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Submitted by: KOK - German nationwide activist coordination group combating trafficking in women and violence against women in the process of migration e.V.

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Human Trafficking and the Protection of Victims in Germany

I. Introduction

1. More and more people are becoming involved in international labour migration. In the course of this they can become victims of psychological, structural and/or physical violence. One form of this violence is human trafficking. The KOK understands trafficking to have occurred when a person is recruited through the use of deception, threats or violence, and has been abused and exploited as a source of labour for services and activities. Persons are trafficked into prostitution, marriage and labour or are subject to other forms of exploitation such as forced begging. The latest estimation from the International Labour Organisation dated June 2012 estimates that at a global level 20.9 million people are victims of forced labour (including forced sexual exploitation).¹

II. United Nations (UN) Documents on Human Trafficking

2. Human trafficking is recognised as a violation of human rights in various UN documents. Especially article 6 CEDAW (“Trafficking in Women”) and the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children”, supplementing the UN Convention against Transnational Organized Crime (“Palermo Protocol”), as well as the “Optional Protocol to the Conventions on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography” contain numerous provisions concerning fighting human trafficking.

¹ ILO 2012 Global estimates of forced labour, June 2012 and European commission „The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016“

3. While the Palermo Protocol includes a thorough definition of Human Trafficking (Art. 3 (a)) and dedicates its second part (Art. 6 et seq.) to the protection of victims of trafficking in persons, states are merely asked in it to “ensure [...] in appropriate cases” certain measures to protect the victims (Art. 6, 2 of the Palermo Protocol). As a result there is no legally binding definition of minimum standards for the protection of trafficked persons at a global level.

4. While states seem to be keen on improving the combat against human trafficking in terms of implementing better law enforcement measures, even the wealthiest countries have yet to adopt comprehensive mechanisms to protect and care for the victims of human trafficking. We believe that in order to effectively combat human trafficking the respect for the fundamental human rights of trafficked persons has to lay at the very heart of any action to be taken. Some international documents already stress the victims’ rights and support respecting them with equal importance as strengthening law enforcement. The European Union (EU) Directive 2011/36/EU (April 2011) is the latest international document that emphasises the importance of support for and protection of victims of trafficking. The Council of Europe Convention on Action against Trafficking in Human Beings from 2005 (CETS No.: 197) has been the first example for an international document focussing on the protection and rights of the trafficked persons.

5. Germany recognises human trafficking as a violation of human rights in concurrence with international conventions (such as CEDAW or the Palermo Protocol). Until April 2013 Germany has to implement the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims. This directive is the first legally binding international document, which contains requirements for the support for and protection of victims of trafficking. The process of ratification of the Council of Europe Convention on Action against Trafficking in Human Beings is imminent.

III. Legal Situation in Germany since 2009

6. Some improvements have recently been made in terms of supporting trafficked persons. In the framework of implementing the EU Directives 2008/115/EG and 2009/52/EG Germany introduced changes in the residence law, which affect trafficked persons:

7. The deadline to leave the country, the so called “reflection period” for trafficked persons who are third-country nationals has been extended from previously one month to at least three months (§ 59 Abs. 7 AufenthG/ Residence Act). During this time the trafficked person shall decide if she/he wants to cooperate with law enforcement.

8. A new section § 25 Abs. 4b AufenthG (Residence Act) has been introduced which allows non-EU-nationals, who have been employed illegally and have been subject to exploitation, to be granted a residence permit if they cooperate with law enforcement for the duration of proceedings. The residence permit can be extended for the purpose of claiming unpaid wages.

9. In terms of adopting comprehensive mechanisms to protect and care for the victims of human trafficking, numerous flaws and shortcomings still exist. Generally, the implementation of a human-rights-based approach in the fight against trafficking - which puts the rights and protection of the victims in the centre - is still missing.

IV. The Main Issues of Concern Include:

9. Unconditional Residence Permit for non-EU Nationals

According to § 25 Abs.4a AufenthG (Residence Act) victims of trafficking are being granted a residence permit during criminal proceedings only if they decide to cooperate with law enforcement and abandon any contact with the incriminated persons. In addition, the granting of the residence permit lies within the discretion of the authorities. Thus, even if the legal requirements are complied to, there is still room for administrative discretion. But for victims of trafficking it is crucial to know, if they will receive a residence permit when cooperating with law enforcement.

Moreover, the limitation of the residence permit to the duration of the legal proceedings is problematic. By this, the persons who are victims of trafficking are in danger of being instrumentalized by law enforcement. Access to support and protection after the so called “reflection period” of three months depends on their willingness to cooperate. In addition, access to education and vocational training for victims of trafficking is rarely provided. Furthermore, access to the labour market is often impeded during the legal proceedings, which can last for several years.

10. Adequate Benefits for Trafficked Persons

During their stay in Germany, victims of trafficking do not receive adequate benefits according to their special needs. Until recently, trafficked persons from non-EU countries were entitled to benefits according to the law on benefits for asylum seekers. These did not cover all necessary costs such as medical care beyond emergency treatments, costs for therapies, interpreter costs etc. The benefits for asylum seekers have not been adapted to the general increased costs of living since 1993. On July 18th 2012 the Federal Constitutional Court gave a judgment according to which the regulations regarding the standard benefits are contrary to the constitution. Within the framework of the law the right to securing the subsistence level is not complied with. German legislature now has to revise the act on benefits for asylum seekers. Additionally, it has to review which groups of persons will be covered by this law. The supposition that persons only stay temporarily in Germany does not legitimate reduced benefits. On the contrary, trafficked persons often have increased needs since many necessitate special medical care, therapies or interpreter costs.

11. Lack of Access to Compensation and Unpaid Wages

The newly introduced § 25 Abs. 4b AufenthG (Residence Act) is a welcomed step towards improving the rights of trafficked and exploited persons. However, it does not apply to all victims of trafficking but excludes certain groups of trafficked persons. For example, persons who work legally in Germany but whose residence title is tied to their work permit (e.g. Au-Pairs or cooks working in specialty restaurants) and who are exploited or became victims of trafficking would not be eligible to apply for an extension of the residence permit for the purpose of claiming unpaid wages. Additionally the extension is to be granted if claiming unpaid wages from outside Germany would pose an exceptional hardship for the person. Thus, the new law does not guarantee equal treatment and rights for all groups of trafficked persons. Access to their right to compensation and unpaid wages is not guaranteed. Even if a trafficked person wants to claim compensation or unpaid wages within civil proceedings she/he has to bear the financial risk (i.e. cover the costs in case the proceeding is not successful) which discourages many trafficked persons from accessing their rights.

12. Lack of Protection for Victims of Labour Exploitation

Despite some improvements in recent years regarding the support for and protection of victims of labour exploitation, a comprehensive support system is still lacking. There are some projects specialised in dealing with the issue of trafficking for labour exploitation carried out by NGOs, civil society or the trade union. However, concrete measures on political level are still missing. Additionally, clarification of

responsibilities on political level is still outstanding.

Many of the existing specialised counselling centres for trafficked persons already counsel victims of labour exploitation. Others expressed their willingness to offer counselling for both victims of trafficking for sexual exploitation and victims of trafficking for labour exploitation but they are (partly) restricted by their funders who limit their mandate to counselling victims of trafficking for sexual exploitation.

13. *Lack of legal provisions for minor victims of trafficking*

Regarding minor victims of trafficking there are no appropriate legal regulations within the AufenthaltG (Residence Act). They are legally treated like adults. The extremely challenging situations of minors, who are victims of trafficking, as well as the best interest of the child are currently not considered within the framework of measures against trafficking.

IV. Challenges and Recommendations

14. To effectively combat human trafficking, a human-rights-based approach is necessary. Additionally, actions taken by the German government should not mainly concentrate on law enforcement, but as well focus on the protection of the victims.

Based on these considerations the KOK demands:

15. Unconditional Right to Residency

Firstly, persons, who are victims of trafficking, should be entitled to a right to residency on the basis of humanitarian reasons for the suffered human rights' violations, irrespective of collaborating with law enforcement or not. Secondly, the resident permit should include a work permit. Thirdly, sufficient possibilities for further training and access to education should be provided for as long as they reside in Germany.

Generally, victims of trafficking should be entitled to a right to unlimited residency.

16. Adequate Benefits

A standard providing financial support for the subsistence of the person according to his/her specific needs (including for example costs for language courses and therapy) should be introduced. Generally, the necessity of the Act on benefits for asylum seekers has to be examined. At least the target groups of the law have to be newly defined. In our opinion trafficked persons should be excluded from the coverage of this law. All trafficked persons should receive benefits according to the German Social Welfare Code.

17. Access to compensation and unpaid wages for all victims of trafficking

All victims should have the option to make use of their right to claim for compensation and unpaid wages. The possibility to apply for an extension of the residence permit for the purpose of claiming unpaid wages according to § 25 Abs. 4b AufenthaltG (Residence Act) should be open for all victims of trafficking and exploitation.

18. Protection for Victims of Trafficking for the Purpose of Labour Exploitation

The federal government should respond to the issue of trafficking for labour exploitation and take the appropriate measures to protect the victims and to fight this phenomenon. The efforts of the government should not be restricted to fighting illegal employment.

Victims do need improved protection, in particular information about their rights and access to them. Outstanding wages have to be paid. Support and counselling structures as well as cooperation models

should be developed and enlarged. Existing counselling centres for trafficked persons, who are willing to counsel victims of labour exploitation, should be funded and equipped accordingly.

In order to protect the rights of the affected migrant workers, Germany should ratify the United Nations International Convention on the Protection of the Rights of all Migrant Workers and their Families (Adopted by General assembly resolution 45/158 of 18 December 1990).

19. Special regulations for minor victims of trafficking

According to international documents such as the Council of Europe Convention on Action against Trafficking in Human Beings, regulations (e.g. the issuance of a residence permit for child victims of trafficking) that focus on the best interest and well-being of the child (Art. 14 pass. 2) have to be implemented. Minor victims of trafficking should be granted a residence permit based on the best interest and the well-being of the child and independent of the willingness to cooperate and of the criminal proceedings in general.

20. Improvement of the Protection of Victims

It is the state's responsibility to provide for sufficient counselling services and accommodation options for victims of all kinds of trafficking, women, men and children/minors. This obligation includes the financial support of specialist counselling centres.

21. Encourage the visit of the Special Rapporteur on trafficking in persons, especially women and children, within the framework of the open and permanent invitation extended to special procedures

KOK supports the recommendation no. 41 by Mexico to invite the Special Rapporteur on trafficking in persons, especially women and children. The KOK and its member organisations would welcome a visit from the Special Rapporteur. In our opinion, it is important for the Rapporteur to be informed about the general situation, the specific measures that have been implemented thus far and the difficulties that have been encountered in the process of combating human trafficking and protecting the rights of trafficked persons in Germany. Further, the KOK and its partner organisations would be very interested in the Rapporteur's views and suggestions in order to improve future research and measures.

In its report of the 11th session the Human Rights Council affirmed "... that it is essential to place the protection of human rights at the centre of measures taken to prevent and end trafficking in persons, and to protect, assist and provide access to adequate redress to victims, including the possibility of obtaining compensation from the perpetrators." and urged governments "...to ensure protection and assistance to the victims of trafficking with full respect for their human rights, including, where appropriate, through legislation" (A/HRC/11/37).

The KOK calls on the Government of the Federal Republic of Germany to

- Establish a human-rights-based approach to combat human trafficking.

- Ensure the protection of trafficked persons and adequate treatment/support according to their specific needs on the basis of legally binding provisions, allowing for a right to residency and adequate benefits as well as for access to counselling services and compensation claims.
- Implement specific regulations for minor victims of trafficking that are in accordance with the best interest and the well-being of the child.
- Encourage states to take the expertise of NGOs working in the field of fighting human trafficking into account and to establish mechanisms of cooperation between the different partners involved (e.g. specialised counselling centres, the national and regional governments and the police).