

## Sexual Abuse of Children Abroad – A German Perspective on the Antalya Case

By Stefan Kirchner\*

### A. Introduction

In recent months a criminal law case has strained relations between Germany and Turkey. A 17 year-old German citizen, who had been vacationing in a Turkish seaside resort town of Antalya with his parents was arrested there in Spring 2007 for allegedly having sexually abused a 13 year-old girl, also a tourist on holiday in Turkey with her parents.<sup>1</sup> Presently, court proceedings are still underway in Antalya. Although the suspect has admitted to having had a sexual encounter with the girl,<sup>2</sup> tests indicated that the intercourse was consensual.<sup>3</sup> Initially both politicians<sup>4</sup> and parts of the media<sup>5</sup> expressed their shock at the arrest and detention of the suspect rather than the alleged crime itself. At the present time of writing there is insufficient information to adequately assess the facts of the case and it is important to note that the young man has not yet been convicted of any crime. Yet, based on media reports concerning statements made by the suspect himself, the case presents a number of interesting questions from the perspective of German law. These questions require a closer look, particularly in the light of the criticism directed at Turkish authorities from German politicians and media and

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<sup>1</sup> *Marco W. weiter in Haft: Türkei lehnt Freilassung ab*, FRANKFURTER ALLGEMEINE ZEITUNG, 26 June 2007, available online at <http://www.faz.net>.

<sup>2</sup> On the victim's and suspect's different claims see Marco Dettweiler, *Der Fall Marco W.: Auch in Deutschland droht Strafe*, FRANKFURTER ALLGEMEINE ZEITUNG, 28 June 2007, available online at <http://www.faz.net>.

<sup>3</sup> *Schüler droht Haftstrafe: Gutachten bestätigt angeblich sexuellen Kontakt*, FRANKFURTER ALLGEMEINE ZEITUNG, 25 June 2007, available online at <http://www.faz.net>.

<sup>4</sup> Dettweiler (note 2).

<sup>5</sup> See Rainer Hermann, *Marco W.: Vom Strand in die Zelle*, FRANKFURTER ALLGEMEINE ZEITUNG, 27 June 2007, available online at <http://www.faz.net>.

since the *Staatsanwaltschaft* (Office of the Prosecutor) in Lüneburg (the suspect's hometown) is now investigating as well.<sup>6</sup> This article considers, as a revealing comparative exercise, how the alleged crime would be addressed under German law.

## B. Sexual Abuse of Children under German Criminal Law

### I. § 176 of the German Criminal Code

§ 176 (1) *Strafgesetzbuch* (StGB) (the German Criminal Code) prohibits sexual activities with children. Children are defined in the Code as persons under the age of fourteen.<sup>7</sup> § 176 (1) StGB (sexual abuse of children) does not require penetration, which already follows from the fact that § 176a (2) No. 1 StGB imposes a harsher punishment in cases of § 176 (1) or (2) StGB which include penetration in cases where the defendant is over the age of 18. § 176 (1) StGB therefore can, but does not have to, include penetration. Rape, which is punishable under § 177 (2) No. 1 StGB, and sexual abuse of children under § 176 StGB are not two mutually exclusive crimes and can be committed in the same act.<sup>8</sup> A defendant can therefore be found to have committed both crimes simultaneously.<sup>9</sup>

What is required by § 176 (1) StGB is a sexual conduct by the defendant with regard to the victim or by the victim with regard to the defendant. It is noteworthy that § 176 (1) StGB also applies to cases in which the perpetrator passively allows the victim to conduct sexual activities.<sup>10</sup> It is not necessary that the conduct impairs the psychological health or the development of the child,<sup>11</sup> although the rule is meant to protect the child's normal sexual development.<sup>12</sup> In the case of § 176 (1) StGB,

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<sup>6</sup> Dettweiler (note 2).

<sup>7</sup> Para. 103 of the Turkish Criminal Code, which forms the basis for the prosecution's case in Turkey, is modeled on § 176 StGB, *Prozess gegen Marco W. vertagt*, FRANKFURTER ALLGEMEINE ZEITUNG, 7 July 2007, 11.

<sup>8</sup> HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH UND NEBENGESETZE (2006), 1062, § 176, margin number 3.

<sup>9</sup> For more detailed information on different combinations of §§ 176 and 177 StGB see also *id.* 1062, § 176, margin number 3a.

<sup>10</sup> See HERBERT TRÖNDLE & THOMAS FISCHER (note 9), 1063, § 176, margin number 6.

<sup>11</sup> 38 BGHSt 68, 69; 45 BGHSt 131, 132.

<sup>12</sup> FRITJOF HAFT, STRAFRECHT: BESONDERER TEIL (1998) 57.

sexual abuse requires physical contact between perpetrator and victim, while this is not the case with regard to the other sub-paragraphs of § 176 StGB which cover *inter alia* sexual activities between the victim and a third party (§ 176 (2) StGB) and even sexual activities which lack physical contact with the victim, as per § 176 (3) and (4) StGB. § 176 (4) Nos. 3 and 4 StGB make it punishable to influence the child through pornography with (§ 176 (4) No. 3 StGB) or without (§ 176 (4) No. 4 StGB) the intent to have the child allow or conduct sexual activities. In those cases, no physical contact to the victim is required.<sup>13</sup> However, the most common cases are ones in which there has been a physical contact between victim and perpetrator. § 176 (1) StGB punishes the defendant for both conducting sexual activities with a child, as well as passively allowing a child to conduct sexual activities with them.<sup>14</sup> According to § 184f No. 1 StGB, this contact must be above a certain threshold in order to be considered sexual in nature.<sup>15</sup> When the victim is a minor, though, the threshold is lower,<sup>16</sup> a view long shared by the *Bundesgerichtshof* (Federal Supreme Court).<sup>17</sup> It is not necessary for the child to understand the sexual nature of the activities,<sup>18</sup> in fact, it is not even necessary for the child to be aware of them.<sup>19</sup>

## II. Intent and Error

The intent required by § 15 StGB for crimes covered by § 176 (1) StGB must include the age of the victim,<sup>20</sup> but it is sufficient that the defendant acted with *dolus eventualis*.<sup>21</sup> *Dolus eventualis* is the most basic form of intent<sup>22</sup> and requires that the defendant included the consequences of his or her actions in his or her plan, even

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<sup>13</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 4.

<sup>14</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 5.

<sup>15</sup> TRÖNDLE & FISCHER (note 8), 1195, § 184f, margin number 5.

<sup>16</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 5.

<sup>17</sup> 18 BGHSt 169, 169.

<sup>18</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 6.

<sup>19</sup> 38 BGHSt 68, 68.

<sup>20</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 30.

<sup>21</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 30.; Theodor Lenckner & Walter Perron, § 176, in STRAFGESETZBUCH: KOMMENTAR (Adolf Schönke & Horst Schröder eds., 2001), margin number 10.

<sup>22</sup> WOLFGANG FRISCH, VORSATZ UND RISIKO (1983) 496; see also CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL, VOL. I: GRUNDLAGEN: AUFBAU DER VERBRECHENSLEHRE (1997), footnote 27 on page 373.

though the consequences in question were not necessarily the only goal that motivated the defendant.<sup>23</sup> This also applies to the age of the victim.<sup>24</sup> A person who conducts sexual activities with a minor and does not know, but also does not care about the age of the victim, is liable if he or she does not exclude the possibility that the victim is under the age of fourteen.<sup>25</sup> Only if the defendant has not thought about the victim's age does he or she lack the required intent.<sup>26</sup> This does not seem to be the case here: the suspect claims that he thought that the victim was already 15 years old.<sup>27</sup> Should the defendant have erred regarding the age of the victim, it would mean that he was not aware of the fact that a requirement for criminal law consequences of his behavior – in this case the young age of the girl – was met. In this case, the perpetrator is considered to have acted without intent to commit the crime, § 16 (1) 1 StGB.<sup>28</sup>

However, the defendant in the Antalya case might still be found criminally liable under § 182 or § 174 StGB,<sup>29</sup> which require a special relationship between the victim and the defendant (§ 174 StGB), or an abuse of the particular situation in which the victim finds him or herself (§ 182 (1) StGB). Given that, as we have just seen, *dolus eventualis* is sufficient for a violation of § 176 (1) StGB, the question is how much room can there be for an error? Of course it is impossible to know from a distance what the defendant really thought at the time in question, yet there are still more aspects to this case which require attention.

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<sup>23</sup> Drawing the line between *dolus eventualis* and negligence is one of the most difficult problems of German Criminal law. See ROXIN (note 24) 372. On the differences between *dolus eventualis* and negligence see Günter Stratenwerth, *Dolus eventualis und bewusste Fahrlässigkeit*, 71 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (1959) 51; Rolf Dietrich Herzberg, *Die Abgrenzung von Vorsatz und bewusster Fahrlässigkeit – ein Problem des objektiven Tatbestandes*, JURISTISCHE SCHULUNG (1986) 249; Christos Mylonopoulos, *Das Verhältnis von Vorsatz und Fahrlässigkeit und der Grundsatz in dubio pro reo*, 99 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (1987), 685; Rolf Dietrich Herzberg, *Das Wollen beim Vorsatzdelikt und dessen Unterscheidung vom bewußten fahrlässigen Verhalten*, 43 JURISTEN ZEITUNG (1988), 573 (Part 1) and 635 (Part 2).

<sup>24</sup> RG, 40 Höchstrichterliche Rechtsprechung (HRR) No. 1327.

<sup>25</sup> Lenckner & Perron (note 21), margin number 10.

<sup>26</sup> Lenckner & Perron (note 21), margin number 10.

<sup>27</sup> Hermann (note 5).

<sup>28</sup> Heribert Ostendorf in an interview with Marco Dettweiler, *Der Fall Marco W. – "Jedes Tabu hat seine Härte"*, FRANKFURTER ALLGEMEINE ZEITUNG, 2 July 2007, available online at <http://www.faz.net>; See also JOHANNES WESSELS & WERNER BEULKE, STRAFRECHT: ALLGEMEINER TEIL: DIE STRAFTAT UND IHR AUFBAU (2002) 145.

<sup>29</sup> TRÖNDLE & FISCHER (note 8), 1063, § 176, margin number 30.

*III. Consent*

Among them is the question of whether the victim consented to the sexual activities and if so, does it matter? If the victim freely consented and was able to do so, no crime has been committed.<sup>30</sup> Consent requires that the victim has been able to consent, that is, was mentally and morally able to understand the consequences of the consent and the extent of the legal rights he or she would give up when consenting.<sup>31</sup> The consenting victim must understand what will happen after he or she consents and which consequences will follow.<sup>32</sup> This ability requires a certain degree of maturity but cannot be linked to a certain age limit.<sup>33</sup> Although the *Bundesgerichtshof* allowed minors to consent,<sup>34</sup> one has to have more than serious doubts as to whether a 13 year-old girl can validly consent to sexual activities. Lacking consent by the underage victim, in general parents can consent for the minor<sup>35</sup> – a rule which obviously cannot apply to sexual abuse of children. According to § 228 StGB consent to physical injury (the standard case being consent to medical treatment such as surgery) is only possible if the injury does not contravene good morals. This rule ought to be generalized and extended to § 176 StGB, which would mean that it is virtually impossible to consent to a sexual abuse of children. Even if the victim agrees to sexual activities with the suspect, sexual activities involving children remain illegal: "There must not be any physical contact with children."<sup>36</sup>

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<sup>30</sup> For a detailed discussion see WESSELS & BEULKE (note 28), 115.

<sup>31</sup> WESSELS & BEULKE (note 28), 118.

<sup>32</sup> WESSELS & BEULKE (note 28), 118.

<sup>33</sup> WESSELS & BEULKE (note 28), 118.

<sup>34</sup> 12 BGHSt 379, 379.

<sup>35</sup> WESSELS & BEULKE (note 28), 118.

<sup>36</sup> Wolters & Horn, SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH, VOL. II, BESONDERER TEIL (§§ 80-358) (Hans-Joachim Rudolphi & Jürgen Wolter, eds.) (2006), § 176, margin number 2 (translation by the author).

## C. Enforcing the Law

### I. Teenage Offenders

Adult defendants who are found guilty of a violation of § 176 (1) StGB face a maximum of ten years in prison. While Turkish criminal law does not have a special criminal code concerning juvenile delinquents and simply cuts the punishment served by adults by 50 % when the crime has been committed by a minor who is old enough to stand trial,<sup>37</sup> Germany has a separate code concerning criminal procedures against young people between the ages of 14 to 20, the *Jugendgerichtsgesetz* (JGG) (literally, the Youth Court Law). Defendants aged 18 to 20 can be tried either according to the JGG or according to the normal rules contained in the StGB and the *Strafprozessordnung* (StPO) (Code on Criminal Procedure). For committing crimes that carry a maximum sentence of ten years imprisonment in the StGB (such as § 176 (1) StGB) teenage defendants can only be sentenced for up to five years imprisonment, as per § 18 (1) 1 JGG. If the penalty according to StGB is more than ten years imprisonment, juvenile delinquents face up to ten years in prison, as per § 18 (1) 2 JGG.

In the Antalya case, this means that if found guilty by a Turkish court the defendant would face three to four years in prison.<sup>38</sup> In Germany, on the other hand, the defendant could be sentenced to up to five years in prison. This makes it all the more difficult to understand why so many politicians are critical of the fact that the German teenager is brought before a Turkish court to begin with.

### II. Arrest

§ 112 and § 112a StPO contain a number of causes for arrest. According to § 112 (2) No. 2 StPO the suspect can be arrested if – given the circumstances of the case<sup>39</sup> – there is a danger that the suspect will flee before he can be brought before a court.<sup>40</sup> It is not sufficient that the suspect is a foreigner who has his or her permanent residence abroad<sup>41</sup> but, as has happened in Turkey with this case, a foreign defendant who has been vacationing in Germany (and who has likely already

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<sup>37</sup> *Prozess gegen Marco W. vertagt* (note 7).

<sup>38</sup> *Prozess gegen Marco W. vertagt* (note 7).

<sup>39</sup> LUTZ MEYER-GÖßNER, STRAFPROZESSORDNUNG: MIT GVG UND NEBENGESETZEN (2006), 446, § 112, margin number 19; WERNER BEULKE, STRAFPROZESSRECHT (2000) 101.

<sup>40</sup> HEIKO HARTMUT LESCH, STRAFPROZESSRECHT (2001) 170.

<sup>41</sup> MEYER-GÖßNER (note 39) 446, § 112, margin number 17a.

purchased a return ticket home) is a classic example for where § 112 (2) No. 2 would apply.<sup>42</sup>

### III. Prosecuting German Suspects for Crimes Committed Abroad

Although the events in question occurred in Turkey, the *Staatsanwaltschaft* was right to open investigations since § 5 No. 8 lit. b) StGB states that foreign children are protected against sexual abuse by German citizens abroad,<sup>43</sup> irrespective of the place of offense or the nationality of the victim. This rule is especially important in the context of sexual acts involving children and is aimed at punishing so-called sex tourists who travel abroad in order to have sexual contacts with children.<sup>44</sup>

### D. Conclusions

We can conclude, therefore, that German authorities by and large would have reacted similarly to the way Turkish authorities reacted. At the time of writing, the case that provided the background to this article is far from solved and it is possible that staff changes both at the Turkish Office of the Prosecutor and at the Turkish Court, which traditionally happen during the summer,<sup>45</sup> might delay proceedings there further.<sup>46</sup> It is too early to give a final judgment on guilt or innocence of the defendant but what is shocking about the case is both the crime itself as well as the public reaction it has received in Germany, where the perpetrator was seen by some as a victim of the Turkish judicial system. This reaction displays a serious lack of knowledge not only among the general population but also among high-ranking German politicians. The fact that these protests have been taken up by mass media includes the risk that incorrect perceptions concerning the illegality of sexual behavior regarding children are maintained in the minds of citizens, which in turn puts children at a greater risk of sexual abuse. Regardless of the outcome of the proceedings in Antalya and the investigations by the Office of the Prosecutor in Lüneburg, this makes it important to reiterate the legal situation under German law in order to protect children against all forms of sexual abuse.

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<sup>42</sup> See Dettweiler (note 2).

<sup>43</sup> TRÖNDLE & FISCHER (note 8), 1062, § 176, margin number 2.

<sup>44</sup> TRÖNDLE & FISCHER (note 8), 40, § 5, margin number 8.

<sup>45</sup> *Prozess gegen Marco W. vertagt* (note 7).

<sup>46</sup> *Prozess gegen Marco W. vertagt* (note 7).