicions that start criminal proceedings. Secondly, much of the victim and witness protection finds its legal basis in the Police Laws.

Police forces at national level in Germany are the Federal Border Police (Bundesgrenzschutz, BGS) and the Federal Criminal Police Office (BKA). Both forces are subordinate to the Federal Ministry of the Interior.

The main responsibility of the BGS within the scope of this study is to maintain the security of Germany's territorial borders. In so doing, the BGS may undertake criminal investigations acting as a police office, amongst others in less serious offences where there is a suspicion that a border crossing should be made possible through deceit, threat, force or in any other illegal manner, and the suspicion arose when controlling cross-border traffic[150].

In the field relevant to THB, the BKA acts as a national and international point of contact for matters of organised crime and crime suppression in general, and serves as the national focal point for all issues concerning international mutual police assistance[151]. To this end, the BKA obtains, collects and analyses information and disperses it to other police offices and the public. Moreover, the BKA may lead its own investigations in outstanding cases of international crime, either by its own initiative (not, however in cases of trafficking in human beings)[152], or when a state office of the public prosecutor or the Federal Office of the Public Prosecutor charges the BKA with such investigations in instances of highly significant offences[153].

As police jurisdiction and competency for the most part lies with the Länder, each Land has its own police force. These police forces are organized and governed regionally by the Ministry of Interior of each Federal State. In each Land, there is a criminal police office (LKA), and there are local police offices. The latter carry out the main investigations in criminal cases concerning THB under supervision by the responsible public prosecutor, while the former has coordinating duties and, like the BKA, may lead its own investigations when charged with such investigations by an Office of the Public Prosecutor.

The main responsibility for carrying out investigations in cases of THB will either lie with local criminal departments charged with investigating offences against sexual self-determination, or with departments responsible for cases of organized crime.

The 'sex crimes' departments will be charged with investigations that have been reported. As it is very rare that THB is reported, these departments are not usually responsible for investigations concerning THB.

The organized crime departments will lead investigations in cases where the facts can be subsumed under the organized crime definition.

In NRW, both the organized crime and the sex crimes departments have specially and continually educated and trained specialists for THB and for financial investigations. The

[150] Cf. sec. 12 par. 1 no. 3 BGSG (Law on the Federal Border Police, BGBl. I 1994, p. 2978, 2979, last amended 11.01.2005, BGBl. I, p. 78).

[151] BKA–Profile, p. 5, available at http://www.bka.de/profil/broschueren/bka_das_profil_engl.pdf. The BKA is the key agency for international police cooperation, and has coordinating functions amongst the state police departments of the Länder. As has already been discussed in section 1.2.3, even where no bilateral or other agreement exists, this competency has in most cases been handed over to the LKAs.

[152] Cf. the catalogue of offences contained in sec. 4 par. 1, 1st sentence BKAG (Law on the Federal Criminal Office, BGBl. I 1997, p. 1650, last amended 10.09.2004, BGBl. I, p. 2318).

[153] BKA–Profile, p. 4.

training and education measures encompass three areas, legal training, phenomena and criminal investigation tactics[154]. Moreover, a concept[155] has been drawn up which aims to make police officers sensitive to various aspects of THB, for example concerning investigative tactics, hints for cases of THB, and the role of victims of THB, who require special treatment, including sensitive questioning, and witness and victim protection measures.

2.2.4 Organization within the Offices of the Public Prosecutor

The role of the public prosecutors in criminal proceedings has already been discussed above (sec. 2.1.2.2.). Offices of the public prosecutor are located at each regional court (Landgericht, LG). Each office of the public prosecutor is divided into different divisions. Depending on the internal organization of the office, cases of THB may be dealt with in the department for organized crime, the sex crimes department, general departments, or, in cases of exploitation of labour, the department for economic crime. In some offices, a practise has developed that all cases of THB are handled in the department for organized crime, irrespective of whether there is a nexus to organized crime, or not. This has a certain appeal, as the same persons deal with all cases, and the prosecutors obtain a certain specialization through their experience on the job. This practice is also backed by an administrative order[156]. In the interviews it became apparent that the prosecutors see themselves as specialized in this manner. In NRW, there is an organized crime meeting once a year, which is attended by public prosecutors for organized crime, but also by representatives from other authorities, such as the criminal police. Here, recent criminal developments are discussed, and experiences in prosecuting organized crime are exchanged. In this context, the situation concerning THB is also addressed. Special training or in-depth education for public prosecutors on matters dealing explicitly with THB, however, does not take place. The interviews also showed that public prosecutors never deal exclusively with cases of THB. These cases, depending of course on the amount of investigations in this field at any given time, usually make up no more than a quarter of the working load of the public prosecutors.
Offices of the Chief Public Prosecutor (‘Generalstaatsanwaltschaften’) are located at the seat of every higher regional court (Oberlandesgericht, OLG). These offices observe coordinating functions in proceedings that reach beyond the regional level. While there is no central competency for cases of THB, the offices of the Chief Prosecutor in NRW have a coordinator for organized crime, who is *inter alia* responsible for THB. Reports and information on ongoing procedures are transmitted to the Ministry of Justice in NRW via these offices. The Offices of the Chief Public Prosecutors may influence individual proceedings by means of supervision (Dienst- und Fachaufsicht), but it is always the regional office of the public prosecutor that leads a concrete proceeding.

2.2.5 Organization within Courts

In Germany, the administration of justice is entrusted to independent judges who are answerable to the law only. There are no special tribunals. Instead, criminal proceedings take place before

[154] Cf. Interview with Police Officer I.
[155] Landeskriminalamt NRW, Verdachtsschöpfung und Sachbearbeitung in Fällen des Menschenhandels, Konzeption der Arbeitsgruppe Menschenhandel, Neuss, 2002.
[156] This is called the ‚Richtlinien für das Strafverfahren und das Bußgeldverfahren, RiStBV’ (Guidelines for the criminal proceedings and the administrative fines proceedings). Its Annex E (Anlage E) contains ‚Joint Guidelines of the Ministers and Senators of Justice and of the Interior on the Cooperation between the Offices of the Public Prosecution and the Police in Prosecuting Organized Crime. Section 2.3. thereof lists areas of crime in which organized crime predominantly occurs, and includes crimes in connection with 'night life' (especially pimping, prostitution, THB, and gambling).

the criminal division of the ordinary courts. These are divided into four levels: the local court (Amtsgericht, AG), the regional court (LG), the higher regional court (OLG) and the Federal Court of Justice (Bundesgerichtshof, BGH). In criminal matters, depending on the nature and seriousness of the crime in question, each of the first three courts may have jurisdiction in the first instance.
In cases concerning trafficking in human beings, the regional court will usually have jurisdiction, either because a prognosis by the office of the public prosecutor lets it seem likely that the overall sentence for at least one defendant will exceed four years of imprisonment[157], or because witness victims are particularly worthy of protection, the case has a special scope or it bears special significance[158]. Where these preconditions are not met, the local courts will have jurisdiction.
There are no court chambers that have a special subject matter jurisdiction in cases of THB. Moreover, within the court chambers, there are no specialized judges who deal with such cases. Judges are not specially trained or educated in issues concerning THB, and do not usually possess special experience, either.

2.2.6 Cases that exceed the regional level

In cases that exceed the regional level, i.e. when offences or acts that constitute an offence have been committed in different places that are in the area of responsibility of different authorities, the office of the Public Prosecutor where the main focus of the offences occurred should lead the whole proceeding concerning all parts of the offence(s) as a collective investigation ('Sammelverfahren'). Where a controversy arises as to which office shall be competent, the Chief Office of the Public Prosecutor should decide where the case will be dealt with. Problems may arise, as there is a constant conflict: On the one hand, it is necessary lead all investigations in one office, in order to put together as many pieces of the puzzle as possible, and create a picture of the whole dimension of a crime. On the other hand, the investigations should be led as swiftly as possible, and a case must be brought before a court as quickly as possible under criminal procedural law. Hence, certain aspects of a crime may be split off, and handed over to other offices to deal with in parallel, which may be detrimental to a comprehensive examination of a crime, and leave certain aspects undetected.
The police offices have different possibilities to cooperate with one another: They may investigate within the area of responsibilities of other police offices themselves; they may 'borrow' officers from other offices to help them investigate, and they may ask other offices to assist in the investigations by inquiring into certain aspects of a crime. They also have the possibility to seize the LKA with such investigations.
All relevant offences may be brought before one court, and dealt with there, if there is at least one scene of crime in the area of jurisdiction of that court. If so, the court also has jurisdiction to adjudicate other acts that took place outside its area of jurisdiction. Where certain aspects of a crime have been split off in the investigative phase, and already brought before a different court, it is no longer possible to seize one court with all aspects of a crime.

[157] Cf. sections 24 par. 1 no. 2; 74 par. 1, 2nd sentence (federal) Courts Constitution Law (GVG).
[158] Cf. sec. 24 par. 1 no. 3 GVG

2.3 Conditions for a successful prosecution

2.3.1 Investigative methods

The following investigative methods are permitted when inquiring into cases of THB: **Observation** without the use of technical aids is generally permissible, both of persons and of objects. For observations that take place for more than 24 hours at a time, or on more than two days, sec. 163f StPO provides the legal basis.

For shorter periods, observation measures find their legal basis in sec. 100c StPO. The police may also observe with the assistance of technical aids under sec. 100c par. 1 no. 1 StPO by taking pictures and using technical means to track the suspect and others. The police may also take such measures when acting preventively under secs. 16,17 PolG NRW (Polizeigesetz NRW, Police Law of the State NRW). The interview partners confirmed that such observations took place. However, observations themselves do not usually yield conclusive evidence that leads to convictions.

'**Entering locked premises**' is possible when undertaking search of premises of a suspect (sec. 102 StPO), or search of premises of other persons (sec. 103 StPO) who are not suspects. Such searches are almost always applied in cases of THB. A search may generally extend to a home or other rooms, to objects, and to a person. Search of the suspect may be undertaken for two reasons: either to arrest the suspect (search to arrest), or to find pieces of evidence (investigative search). In order to obtain a search warrant in such a case, it is sufficient that there is a suspicion that the person who is to be arrested is in the rooms that are to be searched, or that the search will lead to the collection of evidence. A search of third persons is more restricted. Here, the aim must be to arrest the suspect, or to obtain specific clues or evidence, and the suspicion that these will be found in the search must be based on concrete facts. In contrast to searches of a suspect's premises, this form of search requires concrete leads that make it likely that the clues, evidence or suspect will be found.

A judge must issue a search warrant. It should form the legal basis for the specific search and must therefore define the outline, limits and aims of the search operation. In expedient circumstances, i.e. when there is a significant risk of delay, a public prosecutor or the police as accessories to the public prosecutor may also order such a warrant. The police may also enter locked premises for preventive reasons. The interviews showed that this method is regularly applied in cases of THB, and that it may lead to useful pieces of evidence. It was remarked that these searches should be used to find leads for proof of the perpetrator's financial circumstances, in order to confiscate proceeds from THB at a later stage.

Information concerning telecommunications may be requested in cases of THB. Here, data about incoming and outgoing connections may be gleaned, without, however, knowing of the contents of such communication. The legal bases for such methods are secs. 100g and 100h StPO. Moreover, it is permissible to track a suspect through his mobile phone (sec. 100i StPO). These methods may lead to names and information about possible accomplices and further victims, and may further the understanding of the perpetrator's modus operandi and his network of crime.

It is only permissible to **record telecommunications** (both phone and e-mail) in serious cases of THB, i.e. in cases under secs. 232 par. 3 to 5, and 233 par. 3, each in so far as they constitute serious criminal offences. The legal bases for such methods are secs. 100a and 100b StPO. This investigative method is used very restrictively. Moreover, as interview partners remarked, this method does not usually yield much conclusive evidence. On the one hand, perpetrators often

use multiple mobile phones and constantly change numbers in order to evade surveillance measures. On the other hand, relevant issues are rarely discussed on the telephone.

As to **recording confidential communications**, that is, recording the spoken, non-public word, one must distinguish where it is spoken. Such recording is highly sensitive in a suspect's place of residence (sec. 100c par. 1 no. 3), but can be carried through under less strict conditions in other, less sensitive places (sec. 100c par. 1 no. 2). As the Constitutional Court has ruled that parts of the provisions dealing with monitoring of places of residence are unconstitutional, and that they may no longer be applied as of mid 2005, legislative reforms are inevitable. Until then, this method, which bears a very high threshold from the outset, will be used in an even more restrictive manner. The interviews confirmed that this method might be highly effective, but is very rarely used.

Investigative officers gather information systematically. In NRW, there are special teams of analysts and interpreters (so-called AStOK) who systematically assess all information gained and hand it on to investigation teams. The interviews showed that this measure is very effective, as the first suspicion in cases of THB often arises through such systematic analysis.

The legal basis for i**nfiltration by police officers**, i.e. the deployment of undercover agents, is sec. 110a StPO. An undercover agent is an official of the police force who investigates under a changed and lasting identity conferred on him[159]. For an undercover agent to be deployed in a case of THB, there must be sufficient actual grounds to suppose that a criminal offence of substantial gravity has been committed professionally, habitually or by a member of a gang or in some other organised way[160]. Undercover agents may also be used to investigate major criminal offences where there is the danger of repetition. Finally, undercover agents may also be used to investigate major criminal offences where the gravity of the offence makes the operation necessary and other measures would be futile. The approval of the public prosecution office or the judge must always be subject to a fixed period (there are, however, no absolute maximum periods). An extension is permissible as long as the requirements for the operation continue to be fulfilled. The operation is only permissible where the investigation of the crime would otherwise be futile or rendered significantly more difficult; if the operation is only permissible because the investigation of a major crime is necessary due to the substantial gravity of the offence, the operation is only allowable if other measures would be futile. Undercover agents using their assumed identity may only enter a dwelling with the consent of the person authorised to give such consent; the consent may however not be obtained by pretence of a right of entry which goes beyond the use of the assumed identity; in all other aspects the powers of the undercover agent are governed by criminal procedure law and other statutory provisions[161]. While interview partners considered this method highly effective, the interviews also showed that it is not very frequently applied in cases of THB.

The same applies for **civilian infiltration**s by so-called informers. Such measures are not covered by the provisions relating to undercover agents, but are permissible under the general provisions of secs. 161, 163 StPO. Annex D RiStBV governs further details[162].

Financial investigations take place regularly in cases of THB. The interviews showed that these should preferably commence and be carried through very far in the covert stage of investigations, in order to ensure that assets have not 'disappeared' once the investigations go into the open phase, and that searches are effective in terms of later confiscations of proceeds of THB.

[159] Cf. sec. 110a par. 2 StPO.
[160] Cf. sec. 110a par. 1 no. 3 or 4 StPO.
[161] Cf sec. 110c StPO.
[162] See above, note 156.

The protection of victims must always stand in first place. Hence, if used at all, which could not be confirmed in the interviews, **pseudo-purchase and pseudo-services by a police officer or a civilian** would have to be the last resort in any criminal investigation.

2.3.2 Role of the victim for the collection of evidence

As has just been shown, the investigative methods described above are either not frequently used, or do not yield much conclusive evidence in cases of THB. In addition, THB is considered to be a control offence, i.e. an offence that only becomes apparent through check-ups in sites where prostitution usually takes place[163]. It is common knowledge that there are very few reports of trafficking in human beings to the police by victims or by other witnesses (friends, neighbours, suitors). The investigations are usually very difficult, time-consuming and require the allocation of lots of personnel[164]. In the light of these circumstances, the victim is indispensable to criminal proceedings[165]. All interview partners, who stated that convictions in THB cases occurred for the most part on the basis of the witness/victim's testimony, confirmed this. Only the victim may give information on her motives for entering Germany, and in which manner the suspects exerted influence on her. The success of a prosecution hinges on the availability of the victim-witness for criminal procedures[166]. Where there is no credible testimony by a reliable witness, the investigations will not proceed, the offences will not be brought before court and the offenders will not be convicted.

Bearing this in mind, it is however also to be noted that there is no training or education within the judiciary on the role of a victim of THB. Moreover, interview partners stressed that it is often very difficult to build up a relationship of mutual trust with victims, as they are afraid of the police and of reprisals by perpetrators, also against the victims' families. At the same time, it was reported that defence lawyers will often try to cast a doubt on the victims' credibility by questioning their motives to testify. They will suggest that the victim is only testifying in order to stay in Germany, or because she is being provided with an accommodation and money, etc.

2.3.3 Information exchange and cooperation with other administrative authorities

THB being a control offence, it is mandatory that investigative authorities gather information instead of waiting for victims or witnesses to come forward. Hence, even before an investigation begins, the police must come by information and be aware of the situation concerning THB in their area of responsibility. It is necessary that police install a functioning information network to know whether there might be instances of THB in their area of responsibility. To do so, it is necessary to form contacts to special counselling agencies, prostitute associations, and municipal offices, such as the public affairs office (Ordnungsamt) and the Foreigners' Office.

Information exchange within the country exists and is considered effective and useful by the interview partners. It does not take place on an automatic basis, but must be initiated in each case. It finds its legal basis in sec. 161 par. 1 StPO, and is conducted by the police.

Besides such information exchanges, cooperation takes place with various other administrative bodies: To ensure that victim willing to act as a witness is not removed from the country, coordination with the Ausländerämter (Foreigner's Offices) is necessary. The Social Welfare

[163] This aspect was stressed in the interviews, as it has repercussions for the role of the victim as witness in the criminal proceedings.

[164] Interview partners remarked that the lack of personnel in the police forces and the offices of the public prosecution were obstacles for a successful prosecution and conviction of perpetrators of THB.

[165] Renzikowski, ZRP 1999, p. 53 (at 54).

[166] The interview partners almost unanimously confirmed this.

Offices in each municipality are responsible for financing the accommodation, and granting the funds under the Federal Social Welfare Law (Bundessozialhilfegesetz, BSHG) or the Law on Benefits for Asylum Seekers (Asylbewerberleistungsgesetz, AsylBewLG) to those witnesses residing within their area of responsibility. It is sometimes difficult to find the competent Social Welfare Office, which must bear these costs. The witnesses are kept at a secret location. Hence, it is not possible to prove that the witnesses are their responsibility, as this would require disclosing their whereabouts to the Social Welfare Office.
The witness/victim should be granted a work permit[167], so coordination with the Employment Agencies is also necessary. Moreover, coordination with specialized counselling agencies (NGOs) may be necessary to protect victims of THB (see below). Interview partners criticized that this cooperation is often hampered, because it takes a long time to establish who the person competent to deal with these issues is[168].

2.3.4 Discontinuance or dismissal of THB accusations

The Office of the Public Prosecutor has discretion not to prosecute an offence under certain circumstances. As has already been seen[169], criminal accusations of THB may be dismissed, and investigations and criminal procedures discontinued when other provisions with a similar threat of punishment are fulfilled and easier to prove than THB[170].
The StPO also provides further possibilities to dismiss criminal proceedings[171]. Sec. 154b StPO grants the public prosecutor the discretion not to prosecute, if a foreigner breaching immigration laws is to be expelled, deported or extradited. If a person was brought to commit an offence through another person's threat to reveal a prior offence (e.g. a victim of THB was brought to commit an illegal act because she was threatened with disclosure of her illegal sojourn in Germany), prosecution of that first offence (breach of immigration law) may also be abandoned.[172] Most importantly, in the context of THB, victims who report that they have been subjected to THB, thereby disclosing their own offence, such as illegal entry or residence in Germany, need not be prosecuted for this offence[173].

[167] Order of 29.05.2001, reference no. IIa7.51/45, issued by the Federal Ministry of Labour and Social Affairs to the Federal Labour Agency (Bundesanstalt für Arbeit): Work permits should be granted to victims of THB who have been granted an exceptional leave to remain, waving the usual waiting period for such a work permit of one year.
[168] In this respect, the 'Bielefelder Modell' may serve as a positive example. In this town, there is one person who is responsible for coordinating actions of all the different authorities within the municipality in THB cases.
[169] See above, section 1.1.1.2.6.
[170] Cf. sec. 154a StPO, a provision which serves to simplify and speed up criminal proceedings. That a criminal proceeding must be carried through as quickly as possible is a result of the rule of law, as laid down in Art. 20 par. 3 of the Basic Law (German Constitution). The accused should know at an early stage, which accusations are to be brought against him in order to organize his defence.
[171] As shall be seen, these are more beneficial to victims of THB.
[172] Cf. sec. 154c par. 1 StPO.
[173] Cf. sec. 154c par. 2 StPO, newly inserted in the Law that expanded the terminology of THB, see above, note 1. This amendment is meant to allow victims of trafficking in human beings to report the perpetrator to the police more easily, as it will be easier to abandon criminal proceedings that address the victim's own breaches of the law, in most cases concerning their illegal status in Germany, in future. This may have a significant impact on the willingness of victims to serve as witnesses.

2.3.5 Confiscation of proceeds of crime

In essence, there are two ways of confiscating the proceeds of THB, by forfeiture (sec. 73 StGB) and by extended forfeiture (sec. 73d StGB)[174]. Forfeiture applies to anything that the perpetrator or participant acquired for or as a result of a criminal offence. This includes uses drawn, and can also include objects which the perpetrator or participant obtained in exchange for an object acquired. If forfeiture is not possible, the forfeiture of a sum of money equivalent to the value of that which was acquired is ordered. Extended forfeiture (sec. 73d StGB) applies to objects of the participant if circumstances justify the belief that these objects were acquired for unlawful acts or as a result of such acts. Hence, extended forfeiture has a lower onus of proof. In turn, it may only be applied in serious cases of THB (sec. 233b StGB).

As these measures may only be implemented in a court judgement, there are additional tools that serve to secure the assets until such judgement may be passed. The public prosecutors or the police may impound assets found ('dinglicher Arrest', secs. 111f, 111e, 111d par. 3 StPO). This measure may only be applied, however, upon order by a judge. In exigent circumstances ('Gefahr im Verzug') the public prosecutor may act without such a judge order, but a judge must then confirm the impounding within a week.

The interviews showed that difficulties in using these tools are twofold: Firstly, in the case of forfeiture, difficulties to prove that an accused has gained a certain benefit through a specific criminal act are encountered. Secondly, it may be very difficult to find assets and prove that they are owned by the accused. This may explain a certain dichotomy in the interviews: While interview partners maintained that confiscation was a measure that was always considered, and pointed to special training for police financial investigators, as well as a high political interest for confiscating proceeds, expressed amongst others through a special training initiative for police financial investigators in NRW, public prosecutors and judges could, if at all, only recall few instances in which the confiscation of proceeds had actually been successful.

A further hindrance to confiscating proceeds is that forfeiture may only take place where victims have no claims against the perpetrator. Where such claims exist, forfeiture may not take place, irrespective of whether the victim wishes to pursue such claims or not. This may lead to a bizarre situation: Due to the victims' claim, the state is barred from ordering forfeiture. Hence, the perpetrator will keep the proceeds[175].

[174] The German Ministry of Justice considers that these rulings fulfill the criteria laid out in the Framework Decision on Confiscation of Crime-related Proceeds, Instrumentalities and Property of 24.02.2005 (14648/04) and hence, sees no need to further implement this instrument into national law, cf. MoJ Press release 24.02.2005, available at www.bmj.de.

[175] Various interview partners called for changes here; it was also mentioned that a legislative initiative has been brought underway to enable confiscation where it becomes evident that the victim will not pursue her claims.

3. ROLE OF THE VICTIM

At the outset of this section, it is crucial to understand that there is always a field of tension in criminal proceedings between victim/witness protection on the one hand, and the actual purpose of the proceedings on the other hand, which is to establish the facts of the case, and come to a fair ruling. As described above, the role of the victim in criminal proceedings concerning THB is crucial to establishing the facts. Therefore, in order to punish perpetrators of THB, it is necessary to enable victims to testify. At the same time, every suspect is presumed innocent until proven guilty, and must therefore be granted the widest possible rights to defend himself against the accusations raised against him. Therefore, there is always a conflict of interests in criminal proceedings between the protection of the victim/ witness and the defence rights of the accused, which must be resolved.
As to obstacles for such protection of witnesses, the most frequent answer by interview partners was that victims imperil their protection through their own behaviour when they get back in contact with old friends or other persons from their old environment.

3.1 Legislation concerning the protection of witnesses/ victims

3.1.1 Codified protection measures

3.1.1.1 Protection concerning witness testimony

As one of the most important principles of German criminal procedural law, the so-called principle of immediacy requires that a witness must testify in person in the main proceedings[176]. When summoned, witnesses must appear before court or a public prosecutor, testify truthfully, and be prepared to give an oath that their testimony was truthful[177]. When summoned by the police in the investigation phase, however, witnesses have no such duty to appear. Witnesses have the right to refuse testimony for personal (sec. 52 StPO) or professional (sec. 53 StPO) reasons. Further, they need not answer questions that might incur criminal investigations against themselves or close relatives (sec. 55 StPO).
There are certain possibilities to grant protection that correlate with the duty to appear before a public prosecutor or the court. These possibilities start with testimonies in the investigation phase before the police or a public prosecutor. All victims of serious crime, sexual offences and organized crime, who are to be heard by the prosecuting attorney's office or a judge as witnesses, and who are probably not sufficiently able to recognize their legal rights during the hearing, are entitled to be assigned a lawyer at the cost of the state (so-called Zeugenbeistand, sec. 68b StPO).
There are also certain measures that can be taken to ensure that a witness's personal details do not become known to the suspect or accused. Sec. 68 StPO provides that a witness, who may be endangered by doing so, need not give her address at the beginning of a questioning, but may

[176] See sec. 250 StPO.
[177] As has been repeatedly ruled by the Constitutional Court, despite the fact that this rule is not expressly contained in the StPO, this code assumes that such a duty exists. The obligation follows from general civic duties of German nationals. Generally, these duties also exist for foreigners who are in Germany.

instead give a different address where she can be summoned as a witness before court. In cases of grave danger to the witness, she may also omit stating other personal details, which are otherwise obligatory. Such information will then not appear in the criminal records, which must be accessible to the defence council, and cannot become known to the suspect through his defence council.

It is not unlawful to preclude the defendant or his defence council from taking part in questionings of a witness in the investigation phase of a criminal procedure[178].

Moreover, the accused may be barred from being present whilst the witness testifies: During the investigation proceedings, the judge can exclude the accused from being present during the hearing if his presence would endanger the purpose of the investigation (sec. 168c par. 3 StPO). This applies in particular if it is to be feared that a witness will not speak the truth in the presence of the accused. Moreover, if there is a grave danger to the witness's well being, a judge may conduct a questioning without allowing anyone with a right to participate[179] to be present. In this case, the hearing is audio-visually transmitted in real time to another room (sec. 168e StPO).

During the main trial, the court can order that the defendant be removed from the courtroom whilst a person is being questioned if it is to be feared that a co-defendant or witness will not speak the truth whilst being questioned in the presence of the defendant. The same applies if there is an imminent danger of a serious detriment to the witness's health (sec. 247 StPO).

For the same reasons as in sec. 68 StPO, it is further possible to keep the witness's identity unknown in the bill of indictment (sec. 200 par. 1 3rd sentence, 68 par. 1 2nd sentence, par. 2, 1st sentence StPO). It is also possible to serve the witness at the address of her lawyer or of the police station in charge of her protection, thereby keeping her address unknown to the defendant.

The general public may be barred from taking part in the main proceedings when a discussion in public would violate interests of the victim that are worthy of protection, or when it is to be expected that the victim may be endangered (sec. 172 no. 1a GVG).

Witnesses may, within strict boundaries, be relieved from having to appear in person before a court to testify in the main procedure[180]. It is in theory possible to read out records, especially of prior hearings by judges, but these possibilities are strictly limited. Moreover, a document is easily contested, while a witness can be questioned further in order to clarify her testimony. In practice, therefore, the victim's personal testimony is of crucial importance for the main proceedings[181]. It is also permissible to question witnesses at embassies or by a foreign judge abroad (sec. 223 StPO), or to question police officers about statements that 'covert' information sources gave. In this last instance, the victim's identity may be kept secret, and the police officer will testify as a 'hearsay' witness. However, as was confirmed by the judges interviewed for this report, the evidence collected though these measures does not have the same value as the immediate testimony of the victim/ witness in a court hearing. In addition, jurisprudence demands that all evidence be exhaustively examined, especially in cases where the only incriminating evidence is a witness/victim's testimony.

[178] Neither sec. 161a, nor sec. 163a par. 5 StPO state that either the accused or the defence lawyer has the right to be present as the witness is being heard; hence, it may be permissible not to inform a defence council that a questioning will take place (sec. 168c par. 5, 2nd sentence StPO). If he learns of such a questioning, however, he may not be barred from taking part. Moreover, the defence council may not be barred from accessing the criminal records, so it may be important to use the possibility to hide the witness's identity described above.

[179] Those entitled to be present are: public prosecutors, the accused and his defence counsel.

[180] These strict limitations flow from the principle of immediacy contained in sec. 250 StPO.

[181] See Welter-Kaschub, at p. 70.

As to the use of audio-visual media for the witness's testimony, besides the possibility proscribed in sec. 168e StPO, sec. 247a StPO provides that a witness may testify at a place other than the location where the hearings are taking place in situations of grave danger to the witness's well being. The hearing is transmitted in real time to the courtroom by means of a videoconference. Further, the questioning of witnesses can, in exceptional cases, be recorded on audio-visual media, pursuant to sec. 58a StPO, and used in the main trial, pursuant to sec. 255a par. 1 StPO, in the same way as a written record of a previous testimony. In proceedings concerning criminal offences against sexual self-determination (secs. 174 to 184c StGB), the court can replace the questioning of a witness of less than 16 years of age by a video recording of a previous judicial questioning of the witness. This requires that the defendant and his defence counsel were given the opportunity of being involved in this previous questioning (sec. 255a par. 2 StPO).
In all other cases, video recordings of witness questionings which were conducted in accordance with the conditions of sec. 58a StPO can, pursuant to sec. 255a par. 1 StPO, be brought into the main trial in the same way as the record of a judicial questioning of a witness. This applies to persons of less than 16 years of age who have been the victim of a criminal offence, or to persons who cannot be questioned as witnesses at the main trial (sec. 58a par. 1 nos. 1 and 2 StPO).
On a more practical side, there are special 'witness waiting' rooms that are only accessible to the victim, her legal advisor, and other persons who are protecting the victim.

3.1.1.2 Procedural rights of a victim

The German law on criminal procedure grants the victim **independent procedural rights** in criminal proceedings. It is to be borne in mind, however, that these rights require participation by the victim. Their effectiveness will depend on the victim's own initiative and willingness to participate in the criminal proceedings[182].
A victim of certain criminal acts, including trafficking under secs. 232 to 233a StGB, may join a charge brought by the public prosecutor as **joint plaintiff**[183]. This entitles them to be present at the main hearing and to actively participate in it. They may ask questions, query others' questions, call for certain evidence to be brought forward and give statements (sec. 397 StPO). In addition, they are entitled to appeal if the court dismisses the case or abandons proceedings because of obstacles to the proceedings (sec. 400 par. 2 StPO). And they may also lodge an appeal or revision against the judgment, so far as it concerns the verdict of guilt (sec. 400 par. 1 StPO).
However, the victim cannot continue proceedings on her own if the public prosecutor agrees to dismissal of proceedings by the court.
Besides acting as a joint plaintiff, a victim who has been damaged may also safeguard her interests by bringing incidental action in the criminal procedure against the perpetrator (sec. 403 StPO). Such incidental action allows the victim to **file a claim for damages** and compensation for pain and suffering on the basis of entitlements accrued from the criminal act, within the framework of **criminal proceedings** (so-called adhesion procedure). The victim or her heir, but not the office of the public prosecutor, may bring such an action. Although the claim is based on provisions taken from civil law, the further proceedings in the adhesion procedure will be

[182] Here, the role of specialized counselling agencies, that provide the victim of THB with legal help, is especially relevant, as was emphasized by a judge interviewed. He stated that witnesses who are legally represented are more confident before court than women who have not been offered such assistance.
[183] Cf. Sec. 395 par. 1 no. 1 d) StGB.

governed by the code of criminal procedure, so that the less strict rules on the burden of proof under civil law do not apply. Consequently, the court will dispense with a decision on the merits of claim, when no verdict of guilt is passed under criminal law. The victim may then pursue his or her claims by taking recourse to a civil court.
The same applies when the claim is not suited for hearing in criminal proceedings, because its examination would delay proceedings. In this case too, the court may dispense with deciding on the merits of the complaint and the victim may make recourse to a civil court. In German legal practice, the possibility of an adhesion procedure is utilized only rarely. A victim taking this opportunity is entitled to take part in the court hearings (sec. 404, par. 3, 2nd sentence). She may rely on the services of a lawyer to pursue her claims, and in certain circumstances be entitled to legal aid.
Even if the victim of trafficking under secs. 232 to 233a StGB does not instigate an adhesion procedure or act as a joint plaintiff, she may personally take part in the main hearing as injured party (406g StPO), and may also call on the help of a lawyer (sec 406f StPO). A victim of THB will usually be entitled to a state lawyer, either because she is a victim of serious THB under secs. 232 par. 3 to 5 and sec. 233 par. 3, or because – in the less serious cases of THB – the victim is not yet 16 years old or is financially needy, and the state of affairs and legal position is difficult (cf. secs. 397a, 406g StPO). This lawyer has the right to be present at judicial examinations of the evidence, even when this takes place outside the main hearing (sec. 406g StPO).
Every injured victim is to be notified of the outcome of the proceedings against the perpetrator (sec. 406 d StPO). In addition, she may view the files through a lawyer who has the right to gain access to the records of the proceedings on her behalf (sec. 406 e StPO). The criminal prosecuting authorities may also grant the victim direct access to individual information from the files if she shows she has a legal interest in such information (sec. 406e par. 5 StPO).

3.1.1.3 Compensation of victims of crime

In the context of confiscation of proceeds from THB, the criminal procedural law allows for certain measures which may help the victim to be compensated for damages, but do not grant her procedural rights: **compensation aid** (Wiedererlangungshilfe), and **conditional probation**.
Compensation aid according to sec. 111b StPO and the following provisions allows the judge and, if there is a possibility of delay, the investigating office of the public prosecutor, to impound, amongst other things, the items required from the offender and his funds if the injured party has a right to demand return of goods or compensation for damages. The withheld profits and any advantages and profits gained through their use or sale may be confiscated. If the goods as such cannot be returned, for example because of wear or processing, a replacement in value in money from the personal funds and debts of the offender may be seized and a security mortgage imposed on real estate. Orders for confiscation or arrest may be given even at the slightest suspicion of guilt, meaning an early stage of investigation. The measures decided upon must be relayed to the victim immediately.
The court may also link suspension of punishment on **probation** with the **condition of restoration**. If the perpetrator fails to fulfill this condition, the sentence, which was initially suspended on probation, may be executed.
Besides the possibility to sue the perpetrator for damages and compensation in an adhesion procedure, or in a separate civil law procedure, a victim of THB may also claim **victim compensation from the government** under the Crime Victim Compensation Act

(Opferentschädigungsgsesetz)[184]. The victim can choose this option when she has suffered damages to her health due to an intentional and unlawful act of physical violence. Under the OEG, costs of medical treatment, support for preserving the work place, compensation for loss of career or vocation, as well as pensions may be paid. The Crime Victims Compensation Act does not, however, cover material and property damages, or compensation for pain and suffering.
In order to gain such compensation, the victim must lodge an application. There may, however, be substantive obstacles to gaining such compensation and that arise from the victim's behaviour[185].
The costs of the compensation are paid out of public funds and borne by the Land in which the damage occurred. If this cannot be determined, the Land where the victim had her place of residence or abode at the time of the committal of the crime must bear the costs. Should the victim be able to claim damages against the perpetrator, these claims are transferred to the Land that has the duty to compensate the victim.

3.1.1.4 Formal victim protection programs

When talking about witness protection in Germany, one must distinguish between different protection tools that offer varying degrees of protection.
There are formal police witness protection programs. These are not specifically designed for witnesses in THB cases, but may also apply to witnesses in THB cases. The main legal provisions for this instrument are contained in the Law on Harmonizing Witness Protection (Zeugenschutzgesetz, ZSHG)[186]. These are further elaborated on and clarified in constantly updated administrative guidelines addressed to the police witness protection units, which are for internal use only. The police can only carry through such formal protection programmes if the office of the public prosecutor has consented to such measures.
In order for a witness to be admitted to such a program, she must meet certain preconditions[187]. The witness must be of great importance for a criminal procedure concerning severe crimes or organized crime. She must be prepared to testify before court. And the witness must be in a situation of tangible danger due to her testimony. Her limb, life, health, freedom or substantial property assets must be at risk. Furthermore, the victim must possess a strong and stable character.
If the witness is accepted to such a program, the police victim protection departments may refuse to provide any information on the particulars and personal data of the victim to all authorities and non-public organizations, with the exception of the offices of the public prosecutor[188]. Public authorities are allowed to build up a temporary guise, a different identity for endangered victims,

[184] Law of 07.05.1985 (BGBl. I, p. 1), amended on 06.12.2000 (BGBl. I, p. 1676). The Federal Ministry for Labour and Social Order issued a guideline (AZ. Via2_62030 of 05.03.2001), in which it clarified that victims of THB who are witnesses in criminal proceedings against perpetrators of THB may be entitled to compensation under this law despite their originally illegal status in Germany.
[185] Such compensation may be denied if the victim gave rise to her damages herself, or when it would be unreasonable to grant such compensation for other reasons related to the victim's own behaviour. It may also be denied if the damaged witness omitted to do everything within her power to contribute to clarifying the facts of the case and prosecuting the perpetrator, especially when the victim has not immediately reported the offence to a public authority responsible for prosecuting offences.
[186] Law of 11.12.2001 (BGBl. I, p. 3510).
[187] Cf. sec. 1 par. 1 ZSHG.
[188] Cf. sec. 4 ZSHG.

and make or procure false documents to this end[189]. As a matter of principle, this identity may, however, not be permanent.
In some Länder, witness protection is organized and implemented centrally by the LKA. In NRW, however, victim protection is organized de-centrally. It lies within the sole responsibility of the special witness protection units maintained at every local police office. The LKA NRW retains to a coordinating function, arranging the initial contacts to other Länder or the BKA, where necessary. In cases that reach beyond the regional level, the local witness protection units will cooperate directly with the appropriate colleagues in other regions after the initial contact has been established through the LKAs. Hence, any further arrangements will be made directly between the witness protection units[190]. The witness protection unit initially responsible for protecting the witness retains this primary responsibility until the protection measure comes to its conclusion. Hence, even when the witness is accommodated elsewhere, the first victim protection unit remains responsible for her and is assisted by the unit whose area of regional competence the witness is taken to. The first unit coordinates and organizes the witness's hearings before court, while police officers from the second unit are the witness's primary contact persons, in that they take care of her more immediate problems and needs. The interview partner was very positive about this cooperation between the witness protection units[191].

3.1.2 Needs-based protection

Should a suspicion of trafficking in human beings become more concrete during investigations, it is to be borne in mind that witness protection is an important issue in the field of counter trafficking. Although both areas, the investigation and the witness protection, must be strictly separated, it is important to take care of possible witnesses already during the phase of clearing of facts. This protection below the threshold of formal witness protection is offered by the police protection units, and by specialized counselling agencies for THB victims. But even earlier, the police investigators must act in a manner that takes into account the needs and situation of victims of THB: Distinguishing victims from offenders visibly sets a clear signal to the women and helps to restore their belief in the police as a non-corrupt institution. To include interpreters, who have been trained to confront the traumatized women accordingly, and to include female police officers in the investigations, is an important means to keep up the women's will to cooperate.

3.1.2.1 Police measures below the threshold of protection programmes

Where one of the criteria for a formal witness protection program is not met, a less formal protection outside the framework of such witness protection programs is carried through. As the ZSHG, as well as the administrative guidelines that elaborate on it, will not apply, the police will act on the legal basis of the applicable Police Law in their capacity to avert dangers from individuals. In such an instance, the police and NGOs with a special focus on protecting victims of THB work together closely. Such cooperation may be strictly formalized in so-called cooperation agreements, or it may be arranged on a case-by-case basis. Cooperation agreements between counselling centres and the police exist in more than half of Germany's Länder[192] and are currently in the process of being drafted in a further three states[193].

[189] Cf. sec. 5 ZSHG.
[190] Cf. Interview III with police officer (Annex IX).
[191] Cf. Interview III with police officer (Annex IX).
[192] See IOM Trafficking in Migrants Bulletin no. 27 – June 2003, p.2.
[193] Information provided by KOK on 08.03.2005.

There is also an administrative decree about cooperation between the police and NGOs for the protection of witness victims in cases of THB for sexual exploitation[194]. This applies in NRW, where no general formal agreement between the police and NGOs exists, but cooperation agreements have been reached between single NGOs and regional police offices, for instance in Cologne. Where such formal agreements do not exist, the cooperation takes place informally through personal contacts between police officers in charge of trafficking investigations and NGOs involved in trafficking victim protection.
The police take care of protection measures, and inform the victims of the possibility to seek assistance from the specialized counselling agencies.

3.1.2.2 THB victim protection by specialized counselling agencies

In NRW, the specialized counselling agencies usually provide secure accommodation for THB victims. They look after the victims in terms of support, especially concerning medical and psychological care, as well as social welfare issues. Amongst others, they make sure that the witness can use the services of a legal adviser in the criminal proceedings by establishing the necessary contacts, and make the victims aware of their procedural position and rights during criminal proceedings. Staff from these organizations will also accompany victims to their hearings.
In NRW, these specialized counselling agencies receive funds from the Land budget. These funds are currently provided for until the end of 2005, and are used to cover costs for safe accommodation of victims, legal advice, interpreters and staff of the relevant agencies[195].

3.1.3 Residence status of a victim of THB

When the prime witness, i.e. the victim, has been deported before the criminal procedure has reached the trial stage, this may lead to the following consequences: The court can refrain from opening the main hearings because there is no sufficient suspicion against the accused, since important witnesses of the prosecution are 'not available'. Though the protocol of a prior hearing by a judge may be read out when the witness is no longer to be found, such evidence is not as strong as an actual testimony, as it is more easily contestable and inconsistencies in the written testimony are more difficult to overcome[196]. The court must attempt to summon the witness from abroad[197]. Frequently, the witnesses are no longer willing to testify, be it because they have been pressurised by the traffickers, be it because they want to keep their past from relatives and friends at home. Not less frequently, it is simply no longer possible to locate the victims. In these constellations, the prosecution in the past has often dropped the accusations concerning trafficking, instead limiting the accusations to other crimes, such as pimping and exploiting prostitution. Hence, there is a certain need to ensure that the victim is available as a witness.
Sec. 50 par. 1 AufenthG provides that a foreigner is obliged to leave the country if he does not posses, or no longer possesses a necessary right to reside in Germany. Under sec. 50 par. 2, the

[194] „Regelung der Zusammenarbeit zwischen Polizei und Fachberatungsstellen zum Schutz von Opferzeuginnen und Opferzeugen in Fällen von Menschenhandel", gemeinsamer Runderlass des Innenministeriums, des Ministeriums für Familie, Arbeit und Soziales und des Ministeriums der Justiz, available online at www.recht-niedersachsen.de/2102100/0032071.htm .
[195] Cf. press release of 02.08.2004, available online at www.presseservice.nrw.de/01_textdienst/11_pm/2004/q3/20040802_04.html.
[196] Renzikowski, ZRP 1999, p. 53 (at 55).
[197] This leads to delays in the proceedings, which, may result in less severe sentences. Moreover, even if the victim is summoned abroad, this does not guarantee that she will appear before court. If she doesn't, this may lead to acquittal of the perpetrators (cf. Interview XI)..

foreigner must leave the territory within a fixed period of time. In order to ensure that the authorities apply the rules contained in the AufenthG in a like manner when using their discretion, the Federal Ministry of the Interior has passed temporary administrative guidelines on how to interpret the different provisions in the AufenthG (VAAufenthG)[198]. These provide for a four week grace period in which a victim or witness of trafficking may deliberate whether or not to cooperate in the investigations against the offenders[199], and in which she may not be expelled. Further, the victim is to be informed that she can request counselling and aid from specialized counselling agencies. Finally, the victims are to be granted sufficient time to settle their private affairs before leaving the country.

If the victim of THB is willing to cooperate and testify before court as a witness, her status during the criminal procedure is determined by sec. 25 par. 4 AufenthG. Under this provision, it is possible to grant a residence permit to persons whose deportation has been postponed where there is a strong public interest in allowing the foreigner to remain in Germany, and so long as this interest remains. Such an interest exists where a foreigner is required as a witness in a criminal or administrative procedure, or is cooperating with the German authorities in the investigation of a crime (section 25.4.1.4 VAAufenthG). However, once the criminal procedure is concluded, the public interest ceases to exist, and the residence permit will come to an end. Moreover, if the victim entered Germany illegally, which is often the case concerning victims of THB, sec. 25 par. 4 AufenthG is not applicable, meaning that the victim may not receive a residence permit. Instead, the victim may only be issued with an exceptional leave to remain under sec. 60a par. 2 in connection with sec. 72 par. 4 AufenthG. This requires that the victim is in a formal victim protection program under the ZSHG, and that the police victim protection authority has not consented to her expulsion. This exceptional leave to remain does not constitute a residence title, but only means that the person will not be expelled. It is debatable under the new law whether this exceptional leave to remain might become a temporary residence permit under sec. 24 par. 5 in connection with sec. 60a par. 2 AufenthG. One of the aims of the AufenthG was to ban the previous administrative practice of stringing multiple periods of leaves to remain behind each other. Under the new law, a residence permit should be issued in cases where the foreigner is unable to leave the country for legal or factual reasons, and has had an exceptional leave to remain for more than 18 months.

In very exceptional cases, under strict limitations, it is also possible to allow endangered family members of a THB witness to come to Germany and be protected together with the witness. However, the danger to the family members must be exceptionally high.

After the criminal proceedings, a victim may only be granted a residence permit in accordance with sec. 25 par. 3, 60 par. 7 AufenthG, i.e. for humanitarian reasons. These rules only apply when the foreigner fears specific, individual threats in her home country because of her role in the criminal proceedings. Sec. 60.7. VAAufenthG expressly mentions witnesses of THB are particularly endangered due to their cooperation in a German criminal proceeding. If there is no concrete and immanent danger to the victim, she may not obtain a residence permit.

[198] Vorläufige Anwendungshinweise des Bundesministeriums des Innern zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/ EU of 22 December 2004, available at http://www.intrecht.euv-frankfurt-o.de/beauftragter/VorlAnwendHinwBMI.pdf.

[199] See section 50.2.2 VAAufenthG.

ANNEX 1 – TRANSLATIONS OF RELEVANT LEGAL PROVISIONS DISCUSSED

1. Current and Former Provisions of the German Criminal Code

1.1 Sec. 177 StGB - Sexual Coercion; Rape

(1) Whoever coerces another person:
1. with force;
2. by a threat of imminent danger to life or limb; or
3. by exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence,
to suffer the commission of sexual acts of the perpetrator or a third person on himself or to commit them on the perpetrator or a third person, shall be punished with imprisonment for not less than one year.
(2) In especially serious cases the punishment shall be imprisonment for not less than two years. An especially serious case exists, as a rule, if:
1. the perpetrator completes an act of sexual intercourse with the victim or commits similar sexual acts on the victim, or allows them to be committed on himself by the victim, which especially degrade the latter, especially if they are combined with penetration of the body (rape); or
2. the act is committed jointly by more than one person.
(3) Imprisonment for not less than three years shall be imposed, if the perpetrator:
1. carries a weapon or another dangerous tool;
2. otherwise carries a tool or means in order to prevent or overcome the resistance of another person through force or threat of force; or
3. places the victim by the act in danger of serious health damage.
(4) Imprisonment for not less than five years shall be imposed, if:
1. the perpetrator uses a weapon or another dangerous tool during the act; or
2. the perpetrator: a) seriously physically maltreats the victim through the act; or b) places the victim in danger of death through the act.
(5) In less serious cases under subsection (1), imprisonment from six months to five years shall be imposed, in less serious cases under subsections (3) and (4), imprisonment from one year to ten years.

1.2 Sec. 180a StGB – Exploiting Prostitution

(1) Whoever professionally maintains or manages an operation in which persons engage in prostitution and in which *(: 1.)* they are held in personal or financial dependency *(; or 2. the exercise of prostitution is promoted by measures which go beyond merely furnishing a dwelling, a place to stay or a residence and the additional services normally associated therewith,)* shall be punished with imprisonment for not more than three years or a fine.
(2) Whoever:
1. furnishes a dwelling, or a place to stay or residence for professional use to a person under eighteen years of age for the exercise of prostitution; or

2. urges another person, for whom he has furnished a dwelling for the exercise of prostitution, to engage in prostitution or exploits the person in relation thereto, shall be similarly punished.

1.3 Old Wording Sec. 180b StGB - Trafficking in Human Beings

(1) Whoever, for his own material benefit, exerts influence on another person, with knowledge of a coercive situation, to induce the person to take up or continue in prostitution, shall be punished with imprisonment for not more than five years or a fine. Whoever, for his own material benefit, exerts influence on another person, with knowledge of the helplessness associated with the person's stay in a foreign country, to bring the person to engage in sexual acts, which the person commits on or in front of a third person or allows to be committed on the person by the third person, shall be similarly punished.
(2) Whoever exerts influence:
1. on another person with knowledge of the helplessness associated with the person's stay in a foreign country; or
2. on a person under twenty-one years of age,
to induce the person to take up or continue prostitution or to bring the person to take it up or continue it, shall be punished with imprisonment from six months to ten years.
(3) In cases under subsection (2) an attempt shall be punishable.

1.4 Old Wording Sec. 181 StGB - Serious Trafficking in Human Beings

(1) Whoever:
1. with force, threat of appreciable harm or trickery induces another person to take up or continue prostitution;
2. recruits another person through trickery or abducts a person against the person's will by threat of appreciable harm or trickery, with knowledge of the helplessness associated with the person's stay in a foreign country, in order to get the person to commit sexual acts on or in front of a third person, to allow them to be committed on the person by a third person; or
3. professionally recruits another person, with knowledge of the helplessness associated with the person's stay in a foreign country, in order to induce the person to take up or continue prostitution,
shall be punished with imprisonment from one year to ten years.
(2) In less serious cases the punishment shall be imprisonment from six months to five years.

1.5 Sec. 181a StGB - Pimping

(1) Whoever:
1. exploits another person who engages in prostitution; or
2. for a material benefit supervises another person's engagement in prostitution, determines the place, time, extent or other circumstances of the engagement in prostitution, or takes measures to prevent the person from giving up prostitution, and in that regard maintains a relationship with the person which goes beyond a particular case,
shall be punished with imprisonment from six months to five years.
(2) Whoever impedes the personal or economic freedom of movement of another person by professionally promoting another person's engagement in prostitution by procuring sexual traffic, and in that regard maintains a relationship with the person which goes beyond the particular case, shall be punished with imprisonment for not more than three years or a fine.

(3) Whoever commits the acts named in subsection (1), numbers 1 and 2 or the promoting indicated in subsection (2) in relation to his spouse, shall also be punished pursuant to subsections (1) and (2).

1.6 Sec. 232 StGB - Trafficking in Human Beings for the purpose of sexual exploitation

(1) Whoever, by taking advantage of a predicament or helplessness associated with the person's stay in a foreign country, brings another person to take up or continue prostitution or to carry out sexual acts that exploit the person on or in front of the perpetrator or a third person or have such acts committed by the perpetrator or a third person on him/ herself shall be punished with imprisonment for six months to ten years. Whoever brings a person under the age of 21 years to take up or continue prostitution or to one of the other sexual acts described in the 1st sentence shall be punished in a like manner.
(2) An attempt is punishable.
(3) The punishment shall be imprisonment for one year to ten years if
1. the victim of the act is a child (Sec. 176 par. 1),
2. the delinquent severely maltreats the victim physically whilst committing the act or through the act exposes her/ him to a danger of death or
3. commits the offence professionally or as a member of a gang that has banded together to continually commit such acts.
(4) Whoever
1. by means of force, threat of appreciable harm or trickery induces another person to take up or continue prostitution or to allow the other sexual acts described in par. one, 1st sentence, or
2. seizes a human being by force, threat of appreciable harm or trickery, in order to bring him to take up or continue prostitution or to permit the other sexual acts described in par. 1, 1st sentence, will also be punished in accordance with par. 3.
(5) In less serious cases under par. 1 the punishment shall be imprisonment for three months to five years, in less serious cases under paragraphs 3 and 4 the punishment shall be imprisonment for six months to five years.

1.7 Sec. 233 StGB - Trafficking in human beings for the purpose of exploiting labour

(1) Whoever, by taking advantage of a predicament or helplessness associated with the person's stay in a foreign country, places another person in slavery or bondage, or brings him to take up or continue an employment with him or a third person under working conditions that show a crass disparity to the working conditions of other employees performing the same or comparable tasks, shall be punished with imprisonment for six months to ten years. Whoever places a person under the age of 21 years in slavery or bondage, or brings him to take up or continue an employment as described in the 1st sentence shall be punished in a like manner.
(2) An attempt shall be punishable.
(3) Sec. 232 paragraphs 3 to 5 shall apply.

1.8 Sec. 233a StGB

(1) Whoever by recruiting, transporting, transferring, harbouring or receiving another person abets an instance of trafficking of human beings, shall be punished with imprisonment of three months to five years.
(2) The punishment shall be imprisonment for six months to ten years, if
1. the victim is a child (Sec. 176 par. 1),

2. the delinquent severely maltreats the victim physically whilst committing the act or through the act exposes her/ him to a danger of death or
3. the delinquent commits the act by force or threat of appreciable harm, or professionally, or as a member of a gang that has banded together to continually commit such acts.
(3) An attempt shall be punishable.

1.9 Old Version Sec. 234 StGB - Kidnapping
(1) Whoever seizes a human being by force, threat of appreciable harm or trickery, in order to abandon him in a helpless situation, place him in slavery or bondage or introduce him to service in a military or paramilitary institution abroad, shall be punished with imprisonment for not less than one year.
(2) In less serious cases the punishment shall be imprisonment from six months to five years.

1.10 Sec. 234 StGB - Kidnapping
(1) Whoever seizes a human being by force, threat of appreciable harm or trickery, in order to abandon him in a helpless situation, or introduce him to service in a military or paramilitary institution abroad, shall be punished with imprisonment for one year to ten years.
(2) In less serious cases the punishment shall be imprisonment from six months to five years.

1.11 Sec. 235 StGB - Child Stealing
(1) Whoever takes away or withholds from the parents, one of the parents, the legal or other guardian:
1. a person under eighteen years of age by force, threat of appreciable harm or trickery; or
2. a child, without being its relative,
shall be punished with imprisonment for not more than five years or a fine.
(2) Whoever:
1. takes a child away from the parents, one of the parents, or the legal or other guardian, in order to take it abroad; or
2. withholds it abroad after it had been taken or had gone there, shall be similarly punished.
(3) In cases under subsection (1), number 2 and subsection (2), number 1, an attempt shall be punishable.
(4) Imprisonment from one year to ten years shall be imposed, if the perpetrator:
1. by the act places the victim in danger of death or serious health damage or a substantial impairment of his physical or emotional development; or
2. commits the act for compensation or with the intent of enriching himself or a third person.
(5) If by the act the perpetrator causes the death of the victim, then the punishment shall be imprisonment for not less than three years.
(6) In less serious cases under subsection (4), imprisonment from six months to five years shall be imposed; in less serious cases under subsection (5), imprisonment from one year to ten years.
(7) Child stealing shall only be prosecuted upon complaint in cases under subsections (1) to (3), unless the authority considers ex officio that it is required to enter the case because of the special public interest therein.

1.12 Sec. 236 StGB - Trafficking in Children
(1) Whoever, with gross neglect of his duties of care and upbringing, leaves his child under fourteen years of age with another indefinitely for compensation, or with the intent of enriching himself or a third person, shall be punished with imprisonment for not more than five years or a

fine. Whoever, in cases under sentence 1, takes the child in indefinitely and gives compensation therefore, shall be similarly punished.
(2) Whoever, without authorization:
1. procures the adoption of a person under eighteen years of age; or
2. engages in procurement activity which has as its goal that a third person takes in a person under eighteen years of age indefinitely,
and thereby acts for compensation or with the intent of enriching himself or a third person, shall be punished with imprisonment for not more than three years or a fine. If the perpetrator in cases under sentence 1 causes the procured person to be brought into Germany or abroad, then the punishment shall be imprisonment for not more than five years or a fine.
(3) An attempt shall be punishable.
(4) Imprisonment from six months to ten years shall be imposed, if the perpetrator:
1. acts for profit, professionally or as a member of a gang, which has combined for the continued commission of trafficking in children; or
2. by the act places the child or the procured person in danger of a substantial impairment of his physical or emotional development.
(5) The court may in its discretion mitigate the punishment (Sec. 49 subsection (2)) or dispense with punishment under subsections (1) to (3) of participants, in cases under subsection (1), and of inciters or accessories, in cases under subsection (2), whose guilt, taking into consideration the physical or emotional welfare of the child or the procured person, is slight.

1.13 Sec. 239 StGB - Deprivation of Liberty
(1) Whoever locks up a human being or otherwise deprives him of his liberty, shall be punished with imprisonment for not more than five years or a fine.
(2) An attempt shall be punishable.
(3) Imprisonment from one year to ten years shall be imposed, if the perpetrator:
1. deprives the victim of his liberty for longer than one week; or
2. by the act or something he did during the act causes serious health damage to the victim.
(4) If by the act or something he did during the act the perpetrator causes the death of the victim, then the punishment shall be imprisonment for not less than three years.
(5) In less serious cases under subsection (3) imprisonment from six months to five years shall be imposed, in less serious cases under subsection (4), imprisonment from one year to ten years.

1.14 Sec. 240 StGB - Coercion
(1) Whoever unlawfully with force or threat of an appreciable harm compels a human being to commit, acquiesce in or omit an act, shall be punished with imprisonment for not more than three years or a fine.
(2) The act shall be unlawful if the use of force or the threat of harm is deemed reprehensible in relation to the desired objective.
(3) An attempt shall be punishable.
(4) In especially serious cases the punishment shall be imprisonment from six months to five years. An especially serious case exists as a rule, if the perpetrator:
1. coerces another person to commit a sexual act or enter into a marriage;
2. coerces a pregnant woman to terminate the pregnancy; or
3. abuses his powers or position as a public official.

2. Law on Transplantation

2.1 Sec. 17 TPG - Prohibition of trading in organs

(1) Es ist verboten, mit Organen, die einer Heilbehandlung zu dienen bestimmt sind, Handel zu treiben. Satz 1 gilt nicht für

1. die Gewährung oder Annahme eines angemessenen Entgelts für die zur Erreichung des Ziels der Heilbehandlung gebotenen Maßnahmen, insbesondere für die Entnahme, die Konservierung, die weitere Aufbereitung einschließlich der Maßnahmen zum Infektionsschutz, die Aufbewahrung und
die Beförderung der Organe, sowie
2. Arzneimittel, die aus oder unter Verwendung von Organen hergestellt sind und den Vorschriften des Arzneimittelgesetzes über die Zulassung oder Registrierung unterliegen oder durch Rechtsverordnung von der Zulassung oder Registrierung freigestellt sind.

(2) Ebenso ist verboten, Organe, die nach Absatz 1 Satz 1 Gegenstand verbotenen Handeltreibens sind, zu entnehmen, auf einen anderen Menschen zu übertragen oder sich übertragen zu lassen.

2.2 Sec. 18 TPG - Trade with organs

(1) Whoever trades with an organ in violation of sec. 17 par. 1, 1st sentence, or removes, transplants or has transplanted to himself an organ in violation of sec. 17 par. 2, shall be punished with imprisonment of up to five years or with a fine.
(2) If the offender acts professionally in cases under par. 1, the punishment is imprisonment from one year to five years.
(3) An attempt is punishable.
(4) The court may refrain from punishment under sec. 1 or alleviate the punishment in accordance with its discretion (sec. 49 par. 2 Criminal Code) in the case of organ donors whose organs were objects of prohibited trade in organs or receivers of organs.

2.3 Sec. 19 TPG - Other Criminal Provisions

(1) Wer entgegen § 3 Abs. 1 oder 2 oder § 4 Abs. 1 Satz 2 ein Organ entnimmt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.
(2) Wer entgegen § 8 Abs. 1 Satz 1 Nr. 1 Buchstabe a, b, Nr. 4 oder Satz 2 ein Organ entnimmt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.
(3) Wer entgegen § 2 Abs. 4 Satz 1 oder 3 eine Auskunft erteilt oder weitergibt oder entgegen § 13 Abs. 2 Angaben verarbeitet oder nutzt oder entgegen § 14 Abs. 2 Satz 1 bis 3 personenbezogene Daten offenbart, verarbeitet oder nutzt, wird, wenn die Tat nicht in § 203 des Strafgesetzbuchs mit Strafe bedroht ist, mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.
(4) In den Fällen der Absätze 1 und 2 ist der Versuch strafbar.
(5) Handelt der Täter in den Fällen des Absatzes 1 fahrlässig, ist die Strafe Freiheitsstrafe bis zu einem Jahr oder Geldstrafe.

3. AufenthG

3.1 Sec. 95 AufenthG – penal provisions

(1) Whoever,

1. contrary to sec. 3 par. 1 in conjunction with sec. 48 par. 2 stays in the Federal territory,

2. stays in the Federal territory without a necessary residency title, whose duty to leave the country is executable, and whose deportation has not been suspended,
3. enters the Federal territory in breach of sec. 14 par. 1 no. 1 or no. 2,
4. counteracts an executable order according to sec. 46 par. 2, 1st or 2nd sentence, or sec. 47 par. 1, 1st sentence or par. 2,
5. in breach of sec. 49 par. 1 does not make a statement, makes an incorrect or an incomplete statement, unless such act is punishable under par. 2 no. 2,
6. in contravention of sec. 49 par. 1 does not tolerate a measure cited there,
6a. in breach of sec. 54a repeatedly does not comply with a duty to register, repeatedly violates spatial limitations of residence or other conditions, or despite having repeatedly been reminded of the legal consequences of a refusal has not complied with the duty to take up a place of residence, or contrary to sec. 54a par. 3 uses certain means of communication,
7. repeatedly acts in contravention of a spatial limitation under sec. 61 par. 1 or
7. on Federal territory belongs to an organization or group which consists for the main part of foreigners and whose existence, aims or acts are kept secret from authorities to avoid a ban on the organisation or group shall be punished with imprisonment of up to one year or a fine.
(2) Whoever
1. in contravention of sec. 11 par. 1, 1st sentence
a) enters the Federal territory or
b) stays in it or
2. makes false or incomplete statements or uses such statements to acquire for himself or another person a residence permit, or knowingly uses a document acquired in such a manner to cheat in legal interactions
is punished with imprisonment of up to three years or a fine.
(2a) In the cases of par. 1 no. 3 and Par. 2 no. 1 lit. a), the attempt is punishable.
(3) Objects related to a crime according to par. 2 no. 2 may be confiscated.
(4) Article 31 par. 1 of the Convention on the Status of Refugees remains untouched.

3.2 Sec. 96 AufenthG – smuggling (in) of foreigners
(1) Whoever incites another person to commit one of the actions laid out in sec. 95 par. 1 no. 1, 2 or 3 or par. 2 or renders aid to the other person committing such an act and
1. for doing so acquires a benefit in terms of legal estate or accepts a pledge for such a benefit or
2. acts repetitively or for the benefit of several foreigners
is punished with imprisonment of up to five years or with a fine.
(2) Whoever in the cases of par. 1
1. acts professionally
2. acts as a member of a gang which has joined for the purpose of committing such acts continuously
3. carries a firearm if the offence relates to an act under sec. 95 par. 1 no. 3 or par. 2 no. 1 lit. a,
4. carries a different weapon in order to use it in commission of the offence if the offence relates to an act under sec. 95 par. 1 no. 3 or par. 2 no. 1 lit. a, or
5. exposes the smuggled person to a treatment that threatens his life, is inhumane or degrading or to the danger of a serious health damage, is punished with imprisonment between six months and ten years.
(3) The attempt is punishable.

(4) Par. 1 no. 1, par. 2 no. 1 and par. 3 are to be applied to violations of legislation concerning the entry and the abode of foreigners in the European sovereign territory of one of the states parties to the Schengen Agreement of 19 June 1990, if
1. the violations correspond to the acts referred to in sec. 95 par. 1 no. 2 or 3 or par. 2 no. 1 and
2. the perpetrator supports a foreigner who does not possess the nationality of a Member State of the European Community or of another Member State of the European Economic Agreement.
(5) In the cases of par. 2 no. 1, also in conjunction with par. 4, and of par. 2 no. 2 to 5 sec. 73 d of the Criminal Code shall be applicable.

3.3 Sec. 97 AufenthG – Smuggling (in) resulting in death; professional and gang smuggling (in)

(1) Whoever, in the cases of sec. 96 par. 1, also in conjunction with sec. 96 par. 4, causes the death of the smuggled person shall be punished with imprisonment of no less than thee years.
(2) Whoever, in the cases of sec. 96 par. 1, also in conjunction with sec. 96 par. 4, acts professionally as a member of a gang that has joined to commit such acts continuously shall be punished with imprisonment from one year up to ten years.
(3) In less severe cases the punishment is imprisonment from six months to five years.
(4) Sec. 73 d of the Criminal Code shall be applicable

ANNEX 2 – LIST OF ABBREVATIONS

AsylBewLG	Asylbewerberleistungsgesetz	Law on Benefits for Asylum Seekers
AufenthG	Aufenthaltsgesetz	Law of Residence
BGH	Bundesgerichtshof	Federal Court of Justice
BGS	Bundesgrenzschutz	Federal Border Police
BKA	Bundeskriminalamt	Federal Criminal Police Office
BSHG	Bundessozialhilfegesetz	Federal Social Welfare Law
CFD	EU-Rahmenbeschluss	Council Framework Decision
GVG	Gerichtsverfassungsgesetz	Federal Court Constitution Law
IRG	Internationales Rechtshilfegesetz	Law on International Criminal Cooperation
KOK	Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationprozess e.V.	Federal Association against Traffic in Women and Violence against Women in the Migration Process
LG	Landgericht	Regional Court
LKA	Landeskriminalamt	State Criminal Police Office
MoJ	Bundesjustizministerium	Federal Ministry of Justice
NGO	Nicht-Regierungsorganisation	Non-Governmental Organization
NRW	Nordrhein-Westfalen	North Rhine-Westphalia
OLG	Oberlandesgericht	Higher Regional Court
PolG NRW	Polizeigesetz NRW	Police Law of the State NRW
RiStBV	Richtlinien für das Strafverfahren und das Bußgeldverfahren	Guidelines for the criminal proceedings and the administrative fines proceedings
RiVASt	Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten	Guidelines for relations with foreign countries in criminal matters
SGB	Sozialgesetzbuch	Social Law Code
StGB	Strafgesetzbuch	Criminal Code
StPO	Strafprozessordnung	Criminal Procedural Law
THB	Menschenhandel	Trafficking in Human Beings
VAAufenthG	Vorläufige Anwendungshinweise des Bundesministeriums des Innern zum Aufenthaltsgesetz und zum Freizügigkeitsgesetz/ EU	Temporary administrative guidelines issued by the Federal Ministry of the Interior on the AufenthG and the Law on Freedom of Movement/ EU
ZSHG	Zeugenschutzharmonisierungsgesetz	Law on Harmonizing Witness Protection

ANNEX 3 – REFERENCES

Bundeskriminalamt: Lagebild Menschenhandel 2001; Lagebild Menschenhandel 2002, Lagebild Menschenhandel 2003, all available in German online at www.bka.de/lageberichte/mh.html.

Bundeskriminalamt: The Bundeskriminalamt – Profile, Wiesbaden 2002, available online at http://www.bka.de/profil/broschueren/bka_das_profil_engl.pdf (cited: BKA-Profile).

Hackner, Thomas/ Lagodny, Otto/ Schomburg, Wolfgang/ Wolf, Norbert: Internationale Rechtshilfe in Strafsachen – Ein Leitfaden für die Praxis, Munich 2003. (cited: Hackner (*et al.*))

Hofmann, Johannes: Menschenhandel: Beziehungen zur Organisierten Kriminalität und Versuche der strafrechtlichen Bekämpfung, Frankfurt am Main (*et al.*) 2002 (cited: Hofmann).

Horn, Eckhard in: Rudolphi *et al.*, Systematischer Kommentar zum Strafgesetzbuch, Band 2: Besonderer Teil, §§ 80 - 358, Neuwied, lose-leaf; standing: 1998 (cited: SK-Horn).

International Organization for Migration: Trafficking in Migrants Bulletin, no. 27, Geneva, June 2003. (cited: IOM Trafficking in Migrants Bulletin no. 27).

Küper, Wilfried: Strafrecht besonderer Teil. Definitionen mit Erläuterungen, Heidelberg, 1999 (cited: Küper).

Meyer-Goßner, Lutz, in: Kleinknecht/ Meyer-Goßner, Strafprozessordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen, Munich 1999 (cited: Kleinknecht/ Meyer-Goßner).

Landeskriminalamt NRW: Lagebild Menschenhandel 2003, available at http://www.lka.nrw.de/lagebilder/menschenhandel2003.pdf

Landeskriminalamt NRW: Verdachtsschöpfung und Sachbearbeitung in Fällen des Menschenhandels, Konzeption der Arbeitsgruppe Menschenhandel, Neuss 2002.

Laubenthal, Klaus: Sexualstraftaten: Die Delikte gegen die Sexuelle Selbstbestimmung, Berlin (*et al.*) 2000 (cited: Laubenthal).

Renzikowski, Joachim: Frauenhandel – Freiheit für Täter, Abschiebung für die Opfer?, Zeitschrift für Rechtspolitik 1999, 53 (cited Renzikowski, ZRP 1999).

Renzikowski, Joachim in: Münchner Kommentar zum Strafgesetzbuch, Band 2/2, §§ 80 –184f, Munich 2005 (cited: Mü-Ko/*Renzikowski*).

Renzikowski, Joachim: SOLWODI Rundbrief Nr. 63, “Legalisierung der Prostitution – Kapitulation vor dem Menschenhandel?“ available at

http://www.solwodi.de/seiten/rundbrief/rb_63/art_rb_63-05.html (cited Renzikowski, SOLWODI Rundbrief Nr. 63).

Welter-Kaschub, Gabriele, in: SOLWODI e.V., Grenzüberschreitendes Verbrechen – Grenzüberschreitende Zusammenarbeit: Schutz und Betreuung von Gewalt- und Menschenhandelsopfern: Ein Handbuch für die Praxis, Boppard, 2003 (cited: Welter-Kaschub).

Wieck-Noodt, Brunhild in: Münchner Kommentar zum Strafgesetzbuch, Band 3, §§185-262, Munich 2003 (cited: Mü-Ko/*Wieck-Noodt*).

Schmidbauer, Wilhelm: Das Prostitutionsgesetz zwischen Anspruch und Wirklichkeit aus polizeilicher Sicht, Neue Juristische Wochenschrift 2005, p. 871 (cited: Schmidbauer, NJW 2005).

Statistisches Bundesamt Wiesbaden, Fachserie 10 Rechtspflege, Reihe 3 Strafverfolgung 2003, Wiesbaden 2004, and available at http://www.destatis.de/shop.

Tröndle, Herbert/ Fischer, Thomas: Strafgesetzbuch und Nebengesetze, Munich 2004 (cited: Tröndle/ Fischer).