THE LEGAL FRAMEWORK OF TRAFFICKING AND SMUGGLING IN GERMANY: VICTIM PROTECTION EMERGING FROM WITNESS PROTECTION?

1. INTRODUCTION: LEGISLATIVE CONTEXT AND DEVELOPMENT

In Germany the criminal offences of smuggling and trafficking in human beings fit into a long tradition. In recent years, particularly since the 1980s, there have been numerous attempts to reform these offences. However, whilst aimed at complying with international obligations, these amendments tended to involve fine-tuning and filling existing lacunae in the law rather than the creation of new offences. Smuggling relates to assisting with illegal entry or residence. Such assistance is, in principle, punishable as an inchoate offence to illegal entry or residence. A separate offence of “smuggling” (thus termed) covers the more serious forms of assistance. Whereas German immigration law has been significantly changed by the Immigration Act (Zuwanderungsgesetz) that entered into force on 1 January 2005, the Act only led to a reshuffling of numbers of the provisions on smuggling in the new Residence Act (Aufenthaltsgesetz (AufenthG)).

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Trafficking (thus called) used to criminalize only the exploitation of persons in a situation of vulnerability where they are influenced or induced to practice prostitution or to commit other acts of a sexual nature. Whereas the offence of
smuggling is contingent on illegal entry or residence of a foreigner, trafficking is not. A recent overhaul of the legislation in this area has, however, broadened the scope of the terminology: a recent amendment\(^4\) to the Criminal Code (\textit{Strafgesetzbuch (StGB)})\(^5\) that entered into force on 19 February 2005 unifies and extends the existing offences\(^6\) in reaction to the Palermo Protocol\(^7\) and the EU Framework Decision on Trafficking of July 2002\(^8\) and includes new expanded provisions dealing not only with trafficking into sexual exploitation but also with trafficking for the purposes of exploitative employment, slavery, bondage and debt servitude which were in part previously codified outside the Criminal Code.\(^9\) Trafficking for the purpose of organ transplantation still remains in a separate statute.\(^10\)

\subsection*{1.1 Close Links between Smuggling and Trafficking}

The factual situations of smuggling and trafficking are often entangled. This feeds into a confusion regarding their respective criminal offences. The confusion is compounded by the fact that cases of trafficking are often not discovered in their full gravity: a high number of potential trafficking cases remain unre-