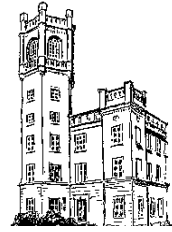




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# Countering Human Trafficking

## A Policy Analysis of Anti-Trafficking Measures in Germany

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## **Abstract**

By examining Germany as a case study, this thesis is analysing the development of human-trafficking counter policies over time. Answering the question how policies evolved between the first and the second eastern enlargement of the European Union, the thesis acknowledges the most common trafficking routes leading from Eastern to Western Europe and analyses a possible policy shift due to this changed framework. Namely, this thesis analyses the legislative reform of human trafficking as a criminal offence, the legislative reform of the German immigration law, and the Second Action Plan of the Federal Government to Combat Violence against women. Here, the thesis identifies a stringent development and continuous thematic focus on prosecution policies. Moreover, clear room for improvement is identified regarding the policies' approach on gender sensitivity, the definition and incorporation of acknowledged purposes of human trafficking as well as the policies' compliance with regional and international standards. In conclusion, the thesis renders policy recommendations related to the identified shortcomings and contextualises the policy development over time in relation to EU proceedings.

Key words: Human trafficking – sexual exploitation – Germany – policy analysis – prosecution policies – migration – path dependence – forced labour

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## X. Abbreviations

BGH	Bundesgerichtshof
BKA	Bundeskriminalamt
BMFSFJ	Bundesministerium für Familie, Senioren, Frauen und Jugend
CoE	Council of Europe
CoEU	Council of the European Union
EU	European Union
FiM	Frauenrecht ist Menschenrecht e.V.
FATW	Foundation Against Trafficking in Women
GAATW	Global Alliance Against Trafficking in Women
GRETA	European Commission's Group of Experts on Action against Trafficking in Human Beings
IHRLG	International Human Rights Law Group
ILO	International Labour Organisation/ International Labour Office
KoK	Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess
NGO	Non-Governmental Organisation
OSCE	Organisation for Security and Cooperation in Europe
TPG	Transplantationsgesetz
SoFFI	Social Science Women's Research Institute
SPD	Sozialdemokratische Partei Deutschland
StGb	Strafgesetzbuch
StRG	Strafrechtsänderungsgesetz
THB	Trafficking in Human Beings
UN	United Nations
UNGA	United Nations General Assembly
UNGIFT	United Nations Global Initiative to Fight Human Trafficking
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention on Transnational Organised Crime

*Throughout the 20th century, slavery was regarded as a feature of ancient, medieval or early capitalist social formations; it was thought that it would disappear automatically with the development of human rights policy and democracy. But at the beginning of the third millennium, a form of international slavery still exists: human trafficking<sup>1</sup>*

## 1. Introduction

Trafficking in human beings (THB) as the contemporary face of slavery is as topical and problematic as ever. Though human trafficking is supposedly hidden from citizens' daily routine, it and its consequences are found everywhere in our society, culture and economy. Whether it is the forced labourer picking the super-marked strawberries<sup>2</sup>, the neighbour's care-taker<sup>3</sup> or the high-street prostitute; this modern form of slavery is omnipresent, if one bothers to look close enough. As estimated by the United Nations Office on Drugs and Crime (UNODC), trafficking in human beings is a multi-billion dollar business, spreading throughout the world and growing faster than any other illicit business sector<sup>4</sup>. According to the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), trafficking in human beings is by now considered to be as lucrative as the smuggling in drugs and weapons, which have led the list of profitable illegal businesses for decades<sup>5</sup>. In 2010, for example, human trafficking in Europe alone is supposed to have generated 2.5 billion USD<sup>6</sup>. In this context, trafficking networks are continuously spreading, covering larger distances and taking advantage of the tight connections characterising today's globalised societies. Signifying the down-side of globalisation, trafficking networks have perfected the abuse of loose border controls, free-trade zones as well as fast and effortless transport infrastructure. At this juncture, simplified proceedings ease the feasibility of human trafficking operations, not only for organised crime groups, but also for individual actors – making it a more profitable business than ever before. As indicated by the German Federal Police Office (Bundeskriminalamt or BKA), more and more perpetrators operate in small groups of two or

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<sup>1</sup> Cyrus (2005) p. 2

<sup>2</sup> As becomes apparent in Greece's huge scandal surrounding illegal migrants working under slave like conditions on strawberry farms. A briefing can be found in: Bone (2013).

Or a court sentence from the Regional Court Augsburg, 2008, regarding the case of 100 migrants working under forced labour conditions on a German strawberry farm as depicted in: UNODC (2008).

<sup>3</sup> For more information on the issue of human trafficking for the purpose of domestic work please see inter alia: Burnham; Theodore (2012) or Pattanaik (2013).

<sup>4</sup> cf. United Nations Office on Drugs and Crime (UNODC) (2013)

<sup>5</sup> cf. United Nations Global Initiative to Fight Human Trafficking (UNGIFT) (2013)

<sup>6</sup> cf. United Nations (UN) (2011)

three people<sup>7</sup>. Traditional organised crime networks are not uncommon, but the number of individual perpetrators who victimize close acquaintances becomes more prevalent<sup>8</sup>.

In 2013, the European Commission (EC) published its first ever Eurostat report on human trafficking, paying tribute to the topicality of the issue. The report identified 80% of all human trafficking victim's in Europe to be female<sup>9</sup>. Moreover, and in accordance with the Eurostat data portrayed in table 1 depicted in the appendix, around 60% of all victims of human trafficking have been trafficked into conditions of sexual exploitation, and one out of seven prostitutes in Europe has been trafficked into the sex industry<sup>10</sup>. Nevertheless, other purposes for human trafficking, such as forced labour, organ harvesting or begging, are continuously on the rise<sup>11</sup>. These numbers alone signify the importance of discussing the problem of human trafficking and finding applicable recommendations in order to support and facilitate effective counter measures. As indicated by the above given numbers, women are the number one target group for human trafficking, especially with connection to the purpose of sexual exploitation.

In response to the challenge of trafficking in human beings, both international actors, including the UN or the EU, as well as national governments have set in place various anti human trafficking policies and initiatives. Those policies, however, have yet to be assessed and critically reviewed. Consequentially, it is not only necessary to examine the overall implementation of political notions on how to counter trafficking in human beings, but, considering the high number of female victim's being trafficked for the purpose of sexual exploitation, to specifically consider if relevant policies target the issue of gender sensitivity and acknowledged purposes for human trafficking.

### *Problematising Anti THB Policies in Germany*

The European Commission set the deadline for implementing the current EU policies on human trafficking to the 5th of April 2013. Yet, despite several warnings, Germany was unable to agree on a legislative reform in order to implement the European Union's stipulation<sup>12</sup>. Due to the pressure arising from the political deadlock regarding this project, the German Parliament is

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<sup>7</sup> cf. Bundeskriminalamt (2013)

<sup>8</sup> cf. Bundeskriminalamt (2013)

<sup>9</sup> cf. Eurostat (2013)

<sup>10</sup> cf. United Nations (2010)

<sup>11</sup> cf. Eurostat (2013)

<sup>12</sup> cf. Breuer; Steffen(2013)

currently having a heated and controversial political debate regarding new legislative proposals<sup>13</sup>. Amongst other factors, the current legislative debate adds to the topicality of the issue and further stresses the need of analysing the development of German anti THB policies as well as their compliance with regional and international guidelines. Additionally, a clear research gap can be identified by pointing out the shortfall of the European Commission's Group of Experts on Action against Trafficking in Human Beings (GRETA) to analyse the stand of anti THB policies in Germany. Despite Germany being one of the top receiving countries in Europe, it has not yet been in the GRETA project's spotlight. This research gap clearly illustrates the need of a thorough policy analysis, supporting the current political debate and indicating a possible path for future policies.

## 1. 1. Aim and Research Question

Trafficking in human beings is a multi-layered phenomenon, creating severe problems on various levels<sup>14</sup>. First of all, on the individual level, enormous human rights violations cause despair for thousands of people before, during and after their captivity. But also on a state level, on which the issue of providing and guarding human security standards while keeping in mind state interests – such as a controlled migratory flow, low crime rates and general security<sup>15</sup> – causes problems. Focussing on the state concerned macro level, this thesis will offer insight into possible motives leading to certain policy choices and foci. Hence, the thesis analyses the development of German human trafficking counter policies. Hereby, the aim is to find out if possible shifts have taken place or not. Consequentially, and by evaluating the approach of previous policies, the analysis will outline the development of policies, and hereby help casting recommendations for future policies and help prevent short-sighted combat strategies.

In order to achieve this, after introducing the aim and research question the thesis clarifies important definitions and terminologies. Sequentially, a brief framework outlining the theoretical approach, research design and methodology is provided. Following an introduction to the history of human trafficking, the seventh chapter contains the analysis of Germany's 2004 – 2007 anti THB policies and is followed by the comparative discussion and implications for theory. Lastly, the thesis' findings will be translated into policy recommendations and concluding remarks are given.

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<sup>13</sup> cf. Deutscher Bundestag (2013).

<sup>14</sup> cf. Everett; Charlton (2014).

<sup>15</sup> cf. Ionescu (2007).

The field of human trafficking has been of interest for scholarly research since decades. Especially the topic's emergence on the political agenda during the 1980's drew the focus of researchers to the complex and diverse field surrounding the so-called *modern-day slavery*. In general, a distinction between research foci can be made along the line of micro- and macro-level analysis. Micro-level analyses usually centre around the fate of individuals, especially in connection to victim's identification and protection, and are most commonly conducted with a human rights focus and often from an anthropological perspective<sup>16</sup>. Compared hereto stands research examining macro-level relations, which offers a wider variety of analytical points of departure. Hereby, the impact of trafficking on state security, economics or migration are of major concern<sup>17</sup>. This paper is going to focus on the macro-level, analysing the development of German policy strategies combating trafficking in human beings between 2004 and 2007 – which covers the policy development between the first and the second eastern enlargement of the European Union (EU). While considering the macro-level impact of human trafficking, the objective of this thesis is to identify counter policies and to analyse them with regards to possible focus shifts. Aiming at enhancing the understanding of political agenda building as well as supporting the development of holistic anti trafficking policies in the future, the main research question hereby is:

### **How did German anti human trafficking policies develop between 2004 and 2007?**

Supportive of and subordinate to the main research question are the following sub-questions: Is a certain policy focus prevalent over time? Which factors seem to have influenced the policy development, and how? In which path or structure did the policies develop over time? To what extent does national anti THB measures comply with regional and international documents?

The study's aim hereby is to analyse if their development follows a certain path or pattern. To be precise, this thesis is going to analyse the development of German anti THB policies while paying special attention to the interrelation between continuity and change within the political approach. With regards to this, the transposition of European and international guidelines and requirements will be of special interest. As stated previously, Germany recently received a warning regarding its non-transposition of EU policies within the given timeframe – resulting in a heated debate and increased determination to comply with the policies in question. Accordingly,

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<sup>16</sup> cf. Rama (2013).

<sup>17</sup> cf. *ibid.*



this thesis will also check if German policy actions correlate with EU deadlines and if looming sanctions can be identified as motivators for implementing political change.

Moreover, and in line with the above given numbers the thesis will pay special attention to the respective policy's approach towards gender sensitivity and the recognised purposes of human trafficking. Although academia, during the last years, paid increased attention to newly emerging purposes of human trafficking, sexual exploitation of women still constitutes the number one characteristic of trafficking in human beings. Therefore, this thesis will pay special attention to the definition of human trafficking within the analysed policies as well as their general approach towards the inclusion and recognition of diverse purposes.

## 2. Terminologies and Definition

Every thorough research analysis requires the clear definition and operationalisation of necessary terminologies and key concepts. In order to prevent misunderstandings, it is important to clarify specific terms, which are providing the frame for the following analysis. In addition to the challenges generally arising when specifying used terminology, the illicit nature of the present topic increases the necessity as well as the difficulty of finding a clear-cut definition. The grey area of various issues regarding human trafficking has to be scaled down as far as possible in order to provide a common ground for a vital and structured discussion. Hereby, especially the distinction between *illegal migration*, *human smuggling* and *trafficking in human beings* is of importance. These three categories are not separated by clear borders but blend into each other and share certain characteristics. Moreover, *forced labour* is often part of the milieu surrounding the above listed criminal offences, particularly aggravating the identification of trafficking cases. In this highly topical and politically relevant context, the issue of definition is far from being a purely academic matter and their impact on politics shall not be underestimated. As a result of different terminological definitions, what they include and what is left for interpretation, different policy measures will be proposed to combat trafficking, strongly varying the landscape of *inter alia* migration, prostitution and human rights. In fact, every definition shapes the meaning and reach of a term, hereby influencing people's understanding of the discussed topic and consequentially effecting their opinion and deriving actions. In order to set the applicable framework for this thesis' analysis, the following paragraph will define the most important concepts in relation to trafficking in human beings. To be precise, the concepts of trafficking in human beings, human smuggling, irregular migration, sexual exploitation and forced labour will be specified.

### *Trafficking in Human Beings*

The United Nations Convention against Transnational Organised Crime (UNTOC) and the protocols thereto – in particular the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, commonly referred to as the Palermo Protocol – were adopted by the United Nations General Assembly (UN GA) in 2000 and went into force on December 25, 2003. The convention and the protocols are signed by Germany as well as 116 other countries out of 159 parties to the protocol. In Article 3 a), it offers the first international, legally binding definition of trafficking in human beings as:

*the recruitment, transportation, transfer, harbouring or receipt of persons, by the means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*<sup>18</sup>.

This definition is of interest to the thesis at hand because the German government explicitly states its intention of streamlining its policies with the UN definition in order to support the worldwide streamlining of criminal offence definitions as well as to prevent duplication of work<sup>19</sup>. Furthermore, the Council of Europe (CoE) takes up all of the UN definition's main points into its *Convention on Action against Trafficking in Human Beings*. Hereby noteworthy is the explicit inclusion of psychological force and persuasion of different kinds. Contrary to common beliefs, trafficking cases seldom involve kidnapping, but rather rely on the use of subtle power, deception and emotional dependency. This is further enhanced in article 3b of the Palermo Protocol, stating that "the consent of a victim of trafficking in persons to the intended exploitation [...] shall be irrelevant where any of the means set forth in subparagraph (a) have been used"<sup>20</sup>. Moreover, both institutions agree on the necessary interplay of act (e.g. recruitment and transport), means (e.g. deception or coercion) and purpose (exploitation of any kind) to constitute the element of trafficking. Another false derivation following the term *trafficking* is the assumption of victims being transported across borders. Although this is often the case, it is, by definition, not required to constitute the element of trafficking. Deriving from the above stated UN definition, the recruitment of victims by given means for the purpose of exploitation is enough to account for trafficking in human beings. As specified in the EU Convention, human trafficking can take place "across borders as well as within a state"<sup>21</sup>. Therefore, the legality or illegality of any border-crossing is *per definitionem* irrelevant.

With regards to the academic discussion of the definition of trafficking in human beings, most scholars and practitioners agree on the legal definition of trafficking in human beings introduced by the United Nations and widely incorporated into national and regional legislations. Nevertheless, aspects of the conceptual definition of human trafficking are debated in academia. Hereby noticeable is Nandita Sharma, who argues against the common approach of explicitly stressing the factors of *deception* or *coercion* as defining human trafficking. Elaborating Sharma's argumentation, trafficking in human beings should not be defined as a crime *abroad*, separating

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<sup>18</sup> United Nations (2000) Annex II, Art. 3 p. 42.

<sup>19</sup> cf. European Commission - Together Against Trafficking in Human Beings (2013).

<sup>20</sup> United Nations (2000) Annex II, Art. 3, p. 43.

<sup>21</sup> cf. Council of Europe (2005) Art. 2.

the conceptual definition from problematic situations in the country of origin<sup>22</sup>. From her point of view, "exploitation comes to be identified with people's movement abroad and loses its moorings from the organisation and expansion of capitalist social relationships [in the country of origin] wherein people's labour is alienated"<sup>23</sup>. In line with this point of view, it seems correct to criticize a separation of human trafficking from socio-economic problems in the involved regions, since the motivation of traffickers as well as victims cannot be separated from their livelihood either. In connection to this, the complex relationship of social marginalisation and economic despair constitutes clear push factors<sup>24</sup> of human trafficking and therefore has to be considered in the design of THB counter measures. However, Sharma's argumentation for the importance of push and pull factors in the process of trafficking in human beings<sup>25</sup> does not necessarily underline their importance for and inclusion in a clear cut definition. Amongst others, this derives from the shortcoming to establish a strict terminological distinction between trafficking in human beings and forced labour<sup>26</sup>, which decreases the precision of academic analysis as well as political responses. In order to strengthen her point, Sharma is comparing her conceptualization to the THB definition by the Global Alliance Against Trafficking in Women (GAATW) as well as the Foundation Against Trafficking in Women (FATW) and the International Human Rights Law Group (IHRIG), who *unisono* state that in order to be considered trafficked, "a person would have to be exploited, abused and deceived in a community other than the one which such person lived at the time of the original deception, coercion or debt bondage"<sup>27</sup>. Labour exploitation and slavery excluding physical movement of any kind is covered under the criminal offence of forced labour, as can be seen in the UN definition as well as in the specification by the International Labour Office (ILO), who as experts in the field of labour rights and human trafficking acknowledge the concept of intra-state trafficking<sup>28</sup>. In addition to this, the above introduced and commonly adopted UN definition supports a broad view upon the physical relocation of human trafficking victims.

Keeping in mind the academic discussion, this analysis will consider the commonly accepted definition by the UN, which is taken up by all institutions relevant for this analysis.

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<sup>22</sup> cf. Sharma (2003) p. 54.

<sup>23</sup> Ibid. p. 54.

<sup>24</sup> The Push and Pull Factor theory is a model commonly used in the analysis of migratory movement. Hereby, push factors refer to reasons for a human to leave his or her country of origin – for example economic despair, poverty, inequality. Pull factors refer to incentives emanating from the destination country – for example economic opportunities, strong demand for certain labour forms, educational opportunities etc. For more information on this theory please regard: Zimmermann (1996) pp.95 – 128.

<sup>25</sup> cf. Sharma (2003) p. 54.

<sup>26</sup> As defined later on in this chapter.

<sup>27</sup> Sharma (2003) p. 54.

<sup>28</sup> Both to be specified later on.

## *Sexual Exploitation*

Regarding the concept of sexual exploitation, neither the Palermo Protocol nor the UNOTC offer a clearer definition, but rather call for a case-to-case interpretation by the state parties<sup>29</sup>. This approach was taken in order to allow all states, regardless from their national legislation on prostitution, to ratify the document<sup>30</sup>. In order to close this gap, the UN state parties working group (as well as other bodies) tried to specify the acts covered by the term sexual exploitation in the Palermo Protocol. The UN working group on trafficking in persons in 2000 defined the term *sexual exploitation* as referring to the "obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials"<sup>31</sup>. As this thesis is referring to Germany as a case study, it is important not only to pay attention to international and regional agreements dealing with the specification and definition of relevant terms, but also to take their national translations into consideration. Accordingly, the German criminal law defines sexual exploitation in connection to human trafficking as exploiting:

*another person's predicament or helplessness arising from being in a foreign country in order to induce them to engage in or continue to engage in prostitution, to engage in exploitative sexual activity with or in the presence of the offender or a third person or to suffer sexual acts on his or her own person by the offender or a third person*<sup>32</sup>.

This definition is slightly misleading, since human trafficking, as defined above and in accordance with several international documents, does not need to involve being abroad. Bridging the gap between human trafficking and forced labour, the German criminal law also coins the term *sexual exploitation* as:

*[on a] commercial basis maintaining or managing an operation in which persons engage in prostitution and in which they are held in personal or financial dependency*<sup>33</sup> *[as well as] supervising another person's engagement in prostitution, determining the place, time, extent or other circumstances of the engagement in prostitution, or taking measures to prevent the person from giving up prostitution, for his or her own material benefit and for that purpose maintaining a general relationship with the person beyond a particular occasion*<sup>34</sup>.

Moreover, neither the UN nor regional or national legislative definitions of sexual exploitation include the concept of forced marriages or mail-order-brides – which depicts a specific form of human trafficking in which the victim is ordered, paid for and *shipped* to the customer. When

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<sup>30</sup> cf. Working Group on Trafficking in Persons (2010) pp. 3 – 4.

<sup>31</sup> Ibid p. 4.

<sup>32</sup> cf. *Strafgesetzbuch* (2013) Abschnitt 18, §§ 232 (3) 3, 233 (3) 3. Moreover, please note that the translation of documents not cited in the original language derive from an official source (i.e. the government or institution websites) and have additionally been proofread by the author.

<sup>33</sup> cf. Lackner, Kühl (2004) Kapitel 13, § 180.

<sup>34</sup> cf. Lackner, Kühl (2004) Kapitel 13, § 181a.

defining sexual exploitation, the focus is seldom on these concepts, since they represent a small margin of sexual exploitation and assaults. Nevertheless, a noteworthy margin of victims are trafficked for the specific purpose of involuntary marriages or similar circumstances<sup>35</sup>. In connection hereunto, the UN working group on trafficking in persons suggests a separate definition<sup>36</sup> of these concepts which is also taken up in UN's Handbook for Parliamentarians. Herein, the second characteristic centres around "trafficking for non-commercial sex purposes, which may include early marriage, forced or servile marriage, arranged marriage, compensation marriage, transactional marriage, temporary marriage or marriage for child-bearing"<sup>37</sup>. For the purpose of this analysis both concepts, sexual exploitation, including forced prostitution, as well as non-commercial sex purposes will be considered.

### *Smuggling in Human Beings*

The term closest to the concept of trafficking in human beings, and most often confused with it, is *smuggling in human beings*. Smuggling constitutes the crime of actively providing transport or aiding humans in entering a closed territory, *i.e.* illegally crossing a border. The smuggled human can be considered as a customer who is paying the smuggler for his services<sup>38</sup>. At first glance, distinguishing both concepts does not seem too difficult. Yet, both concepts are not outlined by clear-cut definitions. The distinction between both concepts is fluent, including a wide grey zone devouring a number of diverse criminal activities. As defined by the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime*, smuggling is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit of the illegal entry of a person into a state party of which the person is not a national or permanent resident"<sup>39</sup>. The problem can be exemplified by looking into the most common variations of smuggling and trafficking in human beings:

The smuggler is usually approached by individuals or groups who are desperate to leave a certain territory and need help migrating into another territory<sup>40</sup>. Usually, the customer "cannot find the legal means to do so [i.e. migrate independently], either because such means do not exist or the smuggled people are not aware of them"<sup>41</sup>. The smuggler hereby provides his or her services in form of hard goods such as transportation and forged passports as well as soft goods

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<sup>35</sup> cf. United Nations Office of the High Commissioner on Human Rights (2013); AhaFoundation (2013).

<sup>36</sup> cf. Working Group on Trafficking in Persons (2010) pp. 6.

<sup>37</sup> UNODC, Inter-Parliamentary Union (IPU) (2009).

<sup>38</sup> cf. Bhabha (2005).

<sup>39</sup> UN (2000), Annex I, *Article 3a* p.45.

<sup>40</sup> cf. Cyrus (2005) p. 3.

<sup>41</sup> cf. *Ibid.*

such as the knowledge of feasible routes or contacts to border patrols<sup>42</sup> and in return is paid by the customer. In contrast to trafficking, the customer gave consent to the process and is aware of its details; moreover, once he or she arrived in the country of destination the customer is left alone – at least in theory. Opposed to this, a victim of human trafficking is regarded as an object which is owned by the trafficker or subsequent buyer, instead of maintaining a – however twisted – business relation. In practice, though, it is not uncommon that smuggled beings end up in relations similar to forced labour. Most often, the smuggling entity raises a fee under the pretence of complications which aroused on the way<sup>43</sup>. Faced with this change of events, the smuggled being has to pay off his *debt* by working for the smuggler or his associates. This phenomenon is known as *debt-bondage*, which is defined by UNODC Model Law, in accordance to the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, as:

*the status or condition arising from a pledge by a debtor of his or her personal services or those of a person under his or her control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or if the length of those services is not limited and defined*<sup>44</sup>.

The transition from smuggling into trafficking evolves seamless, since the customers or victims are already in a very vulnerable position. The victim is unfamiliar with the new surroundings and feels isolated, leaving the victim in a vulnerable position in which seeking help is extremely aggravated. In addition to this, the perpetrator (i.e. the smuggler) often collects the customer's passport early on in the process and leaves him or her with no or only forged identification documents, hereby further decreasing the opportunity to seek help with official institutions. When following the definition offered by the United Nations, the described process cannot be categorised as human trafficking, although illegal migration and transportation with the help of a third person results in exploitation and forced labour. In contrast to the conceptual definition of human trafficking, the victim was first of all neither tricked nor pressured into an agreement with the smuggler. Second of all, it is not proven that the exploitation of the victim was part of the initial plan or rather developed later on. Trafficking as defined by the Palermo Protocol requires the stringent interplay as well as early and continuous perceptibility of act, means and purpose<sup>45</sup>. Since the described example does not fulfil these requirements beyond reasonable doubt, it qualifies as two different elements of crime: smuggling and forced labour. A typical example for this difficult distinction is the case of a woman agreeing to be smuggled into another country in

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<sup>42</sup> cf. UNODC (2014).

<sup>43</sup> Ibid.

<sup>44</sup> cf. Working Group on Trafficking in Persons (2010) p. 7.

<sup>45</sup> United Nations (2000) Annex II, Art. 3 p.43.

order to take a promised job as a waitress or dancer, where in fact, she is being trafficked into forced labour and sexual exploitation<sup>46</sup>.

### *Irregular Migration*

In addition to this, the term *irregular migration* needs to be defined. As explained above, human trafficking might or might not involve irregular migration. Smuggling, on the other hand, always includes irregular migration. Still, this correlation is one-sided since irregular migration is not conceptually dependant on either of the above mentioned concepts<sup>47</sup>. By definition, irregular migration refers to individuals or groups who illegally, i.e.: by breaking immigration laws, migrate voluntarily and independently. It is of utmost importance to draw a clear line between human trafficking, smuggling and irregular migration since a confusion of the concepts is hindering a precise analysis as well as a comprehensive political response.

### *Forced Labour*

*Forced labour*, as is evident from the foregoing notion, plays an important role in human trafficking. Still, a clear distinction between forced labour as a part of THB and forced labour as a general concept has to be made. In contrast to the conceptual set-up of human trafficking, forced labour does not require coercion or deception of any kind, although it is prevalent in many cases. According to UNODC, whose definition derives from the International Labour Organisation, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"<sup>48</sup> qualifies as forced labour. Although international laws and legislative recommendations agree upon the before mentioned definition, the academic discussion is more diverse, and takes up and addresses several problematic issues of which international legislations fall short. As noted by Bales, forced labour is nowadays apparent in "short term (...) exploitative relationships in which victims are highly dispensable due to a surplus of other vulnerable workers"<sup>49</sup>. The International Labour Organisation points out that even if the worker is not physically or emotionally coerced to perform certain tasks or deceived in any kind, the surplus of desperate workers leads to factually unlimited power of the employee – leading to slavery-like working conditions<sup>50</sup>. The International Labour Organisation identified five key factors pointing towards situations of forced labour, despite the workers consent:

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<sup>46</sup> cf. Cyrus (2005) p. 18.

<sup>47</sup> cf. Bridget Anderson, Rutvica Andrijasevic (2008).

<sup>48</sup> International Labour Organisation (1930) Art. 2.1.

<sup>49</sup> cf. Bales (2000).

<sup>50</sup> cf. Taran (2009).



- *(Threat of) physical or sexual violence<sup>51</sup>, this may also include emotional torture like blackmail, condemnation, using abusive language and so on;*
- *Restriction of movement and/ or confinement to the workplace or to a limited area;*
- *Debt bondage/ bonded labour; withholding of wages or refusal of payment;*
- *Retention of passport and identity papers so that the worker cannot leave or prove his or her identity and status;*
- *Threat of denunciation to the authorities<sup>52</sup>*

As the ILO's key points suggest, human trafficking cases often fulfil the above listed criteria, which underlines the importance of this definition for the structured analysis of THB cases<sup>53</sup>.

Summarising the definitions as referred to throughout this thesis, *trafficking in human beings* shall imply the interplay of act, means and purpose as defined in the UNTOC. The purpose of *sexual exploitation* will be defined broadly, including all above mentioned forced sexual acts. The term *forced labour* is used in accordance to the ILO's definition, going beyond a mere physical or psychological threat and attributing the victim's vulnerability due to a social or economic forlornness.

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<sup>51</sup> I would like to mention the questionability of differing between physical and sexual violence. Sexual violence is almost always physical violence. If not, it is psychological violence which also agrees with IOL' mentioning of abusive language. Therefore, I would recommend the distinction between physical and psychological violence, with the explicit mentioning of sexual violence which has an outstanding position in this context.

<sup>52</sup> International Labour Organisation (2005).

<sup>53</sup> cf. Working Group on Trafficking in Persons (2010) pp. 6.

### 3. Previous Research

Illicit trafficking in general has been on the agenda of researchers and practitioners for decades. Yet, for a long time the interest of researchers and practitioners alike has focused specifically on drug trade. This phenomenon is mainly caused by the fact that drug trafficking carries a higher potential for violence, thereby often stating a more immediate threat for national security<sup>54</sup>. Due to this, policy efforts as well as related research on illicit trafficking often moves in the orbit of organized drug trade. Nevertheless, research on other forms of illicit trafficking come to the fore. The trafficking in human beings, especially when related to forms of sexual exploitation<sup>55</sup>, is receiving more and more public recognition.

Previous academic research on trafficking in human beings must be categorized along geographic as well as topical lines. Due to its regional particularities, the business of trafficking as well as related research interests differ greatly between geographical areas. Since this study is analysing German policy efforts examined previous research mainly deals with Germany as well as the general situation in Europe. Research concerned with the general set-up of human trafficking and its international features can be divided into four substantial groups. Hereby, most academics centre around one of these main research aspects, although the popularity and frequency amongst the listed sub-groups differs highly.

- Human trafficking as a human rights violation, focussing on victim protection
- Human trafficking as an illicit business, focussing on an economic perspective
- Identification of actors
- Identification of root causes of human trafficking

Most academics agree on a political shortcoming to provide sufficient victim's protection. This might be one of the reasons why victim's identification and victim's protection is one of the main academic research foci. Studies analysing this specific problem often feature a distinct human rights focus. Hereby, a majority of studies analyse victims support as opposed to security issues. For example, many authors conduct research analysing the assumption that improved victim's protection, including extended allowance to stay and work in their country of destination, would only provide another incentive to risk irregular migration. Commonly, however, it is concluded that this argument cannot be evaluated precisely due to the morally questionable

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<sup>54</sup> Cf. Shelley, Louise (2012): The relationship of drugs and human trafficking: A global perspective. European Journal on Criminal Policy and Research, Vol. 18, pp. 241 – 253. Berlin: Springer Science and Business Media.

<sup>55</sup> For more information on public awareness and media coverage of different forms of Human trafficking, please check the Lexis Nexis Human Trafficking Awareness Index: <http://www.nexis.co.uk/humantrafficking.php> last accessed: 15.05.2014.

implications of the statement. An interesting example for this approach is Johannsons's anthropological study of victim's protection<sup>56</sup>.

An opposing approach can be found in recent studies focussing on the economic reach of human trafficking. Many actors in the field advocate the viewpoint of trafficking in human beings as a multinational business. Amongst other by the United Nations Office on Drugs and Crime (UNODC), whose 2012 campaign reads "Human Trafficking: Organized crime and the multibillion dollar sale of people".<sup>57</sup> As anticipated, this point of view is mainly put forward by academics within the field of economics. One of the most renowned economists in the field of human trafficking is Seo-Young Cho, co-designer of the 3P Index<sup>58</sup>, which separates human trafficking policies into three categories: Prevention, Prosecution and Protection. This categorisation is pursued by various scholars and practitioners because it provides an utilisable distinction able to include almost all policy measures. As a continuation of this approach the so called 4P or 5P categorisation was established. Here, researchers take up on the 3P and add one or two additional categories. Usually, 4P adds the category of Partnership – referring to the cross-sectorial cooperation of involved actors and institutions<sup>59</sup>, this approach is, amongst others, followed by the United States Department of State<sup>60</sup>. Approaches following the 5P paradigm additionally distinguish between prosecution and punishment, hereby adding a fifth component. Amongst others, this approach is advocated by the United Nations Office of the High Commissioner for Human Rights (OHCHR)<sup>61</sup> or the Netherland's National Rapporteur on Trafficking in Human Beings.<sup>62</sup>

Additionally, Louise Shelley is a forerunner for thorough analysis from a financial perspective. According to Shelley's "Human trafficking: A global perspective"<sup>63</sup>, the business of human trafficking constitutes a "low cost, high reward enterprise"<sup>64</sup> in which one commodity can be sold multiple times. In agreement with Shelley's argumentation, Finckenauer and Chin as well as multiple other academics are convinced that human trafficking will only decline if targeted from an economic angle. Which means the transformation of a highly rewarding enterprise into a

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<sup>56</sup> Johannson (2012).

<sup>57</sup> UNODC (2012).

<sup>58</sup> More information on the 3P Index can be found on the project's website. URL: <http://www.economics-human-trafficking.net/anti-trafficking-3p.html> last accessed: 15.05.2014.

<sup>59</sup> A more detailed explanation is for example provided by the Colorado Project (2014).

<sup>60</sup> United States Department of State (2014).

<sup>61</sup> United Nations Office of the Commissioner on Human Rights (2011).

<sup>62</sup> National Rapporteur on Trafficking in Human Beings (2010).

<sup>63</sup> Shelly (2010).

<sup>64</sup> Ibid

business which risks stand no longer in relation to the estimated revenues. The most rewarding analyses from an economical perspective have, *inter alia*, been conducted by:

Louise Shelley (2010): Human trafficking: A global perspective. Cambridge: Cambridge University Press.

Finckenauer, J. O., & Chin, K. L. (2010). Sex trafficking: a target for situational crime prevention? In K. Bullock, R. V. Clarke, & N. Tilley (Eds.), Situational Prevention of Organised Crimes. Cullompton: Willan Publishing.

The third group of academic interest is the identification of actors involved in human trafficking. Here, the academics try to clarify the specific roles of involved actors – perpetrators as well as victims, their motives and distinct situation in order to get a clearer picture of human trafficking as a transnational business. Research efforts range from anthropological studies of corrupt individuals to the mapping of entire organized crime groups, aiming at the depiction of a general *modus operandi*.

This approach, especially when taking into consideration the analysis of victims, leads to another major research category – the exposure of factors fostering human trafficking and leading towards the victimization of certain groups. The interest hereby lies in the identification of reasons for human trafficking as well as enabling and fuelling factors. These so-called push and pull factors, influencing the dynamics of illicit trafficking and depict a starting point for many counter policy concepts. Of major interest within this field have been *inter alia* :

National Rapporteur on Trafficking in Human Beings. (2010). Human Trafficking – ten years of independent monitoring. The Hague: BNRM.

Kleemans, E. R., & Van De Bunt, H. G. (2008). Organised crime, occupations and opportunity. *Global Crime*, 9(3), 185–197.

Sanders, T. (2008). *Paying for pleasure: men who buy sex*. Cullompton: Willan Publishing.

Savona, E.U., Decarli, S., & Di Nicola, A. (2002). MON-EU-TRAF I - A pilot study on the three European Union key immigration points for monitoring the trafficking of human beings for the purpose of sexual exploitation across the European Union - Transcrime Report no. 3. Trento: Transcrime.

Surtees, R. (2008). Traffickers and Trafficking in Southern and Eastern Europe: Considering the Other Side of Human Trafficking. *European Journal of Criminology*, 5(1), 39–68.

A rather limited amount of academic works has been published on gender issues within the field of human trafficking. A few researchers have analysed gender roles within organized crime, such as the double role of women as victims and perpetrators. Often, the study of women as victims as well as the policy design and law enforcement is connected to stereotypical gender roles, linking victimhood to a discourse of vulnerability, low self-esteem and physical violence. Women as perpetrators, on the other hand, are seldom the foci of academic studies. If female involvement in trafficking in human being is analysed it is often connected with the less violent set-up of human trafficking compared to drug trafficking. Interesting research in this field can be found in:

Achebe, N. (2004): The Road to Italy: Nigerian Sex Workers at Home and Abroad. *Journal of Women's History*, 15(4), 178-185.

Kleemans & Van De Bunt (2008): Organised crime, occupations and opportunity. *GlobalCrime*, 9(3), 185–197.

Anderson, Bridget & Andrijasevic, Rutvica (2008) Sex, slaves and citizens: the politics of anti-trafficking. *Soundings Winter Issue* 40, 135-145.

## 4. Methodology and Research Design

The following chapter will explain the methodological foundations upon which this thesis is based. Subsequently, the decision making process and reasoning behind the case selection, methodology and analytical concept will be outlined in order to provide a transparent and comprehensible research process.

In order to conduct an analysis of German anti-human trafficking policies over time, the author chose a qualitative approach. Therefore, the policy analysis will be based on the Federal Republic of Germany as a case study. Here, the Path Dependence theory will set the theoretical frame for the thesis and support the policy analysis. Path Dependency is a frequently used concept within social sciences and particularly helpful with regards to policy analysis. Herein, it is assumed that consequential policies are always tightly connected to previous decisions – creating a so called path, which the overall policy development follows. However, the decisions' quality is not of importance for this development. Rather, the focus lies on continuity and the steady evolution of policies based upon foregoing choices<sup>65</sup>.

### *Case Selection Criteria*

Since this research is determined to analyse the development of human trafficking counter policies in Germany, it is of primary importance to explain the case selection. First of all, the structure and operation mode of the European Union is particularly interesting for many policy studies. Despite, its tight interconnection and responsibility the EU member states remain independent. Even though the European Union and its representative bodies establish policies and recommendations, every single member state is responsible for translating these decisions into national law and for enforcing them. The interplay of shared responsibility and cooperation opposed to national politics and bureaucracy creates a dynamic of high relevance to the field of policy analysis, since it represents the general trend towards regional cooperation. Moreover, the European Union in different rankings has been identified as a worldwide leading entity in the fight against trafficking in human beings<sup>66</sup>. While being a major hub for human trafficking on a regional as well as international scale, Europe faces threats from various fronts and works hard on countering them<sup>67</sup>.

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<sup>65</sup> More information about Path Dependency and its analytical value for this paper can be found in the chapter 5. Theoretical Framework – Path Dependency in Policy Analysis.

<sup>66</sup> Cf. US Department of State (2013). Cf. Cho, Dreher, Neumeyer (2011).

<sup>67</sup> Cf. Cho, Dreher, Neumeyer (2011).

Therefore, this study is going to focus on intra EU developments. Germany, hereby, sets the ideal case study for several reasons. In general, it needs to be distinguished between countries of origin, transit countries and destination countries. The term countries of origin is referring to the victim's country of origin or country of residence – in either case, it describes the place in which the abduction or recruitment of victims takes place. Usually, Germany is classified as transit and destination country, which is partially caused by its economic as well as geographic situation. Destination countries, as the name suggests, depict the final destination of the trafficking victim – usually a country in which the trafficker's business partners operate in. While Germany's geographic position in the middle of Europe almost automatically turns the country into a transit hub, its economic strength and relatively high standard of living are fuelling its establishment as a destination country<sup>68</sup>.

Moreover, Germany has the longest tradition of actively fighting human trafficking and implementing related policies, dating back to the early 1980's<sup>69</sup>. Contrary to the common and more traditional approach followed by most countries during these years, Germany aimed at tackling human trafficking as a specific and independent crime, detached from drug or arms trade executed by organised crime syndicates<sup>70</sup>. Despite these early and focussed counter measures, it is nowadays still one of the major destination countries within the European Union, concluding almost 500 criminal proceedings dealing with human trafficking for the purpose of sexual exploitation annually<sup>71</sup>. The dark figure, however, is expected to outnumber the officially recorded proceedings by far<sup>72</sup>. Additionally to these arguments, within the European Union, Germany constitutes one of its driving economies, is a major player in EU decision making processes and has the most citizens under its jurisdiction. All of these facts, especially the long standing policy tradition and topical significance illustrate the need for a thorough analysis of the development of anti THB policies and signify Germany's suitability as a case study.

Focussing on German policy decisions, the chosen time frame was determined by major national as well as regional decisions within the field of human trafficking, as well as related policies. The decision to analyse the policy development between 2004 and 2007 was induced by the first eastern enlargement of the EU in 2004 – on the one hand, as well as second eastern enlargement in 2007, on the other hand. Since, numerous policy players identified the main human trafficking threat deriving from within the EU – particularly along the figurative

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<sup>68</sup> cf. United Nations (2011).

<sup>69</sup> cf. UNODC (2010).

<sup>70</sup> cf. Ibid.

<sup>71</sup> cf. Bundeskriminalamt (2013).

<sup>72</sup> cf. Eurostat (2013) p.47; 55.

intersection of poorer and richer member states<sup>73</sup>. A possible incentive set by the inclusion of these eastern neighbours into the EU to implement anti THB policies or adjust them to the recent developments are particularly interesting. Moreover, the FIFA Football Championship in Germany, which was expected to increase the numbers of trafficking cases at least for the length of the tournament, falls into this timeframe.

2004	First EU eastern enlargement, including Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia
2006	FIFA Football World Championship in Germany
2007	Second EU eastern enlargement, including Bulgaria and Rumania

### *Policy Analysis and Indicators*

As a starting point when conducting a policy analysis of human trafficking counter measures, it is essential to distinguish between different policy foci. Most often, policy design is aligned to the so called 3P model – distinguishing between *Prevention*, *Prosecution* and *Protection*. Hereby, *prevention* refers to all the measures targeting the prevention of future atrocities. Measures can be very diverse and may include border control and awareness-raising initiatives. Commonly, prevention policies are divided into three approaches, which are either related to development; security, or awareness-raising and education. Measures focussing on *prosecution* mainly evolve around law enforcement agencies and target, for example, their right to investigate or intervene as well as the cooperation between regional bodies. Lastly, *protection* refers to the victims protection and, in contrast to the previous concepts, takes a clear human rights stance. Additionally to the 3P related components, another factor will aid operationalising the process. In order to ensure the analysis' comparability, three indicators will be utilized: recognised purposes of trafficking, gender sensitivity and the policy's compliance with regional and international standards.

Although newly recognised purposes of trafficking emerged on the political agenda in recent years, the case of female victims being trafficked for the purpose of sexual exploitation is still the most common and wide-spread human trafficking scenarios. According to the European Union's statistics the purpose of sexual exploitation increases continuously; according to the EU, its share in all THB cases rose from 58% in 2008 to 66% in 2010. The rise of almost 10% in only three years is particularly interesting when considering the fact that special measures to counter

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<sup>73</sup> cf. Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) (2014).



THB for the purpose of sexual exploitation are in many member states implemented since almost two decades.

Due to this discrepancy, this thesis is going to analyse the policy's approach towards the different purposes of human trafficking and examine which purposes are recognised. Moreover, and in connection to the above outlined imbalance towards a strong victimisation of women, the second indicator refers to the policy's approach towards gender sensitive policy design. The analysis of the policies' approach on gender sensitivity sparks a special interest if concepts such as the feminisation of poverty and hereto related feminisation of migration<sup>74</sup> are kept in mind. Here, it is of interest how policies respond to high numbers of female victims, while acknowledging that men, too, are victims of human trafficking. Moreover, this thesis is paying attention to the general approach of policy design towards gender roles and the possible predication of policy design on gender stereotypes.

Lastly, the third indicator will be the policies' compliance with international and regional standards. Hereby, the thesis will focus on agreements of European bodies such as the Council of the European Union (CoEU) or the Organisation for Security and Cooperation in Europe (OSCE) as well as the documents of the United Nations (UN). To recap, the indicators guiding the analysis are:

- a) gender sensitivity of the policy design
- b) purposes of human trafficking acknowledged in the policy
- c) the policy's compliance with regional and international standards

The policies to be analysed have been selected according to the following criteria: First of all, the research only considers policy choices made on the federal governmental level. Accordingly, the term policy is defined as "declared objectives that a government (...) seeks to achieve and preserve in the interest of national community<sup>75</sup>". Consequentially, policy decisions on a local level or by non-governmental entities will not be considered. Moreover, the policies needed to be adopted during the selected time period between 2004 and 2007. Based upon these criteria, and acknowledging that no policy measure has been implemented in 2004, the following policy decisions were identified and will hence be analysed:

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<sup>74</sup> More on the concepts of feminisation of poverty and feminisation of migration can be found in: Pearce (1978) as well as Chang (2000).

<sup>75</sup> Business Dictionary (2014).

- 2005     Legislative reform – Amendment to the Criminal Code  
             Element of Crime: Human Trafficking §§ 232 - 233 replacing §§ 180b - 181
- 2007     Legislative reform – Reform of the German Immigration Act
- 2007     Second Action Plan of the Federal Government to Combat Violence Against Women

Aiming to provide a solid background for strengthening the analysis, several regional and international policy tools will be utilised. These documents will serve as a blueprint for a thorough comparison and assessment of the German policies. Additionally, statistics on human trafficking in Germany will be consulted for further explanation of the policy development. The documents supporting the analysis are:

- United Nations [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children](#), Supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000 (Palermo Protocol)
- [Council of the European Union Framework Decision 2002/629/JI](#) on combatting trafficking in human beings – by replaced by 2011/36/EU
- [Council of the European Union Directive 2004/81/EC](#) on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities
- [Council of Europe Convention on Action against Trafficking in Human Beings](#) of 16 May 2005
- German Federal Police (BKA) [Situational Report on Human Trafficking in Germany](#) of relevant years

In order to support the primary analysis of the above identified policies, two expert interviews have been conducted. Rather than adding primary information, these interviews have been conducted in order to support and backup the thesis' findings. Originally, three interviews have been planned – each covering one relevant sector related to the analysis of human trafficking counter policies: academia, civil society and non-governmental organisations as well as state representatives and law enforcement. Unfortunately, no comment or response could be obtained from the state representative and law enforcement sector. Upon request, representatives of the German parliament as well as the German Federal Police Force were unable to participate in an interview. Both sides justified their reservations with the sensitivity of the negotiations surrounding the pending legislative reform as well as the ongoing parliamentary debate<sup>76</sup>.

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<sup>76</sup> Further information on the parliamentary debate can be found on the German Parliament's website. URL: <http://bundestag.de/dokumente/index.jsp?cookieTest=true> last accessed: 15.05.2014.

Nevertheless, the two conducted interviews cover representatives of civil society as well as academia. The first interview was conducted with Prof. Dr. Seo-Young Cho, junior professor of economics at Philipps-University Marburg, Germany who has co-developed the 3P Anti-trafficking Policy Index, a quantitative ranking evaluating human trafficking counter policies worldwide<sup>77</sup>. Cho was chosen as an interview partner due to her unique experience on human trafficking in Germany and her outstanding work on policy analysis in this field. The semi structured interview contained open questions and was conducted in Cho's office in Marburg, Germany on January 7th, 2014 and lasted about 120 minutes.

The second interview was conducted with two representatives of the Hessian organisation *Frauenrecht ist Menschenrecht* (FiM) – Doris Eckard and Encarni Ramirez Vega. The organisation was chosen for several reasons. First of all, it is one of the longest existing German NGO's fighting human trafficking. Established in 1980, FiM accumulate more than 3 decades of experience in the field and have influenced and experienced most policy changes along the way. Moreover, FiM is the member of several federal and regional advisory boards on the issue, amongst others the *Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess* (KoK). Additionally, FiM is appointed liaison office to the Hessian Landes government in charge of human trafficking victim's protection<sup>78</sup>. The semi-structured interview comprised open ended questions and was conducted on January 10th, 2014 in the FiM premises in Frankfurt am Main, Germany. The interview was conducted with both NGO representatives at the same time and lasted about 150 minutes.

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<sup>77</sup> More information on the Index can be found via Cho (2014).

<sup>78</sup> cf. *Frauenrecht ist Menschenrecht e.V* (FiM) (2014).

## 5. Theoretical Framework – Path Dependency in Policy Analysis

The following chapter aims at providing a theoretical base for this research, in order to enable a well-structured and clear-cut analysis of the question at hand. In order to conduct the proposed analysis of the development of German anti human trafficking policies, this thesis will rely on the Path Dependence theory. Peters, Pierre and King make a valid point when arguing that the basic foundation underlying all attempts to explain social, political or cultural developments has not changed since ancient Greece<sup>79</sup>. The rudimentary dynamic of continuity and change is also characteristic of the Path Dependency theory, which will be introduced in this chapter.

As mentioned above, the research design is based upon the operationalization of the Path Dependence theory. This concept originates from the field of economics and has been developed by Paul David in the early 1980's<sup>80</sup>. Its approach has proven to be valuable not only for the understanding of market development, but also for the comprehension of societal and political decision making processes. The preliminary thought of Path Dependence is the assumption that every development follows a path defined by previous choices and their consequential outcomes<sup>81</sup>.

Following a purely theoretical assumption, Path Dependence supposes that different developmental stages follow a specific path. The development in question will proceed on a continuous path leading in a direction which was defined by previous decisions and therefore depicts continuity and stability<sup>82</sup>. Emanating from this, stability and permanence are defining features within this concept – *a fortiori*, the possibility of change needs to be acknowledged and incorporated within this construct. With regards to the general theory of Path Dependence, not only actual transformation but also the mere opportunity for change is recognised solely in the occasion of a so-called *crossroad*. The crossroad hereby illustrates a point in time enabling the introduction of different options as well as the sequential choice between them. At this juncture, the established path is met by other policy options, introducing one or more opportunities to change the existing policy and herewith leading the path into another direction. Hence, the crossroad is a very important aspect of the Path Dependence theory, depicting one of the rare possibilities for change and a moment of instability within an overall rather durable process. Therefore, even decisions deemed insignificant at the time can influence the direction of the path

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<sup>79</sup> cf. Peters, Pierre, King (2005) p. 1275.

<sup>80</sup> cf. Liebowitz; Margolis (1995) p.33 – 35.

<sup>81</sup> cf. Page (2006) p. 88.

<sup>82</sup> cf. Peters, Pierre, King (2005) p. 1275.

and accordingly set the course for important future developments<sup>83</sup>. Even if, at a later point in time, a different path seems to have been the more applicable or appropriate choice, a change of policy is seen as highly problematic since it involves the revision of many previously taken decisions<sup>84</sup>. The theory argues that for pragmatic reasons, the herewith created backlash and its accompanying costs in most cases stand in no relation to gained advantages. Hence, decisions made in a path dependent construct might support the maintenance of low quality decisions, since it supposedly restrains flexible and quick adjustments to newly gained insight or recent developments<sup>85</sup>.

The theoretical assumption underlying Path Dependency has been applied frequently in the field of public administration, politics and policy. As Page points out, "Path Dependence requires a build-up of behavioural routines, social connections, or cognitive structures around an institution<sup>86</sup>" – a framework evident in the political arena. Since legislative measures most often follow a consecutive line of argument and consider previously taken steps, the concept of Path Dependency seems well suited for analysing the complex interrelations featuring in policy design. In almost all scenarios, current legislative decisions use established laws as a model or pattern and add, subtract or revise existing information according to newly gained insights and other influencing factors<sup>87</sup>. On the one hand, this increases stability and in most cases accelerates the process of finding a political compromise acceptable for all involved actors. On the other hand, however, this approach might lead to a slowed down process, dragging on previous mistakes<sup>88</sup>.

Nevertheless, when considering policy development, the concepts of stagnancy and stability need to be distinguished. Policies are indeed often developed within the legacy of previous policy decisions. Yet, this does not imply a thematic or operative deadlock. Rather, change within a preliminarily determined set of options conveys a sense of stability and continuity which is of utmost importance for any political entity, since it allows and supports farsighted political development as well as societal stability<sup>89</sup>. Most political projects are far too big to be planned and implemented within one legislative period. When considering the time period needed for those policies to actually bear fruit and reveal its outcomes, the necessity of continuous policy planning becomes prevalent.

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<sup>83</sup> cf. Liebowitz; Margolis (1995) p.33.

<sup>84</sup> cf. Liebowitz; Margolis (1995) p.34.

<sup>85</sup> cf. Liebowitz; Margolis (1995) pp.34.

<sup>86</sup> Page (2006) p. 89.

<sup>87</sup> cf. Kay, Adrian (2005) p.566.

<sup>88</sup> cf. *ibid.*

<sup>89</sup> cf. Kay, Adrian (2005) p.565.

Therefore, the consequential inference regards the suitability of Path Dependence as being dependent on the reflection and integration of previous policy choices in succeeding policy decisions.

In addition to this notion of continuity as an outcome of following an existing path (as well as change being depicted by crossroads), the widening of an existing path is used as a metaphor for adding new policies to an already existing political agenda<sup>90</sup>. Remaining within the metaphor of a path, it can be said that the wider the policy path is, and therefore the wider the options of choice within a single path are, the more the explanatory power of the Path Dependence theory in general decreases<sup>91</sup>, since the strict interrelation, succession and dependence is diluted.

One of the main criticisms of Path Dependence argues that the concept is well suited for explaining stability and continuity, but faces challenges when expected to analyse patterns of change. As outlined above, one defining feature of Path Dependency is the notion of crossroads as opportunities of change and enhancement. Therefore, one should refrain from questioning the general possibility of analysing change but rather investigate how the mentioned crossroads can be identified and which events or preconditions lead to their establishment and recognition<sup>92</sup>. Peters, Pierre and King, interpret crossroads as "formative moment[s] (...) [in which] public policy is assigned new objectives, new priorities are established, and new political and administrative coalitions evolve to sustain those new policies." Herein, they agree with several other scholars, who assign an influential role to unintended consequences of previous policy decisions and external factors<sup>93</sup>. Due to the difficulty of a precise and timely identification of these factors and their impact, most academics agree on the advantage of Path Dependence as an analytical tool used in retrospect<sup>94</sup>.

Another relevant notion regarding Path Dependency is questioning the theories' notable focus on continuity and its' herewith hindered ability to conceive and explain occurring change. As argued previously, Path Dependency as a theoretical notion easily runs the risk of losing sight of developments bringing about actual change, since it focuses on processes of continuity. Especially Alexander<sup>95</sup> as well as Dimitrakopoulos<sup>96</sup> develop the Path Dependence theory towards a rational choice interpretation by stressing a "positively perceived trade-off between

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<sup>90</sup> Kay, Adrian (2005) p.567.

<sup>91</sup> cf. Kay (2005) p.566.

<sup>92</sup> cf. Kay (2005) p.565.

<sup>93</sup> cf. Kay (2005) p.567. / cf. Peters, Pierre, King (2005) p. 1283.

<sup>94</sup> cf. Peters, Pierre, King (2005) p. 1277.

<sup>95</sup> cf. Alexander (2001).

<sup>96</sup> cf. Dimitrakopoulos (2001).

short-run costs for long-term improvements"<sup>97</sup>. Therefore, the effectiveness and significance of decisions supposedly increases when keeping them in line with previous policies, in order to guarantee political continuity and consequential utilisation of all available means. According to Dimitrakopoulos, this leads to incremental developments, which are only modified in a drastic way when met by a cross-road<sup>98</sup>. Commonly, Path Dependence focuses on the incremental change and development within the path of interest, while risking to lose sight of parallel developments and decisions foreshadowing a possible policy change or so-called cross-road<sup>99</sup>. The retrospective feature, as put by Collier, is one of the reasons why academics tend to focus solely on the chosen policies, instead of analysing the highly complex and competitive route leading to the final decision<sup>100</sup>. Expanding the reasoning behind political stability, Sabatier introduces the notion of ideas and ideologies. He supports the assumption that the prevalence of political stability and only incremental change are due to the fact that decision makers tend to stick to their core beliefs over a long period of time, allowing only gradual change and trade-offs on the idea's margin in order to preserve their overall belief<sup>101</sup>. As outlined by Peters, Pierre and King, the importance of ideas (as opposed to mere pragmatism) goes hand in hand with the need to consider other third-factor influences when analysing policy decisions. Political choices can never be analysed in an assumed vacuum and separated from influential third-party factors, such as economic interests, lobbyism, public opinion or overall socio-cultural developments<sup>102</sup>. Therefore, it "requires a careful analysis not only of the ideas that drive the change but also the larger social, economic and political context in which these ideas are situated (...) [as well as the general] need to be more aware of exogenous drivers of policy change"<sup>103</sup>.

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<sup>97</sup> Greener (2005) p. 63.

<sup>98</sup> cf. Ibid.

<sup>99</sup> cf. Peters, Pierre, King (2005) p. 1277.

<sup>100</sup> cf. Collier; Collier (2002).

<sup>101</sup> cf. Peters, Pierre, King (2005) p. 1289.

<sup>102</sup> cf. Peters, Pierre, King (2005) p. 1296.

<sup>103</sup> Peters, Pierre, King (2005) p. 1298.

## 6. History of Trafficking in Human Beings

### *A Brief introduction of trafficking in human beings in 20th century Germany*

As indicated by picture 1 in the appendix, human trafficking – especially the trafficking of women and girls for the purpose of sexual exploitation – has been recognised and problematized since centuries. The *German National Committee for the International Fight against Trafficking in Girls* has had an outstanding position in the early days of the public fight against human trafficking. Contemporaneous to the educational campaigns conducted by the *German National Committee for the International Fight against Trafficking in Girls* in 1910, the *International Convention for the Suppression of White Slave Trade* obliges states to punish "any person who, to gratify the passion of others, has by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed a woman of full age for immoral purposes"<sup>104</sup>. In similarity to the German National Committee, whose name already indicated a specific focus in its campaign, the *International Convention for the Suppression of White Slave Trade* displays several obvious biases. First of all, the Convention only refers to white slave trade: Arguably, the fact that race is not specified by the German National Committee is most likely rather due to the fact that black citizens were of no concern to the German National Committee, and not because they specifically include a concern for black victims of trafficking in human beings. Yet, the focus on female victims of sexual exploitation is explicitly stated by the German National Committee, as well as in the *International Convention for the Suppression of White Slave Trade*. The policy recommendations in question are made from a strictly moral point of view, interpreting women as an innocent and abused victim who found herself in the sex industry – the victim, hereby, is strictly distinguished from the *ordinary* immoral prostitute. In this connection, the marked of sex-work itself is not considered.

For a long time, trafficking for the purpose of sexual exploitation has been interpreted as applying only to the recruitment process. First of all, only forced recruitment processes – including coercion, physical violence and threats – have been accepted as qualifying factors for being trafficked. Accordingly, the term *forced prostitution* was consistent with *forced recruitment*. Here, the possibility of women consenting to working in the sex industry but being deceived about employment details, working conditions and job realities are left unnoticed<sup>105</sup>. Over time, moral condemnation is still playing a strong role in the evaluation of human trafficking and prostitution, although the general bias, however, has decreased. The moral condemnation of immigrating

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<sup>104</sup> Cf. Wijers (2000) p. 4.

<sup>105</sup> Cf. Wijers (2000) p. 5.



women who consent to work in the sex industry has lessened and paved the way for a more comprehensive approach countering human trafficking. For the first time in 1933, the *International Convention for the Suppression of the Traffic in Women* considered the consent of a women as irrelevant to the element of crime. Hereby, the conceptual discussion surrounding trafficking and smuggling is intensified by acknowledging that not only smuggling but also trafficking can take place with the victim's original consent<sup>106</sup>.

A further development along the path of de-stigmatising prostitution and stressing the independence of sex work from trafficking is found in the shift of perspective in most conventions and recommendations following the 1949 *Convention for the Suppression for the Traffic in Persons and of the Exploitation of the Prostitution of Others*, which still held prostitution as morally reprehensible<sup>107</sup>. As Wijers point out, the 1993 *Vienna Declaration and Programme of Action* as well as the 1995 *Beijing Platform of Action*, for example, "recognised that trafficking – and not prostitution per se – constitutes a violation of the human rights of women, because of its core elements of coercion and deception"<sup>108</sup>.

Moreover, this introduces another relevant aspect into the debate by pinpointing the importance of trafficking as a migratory problem of wider concern. Being put on the main political agenda in the 1990's, this debate is most sensitive – especially when regarded in connection to the European Union's strict border controls and migration policies. In many aspects, the connection between trafficking in human beings, restrictive migration policies and economic inequalities of contiguous countries is up to today one of the most tabooed topics of discussions and state responses to human trafficking<sup>109</sup>. These factors, however, are of major importance when analysing the root causes of human trafficking. As illustrated by picture 1, in the early 20<sup>th</sup> century, Germany was categorised as a country of origin, in which women and girls might be in danger of falling victim to human trafficking and being trafficked to destination countries. Linear to Germany's economic and social development, its categorisation shifted from a country of origin to a destination country. This development can serve as a first indicator of root causes and highlights the importance of economic and social equality as factors influencing the categorisation as country of origin or destination country.

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<sup>106</sup> cf. Wijers (2000) p. 6.

<sup>107</sup> cf. Wijers (2000) p. 5.

<sup>108</sup> cf. Ibid.

<sup>109</sup> cf. Wijers (2000) p. 6.

## 7. Main Analysis

The following section will analyse the policy initiatives targeting the fight against trafficking in human beings taken by the German federal government between 2004 and 2007. The timeframe is chosen to enclose the first and second eastern enlargement of the EU, given that the problem of human trafficking in or to Germany is tightly connected with Eastern Europe since most perpetrators and victims originate from this area. Within the chosen timeframe, three policy measures have been implemented by the federal government:

2005 – Legislative reform of the German criminal code's section on trafficking in human beings

2007 – Legislative reform of the asylum law

2007 – Second Action Plan of the federal government to combat violence against women

In order to provide comparability over time, the analysis will focus on three indicators: gender sensitivity, acknowledged purposes of human trafficking and compliance with international and regional documents.

### 7. 1. Analysis of the 2005 Legislative Reform replacing §§ 180 - 181 with §§232 - 233a

This section will analyse the first major policy initiative implemented in 2005. The legislative reform of the criminal code's (StGb) section governing the offence of trafficking in human beings revised §§ 180 - 181 and introduced its replacement §§ 232 - 233 – which from 2005 onwards governed the criminal offense of human trafficking. In the following, the revision of §§ 180 - 181 as well as its outcome, §§ 232 - 233, will be analysed<sup>110</sup>. Starting with analysing the reforms approach on gender sensitivity, the section will continue with analysing the acknowledged purposes of human trafficking and close its examination by comparing the reforms compliance with international and regional standards. At the time, two documents set the bar on international standards regarding the fight against trafficking in human beings; namely the 2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*<sup>111</sup> and the 2002

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<sup>110</sup> In order to operationalise the analysis the thesis will, amongst others, utilise the draft bill of the Social Democrats and Green Party. Since these two parties supplied the government in 2004/2005 the draft bill has consequentially been adopted as law. Yet, contrary to the actual law, the draft bill gives a more detailed and explanatory view on certain decisions and the motivation behind them.

<sup>111</sup> UN (2000) Annex II.

*Council of the EU Framework Decision 2002/629/JI on Combatting Trafficking in Human Beings*<sup>112</sup>. Therefore, these two documents will serve as points of departure, in order to compare policies and consequentially determine the German reform's position in the erratic field of international standards.

Following the European Union's regulations, EU law has supremacy over national law. Consequentially, EU laws have to be implemented by its member states. In line with this, the EU determined that Council Framework Decision 2002/629/JI needed to be implemented and translated into national law by all member states until the 04th August 2004. In case of non-compliance with this deadline, sequential sanctions were to be implemented on the member state in question. Hence, the EU deadline sets a strong motivation for the legislative reform aiming at the compliance of the German criminal code with EU regulations. Despite aiming at the observance of the set time limit, Germany failed to adopt the legislative reform before August 2004. Yet, trying to comply with the set deadline led to the policy's actual implementation in early 2005, and thus prevented the incorporation of the European Union's current guideline concerning human trafficking – the *Council of Europe Convention on Action against Human Trafficking*<sup>113</sup> – which was disclosed in May 2005. Keeping the EU deadline in mind, the German government decided in early 2004 to revise the German Criminal Code's paragraphs dealing with trafficking in human beings. The foregoing version, namely § 180b and 181 StGb, dates back to 1998<sup>114</sup>. The legislative reform targeting the elements of crime treating trafficking in human beings was initiated in 2004 and finally implemented in 2005. Due to this, the involved actors mainly refer to the 2000 UN Palermo Protocol, which is until today the effective and most comprehensive international treaty dealing with human trafficking, as well as the Council of the European Union Framework Decision 2002/629/JI which has been replaced by a revised version in 2011. Paragraph 180b and 181 StGb read as follows:

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<sup>112</sup> Council of the European Union (2002).

<sup>113</sup> Council of Europe (2005).

<sup>114</sup> cf. Bundestagsfraktionen der SPD und Bündnis 90/ Die Grünen (2004).

### **§ 180b - 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 get 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 get the person to take it up or continue it, shall be punished with imprisonment from six months to ten years.*

### **§ 181 - 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 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.*

In line with the general historical interpretation of human trafficking - which was in most cases defined as trafficking into prostitution – the criminal definition in the German StGb focussed on the trade of human beings into sexual exploitation<sup>115</sup>. The §§ 180b (human trafficking) and 181 (severe cases of human trafficking) were categorised in section thirteen, the criminal code's chapter on crimes against sexual self-determination. Moreover, the numeration and sequencing of the crimes increase the prevalent notion of human trafficking as a sexualised crime. By definition, § 180b is a sub-article and thereby linked to foregoing §§ 180 and 180a. Paragraph 180 StGb refers to the encouragement of sexual acts of minors, while § 180a criminalises the encouragement of prostitution<sup>116</sup>.

Paragraph 181 – criminalising severe cases of human trafficking – is followed by § 181a, penalising procuration<sup>117</sup>. Opposing the usual connotation of prostitution as an occupation being followed mainly by women, the articles in question do not specify the victim's sex but take a

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<sup>115</sup> cf. Krieg (2007) p. 76.

<sup>116</sup> cf. Lackner, Kühl (2004) Kapitel 13, §§ 180 - 181.

<sup>117</sup> cf. Ibid.

gender neutral stand by referring solely to "*a person*"<sup>118</sup>. Here, it is important to distinguish between the denomination of victims and perpetrators. Whereas no specific regulation applies to the definition of perpetrators, the sixth criminal code amendment law (6. StrRG) established the maxim of applying gender-neutral formulations with regards to victimhood only<sup>119</sup>. This is mainly due to the fact that the German language often applies the generic masculinum instead of a gender neutral terminology. Connected to this, the Bundestag and Bundesrat<sup>120</sup> agreed upon introducing an explicitly gender neutral formulation whenever victims of crimes most often committed against women are concerned. Hereby, the change aimed at highlighting the sensitive and vulnerable position of women. Consequentially, as argued by the legislature, a similar adaptation of the German language in the case of perpetrators was not regarded necessary<sup>121</sup>.

Yet, the intention of providing a gender mainstreamed element of crime, including male victims of human trafficking, can be questioned. As indicated by numerous statistics, the prevalent victim group of human trafficking for the purpose of crimes against sexual self-determination are women and girls<sup>122</sup>. Hence, early on, scholars questioned the decision to use the generic masculinum in this context as a euphemism and distraction from the fact that mainly women are victims of human trafficking<sup>123</sup>. Of course, the precise numbers of victims as well as the percentage of women amongst them change, yet the general pattern continuously depicts a high number of female victims<sup>124</sup>. This, in connection to the traditional picture of prostitution being a business pursued by women, indicates that the phrasing of articles 180b and 181 should not automatically be attributed to an early manifestation of gender sensitivity in German legislation.

Here, instead of including the possibility of male victims, the phrasing might not do justice to the fact that this crime usually victimises women and consequentially should be followed by gender specific counter measures. Nevertheless, both interpretations can be argued for; whether one regards gender mainstreaming as being depicted by the absolute equalisation or neutralisation of gender specific wording, or rather the explicit emphasis of differences between women and men is dependent to prior definition and varies notably in different schools of

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<sup>118</sup> Ibid.

<sup>119</sup> For more information please consider: Deutscher Bundestag (1997) p.12.

<sup>120</sup> Whereas, the Bundestag is the Federal German Parliament, the Bundesrat assembles representatives of the federal states (Länder) and alongside the Bundestag is a form of Second Chamber. The Bundesrat plays a role in passing federal legislation.

<sup>121</sup> cf. Deutscher Bundestag (1997) p.12.

<sup>122</sup> Cf. Bundeskriminalamt (2003 – 2013).

<sup>123</sup> cf. Hoffmann (2002) p. 328.

<sup>124</sup> Cf. Bundeskriminalamt (2003 – 2013).

feminism<sup>125</sup>. According to Carol Smart, the distinction relevant for the interpretation of §§ 180b and 181 has to be made between the *prohibition of differentiation*<sup>126</sup> on the one hand, and *differentiation imperative*<sup>127</sup> on the other. Supporters of the *prohibition of differentiation* paradigm would argue in favour of §§ 180b and 181 as being gender neutral and hereby providing a legislative base of equality<sup>128</sup> – namely the gender neutral phrasing including males and females. Opposing to this, advocates of the *differentiation imperative* argue that the phrasing and objective of a law has to reflect the actual realities of a specific crime or other occurrences<sup>129</sup>. Therefore, the phrasing defining human trafficking as an element of crime should depict the numeric realities of mostly female victims.

The major distinction between § 180b – human trafficking – and § 181 – severe cases of human trafficking – was the inclusion of violence or threats in the latter. Whereas human trafficking as criminalised in § 180b is fulfilled by taking advantage of a person's helplessness or problematic situation – especially while being abroad – § 181 is fulfilled when adding violence, threats or deceit to the element of crime outlined in § 180b<sup>130</sup>.

Consequently, other arguments outlined in international agreements are not to be found<sup>131</sup>. Moreover, a particularly worrisome aspect is the exclusive nature of the purposes of human trafficking. As explained above, §§ 180b and 181 were situated in section 13 of the German criminal code, which refers solely to crimes against sexual self-determination, and therefore only included prostitution and sexual exploitation as listed purposes of human trafficking. Contrary to this, the UN Palermo Protocol, signed by Germany in 2000, obligates all signatories to adopt the details of the protocol, amongst others specifications regarding purposes of human trafficking. Being aware of this discrepancy, the reasoning brought forward by the German Parliament for the legislative reform of the paragraphs criminalising human trafficking was the adaptation of German policies to the international standard, especially to the UN Palermo Protocol of 2000 as well as the EU Council resolution of 2002<sup>132</sup>. Hereby, the Bundestag accentuates the position of women as victims of human trafficking as highlighted in both the EU and the UN agreement. Despite a gender neutral policy formulation within the document, the UN's *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* clearly

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<sup>125</sup> cf. Krieg (2007) p.78.

<sup>126</sup> cf. Smart (1992).

<sup>127</sup> cf. Ibid.

<sup>128</sup> cf. Ibid.

<sup>129</sup> cf. Ibid.

<sup>130</sup> cf. Lackner, Kühl (2004) Kapitel 13, §§ 180 - 181.

<sup>131</sup> cf. Ibid.

<sup>132</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p. 6.

emphasizes a policy focus in line with the numeric evidence suggesting the increased vulnerability of women and children<sup>133</sup>. In connection hereto, the explanation accompanying the Social Democrats' and the Green Party's draft bill points out that

*the draft does legally not distinguish between the protection of men and women. However, in its practical consequences, with regards to the suppression of trafficking in human beings, it will primarily improve the situation of women*<sup>134</sup>.

Contrary to the original set up of §§ 180b and 181, the Palermo Protocol identifies not only sexual exploitation but also forced labour, organ trafficking, slavery or slavery-like practices as purposes substantiating trafficking in human beings<sup>135</sup>. The Council of the EU Framework Decision of 2002, on the other hand, does not specify organ harvesting and trading as purposes of human trafficking. In line with this, the German Parliament is not attending to illicit organ trade within the legislative reform of §§ 180b and 181, since the issue of organ harvesting is dealt with in §§ 18 and 19 of the German transplantation act<sup>136</sup>.

As pointed out by the Social Democrats and the Green Party, various articles criminalising the listed offenses exist but are not yet sufficient enough to fulfil transnational obligations deriving from Germany's EU and UN membership<sup>137</sup>. This becomes apparent with regards to forced labour, which is listed as a purpose of human trafficking by both the EU resolution and the UN convention. Prior to the 2004 legislative reform, criminal offences regarding forced labour could only be prosecuted by referring to §§ 234, 239 and 240 StGb – respectively covering the statutory offences of kidnapping (§234 StGb), deprivation of liberty (§239 StGb) and coercion (§240 StGb)<sup>138</sup>. Due to this, actual criminal proceedings and convictions on grounds of forced labour were extremely difficult to commence<sup>139</sup>. Nevertheless, the legislative reform focussed on the incorporation of existing elements of crime instead of a comprehensive and depletive amendment. Hence, the succeeding paragraphs regulating human trafficking from 2005 onwards (§§ 232 -233 StGb), are situated within chapter 18 of the German criminal code – referring to criminal offences against personal liberty.

As explicitly justified in the Social Democrats' and the Green Party's draft bill, the motivation for the legislative reform in 2005 derives primarily from international and regional obligations as well as from the objective to standardise the international definition and practical

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<sup>133</sup> cf. UN (2000) Annex II.

<sup>134</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p.6.

<sup>135</sup> cf. UN (2000) Annex II p. 42.

<sup>136</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p.6. Berlin.

<sup>137</sup> cf. Ibid.

<sup>138</sup> cf. Lackner, Kühl (2004) Kapitel 18, §§ 234, 239, 240.

<sup>139</sup> Cf. Bundeskriminalamt (2007).

substance of human trafficking<sup>140</sup>. Only secondarily, the thematic importance and perceived necessity to up-date German criminal law with regards to human trafficking shaped and promoted the 2005 legislative reform<sup>141</sup>. This demonstrates the importance of intergovernmental treaties for national legislative process, as well as the potential influence regional or international organisations can have in today's globalised society. The revised §§ 232, 233 and 233a StGb read as follows:

### **§ 232 – Human trafficking for the purpose of sexual exploitation**

*(1) Whosoever exploits another person's predicament or helplessness arising from being in a foreign country in order to induce them to engage in or continue to engage in prostitution, to engage in exploitative sexual activity with or in the presence of the offender or a third person or to suffer sexual acts on his own person by the offender or a third person shall be liable to imprisonment from six months to ten years. Whosoever induces a person under twenty-one years of age to engage in or continue to engage in prostitution or any of the sexual activity mentioned in the 1st sentence above shall incur the same penalty.*

*(2) The attempt shall be punishable.*

*(3) The penalty shall be imprisonment from one to ten years if*

- 1. the victim is a child (section 176(1));*
- 2. the offender through the act seriously physically abuses the victim or places the victim in danger of death; or*
- 3. the offender commits the offence on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.*

*(4) The penalty under subsection (3) above shall be imposed on any person who*

- 1. induces another person by force, threat of serious harm or by deception to engage in or continue to engage in prostitution or any of the sexual activity mentioned in subsection (1) 1st sentence above or*
- 2. gains physical control of another person by force, threat of serious harm or deception to induce them to engage in or continue to engage in prostitution or any of the sexual activity mentioned in subsection (1) 1st sentence above.*

### **§ 233 - Human trafficking for the purpose of labour exploitation**

*(1) Whosoever exploits another person's predicament or helplessness arising from being in a foreign country to subject them to slavery, servitude or bonded labour, or makes him work for him or a third person under working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity, shall be liable to imprisonment from six months to ten years. Whosoever subjects a person under twenty-one years of age to slavery, servitude or bonded labour or makes him work as mentioned in the 1st sentence above shall incur the same penalty.*

*(2) The attempt shall be punishable.*

*(3) Section 232(3) to (5) shall apply mutatis mutandis.*

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<sup>140</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p.6.

<sup>141</sup> cf. Ibid.



**§ 233a – Assisting in human trafficking**

*(1) Whosoever assists in human trafficking under section 232 or section 233 by recruiting, transporting, referring, harbouring or sheltering another person shall be liable to imprisonment from three months to five years.*

*(2) The penalty shall be imprisonment from six months to ten years if*

- 1. the victim is a child (section 176(1));*
- 2. the offender through the act seriously physically abuses the victim or places the victim in danger of death; or*
- 3. the offender commits the offence on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.*

Contrary to §§ 180b and 181, the revised §§ 232, 233 and 233a do not only refer to a broader set of human trafficking purposes, but also define the process of trafficking in human beings as such. While §§ 180b and 181 only criminalised the exploitative action, violence, threat and coercion, the reform led to a more comprehensive interpretation of human trafficking as a multi-layered phenomenon. In contrast to previous definitions, the different steps involved in the process of trafficking in human beings are legally recognised<sup>142</sup>. As laid out by the United Nations Palermo Protocol as well as in the Council of the Europe Union 2002 Framework Decision, human trafficking as an element of crime does now include the three-fold process of *act, means and purpose*<sup>143</sup>. Additionally, aiding and abetting within these singular steps, for example procurement, transportation or harbouring victims, constitute a criminal offence defined in § 233a<sup>144</sup>. Previously aiding and abetting was not explicitly criminalised in any of the applicable paragraphs<sup>145</sup>.

To recall, the decision to reform the laws concerning human trafficking was greatly motivated by the wish and need to adjust national legislation to international standards and to incorporate latest decisions and developments in the field. Namely, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>146</sup> which served as a guideline for the reform and is a supplement to the UN Convention Against Transnational Organised Crime. Hence, one major alteration concerns the targeting and contouring of perpetrators. In order to act in accordance with the UN's suggestion, §§ 232 (3) 3 and 233 (3) 3

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<sup>142</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p.8. Berlin.

<sup>143</sup> For a more detailed explanation of this concept, please view *chapter 3 - definitions and terminology* - of this thesis.

<sup>144</sup> cf. Strafgesetzbuch, (2013) Abschnitt 18, § 233a.

<sup>145</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p.8.

now draw explicit attention to the possibility of perpetrators' involvement in organised crime and gang membership<sup>147</sup>.

Whereas it is important to include organised crime in the legal base underlying the prosecution of human trafficking in Germany, it is also crucial to put the involvement of organised crime in human trafficking into perspective. According to the federal police agency (Bundeskriminalamt/ BKA), Germany's problem regarding trafficking in human beings is only marginally connected to organised crime<sup>148</sup>. Though organised criminal structures do play a role in the trafficking and smuggling of humans in Germany, the majority of cases involve single perpetrators or small groups of three or four individuals. Unfortunately, the German federal police agency did not adjust their data collection methodology to this specification in the changed legal base. Their annual report on the situation of human trafficking in Germany was partially adjusted to the new legislation, for example with regards to the distinction between different purposes of trafficking, but does not include specific data on the perpetrators' background or their involvement in organised crime<sup>149</sup>.

In general, the revised articles establish a more extensive base for prosecuting the crime of trafficking in human beings than their predecessor. A major enhancement compared to the previous version (§§ 180b – 181) is the broadening of the scope of human trafficking in the reformed articles. As pointed out previously, it is widely agreed upon and incorporated in various inter-governmental agreements<sup>150</sup> that the actual purposes of human trafficking extend sexual exploitation and prostitution by far. Whereas § 232 deals with the traditional interpretation of human trafficking as a crime concerning the sexual self-determination of victims, § 233 aims at the criminalisation of trafficking for the purpose of forced labour<sup>151</sup>.

Before analysing the specific changes taken up in § 233 and dealing with purposes of human trafficking beyond sexual exploitation; the next paragraph will analyse § 232 and the respective changes within the interpretation of sexual exploitation. Whereas §§ 180b and 181 specified that only sexual acts committed "on or in front of a third person"<sup>152</sup> fulfil the crime of sexual exploitation, sexual abuse, as defined in § 232, incorporates forced sexual acts with third parties as well as with the primary perpetrator. This change specifically aims at increasing the policies' potential to counter more diverse acts of sexual exploitation. While the old definition

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<sup>147</sup> cf. Strafgesetzbuch (2013), Abschnitt 18, §§ 232 (3) 3, 233 (3) 3.

<sup>148</sup> The connection between human trafficking and organised crime can be followed up on in the Federal Police Force's report on organised crime. Cf. Bundeskriminalamt (2003 – 2012).

<sup>149</sup> As becomes evident when comparing the annual reports before and after the legislative reform - all report can be found at the BKA's website. Cf. Bundeskriminalamt (2003 – 2013).

<sup>150</sup> For more information please regard chapter 2. terminologies and definition

<sup>151</sup> cf. Strafgesetzbuch (2013), Abschnitt 18, §§ 232, 233.

<sup>152</sup> cf. Lackner, Kühl (2004) Kapitel 18, §§ 234, 239, 240.

covered a rather limited scope – aiming mainly at forced prostitution – the revised version is designed to force a stronger grip upon a variety of offences<sup>153</sup>. Especially, the "commercial marketing"<sup>154</sup> of victims as depicted in the concepts of mail-order-brides, forced marriages and pornography were situated in a legal limbo under the old paragraphs' definition<sup>155</sup>.

A common denominator of both § 232 and § 233 is the attribute of *exploitation* as an indicator of a perpetration of an offence; the term *exploitation* is used in this context since it is regarded as objectively identifiable<sup>156</sup>. Previously, it was not only necessary to substantiate the exploitation of victims but additionally to prove the perpetrators' previous knowledge of the victim living in a situation of despair, vulnerability and helplessness – ideally in connection to a stay abroad<sup>157</sup>.

Moreover, § 233 StGb broadens the interpretation of human trafficking by extending the recognised purposes for trafficking in human beings beyond sexual exploitation. To be precise, § 233 criminalises human trafficking for the purpose of labour exploitation. First of all, the revised interpretation includes the element of crime previously referred to in § 240 StGb – kidnapping<sup>158</sup>. Here, the legislature resume the elements of slavery and serfdom. Further, two more occurrences of forced labour are added in § 233: First of all, the concept of debt bondage<sup>159</sup> is added to the previous description of slavery and serfdom, since it is closely related to both concepts and a common mean to tie victims to the perpetrator and to ensure their dependence. The second added definition of forced labour is labelled "adverse working conditions"<sup>160</sup>. This concept refers to "working conditions which stand in a stark contrast to working conditions of other employees, which fulfil the same or a similar duty"<sup>161</sup>. This rather broad definition gives law enforcement agencies and barristers room for the law's construction and interpretation, but also demonstrates a lack of detailed definition, which might cause problems differentiating this concept from unfair but not necessarily illegal forms of employment. According to a ruling of the German Federal Supreme Court (Bundesgerichtshof/ BGH), earnings falling below a limit of one-third of the standard minimal wage fulfil the conditions of a *stark contrast* as applicable in § 233 StGb<sup>162</sup>. Thus, the common practice of unpaid internships could fulfil the criteria of a stark contrast in wages

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<sup>153</sup> cf. Bundestagsfraktionen SPD und Bündnis 90/ Die Grünen (2004) p. 8. Berlin.

<sup>154</sup> Ibid.

<sup>155</sup> cf. Ibid.

<sup>156</sup> cf. Ibid.

<sup>157</sup> cf. Lackner, Kühl (2004) Kapitel 18, §§ 234, 239, 240.

<sup>158</sup> cf. Lackner, Kühl (2004) Kapitel 18, §240.

<sup>159</sup> For a definition of the concept of debt bondage please consider: United Nations Working Group on Trafficking in Persons (2009).

<sup>160</sup> Strafgesetzbuch (2013) Abschnitt 18, § 233.

<sup>161</sup> Ibid.

<sup>162</sup> cf. Heinrich (2008) p. 3.

while executing the same tasks and responsibilities as colleagues with a significantly higher income<sup>163</sup>. As illustrated by this example, the broad definition of § 233 causes factual difficulties in the identification of forced labour in comparison to unfair working conditions.

Nevertheless, this interpretation refers mainly to the definition of labour exploitation; other terminologies which are of major importance for the appropriate understanding and implementation of human trafficking for labour exploitation as a criminal offence are not explicitly defined in § 233. Yet, recalling the definition of human trafficking is needed to distinguish unfair working conditions from criminal actions.

Paragraph 233 (1) does recall the definition of human trafficking laid out in the Palermo Protocol partially, by addressing the exploitation of the victims' "helplessness and despair in a foreign country"<sup>164</sup>. Hereby it is essential to draw attention to the difficult definition and identification of a person's "helplessness and despair in a foreign country"<sup>165</sup>. Whereas this formulation presents a practical problem and is in many cases up to individual judgement, other factors enable a clearer distinction between unfair employment and human trafficking for the purpose of forced labour. Paragraph 233 (4), for example, specifies increased penalties whenever violence, threats or deceit is used in the exploitative process<sup>166</sup> – attributes that should not be present in regular employment relations. Another distinguishing attribute is the genuine agreement between a trainee and his employer. In the case of an internship or trainee position, the employee has knowledge about the working conditions and is not tricked into accepting the position under false assumptions or expectations. Therefore, even though an unpaid internship might fulfil the payment criteria as outlined by the BGH, it does not constitute a case of forced labour or human trafficking for the purpose of forced labour. Recapitulating, it should be pointed out that a misinterpretation and consequential application of § 233 to unfair working conditions is not very likely due to the specifications integrated in § 233 (4), referring to the use of violence. Rather, the analysis of the problematic definition is of legal and academic nature, emphasising the importance of legal standards and precision.

In line with this, a further conceptual specification of trafficking in human beings and an adjustment to the UN Palermo Protocol as well as the Council framework decision would have increased the reforms success<sup>167</sup> and worked in favour of the practicality and exactness of the bill. Supported by both inter-governmental agreements, specifying the process of trafficking could help to separate human trafficking for the purpose of forced labour from other, more general

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<sup>163</sup> cf. *Ibid.*

<sup>164</sup> *Strafgesetzbuch (2013) Abschnitt 18, §§ 232 - 233.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> cf. Heinrich (2008) p. 3.

forms of labour exploitation. At this juncture, the UN Palermo Protocol stresses the interplay of act, means and purpose<sup>168</sup> by pointing out that identifying the purpose is not sufficient to categorise a crime as human trafficking. Rather, as argued by UN<sup>169</sup> and EU<sup>170</sup>, in order to constitute the crime of human trafficking, the perpetrators need to be involved or at least be knowledgeable about the abusive and illicit nature of the recruitment as well as the general process. For example, if police forces identify a farmer who holds its workers under illegal conditions, the farmer in question possibly has to answer to the charge of exploiting forced labour. However, if he did not participate or is unaware of the workers' recruitment, as specified in the definition of the element of crime of human trafficking, he or she does not have to face charges of trafficking in human beings.

On the one hand, this regulation is necessary in order to distinguish between certain levels of graveness in the grey area between labour exploitation and human trafficking. As outlined before, precision in definition and distinguishing between different criminal offences is important for a just application of the law, as well as for enabling precise counter measures. On the other hand, however, this regulation provides a legal loophole for perpetrators who can easily claim to be unaware of the origin of their workers or the connected recruitment process.

Disregarding this legally controversial point, the German parliament took a first step towards an improved definition of human trafficking by revising the acknowledged purposes of trafficking in human beings. In accordance to the Council of the EU framework decision, the purpose of labour exploitation was added to the already existing understanding of sexual exploitation as a purpose of human trafficking. Yet, the Palermo Protocol also introduces organ harvesting as a possible purpose for human trafficking. Although the UN Convention was adopted already in 2000, neither the EU framework decision of 2002 nor the German legislative renewal in 2005 took up on this issue. Up until today, organ and tissue trade is dealt with under § 18 of the German transplantation act (Transplantationsgesetz/ TPG)<sup>171</sup>. Although organ trading is dealt with in the TPG, it is not put in any context or connection to trafficking in human beings, but rather regarded as an isolated criminal offence<sup>172</sup>.

Regarding the notion of Path Dependency, the legislative reform continued previous policy decisions. By incorporating pre-existing paragraphs, such as § 240 StGb – dealing with kidnapping and slavery – as well as using notions and decisions reflected in § 180b and § 181 StGb, the new bills pursued previous trends and approaches. Moreover, it is justifiable to assume

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<sup>168</sup> cf. UN (2000): Annex II, p. 42.

<sup>169</sup> cf. UNODC (2013).

<sup>170</sup> Council of the European Union (2002) Article.1 p.2.

<sup>171</sup> Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (2007) Abschnitt 7, § 18.

<sup>172</sup> Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (2007) Abschnitt 7, § 18.

that the reformative action was initiated by a closing deadline – namely the need to implement the Council Framework Decision until the 04th of August 2004. Even though this does not strictly qualify as a crossroad defined in the path dependency concept, the EU deadline does constitute an external pressure which ensures and reinforces the motivation and opportunity to develop new decisions and implement existing policies. Therefore, the continuation of foregoing policies and inclusion of new findings supported and induced by regional powerbrokers qualifies as first indicator supporting the explanatory power of path dependency in policy development.

In summary, the legislative reform of 2005 changed the element of crime of trafficking in human beings in various ways. First of all, the previously listed purpose of sexual exploitation was extended in order to include concepts such as pornography, forced marriages and mail-order-brides in addition to the already criminalised forced prostitution. Secondly, human trafficking as a general offence was moved from the criminal code's section on crimes against sexual self-determination to the criminal code's section 18 – Crimes against personal freedom. Thereby, the policy change enables the extension of recognised purposes of human trafficking for the first time beyond sexual assaults and includes the purpose of labour exploitation. Although this inclusion marks an important and valuable step, it becomes apparent that the close EU deadline impacted the parliament's effort in two ways. On the one hand, the deadline spurred legislative action and ensured the implementation and adoption of important renewals. On the other hand, it needs to be highlighted that a more thorough consideration of the used definitions and included concepts, especially with regards to § 233 and the application of "adverse working conditions"<sup>173</sup>, would have been beneficial. As described earlier in this chapter, the terminology of §§ 232 - 233 has been adjusted to the sixth decision to change the criminal code<sup>174</sup> and reflects a gender sensitive approach. Here, all terminology regarding victims of human trafficking is gender neutral, whereas all terminology regarding possible perpetrators is kept in the previously used generic masculinum. This decision reflects an often criticised view – provoking a pre-victimisation of women<sup>175</sup> by assuming their one sided involvement in human trafficking, whereas BKA statistics suggest that at the time, women constitute up to 24 percent of all perpetrators involved in the trafficking of human beings in Germany<sup>176</sup>. Moreover, it supports a biased view on the involvement of men in cases of human trafficking, too. Although, by the gender neutral phrasing, men are included as possible victims of human trafficking, the generic masculinum referring to perpetrators suggests that men are first and foremost criminal suspects.

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<sup>173</sup> cf. Strafgesetzbuch(2013) Abschnitt 18, § 233.

<sup>174</sup> cf. Rechtsausschuss des Deutschen Bundestages (1997) p.12..

<sup>175</sup> An introduction to this topic can be found in: Meloy; Miller (2010).

<sup>176</sup> cf. Bundeskriminalamt (2005) p. 14.

## 7.2. Analysis of the 2007 Legislative Reform of the German Immigration Act

The following section is going to analyse the legislative reform changing the immigration and residence rights for foreigners in Germany as the second relevant policy measures. Based on the 2004 version of the *Regulation and Limitation of Immigration and Residence and Integration Regulation of foreigners and EU citizens Act*<sup>177</sup>, the reform was conducted in two steps, starting in 2005 and being finalised in 2007. In line with the three utilised indicators of recognised purposes, gender sensitivity, and compliance with international and regional standards, the following section will pay increased attention to the reform's incorporation of the Council of the European Union *Directive 2004/81/EC – on the residence permit issued to third country nationals who have been victims of trafficking in human beings or who have been the subject of an action to facilitate illegal migration, who cooperate with the competent authorities*. Moreover, the policies implementation of gender mainstreaming will focus on the interpretation of victimhood as a gender sensitive concept as well as on the victim identification processes.

The chronologically second policy is the Directive Transposition Act implementing the Council of the EU directive. The reformation of the asylum- and immigration act was finalised in 2007 and, amongst other issues, addressed the situation of identified victims of human trafficking, with a distinct focus on the question if and under which conditions trafficking victims are allowed to remain in Germany. The first revision of the immigration law was modified in 2005 and showed strong indications of a path dependent process.

The EU asylum directive was adopted in 2004, correlating with the first EU eastern enlargement. Thereby, in the foreseeable future, the free movement of EU citizens within the Union includes more people than ever before – shifting the primary responsibility of border control further eastward and thereby even closer to countries who have been known to struggle with their role as a *supply country*<sup>178</sup> for human trafficking victims, such as Bulgaria, Rumania or Russia<sup>179</sup>. Due to this, the European Union paid special attention to human trafficking within or across its borders, implementing the Council of the European Union's *Directive 2004/81/EC*, which was translated by the German parliament in two steps.

The first step was taken shortly after the Council passed the Directive on asylum and immigration policies in 2004. Here, the German legislature decided to act quickly and adopted a

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<sup>177</sup> The act will also be referred to as *Immigration Law/Act or Asylum Law/Act*.

<sup>178</sup> The term *supply country* refers to the victim's country of origin, in which the trafficking process was started by recruiting or kidnapping victims.

<sup>179</sup> cf. Bundeskriminalamt (2004 – 2006).

corresponding law on January 1st 2005 – only half a year after the publication of the aforementioned directive. Accompanying this quick respond is a rather superficial implementation<sup>180</sup>. The omnibus act, entitled *Regulation and Limitation of Immigration and Residence and Integration Regulation of foreigners and EU citizens Act*, implements two new articles but mainly limits itself to the revision of previously existing articles. While article two of the reformed immigration law deals with the freedom of movement and residence right of EU citizens in general, only a small paragraph in article one deals with the residence, or so called *exceptional right to remain* of non EU citizens<sup>181</sup> as well as with limitations of deportation<sup>182</sup>. Generally, only a fraction of the translated decisions are relevant for or can be implemented with regards to the situation of victims of trafficking in human beings. One of these relevant sections is article 1, chapter 5 – dealing with prohibitions of deportations<sup>183</sup>. Herein, it is stated that a deportation consequential from illegal immigration and stay in Germany has to be aborted if the victim's safety cannot be guaranteed in its country of origin. Specifically, the victim's safety is defined in § 60 as an “immediate threat to [the individuals] life or freedom on grounds of race, religious beliefs, citizenship or membership of a certain social group”<sup>184</sup>. Article 60 (1) specifies that the affiliation with or belonging to a certain social group is also given if the individual's physical integrity is threatened only due to his or her sex or gender<sup>185</sup>. As pointed out by Schneider, the extensions of actors who qualify as a legitimate source of threat signifies a major enhancement of the legal base governing the intermission of deportations<sup>186</sup>. In addition to the previously recognised aggressors – namely the state as well as parties or organisations holding power over a state's significant geographical territories – the third accepted source of threat, namely non-state entities<sup>187</sup> has been added. Theoretically, organised crime groups involved in trafficking in human beings fulfil the criteria of being a non-state entity posing a serious threat to the lives and personal freedom of trafficking victims who return to their country of origin. In fact, various experts, such as the German counselling service *Frauenrecht ist Menschenrecht*, which is working with victims of human trafficking since the 1980's, verify that victims who return to their country of

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<sup>180</sup> cf. Schneider (2007).

<sup>181</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1- 2.

<sup>182</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 2, Abschnitt 2, § 60.

<sup>183</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 1, Abschnitt 5.

<sup>184</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 2, Abschnitt 2, § 60.

<sup>185</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 5, Abschnitt 2, § 60 (1).

<sup>186</sup> cf. Schneider (2007).

<sup>187</sup> Non-state actors are not to be confused with non-governmental organisations. Rather, the term refers to entities which have the power to severely harm or threaten an individual but are not affiliated with the state.



origin are prone to fall victim to human trafficking again or to be otherwise severely threatened and assaulted<sup>188</sup>. As specified by Moog and Koch, "perpetrators repeatedly threaten or attack victims and their families in their countries of origin when criminal proceedings have been initiated in Germany, especially when perpetrators or their associates are convicted of the crime"<sup>189</sup>. This interpretation is in line with the European Court of Human Rights' ruling, which construes article 3 of the "European Convention on Human Rights to mean the prohibition of deportation when the deportee could be subjected to torture or inhuman or degrading treatment or punishment in his or her country of origin"<sup>190</sup>.

Practically, however, as indicated by Lindner, EU member states often disregard the Court's ruling<sup>191</sup>. In the case of Germany, the specifications in § 60 (1) c) prevent an application of this protection clause in most cases. To be precise, the respective paragraph guarantees the protection of a victim only if his or her state of origin is "unable or unwilling to provide protection of persecution"<sup>192</sup> and moreover demands to previously rule out a so called *domestic-flight alternative*, which refers to an "escape-alternative"<sup>193</sup> within the country of origin. Considering the overall stable political structure of countries from which victims of human trafficking into the EU commonly originate, the practical applicability of § 60 – which would allow third-country nationals to remain in Germany for a certain period of time – tends to zero. To specify, the only section which can be applied to trafficking in human beings, targets organised crime groups and individuals involved in smuggling. However, the legislature does not distinguish between smuggling of irregular immigrants and trafficking in human beings. Here, the migration act of 2005 specifies that all perpetrators who have been involved in smuggling or trafficking persons and were convicted to an imprisonment without probation has to be deported immediately<sup>194</sup>. Yet, the 2005 reform does not consider the asylum or general migration status or procedure of victims, although the EU directive offers clear guidelines with regards to the victim's situation. Consequentially, the first reform conducted by the German parliament with the aim of translating the EU asylum and immigration directive, as well as the directive regarding residence permit

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<sup>188</sup> Interview with Doris Eckhard and Encarni Ramirez Vega - Frauenrecht ist Menschenrecht e.V. (FiM), Frankfurt, Germany, 10.01.2014.

<sup>189</sup> Moog, Koch (2012) p.6.

<sup>190</sup> Moog, Koch (2012) p.8.

<sup>191</sup> cf. Lindner (2012) pp. 41 - 47.

<sup>192</sup> Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern. (2004) Artikel 1, Kapitel 5, Abschnitt 2, § 60 (1) c).

<sup>193</sup> Ibid.

<sup>194</sup> cf. Schneider, Jan (2007) p.3.

allowances to third country nationals – who are victims of trafficking in human beings – was regarded as fragmentary<sup>195</sup>.

Consequentially, the need for a sequential reform was identified only shortly after the first adjustment of the German immigration act was adopted. As pointed out by Schneider, the 2005 legislative reform depicts strong tendencies of a path dependent process<sup>196</sup>. The tight connection to previous policies as well as the continuation of the foregoing structure and integration of most pre-existing paragraphs indicate a path dependent development<sup>197</sup>. Moreover, as pointed out in the theoretical framework, a path dependent process tends to continue flawed policies as opposed to disregarding previous decisions in favour of improved and enhanced policies<sup>198</sup>. Based on the theoretical concept, the costs of time, money and effort – which are needed for a complete reassessment of the policy in question and its revision – based on the assessment, is considered as too high in comparison to the expected benefit. The convenience of sticking to pre-existing decisions which all involved parties previously agreed on – even though they have proven to be flawed – is to apparent to be sacrificed in favour of time-consuming debates of uncertain outcome. The assumption of Germany's immigration reform being a path dependent process, including the defectiveness of the legal overhaul, is further supported by several politicians and civil society actors who identified and proclaimed the need for further reforms only briefly after the bill's adoption<sup>199</sup>.

Subsequently, the second reform of Germany's immigration and asylum act took place in 2007, aiming at a more comprehensive incorporation of eleven EU decisions<sup>200</sup>, including amongst others directive 2004/81/EC - *on the residence permit issued to third country nationals who have been victims of trafficking in human beings or who have been the subject of an action to facilitate illegal migration, who cooperate with the competent authorities*. In addition to the improvements applied in the 2005 overhaul, the ensuing amendment translated decisions which had not yet been introduced to the immigration act. One of the previously disregarded but widespread and controversial issues was illegal migration. This problem was brought to attention by humanitarian associations and churches, who criticised the ignorance with which the issue was met during the parliamentary debate surrounding the migration and asylum reform<sup>201</sup>.

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<sup>195</sup> cf. Schneider (2007) p.3.

<sup>196</sup> cf. Schneider (2007), p.1.

<sup>197</sup> cf. Liebowitz; Margolis (1995) p.34.

<sup>198</sup> cf. Ibid.

<sup>199</sup> cf. Schneider, Jan (2007a) p.1.

<sup>200</sup> Other transposed EU directives are not analysed in this context because they are not related to trafficking in human beings.

<sup>201</sup>cf. Schneider (2007) p.3.

In the case of the first immigration reform, the possibility and reality of illegal migration was completely ignored. Yet, a general political discussion of illegal migration unquestionably exists. However, the nexus of illegal migration and human trafficking is often misinterpreted. As argued by academics such as Nandita Sharma, policies countering human trafficking are often missing their aim by targeting illegal migration instead. Here, Sharma argues that government agencies are trying to decrease immigration flows in general by blurring the line between human trafficking and irregular migration. Sharma brings forward that the moral judgement of victims of human trafficking is much milder than comparable resentments towards independent irregular migrants, which in turn leads to the pitying of trafficked beings and a consequential support for the victims by the general public<sup>202</sup>.

This support, however, does usually not align with the needs and wishes commonly expressed by identified victims. Being depicted as abductees by the media, victims of human trafficking are socially expected to desire a return to their country of origin, since their migration to the country of destination is viewed as unintentional. This leads to a social and political support of initiatives enabling victims to return home. Contrary to this public perception, most victims do not desire the immediate return to their home country. As outlined by *Frauenrecht ist Menschenrecht e.V.*, most victims of trafficking pursued a migratory plan primary to their *abduction* in order to escape classic migratory push factors, such as harsh economic conditions and a severe lack of opportunities in their respective country of origin<sup>203</sup>. Although most victims were unaware of the full trafficking process and its consequences, the majority of victims were at least knowledgeable about the planned departure and their journey to the destination country<sup>204</sup>. This socio-political construct, as argued by Sharma, is abused by politicians to ease the deportation of irregular migrants in general. The assumption that victims of human trafficking are wishing to return to their country of origin can be doubted and will be discussed further in the following analysis.

With regards to the situation of trafficking victims in a migratory process, all above discussed articles have been retained. To recall, this includes the prohibition of deportation if an irregular migrant's safety in his country of origin cannot be guaranteed, because his life is threatened by a non-state actor due to his or her sex or gender<sup>205</sup>. Moreover, the requisition of

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<sup>202</sup> cf. Sharma (2003) p. 54.

<sup>203</sup> Interview with Doris Eckhardt and Encarni Ramirez Vega as representatives of the NGO Frauenrecht ist Menschenrecht e.V., 10.01.2014, Frankfurt am Main.

<sup>204</sup> Interview with Doris Eckhardt and Encarni Ramirez Vega as representatives of the NGO Frauenrecht ist Menschenrecht e.V., 10.01.2014, Frankfurt am Main.

<sup>205</sup> as before, sex or gender is hereby included in the definition of "membership in a social group" and not listed as a specific factor.

the immediate deportation of perpetrators involved in the smuggling or trafficking of human beings remained unchanged throughout the reformatory process. A distinct enhancement, however, was reached with regards to the implementation of a core element of the EU guidelines in the asylum and immigration act. Listed under article 1, the residence act signifies the core of the asylum and immigration law. Paragraph 60 4 a) of the residence act takes up on the Council of the European Union Directive 2004/81/EC article 8, dealing with the issuance of a residence permit<sup>206</sup>. In particular, a victim of trafficking, even though subjected to immediate deportation, can be granted a temporary residence permit<sup>207</sup> if the victim's presence is deemed necessary for investigations<sup>208</sup> and he or she is willing to cooperate with the authorities and serve as a witness in the criminal proceedings.<sup>209</sup> Moreover, it is determined that any voluntary and pro-active contact to the alleged perpetrator will lead to the termination of all previous agreements, including the residence permit's nullity<sup>210</sup>. Additionally, amongst the EU guidelines entrenched into national legislation during the comprehensive reformation of 2007 is the introduction of a 30 day reflection period. As outlined in article six of the EU asylum directive<sup>211</sup>, this period is designated to provide the victims of trafficking with an adequate amount of time to consider their participation in criminal proceedings<sup>212</sup>. Yet, considering the enormous distress victims have to suffer, as well as their unfamiliarity with the country, its language and the legal framework, a period of thirty days seems too short for the victims to recover and thoroughly inform themselves about future possibilities<sup>213</sup>.

To summarize, the continuous reformation of Germany's asylum and immigration law and the aim of transposing the EU directive 2004/81/EC can be considered to have succeeded only partly. Whereas the above described decisions have been implemented rather thoroughly, some of the 2004/81/EC objectives did not expand into the German immigration principles. For example, the EU directive encourages each member-state to ensure an acceptable standard of living for the identified victim as well as to offer medical or psychological treatment and legal

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<sup>206</sup> Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 5, Abschnitt 2, § 60 (4a) 1.

<sup>207</sup> cf. Schneider (2007a) p.3.

<sup>208</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 5, Abschnitt 2, § 60. (4a) 3.

<sup>209</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 5, Abschnitt 2, § 60. (4a) 2.

<sup>210</sup> Cf. Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 5, Abschnitt 2, § 60.

<sup>211</sup> cf. Council of the European Union (2004) Article 6.

<sup>212</sup> cf. Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSFJ) (2007) p. 36.

<sup>213</sup> cf. Deutscher Bundestag (2012) p. 22570. In accordance to this interpretation the recovery time was raised to three month in 2011.

counsel during the reflection period as well as during subsequent proceedings<sup>214</sup>. None of these EU regulations, however, are directly transposed into the reform of the German asylum and immigration law. Rather, medical care and housing situations are defined by the general regulation in the immigration and asylum act, which does not distinguish between different categories of irregular migrants or the experience they have been through<sup>215</sup>. The housing regulations, for example, do not account for the increased security need of victims of human trafficking<sup>216</sup>.

Additionally, the EU directive refers to the Council of the European Union's previous definition, relegating to the purposes constituting trafficking in human beings as identified in framework decision 2002/JHA/629<sup>217</sup>. As pointed out previously, the herein specified purposes of trafficking are comprised of sexual exploitation and forced labour, while other purposes of trafficking such as organ harvesting or begging are not considered<sup>218</sup>. In line with this, the transposition into national law refers to §§ 232 - 233 StGb<sup>219</sup>, which, as pointed out earlier, comply with the EU's specification on the purposes of human trafficking – referring to sexual exploitation and forced labour respectively<sup>220</sup>. Therefore, a widening of the scope of trafficking in human beings has not taken place, which automatically leads to the possible negligence of potential victims who have been trafficked for purposes not yet recognised as such.

Furthermore, the issue of identifying victims is per se a difficult task. Even when solely considering victims who fall into officially acknowledged categories of human trafficking, identifying these victims still presents a major challenge. First of all, it needs to be questioned who identifies potential victims of trafficking, and how this personnel is trained. In the case of Germany, as well as in most other countries, this task is fulfilled by law-enforcement agents, often in cooperation with specialised counselling services. In order to support responsible agents, the German government set up educational programmes and in-house trainings for those in charge, hereby acknowledging the difficulty of the required task<sup>221</sup>. Still, the general approach and discourse underlying victim's identification is highly questionable. The information on how victims of trafficking in human beings are identified is rather divergent. Whereas the Federal Police Force's data suggest that a first identification and more than 50 percent of proceedings

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<sup>214</sup> cf. Council of the European Union (2004) Article 3; Article 7.

<sup>215</sup> Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (2004) Artikel 1, Kapitel 1, Abschnitt 2, § 15a.

<sup>216</sup> cf. BMFSFJ (2007) p. 36.

<sup>217</sup> cf. Council of the European Union (2004) Article 2..

<sup>218</sup> Cf. UN (2000): Annex II, p. 42.

<sup>219</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (2008) § 25, (4a).

<sup>220</sup> cf. Strafgesetzbuch (2013) Abschnitt 18, § 232 - 233.

<sup>221</sup> BMFSFJ (2007) p. 50.

result from police operations<sup>222</sup>, non-governmental organisation amount the input and importance of police forces in the identification of cases and initiation of proceedings as considerably lower. In 2010 the Federal Police Forces, in cooperation with the University of Freiburg's *Social Science Women's Research Institute (SoFFI)*, published an official report on: *Determinants of the willingness to make a statement of victims of human trafficking for the purpose of sexual exploitation in the triangle offender-police-victim*<sup>223</sup>, summarizing the findings of a study on *Identification of Victims of Trafficking in Human Beings*<sup>224</sup>. Herein, a clear stance on the definition and determination of victimhood is presented. Offering an insight to the interpretation of victimhood by German law-enforcement agencies in general, the study distinguishes strictly between a victim's identification by the police on the one hand, and a so-called self-declaration by the victim on the other. Both processes do not have to be connected or come to the same conclusion. Accordingly, a person can see himself as a victim but not be recognised by the police – or vice versa, be identified as a victim by the police while having a differing self-perception.

With regards hereto, Helfferich, Kavemann and Rabe specify that "the process of victimisation refers to the period of life in which the (...) [person in question] fell victim to human trafficking, regardless of their subjective definition"<sup>225</sup>. This discrepancy is particularly interesting with regards to the identification-determinants used by law-enforcement agencies. As outlined in the publication, the definition of victimhood follows a rather gender-stereotypical approach, postulating a certain degree of helplessness and passiveness in order to be categorised as victim and consequentially treated on the corresponding legal base. Substantiating this claim, Helfferich *et. al.* give several examples of victims whose self-perception was not in line with the assessment and categorisation conducted by law enforcement agencies. Hereby, the distinguishing factors are all related to a stereotypical interpretation of victim- and womanhood. One exemplary case<sup>226</sup> in Helfferich, Kavemann and Rabe's study introduces a women who realised being a victim of trafficking shortly after arriving in Germany and being forced into prostitution<sup>227</sup>. As soon as the woman in question realised her situation, she called the police and actively engaged in the arrest and conviction of the traffickers, hereby freeing herself as well as ten other women<sup>228</sup>. Opposing her self-perception of being a victim, the police assessed her situation as unproblematic, not

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<sup>222</sup> Bundeskriminalamt (2008) p. 6.

<sup>223</sup> Helfferich, Kavemann, Rabe (2010).

<sup>224</sup> Please, find more information on this research project in: Bundeskriminalamt (2012).

<sup>225</sup> Helfferich, Kavemann, Rabe (2010) p. 139.

<sup>226</sup> Please note, that Helfferich *et al.* as well as other scholars identify various cases of diverging assessments of victimhood along the lines of stereotyped understandings of woman- and victimhood. Due to the limited scope of the study only two exemplary cases will be introduced and shall represent other comparable cases.

<sup>227</sup> Helfferich, Kavemann, Rabe (2010) p. 139.

<sup>228</sup> *Ibid.*

accepting her categorisation as a victim of human trafficking and instead arrested her for offences against immigration regulations<sup>229</sup>. This example strongly supports the assumption that the law enforcement's perception of victimhood is clearly linked to behavioural patterns of passivity, fear and helplessness.

In addition to this example, a contrary case supports this assumption, too. In this case, a woman who feels empowered and sees herself involved in a voluntary migration process is categorised as a victim of human trafficking by police forces<sup>230</sup>. Contrary to the previously described case, the woman in question "accepted harsh working conditions and debts, seeing them not as unfair but as a realistic option to fulfil her migratory goals"<sup>231</sup>. Against her own will and judgement, the woman was categorised as a victim because she fulfilled the norm of passive and suppressive behaviour associated with victimhood. In her study *Sex, slaves and citizens: the politics of anti-trafficking*, Andrejasevic emphasises this drawback with her observation that:

*Only the most victimized – those who are unable to act for themselves – can qualify as victims of trafficking and become entitled to the state's assistance and protection. To pass the 'test' of trafficking one must be a 'true' victim: injured, suffering, and enslaved. (...)They [the victims] are not seen as political subjects, but as objects of intervention. Victims cannot engage in the realm of the political.*<sup>232</sup>

The interesting dynamic of trafficked persons in the nexus of victimhood and criminality is also reflected in the formalities of Germany's legislation. To recall, the technicalities of German bills and their formulation are highly regulated. As pointed out previously, the use of gender sensitive phrasing is regulated in the sixth criminal code amendment law (6.StrRG). In connection to this, it is interesting to note that – in contradiction to the foregoing reform of §§232 -233 StGb – the phrasing used in the asylum and immigration act's amendments is using the generic masculine. As pointed out in the previous analysis of the first policy measure in chapter 7.1, the sixth criminal code amendment law (6. StrRG) determined the application of gender neutral formulations with regards to victimhood: When referring to perpetrators and suspect, on the other hand, no specific formulations have to be considered<sup>233</sup>. This raises the interesting question of whether a *victim* of trafficking in human beings is only considered a victim as long as he or she does not pose an inconvenience to the state. Accusing the German legislature of inattentiveness with regard to this paradox does not seem justifiable, since they paid close attention to the

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Andersson; Andrijasevic (2008) p. 143.

<sup>233</sup> Deutscher Bundestag (1997) p.12. As outlined previously this paper's objective does not include a broader discussion concerning the appropriateness of using the generic masculine when referring to perpetrators but not when referring to victims. Further research examining the sociologic background and societal implications of this approach is highly recommendable.

formulation of §§ 232 - 233 StGb and moreover are obliged to follow the law regulating the formulation of bills<sup>234</sup>.

Firstly, even though it should be acknowledged that the law's primary focus is not on the victim as such, but rather on the victim's role in supporting criminal proceedings, the German criminal code nevertheless regards a person who has been trafficked into Germany as a victim. Secondly, in the asylum and immigration law, the focus is on the victim and its rights and opportunities to remain in the country. Seemingly, the focus shifts from the trafficked person as a victim – represented by a gender neutral formulation in the criminal code – towards the interpretation of the trafficked person as a suspect or perpetrator of illegal immigration – represented by the generic masculinum used in the immigration act.

In summary, it can be said that the finalisation of the immigration act's reform in 2007 addressed several issues previously unattended, but failed to incorporate all EU requisitions to its full extent. The tight connection of victims' residence allowance and victim's support with their willingness to cooperate with law enforcement agencies illustrates the national reform's shortcoming to fully comply with regional standards. This becomes apparent when regarding the EU's explicit requirement of detaching victim's support from the victim's possible participation in criminal proceedings. Moreover, the reform's stance on and the practical implementation of victim's identification indicates stereotypical gender roles, and suggests a re-evaluation of the general approach as well as the training and education of personnel involved in victim's identification processes. Lastly, the gender stereotypical approach which becomes apparent when regarding the immigration law's phrasing, as outlined in the previous paragraph, depicts not only a terminological shortcoming but also a pre-criminalisation of masculinity.

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<sup>234</sup> Ibid.



### 7. 3. Analysis of the 2007 Second Plan of Action of the Federal Government to Combat Violence against Women

The following section will analyse the third, and last, policy initiated between 2004 and 2007 targeting trafficking in human beings: The *Second Plan of Action of the Federal Government to Combat Violence against Women* by the German federal Ministry for Family, Elderly, Women and Youth (BMFSFJ). Due to the wider scope of the policy, this analysis will consequently follow a broader approach. In line with the previous two section, this sub-chapter will cover the determined indicators of gender sensitivity and purposes of human trafficking integrated in the policies definition, while focusing on the examination of the policy's compliance with international and regional documents.

Launched in 2007, the Federal Action Plan to combat violence against women draws from three major international treaties, namely the 2000 United Nation *Palermo Protocol*, the 2003 OSCE's *Action Plan to Prevent Human Trafficking*<sup>235</sup> and the 2005 Council of Europe *Convention on Combating Trafficking in Human Beings*<sup>236</sup>. In order to evaluate the Second Federal Action Plan, this section will compare the German policy plan to the above listed documents by comparing its compliance in the above discussed categories of Prevention, Prosecution and Protection (3P).

In accordance with the design of the regional and international agreements in question, the action plan, too, concentrates on outlining future policy steps and identifying areas of further attention. In contrast to the above conducted analyses, it is not possible to compare the Second Plan of Action of the Federal Government to Combat Violence against Women to its direct predecessor to examine the possibility of a path dependent process. Unfortunately, the First Federal Action Plan, published in 1999, cannot be accessed, given its substitution with the Second Federal Action Plan<sup>237</sup>. Yet, the Second Federal Action Plan confirms that its structure and orientation is based on the preceding first action plan<sup>238</sup>.

The first determinant of gender sensitivity can be reviewed rather quickly, since the policy specifically focuses on the situation of women and girls. Thus, this clear focus on women and girls as well as the prevalent disparity from afore examined policies, which did not officially focus on one sex or gender, might redound to the questioning of the action plan's comparability and consequentially its qualification to be analysed in this study. While the explicit focus on women

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<sup>235</sup> URL: <http://www.osce.org/odihr/23866> last accessed: 15.05.2014.

<sup>236</sup> URL: <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG> last accessed: 15.05.2014.

<sup>237</sup> Due to this, when speaking of *action plan* or *Federal Action Plan* the term always refers to the Second Plan of Action of the Federal Government to Combat Violence against Women.

<sup>238</sup> Cf. BMFSFJ (2007) p.14.

and girls renders the analysis of the action plan's gender focus and attitude towards men and women in comparison irrelevant, a general evaluation whether stereotypical gender roles are reproduced in the action plan should nevertheless be included in this study. Moreover, the Action Plan's capitalisation on and accentuation of female victims of violence and human trafficking is well reasoned, since – as indicated in Diagram 1 – around 68% of human trafficking victims are women and 12 % girls (under 18)<sup>239</sup>. Up to today, no federal policy document targeting violence against men or male victims of human trafficking exists. This discrepancy, however, as well as the disparity with which the – significantly lower, but still existing – levels of violence against men are met on a policy level in general identifies an interesting field of future research, but does not align with this thesis' objective.



Diagram 1) Source: Eurostat URL: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415\\_tbb\\_stats\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415_tbb_stats_report_en.pdf)

### *Acknowledged Purposes of Human Trafficking*

The action plan distinguishes different categories of violence against women and explicitly singularises migrants as a group of women who are subjected to specific forms of violence. In accordance with this, the action plan stresses the severity of "trafficking in human beings, especially for the purpose of sexual exploitation and forced labour"<sup>240</sup>. Here, the policy stays in line with the governments general approach and specification of §§232 - 233, recognizing sexual exploitation and forced labour as crucial and prevalent purposes of human trafficking. Though, when paying attention to the exact phrasing, it appears that a certain development and widening of the interpretation occurred. In contrast to previous formulations, by using the term "especially

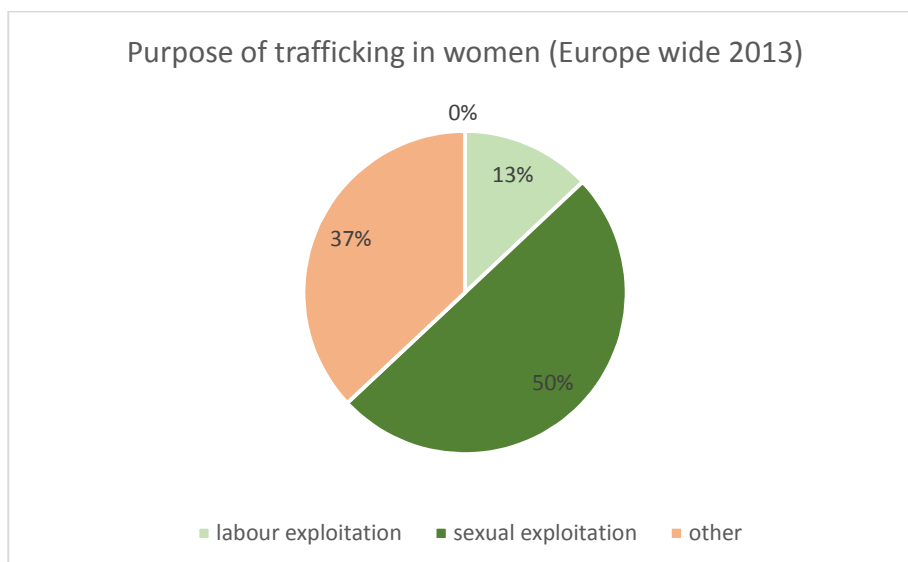
<sup>239</sup> cf. Eurostat (2013).

<sup>240</sup> cf. BMFSFJ (2007) p.7.

for the purpose of..."<sup>241</sup>, the action plan list sexual exploitation and forced labour as most recognisable purposes, yet the wording leaves the possibility of further purposes open – marking a strong contrast to foregoing stricter interpretations.

Moreover, the action plan alludes to forced marriages, but does not directly connect it with human trafficking. The Federal Action Plan refers to the scenario of arranged marriages – in this connection, the most common scenario involves partners who already live in Germany and are subjected to the marriage by third parties. This is problematic, since forced marriages do not only occur in the nexus of arranged marriages and cultural norms, but also in the form of mail-order-bride services. Instead of acknowledging this form of forced marriages as trafficking in human beings, the Federal Action Plan, in line with the German criminal code, categorises forced marriages under §240 StGb as a severe form of coercion<sup>242</sup>, which does not cover the full extent of the crime.

Despite these straight-forward statements made in the Federal Action Plan, the purpose of sexual exploitation plays a far more significant role than other purposes. Although the Action Plan officially bases its definition of human trafficking on §§ 232 - 233 and § 240 of the German criminal law, which include sexual as well as labour exploitation, the latter is practically not considered in the Action Plan's recommendations. To underline this, the Action Plan's argues that the majority of female victims – as illustrated in Diagram 2 – are trafficked for the purpose of sexual exploitation, and not for the purpose of forced labour<sup>243</sup>.



Source: Eurostat URL: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415\\_tbb\\_stats\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415_tbb_stats_report_en.pdf)

<sup>241</sup> cf. Ibid.

<sup>242</sup> cf. BMFSFJ (2007) p.33.

<sup>243</sup> Cf. Bundeskriminalamt (2003 – 2013).

This line of argument – although appearing logical at first – does not hold up when compared to official statistics. Rather than just considering the likeliness of a woman being trafficked into sexual exploitation versus the likeliness of falling victim to forced labour, it is necessary to consider different angles from which to analyse the BKA's official statistics. Though, women indeed face a lesser chance of being trafficked into labour exploitation than into sexual exploitation; the percentage of female trafficking victims ending up in forced labour relations is still equivalent to the percentage of male victims in this field<sup>244</sup>. According to BKA data, in 2006, for example, the percentage of female victims being trafficked into forced labour amounted to 26,5 %, whereas in 2007 – as depicted below in Diagram 3 – women made up 61 % of all victims being trafficked for the purpose of forced labour. These numbers are exemplary and continue to vary throughout the BKA's data, indicating a varying yet persistent trafficking of women into forced labour relations.

Therefore, the assumption that trafficking for the purpose of labour exploitation does not concern or harm women is falsified. Rather, statistical evidence proves that over time, just as many women as men are trafficked in order to exploit their work force, which poses an additional threat to women's already higher chances of falling victim to human trafficking. Consequentially, the Federal Action Plan's stringent focus on sexual exploitation – despite a differing official declaration as well as contradictory data - signifies a clear policy shortcoming and does justice to neither the victims' life reality, nor to the diverse threat posed by trafficking in human beings.



Source: BKA URL: [http://www.bka.de/DE/Themen/ABisZ/Deliktsbereiche/Menschenhandel/Lagebilder/lagebilder\\_\\_node.html?\\_\\_nnn=true](http://www.bka.de/DE/Themen/ABisZ/Deliktsbereiche/Menschenhandel/Lagebilder/lagebilder__node.html?__nnn=true)

<sup>244</sup> The number of men being trafficked into sexual exploitation is insignificant. In the relevant years between 2005 and 2007 for example the percentage of male victims ranged between 0, 5 and 5% - whereat the majority of these victims are under aged boys and not men. Cf. Bundeskriminalamt(2006 -2008).

### *Compliance with regional and international agreements*

With regard to the analysis of the Federal Action Plan's compliance with international and regional documents, a categorising structure in line with the 3P distinction between *Prevention*, *Prosecution* and *Protection* will be utilised. To recall, almost all policy decisions and projects can be incorporated in one – or more – of these denominations, hereby providing a useful system for their structuring. Thus, the following paragraph will start by analysing the Action Plan's compliance with regional and international documents in the field of *prosecution* policies, continue by comparing the Action Plan's adherence with regards to *protection* policies and lastly analyse its translation of *prevention* measures.

According to recent quantitative findings by Cho, Dreher and Neumayer<sup>245</sup>, a majority of states clearly emphasise prosecution policies by strengthening law enforcement agencies and their respective reach. Hence, this section will start by analysing measures which are supposed to enhance the investigation of cases and prosecution of perpetrators. As stated above, the Federal Action Plan was designed and published by the German Ministry for Family, Elderly, Women and Youth – in line with their general objective the Second Federal Action Plan to Combat Violence against Women can be categorised as a human rights instrument, focussing on victims' support and protection as well as – to a lesser extend – on prevention policies. Consequentially, measures enhancing the work of law enforcement agencies or investigation and prosecution issues do not receive the same attention as the other categories. This focus, however, is not *per-se* to the disadvantage of anti-trafficking policies outlined in the Federal Action Plan. On the contrary, it shall be acknowledged that the Action Plan advocates a human rights perspective, and that means of investigation and prosecution fall mainly into another ministries' area of responsibility. Nevertheless, the Second Action Plan of the federal government puts forward two suggestions exceeding the already implemented criminalisation of trafficking in human beings. Here, one of these measures – the criminalisation of sexual buyers – can be categorised strictly as a prosecution measure, whereas the second policy – the cooperation of the office of the public prosecutor with counselling services – is situated between the areas of prosecution and protection.

### *Prosecution*

The first policy incentive discusses the criminalisation of sexual buyers, following the lead of countries such as Sweden or the Philippines who already criminalized the purchase of sexual

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<sup>245</sup> cf. Cho, Dreher, Neumayer (2011).

services<sup>246</sup>. Here, the BMFSFJ suggests that the federal government finds a realistic compromise dealing with the criminalisation of sexual buyers in the grey area of voluntary sex work and forced prostitution<sup>247</sup>. By definition, the Palermo Protocol is an international instrument targeting organised crime and putting law enforcement cooperation and prosecution at the centre of its purpose<sup>248</sup>. Yet, the contract avoids any specification with regards to the criminalisation of sexual buyers as a measure to counter trafficking in human beings. This is sequential to a broader decision by the UN General Assembly with regards to the drafting and adaption of the Palermo Protocol. In order to safe-guard national interest and diverging approaches towards sex work, the Protocol fails to address the topic of legalising or criminalising prostitution. In line with this, the UN Handbook for Parliamentarians clarifies that the term *prostitution* is intentionally left undefined in the Palermo Protocol in order to "leave the issue of prostitution to the domestic legislation enacted in each state"<sup>249</sup>. Deducting from this statement, the practical approach followed by the UN GA becomes apparent; by avoiding to take a clear stance on prostitution – its legality or illegality – the Palermo Protocol increases its chances to be ratified by member states, who support a wide range of approaches towards prostitution, covering various models from the complete legality on the one side, to absolute criminalisation on the other side. Compared hereto, the European Union takes a comparably deliberate stance by explicitly stating, in article 19 of the Convention on Action against Trafficking in Human Beings, that:

*each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings*<sup>250</sup>

Although this paragraph does not explicitly address prostitution in order to avoid a debate about the differentiation between forced prostitution and voluntary sex work, it at least addresses the demand side of the market – a powerful structure not to be underestimated when considering human trafficking counter measures.

Lastly, comparing the German Federal Action Plan to the OSCE Action Plan shows that the Organisation for Security and Cooperation in Europe takes neither a stand on the criminalization of prostitution, nor on the criminalization of sexual buyers. Yet, it supports the establishment of a police bureau designated to the fight against trafficking in human beings, as well as a reinforcement of the cooperation between law enforcement agencies and counselling

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<sup>246</sup> cf. UNODC, IPU (2009) p. 71.

<sup>247</sup> cf. BMFSFJ (2007) p.33.

<sup>248</sup> cf. UN (2000) pp. 5.

<sup>249</sup> Cf. UNODC, IPU (2009) p. 16.

<sup>250</sup> Cf. Council of Europe (2005) Article 19.

services<sup>251</sup> – which is taken up by the Federal Action Plan in its section on victim's protection<sup>252</sup>. Moreover, the OSCE advocates for a shift in investigation strategies, which is especially interesting since it contradicts the approach supported in the Federal Action Plan. Whereas the Federal Action Plan pays special attention to an enhanced cooperation between law enforcement agencies and victims, in order to increase the latter's willingness to participate and bear witness in proceedings<sup>253</sup>, the findings reveal an opposing strategy endorsed by the OSCE. To be precise, the OSCE explicitly recommends to refrain from a prosecution strategy based upon witness' testimonies since it, almost always, implicates two major complications. First of all, testimonies entail complications with regards to legal proceedings. Due to several reasons, such as a victim's changed memory or a sudden lack of courage, testimonies can change over the course of a trial and be easily challenged by the defence. Furthermore, especially when considering the high levels of stress the victim was subjected to during his or her captivity as well as during the trial, the victim's testimony might lack precision and attention to detail, which is important to apply witness-based proceedings. Accordingly, the success rate of witness-based human trafficking trials is low, which in turn reveals this investigation and prosecution strategy as deficient.

Secondly, and specifically emphasized in the OSCE Action Plan, the psychological bearing for the witness – who in this case is assumed to be a victim of human trafficking – is enormous. Recapitulating the events in front of a jury and being questioned repeatedly can be very challenging for the victim and might lead to post-traumatic-stress-syndrome, as well as to other severe psychological disorders, which is why the OSCE takes a clear stand countering the base of criminal proceedings upon witness testimony<sup>254</sup>.

Further, it is distinctly recommended to identify alternative means of conducting an investigation in order to avoid the necessity of a victim's presence in court. As evident in the Federal Action Plan's section on victim's protection – which discusses the treatment of victim-witnesses in detail and will be examined in this thesis later on – the BMFSFJ does acknowledge the psychological and legal complications of a victim's testimony. Despite this awareness, the Federal Action Plan does not seem to draw conclusions similar to the OSCE's recommendations, but rather focuses on the identification of means increasing the proceedings tolerability for the victim. Therefore, it can be assumed that the persisting base of proceedings on victim's testimony, despite the psychological implications, is a deliberate choice and cannot be accounted to mere ignorance.

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<sup>251</sup> Cf. Organisation for Security and Cooperation in Europe (OSCE) (2003) pp. 5 - 6.

<sup>252</sup> cf. BMFSFJ (2007) p.14.

<sup>253</sup> This strategy and its related policy will be further discussed in the following section on protection policies.

<sup>254</sup> Cf. OSCE (2003) p. 6.

Consequentially, one has to consider the motives behind this decision. Here, considering the stated lack of investigative alternatives, it seems to come down to a choice between victims protection on the one hand, and the national interest of prosecuting traffickers on the other. As illustrated by the above given observations, the distinct choice to prioritize prosecution over the consideration for victim's recovery shows that the initially advocated protection focus of the Federal Action Plan loses its substance. This thin line between prosecution and protection policies will be discussed further in the following section on the Federal Action Plans protection policies.

### *Protection*

As outlined in the foregoing paragraph, the BMFSFJ denies any particular focus on prosecution policies and initially stresses the importance of protection policies. Yet, both concepts cannot be strictly separated since the Federal Action Plan's approach towards prosecution policies fuels into the design of protection measures. To be precise, it should be questioned why the BMFSFJ continuously blurs the lines between criminal prosecution and victim's protection, instead of taking a clear stance and explaining why or why not to emphasise prosecution measures in the Second Federal Action Plan.

In order to clarify the BMFSFJ's approach, it is important to point out that the Action Plan explicitly announces to introduce a victim's protection policy. Actually, though, the Action Plan continues to shift the alleged protection policy's focus towards a contribution to prosecution efforts, without ever explicitly stating the related purpose. While outlining the importance of victim's protection and support as a basic necessity to ensure human rights, the Federal Action Plan continuously connects this argumentation with the importance of criminal investigations and prosecution supported by victims. This is implemented in a rather subtle way, for example by replacing the term *victim* with *victim-witness*<sup>255</sup> – adding an entirely new perspective to the discussion of *victim's* support and protection.

Generally speaking, the Second Federal Action Plan of the German government features a broad variety of victim protection and support measures. Most of these suggestions are based upon the recommendations of the regional and international documents and elaborated to a more detailed version. Several policies can be found in the OSCE, EU and UN documents as well as in the Federal Action Plan. Despite their differing foci, all of the organisations paid most attention to individual victim's support, which is evident in the unanimous call for providing medical care as well as psychological, social, legal and administrative counselling services to the

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<sup>255</sup> cf. BMFSFJ (2007) p.50.



victim<sup>256</sup>. Moreover, the UN, EU and OSCE unanimously request the state in question to ensure the victim's access to the labour market or adequate educational training<sup>257</sup>. Hereby, it is of utmost importance that the EU Convention for Action against Trafficking in Human Beings – a legally binding treaty – explicitly detaches these services from the victim's willingness to act as a witness or support legal proceedings<sup>258</sup>.

The Federal Action Plan implements these points by requesting in-depth counselling programmes in various languages and set-ups. To be precise, the BMFSFJ puts forward the need for easily accessible, low-threshold counselling programmes. As explained in the Federal Action Plan, setting up an anonymous and multi-lingual national telephone hotline as well as encouraging pro-active visits by NGO's in high risk areas such as brothels, the current protection and support network is supposed to be tightened. This focus was chosen due to a state-wide study conducted by the BMFSFJ, showing the necessity of diversified approaches<sup>259</sup>. On the one hand, victims of human trafficking indicated to appreciate projects which pro-actively visit high risk sights in order to provide information on victim's rights and further counselling services<sup>260</sup>. This is of special importance since victims of human trafficking might not be able to locate and visit counselling services, especially when confronted with an additional language barrier. On the other hand, pro-active campaigns might as well attract the attention of traffickers or their accomplices. Therefore, victims suggested anonymous counselling options which can be easily utilised without attracting attention<sup>261</sup>. With regards to the requested medical treatment, the Federal Action Plan does not propose any renewals. As explained previously, the provision of medical care is discussed in the general asylum law and not specifically tailored to the needs of trafficking victims. The Council of Europe Convention, moreover, discusses the issue of victim's identification which is taken up by neither the OSCE and UN nor the Federal Action Plan – at least not in relation to victim protection or support. Nevertheless, the question of confidentiality and identity protection is raised unanimously<sup>262</sup>. The German Action Plan connects the issue with another requirement raised by the EU and OSCE: The introduction of a rehabilitation and consideration period of at least 30 days, which shall give victims the opportunity to recover from their immediate stress and consider cooperating with the law enforcement agencies in charge.

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<sup>256</sup> cf. OSCE (2003) pp. 18. / Cf. UN (2000): *Annex II*, Article 6 p.43. / cf. Council of Europe (2005) Chapter 3.

<sup>257</sup> *Ibid.*

<sup>258</sup> cf. Council of Europe (2005): Chapter 3, Article 12, Paragraph 6.

<sup>259</sup> cf. BMFSFJ (2007) p.12.

<sup>260</sup> cf. BMFSFJ (2007) pp. 12.

<sup>261</sup> Cf. *Ibid.*

<sup>262</sup> Cf. Council of Europe (2005) Chapter 3, Article 11. / Cf. OSCE (2003) Chapter 5 Article 6 Paragraph 7.4, p. 17. / Cf. UN (2000): *Annex II*, Article 6 p.43.

To be precise, the Federal Action Plan does not directly deem identity protection necessary during the reflection period. Rather, it relates identity protection to the reflection period's anticipated outcome: The victim's participation in criminal proceedings and testimony against alleged perpetrators<sup>263</sup>. With regards hereto, the BMFSFJ advises a joint operation for the creation of specialised witness protection programmes for victims of human trafficking, since the existing programmes are not capable of catering to the special needs of often traumatised victims<sup>264</sup>. Here, it is important to point out that consequentially a victim's identity will only be actively protected once he or she has decided to participate in criminal proceedings.

The OSCE as well as the Council of Europe describe the reflection period as an opportunity for victims to rehabilitate from their trauma, consider their future and decide if they are interested to cooperate with police forces. Moreover, it is required that victims cut all bonds to possible perpetrators. Neither of the European entities in question elaborate further on potential difficulties arising during the reflection period. These requirements, as well as the suggested time frame of 30 days, are supported by the Federal Action Plan. Yet, and despite the above determined shortcoming, the analysis quarries that the Federal Action Plan draws a more accurate picture of the difficulties the reflection period entails on the victim.

To specify, the BMFSFJ correctly raises the existing divergence between theory and practice and points out that the psychological detachment might be more difficult than reflected in the regional treaties. Especially with regards to forced prostitution, the emotional attachment of a victim to the perpetrator can be surprisingly strong. For example, strategies such as the so called *lover-boy-scheme* – in which the perpetrator feigns genuine feelings for the victim – complicate the emotional bondage between victim and perpetrator. While pretending to be in a relationship and ensuring the victim's emotional dependence, the perpetrator dissembles serious financial problems and being in need of the victim's support. Here, the perpetrator enforces stress on the victim by emphasising the importance of settling his or her (the perpetrator's) debts quickly since he or she (the perpetrator) supposedly receives physical threats. This, in many cases, leads to the victim's consent to take up employment abroad – which signifies the start of the human trafficking process<sup>265</sup>. The *lover-boy-scheme* is a common strategy by individually acting perpetrators (as opposed to organised crime groups) and multiplies the victim's emotional dependence. Additionally, the OSCE suggests the establishment of national centres to coordinate

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<sup>263</sup> Cf. BMFSFJ (2007) p.36.

<sup>264</sup> Cf. BMFSFJ (2007) pp. 36 - 37.

<sup>265</sup> The *lover-boy-scheme* is also a common strategy in forced prostitution. Here, the victim is not convinced to take up employment abroad but to financially support the perpetrator by taking up prostitution as a quick way to earn money.

the victim support and protection between different actors and areas<sup>266</sup>. This measure is not requested by the UN or EU, but expands into the Federal Action Plan<sup>267</sup>. With regards to this, the OSCE stresses the centre's task not only to coordinate cooperative measures but moreover to coordinate and improve the alignment of victim support and protection to the requirements and needs of the prosecution<sup>268</sup>, which mirrors the Federal Action Plan's approach of prioritising concern of prosecution over protection.

Correlating with this, the Action Plan generally supports a tight connection of diverging actors on a national and federal states (Länder) level, but does not discuss the issue further. Other issues discussed in the regional and international treaties, such as the issue of compensation and legal remedy, legal documentation and repatriation, are not considered in the Federal Action Plan. This is mainly due to the fact that these problems are highly specific and almost exclusively relate to victims of human trafficking and/or irregular migrants. The Federal Action Plan, however, does not specifically focus on victims of human trafficking – although it is the official action plan on this issue – but rather targets violence against women and discusses human trafficking as one specific sub-form.

After discussing the individual protection policies recommended by the regional and international documents as well as their application in the Federal Action Plan, the following paragraph will elaborate further on the difficult relationship between the interest sphere of protection and prosecution. As indicated earlier, the BMFSFJ's approach to protection policies can be categorised as problematic. The Action Plan explicitly states that Germany supported the development of the EU Convention on Combating Trafficking in Human Beings and advocated for a strong focus on victims support and protection<sup>269</sup>. Yet, the BMFSFJ undermines the rights of victims by continuously limiting them to their role as witnesses in criminal proceedings or by directly referring to victims as *victim-witnesses*<sup>270</sup>. Hereby, the position of victims who are not able or willing to support investigations or participate in criminal proceedings is severely degraded and their suffering neglected. Despite contradictory official statements by the BMFSFJ, victims who do not testify in criminal proceedings are not covered by the Action Plan's recommendations, but excluded from any kind of support and protection.

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<sup>266</sup> Cf. OSCE (2003) Chapter 6 Article 2, p. 22.

<sup>267</sup> Cf. BMFSFJ (2007) pp.14; 16; 19.

<sup>268</sup> Cf. OSCE (2003) Chapter 5 Article 3, p. 15.

<sup>269</sup> Cf. BMFSFJ (2007) p. 62.

<sup>270</sup> Cf. BMFSFJ (2007) p. 50.

Moreover, this approach becomes evident when examining the BMFSFJ's publications listed in the Federal Action Plan. In cooperation with the BKA, the Ministry developed the *Guideline for dealing with traumatised victims of human trafficking for the purpose of sexual exploitation*, which aims at the "sensitisation and specialisation of [...] police forces and concerned departments specifically for the recognition and competent handling of traumatised *victim-witnesses* of human trafficking for the purpose of sexual exploitation"<sup>271</sup>. This example illustrates the Ministries approach of subtly modify the aim and focus of protection policies. Accordingly, the publications title refers to dealing with traumatised victims – an important and difficult measure when concerned with human trafficking in general as well as when considering protection policies. Yet, the chosen title does not hint at the actual purpose of the guideline – which depicts the victim solely as an actor in the investigation and prosecution process. Consequentially, the Federal Action Plan depicts a lack of adequate reflection on the distinction between victims as individuals and victims as participators in criminal investigations.

Furthermore, this discrepancy stands in stark contrast to the requirements set out in the regional and international documents, which served as reference point for the Action Plan's set up. Chapter 3 Article 2 of the EU convention, for example, states that "every party shall [...] secure and guarantee that the support and help granted to a victim shall not be conditioned on the victim's willingness to serve as a witness"<sup>272</sup>. This discrepancy is of special interest when considering the Federal Action Plan's above mentioned statement on Germany's support of victim protection as a core part of the EU Convention. This approach raises the question if the Federal Action Plan favours victim's support and protection as an end in itself, or if its role is rather regarded as a necessity for ensuring effective and successful prosecution processes. This assumption is further consolidated when examining the previously mentioned witness-protection programmes specialised in human trafficking victims. With regards to this, the Federal Action Plan emphasises that "without professional support of counselling services, the police rarely succeed in receiving utilisable information from the traumatised victim"<sup>273</sup>. Here, the Action Plan clearly connects the necessity of involving counselling services only to the services' positive influence on investigative results. The victim's general need for support in order to rehabilitate – detached from their eventual participation in criminal proceedings – is not regarded. Hereby, the victim as an individual – including his or her personal rights and well-being – is subordinate to the interest of the prosecution. This once more consolidates the Federal Action Plan's prioritisation of prosecution policies and investigative successes over victims' rights.

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<sup>271</sup> Cf. Ibid.

<sup>272</sup> Cf. Council of Europe (2005) Chapter 3, Article 12.

<sup>273</sup> Cf. BMFSFJ (2007) p. 37.

## *Prevention*

In its introductory section, the OSCE's Action Plan to Combat Trafficking in Human Beings refers to a major aspect fostering so called modern day slavery – Globalisation. The importance of globalisation and increased regional and international cooperation in the context of human trafficking is also stressed by both the Council of Europe Convention as well as the Palermo Protocol. With regards to this, the OSCE stresses the significance of local politics and businesses – actors who are often unaware of their important role in fighting human trafficking. This lack of awareness in politics and business in turn leads to a continuing rise of human trafficking despite high-level policy efforts. As pointed out in the OSCE Action Plan, high level policy plans of regional or international scope can only be a first step of many, since they miss their target if not implemented and supported on a national and local level by both politics and the industry<sup>274</sup>.

Despite shared belief by all three trans-national documents regarding the significance of globalisation for trafficking in human beings, the conclusions on how to combat human trafficking drawn by the OSCE differ from those prevalent in the UN and EU documents. The Palermo Protocol supplementing the United Nations Convention on Transnational Organised Crime is classified as a law-enforcement and prosecution document. However, the Council of Europe Convention on Action against Trafficking in Human Beings is stressing the importance of victim's protection and human rights. Lastly, the OSCE pays special attention to the situation in the countries of origin and related prevention policies.

Accordingly, examining the OSCE document reveals that other regional and international agreements have neglected factors important to thorough prevention policies. Exemplary for this are weak state structures, poverty, inequality and a lack of opportunities as factors increasing the despair of potential victims and thereby fostering trafficking in human beings<sup>275</sup>. Hereby, the OSCE follows the Palermo Protocol's definition of trafficking and refers to a wide range of offences including sexual exploitation as well as forced labour, debt bondage or organ harvesting<sup>276</sup>. This stands in significant contrast to the limited definition used in the Federal Action Plan which is based upon German law and only refers to sexual exploitation and forced labour<sup>277</sup>. While the OSCE emphasises the need for broad awareness-raising campaigns targeting the general public as well as professionals in media and industry, a special focus is set upon state employees<sup>278</sup>.

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<sup>274</sup> OSCE (2003) p. 1.

<sup>275</sup> *Ibid.*

<sup>276</sup> Cf. OSCE (2003) p. 4.

<sup>277</sup> Cf. BMFSFJ (2007) p. 33.

<sup>278</sup> Cf. OSCE (2003) p. 8.

The importance of educational training is reflected in the Federal Action Plan's call for the support and training of diverse groups working at one of the many crossroads between human trafficking and state services<sup>279</sup>. Here, the federal government pays special attention to the training of law enforcement agents while neglecting the possible need of other state employees for further training. Moreover, general awareness-raising campaigns for the public are neglected.

The Second Action Plan neither suggests public awareness-raising campaigns targeting human trafficking nor violence against women in general. Nevertheless, the Second Federal Action Plan takes up other preventive measures identified by the OSCE. Especially, the cooperation between origin, transit and destination countries as well as cross-border analysis is being emphasized. Whereas the OSCE suggestion for an in-depth analysis of push and pull factors is not reflected in the German Action Plan, the BMFSFJ pays attention to several initiatives to improve the livelihood of potential victims and "eliminate actual root-causes in countries of origin"<sup>280</sup>. Here, special attention is paid to women's societal role as well as their access to the labour market and financial resources<sup>281</sup>.

Another factor stressed by the OSCE is referring to the identification and subsequent analysis of high-risk groups. To be precise, the OSCE advises to facilitate an in-depth study of potential victim's groups and their livelihood, in order to establish tailored programmes to decrease the risk of these specific groups to fall victim to trafficking in human beings. Here, although paying attention to a European and migratory dynamic, the Action Plan's general focus is set on a national level. This, on the one hand, becomes evident when paying attention to details such as the limitation of awareness raising programmes to national law enforcement agencies, instead of encouraging the involvement of embassy employees responsible for visa issuance and other migration procedures, as suggested in the OSCE guideline. With relation to the identification and analysis of potential victims, on the other hand, this focus is not followed through. Whereas the Federal Action Plan supports the analysis of potential victims and the subsequent introduction of specific support programmes abroad the plan is hesitant to take up similar measures within Germany. Here, a clear discrepancy between the Action Plan's general focus and their negligent approach towards trafficking victims of German nationality and high-risk groups within the vicinities of the country becomes apparent. While the Federal Action Plan does not seem to see the need of raising the issue of identifying victim's groups within Germany, the BKA sheds a different light on the situation of German women as victims of human trafficking. According to all BKA reports on the situation of trafficking in human beings in

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<sup>279</sup> Cf. BMFSFJ (2007) p. 49.

<sup>280</sup> Cf. OSCE (2003) p. 11.

<sup>281</sup> Cf. *Ibid.*; cf. BMFSFJ (2007) p. 71; pp. 67 - 69

Germany, between 2003 and 2012, victims of German nationality were amongst the top 5 victim nationalities, amounting from 10% (2003<sup>282</sup>) to 21% (2012<sup>283</sup>) of all victims. From 2006 onwards, Germans continuously represent the majority of victims, accounting to 23% in 2006<sup>284</sup> and 27% in 2007<sup>285</sup> – the years during which the Federal Action Plan was designed and published.

Yet, the Federal Action Plan does not mention the need to identify these most vulnerable groups, although this accounts for an obvious pre-condition to the development and establishment of projects supporting these groups, thereby diminishing the risk of falling victims to human trafficking. Hereby, it is important to note that this shortcoming is not due to a general thematic gap – the Federal Action Plan specifically addresses the importance of identifying vulnerable groups<sup>286</sup> – but rather hints towards a selective perception, downplaying the role of Germany as a country of origin. This raises the question of why the ministry in charge decided to ignore the data provided by the federal police force and not to develop a strategy to shed light on and counter inner-German trafficking recruitment processes. Lastly, the OSCE's recommendations for national implementation include the involvement of mainstream media in the fight against human trafficking and violence against women. Under the headline of measures aiming at the decrease of pull factors in destination countries, the OSCE advocates for two complimentary approaches. First of all, the national media shall be involved in classic awareness-raising campaigns, such as television spots or newspaper and magazine articles. Secondly, a national board or committee shall question and analyse the media's role in creating, supporting or spreading ideas fostering the marginalisation of women, their possibly inferior role in society as well as the banalisation of violence against women and sexual violence<sup>287</sup>. This approach is taken up on in the Federal Action Plan, which advocates for the active engagement of national media in this issue. Specifically, the media shall foster the portrayal of women and girls as competent, self-aware and self-confident in order to create positive role models. Moreover, it aims at combating the depiction of sexual violence in general as well as the use of violence as a coping mechanism for conflict<sup>288</sup>.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children follows a broader approach with regards to the prevention of human trafficking. Being supplementary to the United Nations Convention against Transnational

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<sup>282</sup> Cf. Bundeskriminalamt (2005).

<sup>283</sup> Cf. Bundeskriminalamt (2013).

<sup>284</sup> Cf. Bundeskriminalamt (2007).

<sup>285</sup> Cf. Bundeskriminalamt (2008).

<sup>286</sup> Cf. BMFSFJ (2007): pp. 60; 71

<sup>287</sup> Cf. OSCE (2003) p. 11.

<sup>288</sup> Cf. BMFSFJ (2007) p. 21.

Organised Crime, it mainly focuses on prosecution and law enforcement issues, especially with regards to organised criminal structures. Moreover, working on such a broad issue – with human trafficking being targeted by only one of three subchapters – and involving as many as 179 parties – the outcome automatically has to be broader and less precise than in comparison to a more specific instrument. Due to this, the Palermo Protocol raises only a few issues not touched upon in the OSCE's action plan to combat trafficking in human being. The Palermo Protocol divides all preventive measures into the following four articles<sup>289</sup>:

Article 10) Information Exchange and Training

Article 11) Border Measures

Article 12) Security and Control of Documents

Article 13) Legitimacy and Validity of Documents

As becomes evident in the articles' title, they strongly reflect the Protocol's nature as a security document focussing on organised crime and combat measures on a law enforcement level. Thus, prevention policies in the Palermo Protocol's understanding can be defined as measures preventing victims and perpetrators to enter the state in question, carrying strong connotations of defence policy and isolation. In fact, however, approaches like these do not factually prevent human trafficking *per se*, but rather prevent the involvement or targeting of a specific country in the process. The enforcement of EU border controls, for example, might hinder traffickers and victims to enter EU territory. Yet, this policy approach would not decrease trafficking *per se*, but rather enforce the perpetrators strategic adjustment or lead to the targeting of different destination countries. Trafficking itself, however, would not be prevented and its numbers not diminished.

In accordance with this reasoning, the general definition of prevention in academia, which is also applied in the OSCE's action plan, refers to a multi-dimensional interpretation of preventive policies. Hereby, special attention is put to the fight of root-causes in both origin and destination countries. Thus, the analysis of push and pull factors such as social marginalisation and poverty on the one side, and a wish for cheap labour on the other is of special importance. Hence, the range of counter measures is not limited to law enforcement agencies but involves multiple fields and actors, such as development organisations, the media and local NGO's.

Due to this diverging interpretation of what qualifies as prevention policy, the Federal Action Plan does not include all measures suggested by the UN Palermo Protocol. Being developed and launched by the BMFSFJ and explicitly focussing on the prevention of violence against women, the document does for example not discuss border measures or security of

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<sup>289</sup> UN (2000): Annex II, Articles 10 – 13, p. 48.



documents, as mentioned in article 10 and 12 of the Palermo Protocol. Still, this should not be interpreted as a shortcoming of the Federal Action Plan, since first of all these measures are regulated in other parts of German legislation, and second of all, the BMFSFJ's area of responsibility does not include border measures and related issues.

Similar to the Palermo Protocol, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings takes up on security and defence measures, such as the reinforcement of border patrols or the development of anti-counterfeit papers. Still, the EU Convention incorporates a wide variety of measures – exceeding security policies in a strict sense. Hereby, the awareness for human trafficking as a multi-faceted and complex phenomenon shall be increased and pull factors, such as the demand for cheap labour, diminished<sup>290</sup>.

In addition to this, the Council of Europe Convention stresses the importance of a previously unexamined factor: The facilitation of legal migration<sup>291</sup>. This option might seem trivial at first sight, yet its impact should not be underestimated. Only in a minority of cases perpetrators need to resort to physical violence and kidnapping in order to dislocate victims from their home-community. On the contrary, most victims initially migrate voluntarily in the hope of building a brighter future and are often deceived by the trafficker's false promises. Due to this, the importance of facilitating and educating about legal migratory options is essential. The easier and more independently legal migration can be realised, the lower becomes the incentive to fall victim to the deceit of human traffickers. Whereas, the Federal Action Plan discussed the need to educate professionals and raise their awareness of trafficking in human beings and how to identify victims,<sup>292</sup> other – closely related – topics are neglected. The mentioned education and training on victim identification, for example, would benefit from research projects and consequent analysis of potential victims groups as suggested by the Council of Europe as well as the OSCE, but is not incorporated in the Action Plan.

In line with this limited approach is the exclusion of the general public from these educational and informative measures. Contrary to the CoE Convention suggestion to diminish pull factors in destination countries by raising awareness for the human rights violations endured by trafficking victims, the German BMFSFJ restricts these measures to experts and professionals<sup>293</sup>. Despite not implementing all suggestions and provisions laid out in the regional and international documents serving as comparison, the Federal Action Plan proposes several means to counter human trafficking for the purpose of sexual exploitation not listed by the UN,

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<sup>290</sup> Council of Europe (2005) Chapter 2, Article 5, Paragraph 6.

<sup>291</sup> Council of Europe (2005) Chapter 2, Article 5, Paragraph 4.

<sup>292</sup> BMFSFJ (2007) p.50.

<sup>293</sup> Ibid.

EU or OSCE. Hereby, the focus is set on the attempt to overcome the difficulty posed by the secretive nature of human trafficking and the herewith connected inability to monitor and uncover cases of human trafficking. At this juncture, the BMFSFJ advises to connect the fight against trafficking in human beings with the monitoring of brothels. In Germany, brothels are legal and are subjected to lesser restrictions than regular bars and restaurants<sup>294</sup>. Restaurants and bars, for example, have to apply for a licence before being allowed to open and can moreover be monitored and regularly visited by the health office. When opening a brothel, however, the labour offices' restrictions are less strict and a license application is not required<sup>295</sup>. Therefore, the Federal Action Plan suggests to check and reinforce the applicable means of industrial law in order to introduce a licensing requirement and enable a thorough check of each brothel and its owner before as well as after its opening<sup>296</sup>.

In summary, the Second Plan of Action of the Federal Government to Combat Violence against Women suggested several policy measures in order to decrease trafficking in human beings in Germany, but also displayed multiple shortcomings. Although, a thorough implementation of the regional and international standards can be partially excused by the Action Plan's broad focus on violence against women as such, in contrast to a more specific focus on human trafficking. Yet, the analysis' findings still identify several shortcoming and challenges, not only regarding the regional and international standards but also regarding the Action Plan's own objectives. Amongst other above identified findings, the BMFSFJ's strong connection of protection and prosecution measures is of particular interest. The Action Plan's suggested contingent link of victim's protection and support measures to the victim's participation in criminal proceedings shows the BMFSFJ's valuation of investigative and prosecutor success over the victim' individual well-being. Consequentially, this finding does not only contradict the Action Plan's self-announced focus on helping victims of gender-based violence, but also conflicts with the recommendations of regional agreements outlined above. A second contradiction of self-set objectives is found in the application of recognised purposes of human trafficking: Despite a contradictory proclamation, the Action Plan solely pays attention to human trafficking for the purpose of sexual exploitation.

In addition to the non-compliance with international and regional standards, these findings disclose the Action Plans continuous inconsistency and raises the question why the BMFSFJ sets its own bar to a level it does not comply with.

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<sup>294</sup> cf. BMFSFJ (2013).

<sup>295</sup> cf. *Ibid.*

<sup>296</sup> cf. BMFSFJ (2007) pp.33 - 34.

## 8. Final Analysis and Implications for Theory

In order to draw a clear conclusion from the foregoing analysis, this chapter will highlight the most interesting findings and its implications for the Path Dependence theory. Moreover, it will be determined if the German government's policy focus shifted between 2004 and 2007. To recall, this timeframe was chosen for several reasons. First of all, it is framed by two events of major influence for the European Union in general: its first eastern enlargement in 2004 as well as its second eastern enlargement in 2007. As pointed out in the beginning, these expansions could have an impact on German anti trafficking policy, since the majority of victims and many perpetrators originate from Eastern Europe<sup>297</sup>. Moreover, the 2006 Football World cup taking place in Germany is covered within this period. This event was of special interest, since many German and international actors promoted the fight against trafficking in human beings during this time, due to the assumption that such a major event might cause a temporary increase in human trafficking within Germany<sup>298</sup>.

In addition to analysing a possible general policy shift, this section will also conclude if a shift in the policies' approach towards gender sensitivity and the acknowledgement of purposes for human trafficking has taken place. Lastly, and in order to verify or falsify the validity of the Path Dependence theory for this scenario, it will be recalled to which extend the policies continue preceding decisions, if the three events marking the timeframe selection can be identified as cross-roads and if these cross-roads led to a significant policy change. As explained previously, the Path Dependent theory supports continuity rather than change and builds on the assumption that a policy shift is only possible if realised at a crossroad, which refers to an extraordinary event, powerful enough to effect and change seasoned paths' of decision making.

Starting with the more detailed picture, the analysis proves that a distinct shift or evolvement in terms of the policies' approach to gender sensitivity or purpose cannot be affirmed. Quite contrary, and herewith in line with the Path Dependence construct, the government's approach to these issues is shaped by continuity and coherence. Starting with the 2005 reform of the federal criminal code – which introduced trafficking in human beings as a singular criminal offence covering the purpose of sexual exploitation as well as forced labour –

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<sup>297</sup> Bundeskriminalamt (2003 – 2013).

<sup>298</sup> An example for the increased activism and attention is "Anpfiff" a nationwide campaign targeting human trafficking specifically aimed at the FIFA worldcup and its visitors. URL: <http://www.stoppt-zwangsprostitution.de/en/> last accessed: 15.05.2014.

the widened scope of human trafficking as a criminal offense presents a continuous motif, gradually developing over time. This is supporting the assumption of Path Dependency, and furthermore highlights the difficulty of intercepting and changing policy interpretations and opinions long proven. In the case of acknowledged purposes of human trafficking, the German government continued to neglect purposes such as debt bondage, begging or organ harvesting, which have been accepted and listed in several international and regional treaties. According to Path Dependency, this indicates the lack of a cross-road with sufficient impact to enable a policy shift or development. The same argument can be made with regards to the policies' gender sensitivity, since the focus on women as victims of human trafficking constitutes a recurrent theme. Disregarding that most victims of human trafficking are in fact female and detaching possible policy responses from the general theoretical discourse of gender-equality vs. affirmative gender emphasis, as outlined in the analysis of §§ 232 – 233, it remains to be said that the German government nevertheless misses to discuss the – admittedly small number – of male victims.

Furthermore, this chapter will examine if the previously conducted policy analysis unveiled a shift in the governments general policy focus. In line with the 3P construct introduced above, it shall be determined if the government either continuously focused on a particular policy area or if its attention shifted between Prevention, Prosecution and Protection policies. In order to further test the theories explanatory power, it will also be reviewed if a possible shift might correlate with an event responsible for causing a cross road. The two major events influencing the European Union – and Germany as a member state – and possibly inducing a cross road allowing and encouraging policy shifts are the first and second eastern enlargement, in 2004 and 2007 respectively. As outlined in the previous analysis, the government's policies consequently prioritise prosecution measures. This overall continuity falsifies the categorisation of the events in question as causing cross roads in line with the Path Dependent construct. Especially when considering the European Union's leitmotif of unity, cooperation and mutual support, an increased effort to fight the root-causes of trafficking and advance preventive measures in countries of origin as well as destination would be expedient. Moreover, although various civil society groups pushed awareness raising campaigns as well as other educational measures ahead of and during the 2006 FIFA world cup the increased public awareness was not mirrored in the amount or focus of governmental policy actions. Most NGO campaigns focused on victim's protection. Considering the broad coverage of campaign ranging from street posters and

information booths to newspaper coverage, the public awareness of the issue sky rocketed during 2006<sup>299</sup>.

However, the federal policies did neither pick up on the generally increased interest nor on the prevalent focus on victim's rights. Between 2004 and 2007, a clear and continuous focus on prosecution policies can be identified. Therefore, the 2006 world cup can be eliminated as a possible cross roads cause. The anti-trafficking policies implemented between 2004 and 2007 – namely the above analysed legislative reform of §§ 232 - 233, as well as the asylum law's reform and the Second Plan of Action of the Federal Government to Combat Violence against Women – consequentially highlight law enforcement and prosecution measures. As depicted by the reform of §§ 232 - 233, they either do so in a direct matter, or more subtle as identified in the analysis of the asylum law or the Federal Action Plan. Particularly the Federal Action Plan constitutes a demonstrative example for policy continuity as implied by the Path Dependence theory. On the one hand, the strong public focus and support of victim protection issues preceding the 2006 world-cup is reflected in the policy's superficial support and incorporation of protection measures as indicated by, for example, the 2007 Action Plan's statement on the government's active role in supporting victim rights in the design of the 2005 CoE Convention. On the other hand, as analysed above, the Action Plan's suggestions on behalf of victim's rights and support was continuously connected to prosecution measures and did not do justice to the victim's past and future realities. This example indicates that although the increased public interest was to a certain extend recognised by the decision makers, it was not strong enough to effectively change the pre-existing focus on prosecution policies.

In addition to the explanation provided by Path Dependency, other possible factors influencing the focus on prosecution policies can be found in the field of politics as such and specifically when considering the set up and power structure of democracies. In the triangle of the 3P concept, prosecution policies constitute the number one state interest. For several reasons, the government as well as other decision makers have always been highly interested in guaranteeing intra-state security, which, to a certain part, is undoubtedly related to the prosecution and imprisonment – or in the case of human trafficking often deportation – of criminals. Moreover, the arrest and prosecution of criminals has an almost immediate effect and reaches the general public via mainstream media. This, in turn, leads to the public's almost immediate positive feedback and not only encourages responsible public officials but furthermore substantiates future career plans.

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<sup>299</sup> Cf. BKA (2007) p.4.

In the field of prevention policies focussing on the elimination of root causes, such as poverty and inequality in a country of origin, the impact of policy decisions is hard to measure and the evolvement of actual results exceed one legislative period. Whereas the inclusion of forced labour as a purpose of human trafficking can be directly implemented in the work of law enforcement agencies and consequentially lead to a measurable result in the process of the following trial, efforts aiming at prevention can hardly be measured. In the context of human trafficking, a young Albanian girl who is supported by a programme to increase her education<sup>300</sup> might or might not have become a victim of human trafficking without the opportunities offered by the programme. Therefore, statistics proving the programme's success are difficult to come by. As in most specificities of development work, the effectiveness of programmes is hard to measure. Moreover, projects which are fighting root causes of trafficking and are connected to development work are often a lot more expensive than prosecution policies. Prior to the legislative reform of §§232 - 233, the German parliament indicated the possibility of increased costs for law enforcement agencies because of their focus on two instead of one purpose of trafficking. Yet, as pointed out by the BKA in their 2006 report, an increase in costs was not the case<sup>301</sup>. Running a development project in order to diminish root causes of human trafficking, such as gender inequality or poverty, are unquestionably expensive undertakings. The combination of high costs, complications of measurement and late effects as well as a low public interest hardly make for a political priority. With regards to the lack of focus on protection policies and related human rights issues, the public interest is slightly higher, though not comparable to the interest in security issues and prosecution policies.

Moreover, protection measures are expensive and quickly expand into sensitive political areas. For example, one of the major criticisms of German protection policies is the connection of a temporary residence permit to the willingness to participate in criminal proceedings. Many victims-support-organisations, such as FiM, demand a policy adjustment in line with the Italian model, which offers a residence permit – or at least the possibility – to all recognised victims of human trafficking. This fuels several political debates and, especially in conservative circles, encounters resistance. As indicated by Prof. Cho and based upon her studies, the top concerns hereby are an increase of immigrants as such, but especially a feared contradiction of prosecution efforts<sup>302</sup>. To be precise, politicians, according to Cho, could fear an increase in human trafficking

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<sup>300</sup> Germany runs a project in rural Albania, supporting girls and women by fighting poverty and improving the participant education. More information on this project can be found via: URL:

<http://www.htsocialprotection.org/index.html>

Last accessed: 15.05.2014.

<sup>301</sup> Cf. BKA (2007).

<sup>302</sup> Interview with Prof. Seo-Young Cho, Marburg, 07.01.2014, conducted by the author.

due to the assumption that victims know about the possibility of gaining a residence permit which consequentially decreases the overall risk of participating in a human trafficking undertaking leading to Germany in comparison to undertakings leading to a country with stricter residence regulation<sup>303</sup>. This, however, leaves two things unexamined: First of all, it can be doubted that potential victims – who as outlined previously often live in rural areas and lack sufficient education – are well informed about German migration policies. Secondly, most victims – in 2012, 89, 1% – trafficked into Germany originate from within the EU, specifically from Bulgaria and Romania. This implies that by now, 89, 1%<sup>304</sup> of victims who are trafficked into Germany already enjoy EU wide freedom of movement and have free access to the labour market. Furthermore, Italy and its liberal issuance of residence permits to victims of trafficking does not suggest an increase in human trafficking victims since the policies adoption<sup>305</sup>.

### *Implications for Theory*

Applying the above drawn conclusion of political continuity and alignment to Path Dependence, neither the EU eastern enlargements nor the 2006 world cup and its accompanying campaigns did not create enough momentum to cause a cross road and to allow for a policy change. So far, the drawn conclusions seem to verify the Path Dependent theory. Yet, the mere absence of cross roads – i.e. significant change – does not *per se* circumstantiate the entire theoretical construct. Rather, to test the theories validity and relevance for this specific case, the theory has to be examined in two independent steps.

Hereby, the first aspect under review is the theory's emphasis of continuity over change. Secondly, the construct of cross roads and their implications will be considered. With regards to the political system in question – a democracy<sup>306</sup> – the persistence of continuity over drastic change does not come as a surprise. In contrast to more radical forms of government, such as autocracies or dictatorships, a democracy is per definition aiming at the satisfaction of the citizenship's majority. In most cases, this implies the agreement on a least common denominator and therefore excludes all too drastic decisions and quick changes. In addition to Germany's checks and balances – such as the strong national parliament and federal states representation – Germany's tradition of building coalition governments<sup>307</sup> illustrate that compromise is the usual

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<sup>303</sup> Cf. Interview with Prof. Seo-Young Cho, Marburg, 07.01.2014, conducted by the author.

<sup>304</sup> According to the latest BKA report analysing data from 2012, 89,1% of victims origin from within the EU. cf. Bundeskriminalamt (2013) p. 7.

<sup>305</sup> Cf. Johansson (2012).

<sup>306</sup> For the purpose of testing the theory in question it is not needed to distinguish between specific forms of democratic systems.

<sup>307</sup> The German government was only once not made up of a coalition. From 1957 – 1961 the Christian Democrats (CDU) governed without the participation of further parties. In addition to this, only in 1982 the SPD

base for German policy decisions. In a democracy, representing parties disagree on certain issues, and hence, an understanding – especially if the country in question is governed by a coalition – can often only be reached by a compromise. In accordance with this, the effectiveness and efficiency of politics can be enhanced by resorting to previously made decisions. By definition, previously implemented decisions have either been agreed upon by the parties in question before, or at least have been previously accepted as status quo. Due to this, realising a political project by orienting policies on previous decisions illustrates a realistic political approach and logical consequence of the frame set by a democratic system. Therefore, the prevalence of continuity over change as well as the orientation of policies on preceding decisions can be rather attributed to the functioning of a democratic system *per se* than to the specificities of the Path Dependence theory. To be precise, the verification of this aspect of Path Dependence is rather due to the theory's over-simplification. The incorporation of a core premise of democratic decision making logically leads to the verification of said assumption without saying all that much about the theory's general validity, especially when considering its second core aspect – the notion of cross-roads.

Utilising Path Dependency barred the questionability of the theory's explanatory power and validity regarding change. To be precise, the existence of a negative causal chain does not automatically imply that said causal chain persists vice versa. In the context of Path Dependency, the lack of political change and the lack of a cross-roads does not imply a positive correlation in the form of political change being automatically generated by an event causing a cross-road. Moreover, Path Dependency demonstrates a lack of explanatory power and consistence with regards to its shortfall to present a clear definition of cross-roads and its defining factors. Thus, no applicable criteria on how to identify events creating policy crossroads is available. Here, the theory leaves room for improvement and displays the need for further adjustment.

In summary, the analysis partially verifies the Path Dependent theory. Yet, the validation refers to a simplified aspect of the theory – namely the above mentioned argument of continuity over change as well as a policies' close alignment to preceding decisions, which depicts a rather basic democratic procedure.

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governed independently for a short time – though this was due to the fact that the Liberals left the coalition as a result of a no-confidence vote and therefore does not fulfil the definition as applicable in this context.



## 9. Conclusion and Policy Recommendations

This thesis contributes to the general understanding of political agenda setting by analysing the development of anti-trafficking policies over time, using Germany as a case study. Hereby, the issue of trafficking in human beings is, in addition to its general severity and topicality, situated between the political field of security and human rights – both areas of high significance for every democratic state. Moreover, the research filled a prevalent research gap since neither a thorough analyse of German anti THB policies between 2004 and 2007 nor an examination of the chosen indicators (gender sensitivity, acknowledged purpose of trafficking and compliance with regional and international standards) has been conducted before. Accordingly, the thesis' findings identify several possibilities of improvement, which are recapitulated below. By identifying policy shortcomings and areas of necessary improvement this thesis contributes not only to the academic debate but is furthermore highly valuable for future policy development as well as the international debate on how to combat human trafficking effectively.

To recall, the thesis analysed three policies: the legislative reform of §§ 232 - 233 of the German criminal code; the legislative reform of the German immigration act; and the Second Plan of Action of the Federal Government to Combat Violence against Women. To summarise, though the precise findings varied between the three policies in question, several outcomes depict a continuous motif.

Summarising, the first policy analysis – the reformation of the paragraphs criminalising trafficking in human beings – elaborates three main findings. First of all, the legislative reform leading to the establishment of §§ 232 - 233 StGB transposed basic EU requirements. Being faced with looming sanction, Germany complied with regional standards to the extent of adding labour exploitation as a recognised purpose of human trafficking and widening the definition of the previously acknowledged purpose of sexual exploitation. Yet, this transposition fell short of UN suggestions, which incorporate a wider range of acknowledged purpose, including organ harvesting. With regards to gender sensitivity, the phrasing of §§ 232 - 233 is highly interesting and revealing. To be precise, the paragraphs are phrased gender neutrally when referring to victims but use the generic masculinum when referring to perpetrators. Hereby, a strong gender bias is reflected. Not only does the formulation pre-victimise women and play down the factually confirmed role of women as perpetrators, but furthermore – although the possibility of male victims is included – the emphasis is set one-sidedly on the role of men as perpetrators. Deriving from these novel findings, widening the scope of acknowledged purposes as well as adjusting the §§ 232 - 233 to a non-biased and gender sensitive phrasing is highly recommendable.

With regards to the reformation of the German immigration act three main findings are identified. First of all, the legislative reform failed to comply fully with the relevant regional and international standards but implemented a minimum of suggestions. Especially the strong link of victim's support to the victim's testimony is opposing the EU's explicit requirement to separate both issues. Moreover, the reforms implementation of a gender sensitive approach is disputable. In addition to a strong gender biased reflected in victims-identification criteria – advocating a stereotypical understanding of victimhood coined by passivity, weakness and fear – the reform's specific formulation is problematic, too. As specified in chapters 7.1 and 7.2 German legislation is obligated to formulate all sentences regarding victims gender neutrally whereas all sentences regarding perpetrators can be phrased in the generic masculine. In connection to this, the thesis elaborated that the immigration act by referring to *victims* of human trafficking in the generic masculine denies these *victims* the status of victimhood. Rather, the use of the generic masculine shifts the focus of a trafficked person as a victim to a trafficked person as a perpetrator – who, by illegally crossing the border – violates German immigration law. By publishing these novel findings this thesis identifies a strong discrepancy and legal inconsistency. In line with this, it is highly necessary to not only adjust the specific phrasing but also to elaborate thorough victims-identification criteria.

Lastly, the third sub-chapter, analysing the Second Plan of Action of the Federal Government to Combat Violence against Women, can be summarised as follows. First of all, the Action Plan does not comply with its own set standards – to specify, despite its introductory announcement to include all purposes of human trafficking as outlined in the German criminal code, the Action Plan factually only refers to the purpose of human trafficking for sexual exploitation. This is a serious deficiency since women are as prone as men to fall victim to human trafficking for the purpose of labour exploitation – yet, women are hardly ever targeted by counter measures focussing on forced labour. Secondly, the Action Plan directly links the issuance of victims support and protection measures to the victim's participation in criminal proceedings. As outlined above, this is not only contradictory to EU requirements but also underlines the Action Plan's general view on victims as individuals enabled to basic human rights. According to the Action Plan, specific support and protection measures – including physical safety and identity protection – shall only be available to victims if they bear witness in criminal proceedings. Hereby, the Action Plan devaluates the victim as an individual and exemplifies the prioritisation of investigation and prosecution success over individual well-being and rehabilitation.

In line with the main research question “how did German anti human trafficking policies develop between 2004 and 2007?” the thesis identifies a continuous policy development, which follows a clear motif and is not interrupted by distinct changes or foci shifts. Relating this to the utilised Path Dependency theory, the two-folded theoretical construct can be partially verified. The absence of any major changes signifies a continuity of policy foci. In the case of Germany, as analysed above the main focus is set on prosecution and investigation policies. In one way or another and as analysed above, all three policies accentuate the importance of prosecution policies. Due to the strong emphasis of prosecution measures policies prioritizing prevention or victim protection measures are less well developed.

This conclusion is further supported when recapitulating the above summarised findings. Comparing the elaborated policy shortcomings a clear motif becomes visible: All three policies lack consistency and profundity with regards to victims’ protection measures – which are continuously combined with prosecution and investigation efforts; as well as with regards to a gender sensitive approach and stereotypical gender roles, which so far do not do justice to the highly complex nexus between men and women in their respective roles as perpetrators and victims.

This, however, leads to another recurrent theme of the analysed policy development: The flawed compliance with regional and international standards on two levels. First of all, the above outlined shortcomings with regards to victim protection measures and secondly, the persistent co-occurrence of policy decisions with EU deadlines. Throughout the analysis, Germany’s timing coincided with the EU’s demand to comply with legally binding agreements, which Germany officially supported yet failed to transpose in a timely manner. Accordingly, Germany’s motivation behind the policy implementation might not only be of normative nature. Though this cannot be proven beyond doubt, it is worth considering that a closing time-slot and looming sanctions might have supported a timely policy implementation yet prevented a sound and thorough policy design. Once more, this phenomenon is currently displayed by the German parliament which is still arguing about the adequate implementation and transposition of the 2005 Council of Europe Convention, which’s deadline has passed in April 2013.

#### *Policy recommendations and avenues for future research*

Consequentially, one of the main policy recommendation deducted from the foregoing analysis is an improved time-management of political agenda setting and decision making as well as an improved compliance with regional and international standards. Especially, a more systematic incorporation of victim protection measures supported by an in-depth examination of victims’ actual needs and the consequent separation of victims’ protection policies from

investigation and prosecution interest would enhance German anti THB policies immensely. Additionally, Germany's fight against human trafficking would benefit from a wider approach and understanding of what signifies human trafficking. Here, the inclusions of purposes beyond forced labour and sexual exploitation – such as organ harvesting and begging – would allow a broader base for identifying diverse cases and consequentially prosecute perpetrators and support victims. In line with this, a further policy recommendation targets a more structured and less gender-biased victims-identification. As this thesis proves, the current guidelines on victims-identification are merely existing and their practical implementation depicts major flaws. As this thesis' findings show, the victims-identification process incorporate highly questionable stereotypical gender roles, which need to be adjusted and extended by more precise criteria. In line with this, the last policy recommendation takes up on a more general gender bias in the field of anti human trafficking measures. Although, both, men and women, are considered in the legal acts analysed in this thesis a general focus on women as victims of human trafficking is apparent. As explained in this thesis, this focus is supported by statistics proving that women depict the majority of victim and men the majority of perpetrators. Yet, men as victims of human trafficking and women as perpetrators should also be included in the public spotlight and policy developments. With regards to this, further academic research cross-examining these roles is recommendable.

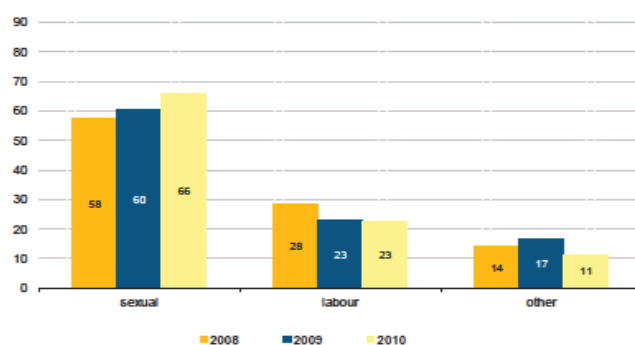
## 10. Appendix

**Table 1**

Chapter 1. – Introduction, p. 2. Human trafficking victims by type of exploitation.

Source: Eurostat (2013): *Trafficking in Human Beings - 2013 edition*. Luxembourg: Publication Office of the European Union. URL: [http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415\\_thb\\_stats\\_report\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2013/docs/20130415_thb_stats_report_en.pdf) last accessed: 15.05.2014

Figure 6: Victims by type of exploitation  
(% of total number of victims)



Source: Eurostat

## Picture 1

Chapter 6 – History of Trafficking in Human Beings, p. 28

Picture 1 shows an educational poster designed by an unknown artist around 1900 - 1910 and published by the German National Committee for the International Fight against Trafficking in Girls. The text, as translated by this thesis' author reads as follows:

Heading: Important warning to all emigrating girls.

Text: Do not take up employment abroad without thorough prior investigation! In hardship and danger, please contact the emigration office at the train station or the *Bahnhofsmission* [a German NGO situated at trainstations] (Georgstreet 22) or the innkeeper.

Source: Wikipedia URL: [http://commons.wikimedia.org/wiki/File:Germany\\_human\\_traffic.JPG](http://commons.wikimedia.org/wiki/File:Germany_human_traffic.JPG)  
last accessed: 15.05.2014



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### **Interviews conducted by the author**

Interview partner: Seo-Young Cho; Professor for Economics at Philipps University Marburg. Marburg, Germany, 07.01.2014.

Interview partner: Doris Eckhard; Encarni Ramirez Vega representatives of the non-governmental organisation - Frauenrecht ist Menschenrecht e.V. (FiM). Frankfurt, Germany, 10.01.2014

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