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UNITED NATIONS COMMITTEE
ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN
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SEX-WORKER FORUM OF VIENNA, AUSTRIA

Persistent and Systematic Violations of Article 6 CEDAW by Austria

Information from Sex-Worker Forum of Vienna, Austria, to the United Nations Committee on the Elimination of Discrimination against Women for the examination of the State party report of Austria at the 54th Session in February 2013

Vienna, at 15.12.2012



Eingabe von Sexworker Forum an den Ausschuss gegen Frauendiskriminierung der Vereinten Nationen zum Bericht Österreichs bei der 54. Session im Februar 2013

GERMAN ABSTRACT

BERICHT VON SEXWORKER-FORUM AN UN´CEDAW

Der Fachausschuss gegen Frauendiskriminierung befasst sich mit der Situation in der Sexarbeit traditionell unter Artikel 6 der Konvention gegen Frauendiskriminierung (CEDAW). Dieser Schattenbericht kritisiert, dass Sexarbeiter im Berichtszeitraum 2004 bis 2012 durch faktische Kriminalisierung aufgrund der Pflicht zur Registrierung im Genuss fundamentaler Menschenrechte, dem Schutz des Lebens, dem Schutz vor Folter, und der Achtung des Privatlebens, benachteiligt wurden, und zwar sowohl durch institutionelle Strukturen, die zu demütigenden Zuständen bei der Registrierung und Pflichtuntersuchung geführt haben, als auch durch Behördenübergriffe, wo Sexarbeiter wie Kriminelle behandelt wurden und in hier dokumentierten Fällen psychischer und physischer sexueller Gewalt ausgesetzt waren.

Als weitere Folge führte diese Behandlung zu einer Diskriminierung bis ins Alltagsleben und Stigmatisierung in der Gesellschaft. Vermieter können Frauen bei Verdacht auf Sexarbeit die Wohnungen kündigen, was zu Obdachlosigkeit führt, Banken ihnen die Kontoführung verweigern, womit die Ausübung eines „zivilen Berufs“ unmöglich wird, und Lebensgefährten können vom Arbeitgeber gezwungen werden, sich von den Frauen zu trennen. Frauen mit Migrationshintergrund können ausgewiesen werden. Frauen in der Sexarbeit werden auch nicht vor Gewalt geschützt. Dies hat negative Auswirkungen auf Frauen insgesamt: 99,2% der

Vergewaltiger und 99,1% der Menschenhändler und Zuhälter bleiben straffrei. (Dies ergibt sich aus einer Analyse der offiziellen Statistiken.)

Diese Stigmatisierung nimmt den Betroffenen die Möglichkeit, ohne nachteilige Konsequenzen auf erlittenes Unrecht hinzuweisen. Der Autor, das Sexworker-Forum überwindet dieses Hindernis durch die Verwendung moderner Medien, um Sexarbeiter insbesondere über die Internet-Plattform www.sexworker.at zu vernetzen. Nach einer Verifizierung ihrer Real-Identität haben Sie in einem für die Öffentlichkeit unzugänglichen Bereich die Möglichkeit, authentische Informationen über ihre Lebenssituation ohne Sorge vor nachteiligen Konsequenzen preiszugeben. Der vorliegende Bericht an den Fachausschuss gegen Frauendiskriminierung basiert auf diesen Kenntnissen. Um die Identität der Auskunftspersonen zu schützen, beruft sich dieser Bericht jedoch nach Möglichkeit zu allen Vorkommnissen auf höchstgerichtliche Erkenntnisse und Medienberichte zu vergleichbaren Ereignissen.

Das *Sexworker-Forum*, ist ein internationaler Verein mit Sitz und Registrierung in Wien, der sich für die Achtung der Menschenrechte der erwachsenen Frauen, Männer und transsexuellen Personen im Umfeld der freiwilligen und selbstbestimmten Sexarbeit einsetzt.

Submission from
Sex-Worker Forum of Vienna
to the United Nations'
Committee on the Elimination of Discrimination against Women

pertaining to Austria's 7th and 8th periodic reports
at the 54th session, 11th February to 1st March 2013



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EXECUTIVE ABSTRACT

This report about Austria is submitted with respect to Article 6 of the Convention (CEDAW), which obliges states to “*take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women*”. The report concerns the reference period 2004 to 2012 and informs about the human rights situation of women in voluntary sex work as well as about the situation of trafficked and sexually exploited women.

- Although sex work is legal in Austria and sex workers pay social security contributions and income taxes, ***sex workers are treated like criminals***. A repressive system of regulations at three different administrative levels (national, provincial, communal) governs prostitution. These regulations perceive sex work exclusively through the perspectives of illegal immigration, morality, public order, trafficking, and “public health” (discussed along myths contrary to standards of World Health Organization, WHO), while they ignore issues of sex workers’ human rights.
- This system of ***obligatory registration and mandatory health controls is characterized by humiliating administrative practices and police harassment***. As a consequence, there are deficiencies in respecting, protecting and fulfilling the human rights obligations towards women in sex work: They do not enjoy human rights guarantees, such as protection of life against criminal attacks, protection against torture and sexual violence by federal police, or protection of private life and homes against arbitrary intrusions of authorities. Case studies confirm this.

- Such practices have a chilling effect on the sexual self-determination of women in general, as women with an unconventional sexual life (women suspected of adultery, women with multiple sexual partners) face the risk of becoming stigmatized as kind of prostitutes, leading to ***discrimination in all aspects of daily life***, confirmed by case studies (eviction from their home, financial exclusion, loss of a “decent job”, pressures on partners to file for divorce).
- Moreover, such ***policies weaken the position of women, who are trafficked for sexual exploitation***. Corrupt police officers rape them and authorities ignore their victim status and fine them for administrative offenses related to prostitution or illegal migration. The “National Action Plan on Combating Human Trafficking 2009-2011” did not change this. Sex-worker organizations were largely ignored in drafting it.
- In certain aspects, such policies weakened the protection by the law for all women: ***99.2% of rapists enjoy impunity and 99.1% of traffickers and pimps enjoy impunity***. As concerns these impunity rates, the report will explain them on the basis of official sources.

Women’s rights are not protected through discrimination, stigmatization, and criminalization of women in voluntary sex work. Rather, this prepares the ground for unfair working conditions and exploitation. Only empowerment and full protection by the law for women in voluntary sex work can suppress exploitation and enhance self-determination of women.

PART 1: BACKGROUND INFORMATION

1.1. Author and Sources

Sex-Worker Forum is an international incorporated non-governmental not-for-profit organization, chartered at Vienna under registration number 699583522. The Forum works to protect and promote the human rights of adult women, men and transgender persons in voluntary sex work.

Sex work is not in the focus of Austrian human rights institutions. Amongst the reasons is a perception that sex workers are not part of civil society. Authorities therefore do not listen to them (example: note 1). On the contrary, where sex workers try to be heard, they face harassment and stigmatization. This muzzles sex workers and the resulting “culture of silence” (Paulo Freire) reinforces their social exclusion.

This situation is an obstacle in obtaining reliable information about the actual situation of women in sex work. Sex-Worker Forum

¹ In 2004 Foreign Ministry established a “Task Force Menschenhandel”. In May 2007 it set up a “Working Group on Prostitution” on policies to improve the situation of sex workers. Participation of sex workers was not aimed at, rather social workers “informed about” sex workers.

overcomes this hurdle by using modern media, connecting sex workers through a multi-lingual internet platform www.sexworker.at. There, in an area closed to the public, sex workers, whose real identity is verified but not disclosed, are offered a medium where they can provide authentic information, in particular about human rights violations affecting them.

“Basing one’s judgment on respect for human dignity does not mean taking a moralistic approach, however. It means respecting people’s decisions and choices as long as they harm no one else.”

*Parliamentary Assembly, Council of Europe
“Prostitution, which Stance to Take”, 2007*

This submission is based on this knowledge and has been written and discussed in the internal area by the sex workers of the internet platform. The final form was then approved by the board of Sex-Worker Forum.

However, to protect the identity of respondents and contributors, the report refers to material from the public domain. Empirical evidence

comes from court documents (link: note 2), media reports (links: note 3), scholarly research, and also from publications by the government, by NGOs with an interest in sex work, and by local

² Austrian legal information system (link: www.ris.bka.gv.at)

³ The main sources are the following periodicals. Their respective websites are: “Der Standard” at <http://derstandard.at>, “Die Presse” at www.diepresse.com, “Falter” at www.falter.at, “Kleine Zeitung” at www.kleinezeitung.at, “Kurier” at <http://kurier.at>, “News” at www.news.at, “Österreich” at www.oe24.at, “Österreichischer Rundfunk” at <http://orf.at>, “TAZ” at www.taz.de; “Vienna Online” at www.vienna.at, “Wiener Zeitung” at www.wienerzeitung.at.

community social work organizations (links: note 4). Legal assessment is based on a Background Paper on Article 6 by this Committee (reference: note 5).

The submission is supplemented by a survey of the situation in Europe by the author (comment: note 6).

1.2. Scope of the Report & Definition of Sex Work

This report is submitted with respect to Article 6 of this Convention.

- Its focus is on the legal, social and economic situation of adult women in voluntary sex work. It is outlined by means of statistics and case studies that point out deficiencies in the legal protection of women in sex work against violence by private or state actors.
- In addition, the situation of women, who are trafficked and sexually exploited, is considered (comment: note 7).

⁴ The author's homepage links to: AIDSHILFE Vienna, LEFÖ Vienna, LENA Linz, SOPHIE Vienna, and SXA Graz. Jurisprudence is cited from the national legal information system (*supra note*) and population data are from Statistik Austria (www.statistik.at). For supplementary information about sexual exploitation of children, the author refers to ECPAT Austria (www.ecpat.at). In addition, the author refers to the European Community sponsored research TAMPEP (<http://tampep.eu>) and the Global Network of Sex Work Projects (www.nswp.org).

⁵ CEDAW, Background paper concerning article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, document CEDAW/2003/II/WP.2 of 13.05.2003.

⁶ "Human Rights of Sex Workers in Europe. A Survey and Critical Analysis". Unsatisfactory regulations of sex work were also a concern for Council of Europe (Parliamentary Assembly, document 11352 of 09.07.2007).

⁷ This report does not consider the situation of trafficked women, who are exploited in other ways, as housemaids, in agriculture or in arranged marriages. Neither does

- Moreover, this report discusses the precarious legal and social situation of trafficked women, who could escape sexual exploitation on their own, but depend on voluntary sex work to secure their livelihood.

The term *sex work* has a broad meaning. For this submission, it refers to sexual behavior of consenting adults, which involves physical contacts in exchange for monetary gains. Thereby, this term refers strictly to voluntary sex work, to distinguish it from the criminal exploitation of the prostitution of others. The national statistics office classifies voluntary sex work as "other occupations in the field of service provision to persons" (references: note 8). Service providers are termed sex workers.

To a large extent, supply of sex work is rooted in absence of economic alternatives. However, the well-being and health of women already in sex work is largely affected by government policies (reference: note 9). This report therefore focuses on the effects of policies and legal regulations in Austria. There, commercial sex work is regulated by prostitution laws. This classifies sex work by the legal status into four groups (comment: note 10):

this report consider the situation of sexually abused children. All these cruelties need to be clearly distinguished from voluntary sex work, also in terminology.

⁸ The legal classification of sex work as labor is based on the judgment European Court of Justice, *Jany et al v Justitie*, C-268/99 of 20.11.2001. The classification of sex work by Statistik Austria uses the job designator 5169 of ÖISCO-08.

⁹ *Della Giusta/Di Tommaso/Stroem*, J. Population Economics, 22/2009, pp 501 ff.

¹⁰ Other classifications distinguish 45 forms of sex work: *Harcourt/Donovan*, Sexually Transmitted Infections, 81/2005, pp 201 ff.

- *Legal sex work* means commercial sex work of women, who registered as prostitutes and obey the regulations of prostitution. Examples are most women in street prostitution or in brothels.
- *Illegal prostitution* means voluntary commercial sex work of women earning their living by providing direct, formal and open sexual services to their clients, but who did not register as prostitutes, or who registered, but violated other regulations (sex work not in tolerance zones of Eastern provinces, sex work not under the control of brothels in Western provinces).
- *Indirect sex work* refers to a grey area, where often women do not rely on sex work as primary source of income. Thus, women in massage parlors may offer sexual services in the clandestine. Escorts pretend that they offer social company, whereby sex may happen, as otherwise escort agencies would face criminal prosecution for procurement into prostitution. Women in BDSM or sexual assistants for the handicapped would not perceive their sexual services as prostitution, either. However, from one moment to the next, women in indirect sex work may end up in illegality, if authorities

“Prostitution, like marriage and family - which also control women’s sexuality - is not a monolithic institution. The degree of autonomy possible, the extent of abuse and violence and the possibility of accessing rights vary widely according to the situation. Women experience the institution of prostitution in a complex way, negotiating spaces and struggling for survival.”

*Meena Saraswathi Seshu, The Violence of Stigmatization
UNAIDS Issue Paper, 2003*

reject the legal fiction upon which these women based their activities.

- *Other (private) sex work* means certain forms of private sex life, which may have a commercial appearance, but no commercial substance. For a recent survey by United Nations Development Programme (UNDP), the legal status of private sex work was a

key indicator in assessing the country situations (reference: note 11). It includes women, who are supported by regular friends in exchange for sexual favors (“*femmes libre*”), women in the swingers’ lifestyle, who occasionally accept money for their presence at parties (e.g. bridging a shortage of female guests at swingers’ clubs), or women, who pose as and actually act like commercial

sex workers, but not in need of money (illustrative example: note 12). *De iure* sex life with merely occasional provision of sex

¹¹ UNDP, *Sex Work and the Law in Asia and the Pacific*, New York, 2012. Joint publication with UNAIDS and UNFPA.

¹² The well-known case of late *Alexandra Sprüngli* illustrates such an instance of non-commercial sex work: After the death of her husband, from whom she inherited about 4 million Euro, she developed her sexual self in sex work, till she married a chocolate industrialist (sources: obituaries in “Bild” and “Spiegel online” of 06.07.2012, also *Lüchinger: Kampf um Sprüngli*, Zürich 1993).

for money qualifies as private life (case law: note 13). However, *de facto* Austrian authorities treat women with unconventional private sex life as illegal prostitutes, whence their situation, too, is to be considered under the ambit of Article 6 of this Convention. For, in Austria women may be fined for illegal prostitution or related administrative offenses, if authorities are merely of the opinion that they are prostitutes; proofs are not needed (case law: note 14).

1.3. Legal Regulations of Commercial Sex Work

In Austria, voluntary commercial sex work is legal, but regulated at three administrative levels, national, provincial (“Länder”), and communal. As to the purpose of such special laws, Austria applies double moral standards: Sex industry as economic sector is accepted, but sex workers are not. Rather, they are perceived as potential

¹³ Where sexual behavior is not commercial, e.g. not visible in the public, it is private life. Austrian Constitutional Court confirmed this repeatedly since 1978 (VfSlg 15.632 of 14.10.1999, see also VfSlg 8.272 of 1978, 8.907, 10.363, 11.926). Administrative Court confirmed this, too (VwGH 2004/09/0219 of 20.11.2008, VwGH 2009/13/0011 of 25.01.2012; related: VwGH 2005/09/0181 of 22.11.2007). In Europe, this is also recognized since European Court of Human Rights, *Dudgeon v United Kingdom* of 22.10.1981 (c.f. *Wildhaber/Breitenmoser*, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention: Kommentierung des Artikels 8*, Cologne 1992, margin no 114). In Common Law, too, the intrinsic private life character of sex work is accepted (*Chamallas*, *Southern California Law Review*, 61/1988, pp 777 ff).

¹⁴ In Tyrol women with swingers’ lifestyle, who placed advertisements seeking fellow swingers, were fined for soliciting illegal prostitution and Administrative Court confirmed the fines, admitting that prostitution was not proven and ignoring free speech concerns (judgments VwGH 2011/01/0209 of 19.09.2012, 2010/01/0062 of 19.04.2012).

criminals, put under strict police control. Relevant national regulations are e.g.: Administrative Penal Act, AIDS Law, Alien Police Law, Civil Code, Immigration Police Law, Income Tax Law, National Insurance Act, Penal Code, and Venereal Diseases Act.

- Commercial sex workers are required to be self-employed. They have to pay income tax and sales tax one year in advance. Due to lacking education and language skills, many women in sex work lose track of the necessary documentations and their income tax is prescribed on the basis of excessive *ex officio* tax assessments, while in view of their low income (statistics section) they would actually be entitled to a negative tax.
- Sex workers are required to pay social insurance, but they do not enjoy protection of labor law and only partially of social law.
- Sex workers are required to register as prostitutes with the local authorities (police department or municipal authority, depending on the province). Registration is based on the Health Checks Directive under the Venereal Diseases Act, together with provincial regulations.
- As part of the registration, sex workers are obliged to attend weekly mandatory vaginal inspections for STIs, quarterly mandatory tests for HIV, and to carry a special document (control card) with them that confirms these checks. Sex workers are required to always carry it and show it to police. In the case of an infection, authorities confiscate it until about three weeks after the completion of treatment.
- Failure to register, to attend the mandatory vaginal inspections and HIV tests, or to obey the additional provincial regulations, is a misdemeanor that is penalized under the Administrative Penal Act

with fines of 20,000 EUR, prison terms, and for migrant sex workers expulsion and deportation. Women may also be forced to attend these inspections against their will.

- Further, HIV positive persons are criminalized for consensual sex with informed partners. They face criminal sanctions under the Penal Code (three years prison term), even if they themselves do not know their HIV status (source: note 15).

Laws of the nine Austrian provinces address the provision of sexual services. The provinces of Carinthia, Lower Austria, Styria, Upper Austria (since 2010), and Vienna have specific laws on sex work, in Burgenland, Upper Austria (prior to 2010), Salzburg and Tyrol sex work is addressed under the Provincial Administrative Penal Code, and in Vorarlberg the Provincial Police Law on Vices addresses sex work.

¹⁵ By sections 178, 179 Penal Code, a person, who does not know about the own HIV infection, may nevertheless be penalized for negligence (*Mayerhofer*, StGB, Vienna 2000). Also, unsafe sex with the consent of the informed partner may be penalized. However, there is no prosecution of safer sex (Supreme Court of Justice, ruling 11Os171/97 of 25.11.1997). Moreover, Regional Criminal Court Vienna accepted, that a HIV positive women practicing unsafe sex had no criminal intent, as due to retroviral therapy the virus count was too low to cause infection risk (source: “Der Standard” of 01.06.2012).

- In Vorarlberg, sex work is *de facto* prohibited: The province restricted sex work to licensed brothels and municipalities prevented the issue of licenses. As all prostitution is illegal, it still exists, but is under the control of pimps.

- Five provinces confine sex work to licensed brothels only and issue licenses (Carinthia, Salzburg, Styria, Tyrol, and Upper Austria). Of these provinces, Tyrol restricts sex work most, pressuring sex workers into illegality and therefore into the hands of pimps (comment: note 16).

- Three provinces prohibit sex work outside of designated tolerance zones (Burgenland, Lower Austria, and Vienna).

- Further, nowhere in Austria may women offer sex work in their own premises (resulting in police intrusions into private homes of women suspected of sex work, see case studies).

¹⁶ The factual restriction of legal sex work in Tyrol is demonstrated by the following figures: In 2009, in Tyrol with a population of 0.7 Mio there were eight brothels and legal sex work was confined to these brothels, while in Salzburg with a smaller population of 0.5 Mio there were 37 brothels.

“forced medical control of prostitutes, where such measures were not implemented with respect to clients, [was] discriminatory”

*United Nations Committee on the Elimination of Discrimination against Women
Background Paper Concerning Article 6 CEDAW, 2003*

Municipalities aim at barring sex work altogether (comment: note 17). However, Constitutional Court repeatedly declared sweeping prohibitions as unconstitutional (case law: note 18). Therefore, municipalities and district authorities utilize the combined effect of the legal regulations at different levels to maximally restrict sex work.

1.4. Statistics

The State Party report does not provide statistical information about the number of women in sex work, their socio-economic situation or the actual level of violence against sex workers or women in general.

Academic studies estimate that in Europe about 1.5 percent of the adult female population in the reproductive age is engaged in some form of voluntary sex work (reference: note 19); figures for sexual exploitation are considered below. For Austria with a population of 8.4 million in 2012 this would result in the estimate of about 35,000 women in sex work (1.5% of women 18 to 60, i.e. 50% of female population, who in turn is 50% of the population). As to the stratification by legal status, the following are common estimates:

¹⁷ The questionable character of such prostitution legislation is well known (*Packer, The Limits of the Criminal Sanction*, Stanford, 1968, pp 328 ff): “To put it crudely, but accurately, the law is perverted”.

¹⁸ Constitutional Court, in judgment VfSlg 19.159 of 23.09.2010, declared the provincial prohibition of advertisements for brothels in Tyrol as unconstitutional and in VfSlg 18.023 of 04.12.2006 declared the municipal prohibition of prostitution within the city boundaries of Oberwart, Burgenland, as unlawful.

¹⁹ *Vandepitte et al*, Sexually Transmitted Infections, 82/2006, Suppl 3, pp 18 ff.

- About 5,000 women in sex work are registered as prostitutes (source: note 20).
- About 5,000 to 10,000 women in commercial sex work are not registered; this estimate includes illegal prostitutes and the grey area of indirect sex work under different legal fictions (source: note 21).
- The remaining 20,000 women of the estimated 35,000 women, who offer sex for money, do this only occasionally. Their sexual lifestyle is private life, though unconventional, whence, in theory, they need not register (see above).

As to their social situation, most persons in sex work are women. About 80% of commercial sex workers are immigrants, and many live in poverty (source: note 22). Thereby, Austrian *subsistence level* is defined by the minimal monthly *per capita* social assistance benefits, in 2010 this was 744 € (source: note 23). According to the national statistics office, in 2010 *poverty* was defined by an income of less

²⁰ Source: Office of the Federal Chancellor, Task Force Menschenhandel, Prostitution in Österreich, Vienna, 2008.

²¹ The above report (*loc cit*) estimates 3,000 illegal prostitutes for Vienna (other estimates: 6,000, compared to between 1,500 and 2,500 registered prostitutes, depending on the reference year), which extrapolates to 5,000 to 10,000 illegal prostitutes in Austria.

²² For more information about the social stratification see the resources of TAMPEP (link: *supra* note 4).

²³ The information about social assistance is from the homepage of the Federal Ministry of Social Affairs for the year of 2010 (744 € = 558 € social assistance + 186 € rental aid).

than 1,031 € per month (sources: note 24). Thereby, 13% of women had lower earning. In particular, migrant women and single mothers are high risk groups for poverty, which indicates a feminization of poverty.

The following estimate of incomes focuses on income that women in sex work generate for themselves and does not consider possible income generated for others (pimps, fines). Working fulltime (8 hours for five days per week), an average sex worker could expect in the long run not more than three clients per day (reference: note 25). At current market prices in street prostitution (15 € per job, source: note 26) this corresponds to an average income of 900 € per month (15 € times 3 clients times 5 days times 4 weeks). Extrapolated to 35,000 women in sex work, this would result in annually 378 million Euros of sex worker incomes. The estimate is consistent with official data of annually 429 million Euros (monthly average 1,021 €) in

²⁴ For income data (definition of poverty) and single mothers: Statistik Austria (topic “Armutgefährdung”); for migrant women: Upper Austria Chamber of Labor, Frauenmonitor, Linz 2011; for general information: *Gächter*, Handbuch Armut in Österreich, Vienna 2009.

²⁵ Estimate for the USA: *Brewer et al.*, Proceedings National Academy of Sciences USA, 97/2000, pp 12385 ff. Estimate for Germany: *Kleiber/Velten*, Prostitutionskunden: Eine Untersuchung über soziale und psychologische Charakteristika von Besuchern weiblicher Prostituiertes in Zeiten von AIDS, German Federal Ministry for Health, 1994. Both sources support 3 clients per working day. For instance, *Brewer et al* estimate 694 clients per year for all types of heterosexual female sex workers in the USA, resulting in 2.9 clients per working day (240 working days = 5 days per week, 4 weeks per month, 12 month per year).

²⁶ According to Administrative Court, judgment VwGH 2011/01/0006 of 31.05.2012, the price of sexual intercourse is 20 € blow jobs and masturbation cost significantly less, resulting in 15 € average.

prostitution incomes (source: note 27). For, other forms of sex work may generate more income, but at higher risks (comment: note 28).

As concerns the evaluation of the actual level of violence against women, criminal statistics alone are insufficient.

- For instance, rape attrition is an international problem. In order to quantify this problem, surveys are needed.
- Further, criminal statistics do not inform about human rights violations that are not recognized as a crime. Thus, in view of a focus on illegal immigration, trafficking within the State Party territory is ignored by Austrian legal system, although this is a human rights violation (United Nations Human Rights Committee, General Comment 28 of 27.03.2000 at § 12).

By estimates for 2012 by International Labor Organization (ILO) in Austria there are about 2,200 sexually exploited and/or trafficked women (6% of all women in sex work), namely:

- ILO estimates 1.5 persons in forced labor per 1,000 inhabitants in the European Union (source: note 29). For a population of 8.4 million this amounts to 12,600 persons. Further, 22% of forced

²⁷ *Statistik Austria*, Volkswirtschaftliche Gesamtrechnungen, Revisionen 2008/2009, Wien 2009, p 15.

²⁸ Working in brothels, women may earn 60 € per job, but they bear economic risk, as they need to pay the room rent in advance – about 2,500 € for one month (based on daily rent of 80 €). Thus, with 3 clients a day, their estimated income after deduction of the room rent would be 1,100 € month. (Statistik Austria counts the income of brothels under a different heading of “legal economy”.)

²⁹ ILO, Global Estimate of Forced Labor, SAP-FL, Geneva, 2012.

laborers are sexually exploited, 79% of them adults, mostly women, which results in 2,200 sexually exploited adult women.

- As Austria is affected by human trafficking as both a transit and destination country due to its geographical location at the centre of Europe, the actual number of victims may be higher: In Vienna, up to 25% of registered prostitutes might be sexually exploited (explanation: note 30).
- However, there is a discrepancy to law enforcement data: In 2011 federal police suspected 123 crimes of sexual exploitation and/or trafficking (187 in 2007) and courts sentenced 20 perpetrators (sources and details: note 31).
- An explanation for such discrepancies was given by United Nations Office on Drugs and Crime (UNODC): Worldwide, pimps socialize with corrupt police officers and offer them e.g. free sex

³⁰ ILO estimates that worldwide for each detected victim of forced labor 27 victims in similar situations go unnoticed (ILO, *loc cit*, p 39). If this ratio is applied to case 11, then 13 + 1 freed or escaped trafficked women in case 11, all of them registered as prostitutes, would translate into 392 sexually exploited women, registered as prostitutes in Vienna, which in turn would amount to between 16% and 25% of all 1,500 to 2,500 registered prostitutes in Vienna (depending on the reference year).

³¹ The criminal statistics is from Federal Ministry of the Interior, Crime Report 2011 to the Parliament (homepage of Parliament) and from Statistik Austria (court cases).

- The 123 suspected perpetrators identified by police in 2011 were: 52 cases of trafficking for sexual exploitation under section 217 Penal Code, 20 cases of trafficking also for other purposes under section 104a Penal Code, and 51 cases of pimping under section 216 Penal Code; the number of victims (cases) was about the same as the number of identified perpetrators.
- The 20 criminal convictions were: 8 cases of trafficking for sexual exploitation under section 217 Penal Code, 1 case of trafficking also for other purposes under section 104a Penal Code, 2 cases of slavery under section 104 Penal Code, 9 cases of pimping under section 216 Penal Code.

with victims of exploitation (reference: note 32). Thus, in Vienna, a leading police officer was publicly criticized for many years in media reports, until he finally was convicted and removed from office in 2011 (sources: note 33). In Austria estimated 200 sexually exploited women have forced sex with police officers, as by data of the International Organization for Migration 8.9% of trafficked and sexually exploited women report police as clients (reference: note 34). This hinders law enforcement against pimps.

There are no data about rape of sex workers. As a proxy, this report considers of rape of adult women.

- According to a government sponsored survey of 2011, in Austria 7% of adult women in the reproductive age suffered rape as adults (reference: note 35). These are 147,000 women in Austria (7% of women 18 to 60, i.e. about 50% of the female population, who in turn is 50% of a population of 8.4 million). It follows that about 15,000 adult women are raped each year. (If adult-rape reports by survivors are weighed according to sexually active years as adults,

³² UNODC, *The Role of Corruption in Trafficking in Persons*, Vienna, 2011.

³³ “News” of 21.03.2007, “Österreich” of 19.03.2010, and “News” of 18.05.2011. The officer is working now as debt collector for a loan shark.

³⁴ *Di Tommaso/Shima/Strom/Bettio*, *European J Political Economy*, 25/2009, pp 143 ff

³⁵ *Austrian Institute of Family Research*, *Österreichische Prävalenzstudie zur Gewalt an Frauen und Männern*, Vienna 2011; study on behalf of Federal Ministry of Economy, Family and Youth Affairs.

then the number of 147,000 rape survivors is divided through the harmonic mean of their years as adults; explanation: note 36.)

- However, there is a discrepancy to law enforcement data, according to which there are annually about 120 convictions under section 201 Penal Code for rape (source: note 37).
- This discrepancy may be explained as follows: Courts sentenced 17% of those rapists, whom victims reported to police (reference: note 38). It follows that 95% of victims do not report to police (120 convictions under an attrition rate of 17% translate into 706

“The proportion of cases designated false allegations [of rape] was only 4%, and it was not higher than 9% in any country participating in the study. This is strong evidence that the extent of false allegations is exaggerated by professionals, leading to a culture of skepticism.”

Seith/Lovett/Kelly, Tracking attrition in reported rape cases in eleven countries, London 2009

³⁶ Reports by women age 18 have weight = 1 rape within a time span of 1 year, of women age 19 weight = 0.5 = 1 rape within a time span of 2 years, age 20 weight = 1/3, etc. till age 60 weight = 1/43. The average weight is 0.1 = reciprocal of harmonic mean 9.89.

³⁷ Statistik Austria, Gerichtliche Kriminalstatistik (to be retrieved for each year).

³⁸ *Seith/Lovett/Kelley*, Different systems, similar outcomes. Tracking attrition in reported rape cases in eleven countries, London, 2009.

reported cases, which is 5% of 15,000 cases). Low reporting of rape is an indicator for victims' fear of secondary victimization by authorities, who do not take them seriously.

PART 2: ANALYSIS OF EMPIRICAL EVIDENCE (CASE STUDIES)

2.1. Forced Health Checks Contravene the Dignity of Women

All cases in this report directly or indirectly are related to the legal obligations of sex workers to register as prostitutes and undergo compulsory health checks. In Austria, registration and forced health checks are not intended to be beneficial to women in sex work. Instead, as government admitted, the sole goal is to protect society against sex workers (source: note 39). Thereby, against better knowledge that sex workers are not responsible for STIs, Austria depersonalizes prostitutes as vectors of disease (reference: note 40).

- Under Article 6 of this Convention, this Committee has repeatedly voiced concerns about registration and mandatory (or even forced) vaginal inspections of women in sex work (reference: note 41). In

³⁹ That health check is an obligation that was introduced to protect society against sex workers, was confirmed by the Office of the Federal Chancellor (Legal Services, document IV-51.749/2-1/81 of 16.04.1981).

⁴⁰ That sex workers are not vectors for infections was confirmed by empirical studies in Spain and the United Kingdom (*Ward/Day/Weber*, Sexually Transmitted Infections, 75/1999, pp 340 ff).

⁴¹ See *CEDAW*, Background paper in *supra* note 5. It mentions concerns about the registration in Peru, about forced vaginal inspections in Azerbaijan and Indonesia, or mandatory health checks in India. Further, in § 22, General Comment 24 (reiterated in General Comment 26 of 05.12.2008 at § 17), this Committee recommends: “States parties should not permit forms of coercion, such as non-

particular, this Committee pointed out that “**forced medical control of prostitutes, where such measures were not implemented with respect to clients, [was] discriminatory** and might be counterproductive.”

- The result of such laws is stigmatization (citation: note 42): “Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens.”
- Amongst 47 member states of the European Council, there are few countries that oblige sex workers to register and undergo compulsory medical checks. Implementation experiences in these countries are negative, and e.g. in Hungary Constitutional Court declared that mandatory registrations of sex workers are incompatible with the dignity of the women (references: note 43).
- As follows from the statistics, in Austria there are 5,000 registered prostitutes, but 86% of 35,000 women in sex work operate outside the Austrian system of registration, amongst them 5,000 to 10,000 women in commercial sex work, and there is no registration of

consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women’s rights to informed consent and dignity.” European Court of Human Rights, too, considered that regulations of prostitution may cause discrimination against women (*Zarb Adami v Malta* of 20.06.2006 at § 87).

⁴² The citation is from the analysis of prostitution laws by the 1985 *Fraser Report* (Committee on Pornography and Prostitution. Pornography and prostitution in Canada, Communications and Public Affairs, Dept. of Justice Canada, 1985). This criticism applies to the situation of Austria due to similar legislative intentions.

⁴³ See the report by this author, *supra* note 6. The cited authority is Hungarian Constitutional Court, judgment 28/C/2005 of 10.01.2011, AB-Bulletin 20/1.

clients. Thus, despite excessive law enforcement efforts to force women into registration (case 22) the *Austrian system is obviously ineffective*. Women “vote with their feet” against this system.

Amongst the reasons for ineffectiveness are prostitution policies that ignore that there are good reasons for a woman not to register as a prostitute, even if this may force her into illegality. By ignoring these reasons; Austrian policies discriminate against women:

- Most important, why women do not register as prostitutes, is their wish to avoid degrading treatment. For, the implementation of mandatory vaginal inspections often is deliberately degrading against the concerned 5,000 women, who registered as prostitutes (cases 01 to 03). However, as the State Party report to this Committee shows, Austria does not take notice of this situation. Despite international criticism (case 01), Austria did not implement effective measures to end humiliating practices against women in sex work.
- Equally important is the wish to avoid stigmatization that is linked to registration. Women registered as prostitutes may face serious discriminations in everyday life (cases 06 to 08) and no effective protection against criminal attacks (cases 12 to 15).
- Moreover, through registration authorities obtain access to sensitive data, including on health, which they distribute and store *de facto* indefinitely, which may violate privacy protection. Data leakage (e.g. computer criminality or violation of data protection in cases 20 and 24) is a realistic risk and may cause stigmatization (see cases 06 to 08). This puts registered sex workers in a state of

continuous anxiety about possible blackmailing and has caused police harassment, as in case 23.

- Commercial sex workers may not register, as their business model charges for companionship with their clients, but does not explicitly promise sex. They are in a grey area, depending on how tolerant local authorities are.
- Other women do not register, as their sex life is not commercial. As noted above, there are 20,000 women in sex work, who need not register, as their sex life qualifies as private life. Yet, authorities may perceive them as illegal prostitutes.
- Women may not register as the very system of registration is too complicated (see case 02).
- Sex workers cannot register in Vorarlberg, as sex work is factually prohibited; hence for them illegal prostitution is the only available option in sex work.
- Sex workers in other Western provinces (where legal sex work is confined to brothels) may not wish to register, as the owners of the brothels prescribe the conditions of sex work (what fees goes with what service, should alcohol be consumed, should sex without a condom be practiced). Pressure towards consumption of alcohol or unsafe practices may make a brothel a substantial health risk for sex workers.

“The State party [Austria] should ensure that these medical examinations are carried out in an environment where privacy is safeguarded and in taking the greatest care to preserve the dignity of women being examined.”

United Nations Committee against Torture, 2010

- Other sex workers in these provinces may not register, as they are concerned that pimps may exploit them. (Some brothel owners cooperate with pimps, who actually decide, who is admitted to work in the brothel.)
- Women, who managed to escape sexual exploitation, may not wish to register to avoid retribution by the pimps, for whom they quit working. (Pimps enjoy factual impunity and therefore police would be no help.)

- For women in poverty driven prostitution, poverty does not only affect the women themselves, but even more their children, who face social exclusion (source: note 44). They may not register, as they fear that once their poverty becomes known, their children are bullied, or authorities may take away their children.

• For most women in poverty driven prostitution, sex work is a last resort to balance their budgets. These women do not earn enough in sex work to become independent of social support, whence they may be driven to work illegally. For, otherwise they risk excessive taxation based on unrealistic assessments of their income by tax office, and this would result also in cuts in social benefits.

⁴⁴ According to “Kirchenzeitung der Diözese Linz” of 04.11.2003, in Austria there are about 227,000 children in poverty, who need support by private charity.

However, thereby they risk high fines, which, in turn, may force them to prolong and intensify prostitution.

- If migrant women with illegal residency status are in sex work, they cannot register without disclosing their illegal status, resulting in deportation; this may happen even if they have never had a chance to legalize their status (cases 04 and 05). In this way, victims of trafficking, who could escape sexual slavery on their own, may be victimized again by authorities that treat them as illegal immigrants in illegal prostitution, rather than as victims.

2.2. Discrimination in the Right to Health

Compulsory health checks implement an outdated concept imitating a strategy of disease control in veterinary medicine, where contaminated animals are slaughtered. However, in human medicine, this concept is doomed to fail for a simple reason: Even if all women, where a STI has been diagnosed, were instantly replaced by healthy ones, there remain the men, who need not undergo any health checks and who continue spreading STIs. Thus, although mandatory health checks for prostitutes seem to aim at the legitimate goal of the protection of public health, public health is not protected. Instead the health of sex workers is jeopardized, as clients are encouraged to irresponsible behavior. This is confirmed by empirical evidence:

- As government reports acknowledge, customers ask for sex without a condom, as they do not fear infections from sex workers with health checks, pimps and owners of brothels pressure women to obey, as they fear for their business, and the most vulnerable amongst the women (victims of trafficking, women in poverty

driven prostitution) finally take the risk – some may become infected (source: note 45).

- As a consequence, in 2009 in Vienna the incidence of Syphilis became higher than in German cities, where there are no compulsory health checks. This experience contrasts with evidence from New Zealand and New South Wales (Australia), where sex work was decriminalized and defined as legitimate labor and where sex workers are empowered. According to UNDP, this “increases their access to HIV and sexual health services and is associated with very high condom use rates” (sources, comments and references: note 46).

⁴⁵ The information about pressure for unsafe practices is from Office of the Federal Chancellor, Task Force Menschenhandel, Prostitution in Österreich, Vienna 2008, p 35. This pressure was foreseeable:

- For clients it is rational to ask for unsafe practices: Clients conclude from the mandatory health checks of sex workers, that their own infection risk is negligible. Therefore, they ask for sex without condom to maximize their utility; this is an instance of the “Peltzman-effect” (*Peltzman, J Political Economy, 83/1975, pp 677 ff*).
- For sex workers, once they have bowed to pressures for unsafe sex, it is rational to offer unsafe practices at slightly higher prices to all clients, as the marginal risk of infection becomes smaller with each additional client (the maximal risk being bounded by 100%); this is an instance of the “rational fatality effect” (*Kaplan, J AIDS, 3/1990, pp 55 ff*).
- Actually, without such pressures due to State Party policies sex workers out of self-interest would educate their customers in safer sex practices (*Sanders, Social Science & Medicine, 62/2006, pp 2434 ff*).

⁴⁶ Syphilis statistics are from Robert Koch Institut Berlin, *Epidemiologisches Bulletin* 49/2009. Information about New Zealand and Australia is from UNDP, *supra note 11*.

Thus, the obligation to register as a prostitute and undergo regular health checks violates the dignity of all women by double moral standards: On the one hand the State Party tolerates irresponsible behavior of men and victimizes women (sex workers and other sexual partners of these men). On the other, women at large are made responsible for STIs and women in sex work are *de facto* criminalized and harassed by police. Thereby, the State Party does not perceive sex workers as service providers, but as commodity, where health is only of interest through the perspective of consumers. Of course, health of clients is a legitimate concern. However, forced testing and health inspections do not prevent HIV, as illustrated above.

“a law [...] designed to combat venereal disease, required prostitutes to undergo mandatory medical examinations. This law legally stigmatized sex workers as being almost solely responsible for the spread of venereal disease, despite the absence of epidemiological studies to support this.”

United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 2010

It follows that in terms of public health the Austrian system of prostitution control is counterproductive. Further, it deteriorates working conditions for sex workers (pressures for sex without a condom, degrading treatment at the health checks, stigmatization and fear of police harassment in the enforcement of this regulation) and this obviously has a negative impact on their health (references: note 47). Thus, ***compulsory medical examinations and HIV tests for women in sex work are an inadequate concept that is incompatible with the dignity of women and their right to health.*** As concerns compulsory HIV tests in particular, UNAIDS voiced serious concerns about human rights violations (references: note 48).

2.3. More Discriminations due to Prostitution Laws

Women in sex work have to obey prostitution laws that restrict their wanted sexuality and that are enforced (high fines, deportation of migrant women), while their male customers have no such restrictions or they are not enforced or the fines are not so high: This alone is a discrimination against women (case law: note 49). Further, law

⁴⁷ For negative effects of criminalization and stigmatization on mental health, see: *Rössler et al*, *Acta Psychiatrica Scandinavica*, 122/2010, pp 143 ff. The negative health implications of a factual criminalization of sex work is well-known in the international context (c.f. *Anand Grover*, Special Rapporteur on Health, United Nations document A/HRC/14/20 of 27.04.2010).

⁴⁸ Information about the state of the art of HIV policies: *UNDP*, *supra note 11*; *UNAIDS*, *International Guidelines on HIV/AIDS and Human Rights*, Joint United Nations Program on HIV/AIDS, Geneva, 2006; *ILO*, *HIV & AIDS Recommendation R200* of 18.06.2010.

⁴⁹ This Committee repeatedly noted that such a situation is discriminatory against women (*CEDAW*, Background paper in *supra note 5*). In an interpretation of 06.11.2009 the Supreme Court of Taiwan confirmed that an observed different

enforcement weakens the protection of women in sex work against unwanted sexuality through police harassment that involves also sexual violence. Thus, the obligation to register as a prostitute neglects women's right to sexual self-determination (reference: note 50). So, in effect, the obligation for women to register as prostitutes generated new risks for maltreatment without eliminating the known risks. Amongst the causes for additional risks are policies by municipalities to curb sex work by means of police harassment.

This is exemplified by the implementation (autumn of 2012) of the Vienna Prostitution Law. Administrative regulations, based e.g. on the building code, were used to shut down two third of about 450 small premises that hitherto offered safe working places to about 2,000 women, including room maids, waitresses and women in sex work. Policies prefer large brothels generating more tax revenues; the inevitable dangers of organized crime and trafficking are deliberately ignored (source: note 51). Moreover, about 120 women in street prostitution are pushed to the outskirts in order to ensure decorum in

treatment of female sex workers, who were criminalized, and their male clients, who were not, was indeed a discrimination against women. This argument is also developed by *Kantola/Squires*, *European J Women's Studies*, 11/2004, pp 77 ff.

⁵⁰ This right enshrines both the right to engage in wanted sexuality and the right to be free and protected from unwanted sexuality; for a discussion see *Graupner / Tahmindjis*, *Sexuality and Human Rights*, New York 2005.

⁵¹ For Vienna, police admitted that pimps have factual control over the largest brothels, but there would be no way to stop them (source: "Der Standard" of 31.10.2012). Literature confirms criticism of large brothels, as a concentration of capital in the hands of few translates into power, also vis-à-vis authorities; *Langley*, *Encyclopedia of human rights issues since 1945*, Greenwood Press, 1999, p 66.

urban life. The impact for the concerned women has not been considered in the formulation of these measures.

Ignorant of the reality of the lives of women in sex work, policy-makers worsen their situation. In view of the generally weak financial and legal position of women in sex work, Austrian policies, which ***prohibit sex work outside of brothels or pressure sex workers to work for brothels make them vulnerable to exploitation*** (reference: note 52). For, in order to pay the room rent in the brothel, social security, taxes, and often the pimp, who actually controls the brothel, these women become easily trapped in escalating financial obligations leading to debt-servitude; their expenses are fixed, but their income is not. Sex work of a few women in their own premises would be a safe and crime-free form of pay sex with barely any nuisance, but it is prohibited (reference: note 53). Further, ***if sex work is restricted excessively, this increases the risk of harm to sex workers*** (references: note 54).

⁵² *Langley*, *supra note 51*.

⁵³ As expert testimonies confirmed, sex work is safer indoors, than outdoors (Superior Court of Ontario, *Bedford v Canada*, 2010 ONSC 4264 of 28.09.2010). Further, where sex work is not spatially concentrated, it is less controlled by pimps, as the ratio of income to efforts is unfavorable to them. Moreover, it causes fewer nuisances. Thus sex work of one or few women in their own premises would be socially optimal. This is recognized in New Zealand, where since 2003 small owner-operator brothels comprising four or fewer sex workers do not need a license (see *UNDP*, *supra note 11*).

⁵⁴ Where street prostitution was restricted to unsafe places or completely prohibited (which restricts it to places, where police does not care for security), women became significantly more often victims of murder (*Bedford v Canada*, *supra note*, § 504).

Austrian prostitution laws have negative repercussions for other groups, too.

- An emerging issue concerns discrimination of disabled persons. On the one hand, certain provincial regulations prohibit them to practice sex work. On the other, factual prohibitions of sex work outside of brothels may deny them the opportunity to experience their sexuality with the aid of sexual assistants. If they actively seek contacts to sex workers, authorities (police, special-care institutions) may treat them like instigators of crime, hindering them in the enjoyment of private life (reference: note 55).
- Further, provincial laws discriminate against children. In order to prevent sexual exploitation of girls, they set a minimum age for prostitution. However, in the case of violations they penalize the girls for illegal prostitution, but do not support child victims of sexual exploitation (source: note 56).

“Violence against women shall be understood to encompass, but not be limited to, the following: Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

United Nations Declaration on the Elimination of Violence against Women, 1993

⁵⁵ The right of disabled persons to experience their sexuality was already guaranteed by Rule 9 of the United Nations’ Standard Rules of 1993 on the Equalization of Opportunities for Persons with Disabilities.

⁵⁶ Committee on the Right of the Child, CRC/C/AUT/CO/3-4 of 05.10.2012 at § 64, CRC/C/OPSC/AUT/CO/1 of 03.10.2008 at §§ 29 and 31.

2.4. Impunity for Violence against Women

As follows from the statistical information, Austrian authorities lack vigilance in protecting women in sex work against violence:

- Amongst the key issues under Article 6 of this Convention is the protection of women against sexual exploitation; it is deficient.
- In view of § 15 of General Comment 19 of this Committee, lacking protection of women in sex work against rape is a concern under Article 6 of this Convention; this protection is non-existent and police officers are amongst the perpetrators.
- Further, in Austria the sexual lifestyle of a woman may put her under the risk of becoming a victim of a hate crime. Austria ignores this issue.

• Police brutality against women in sex work is an international problem, also in Austria; it is considered in the section below.

Thus, in Austria there are structural problem in law enforcement with respect to the protection of women against violence. In particular, women in sex work are not effectively protected. ***Austria thereby factually tolerates rapists, pimps and traffickers*** in violation of Article 6 of this Convention. Already in 1928, Austrian Parliament (reference: note 57) took note of the discrepancy of severity against

⁵⁷ *Adelheid Popp*, address to Austrian Parliament (cited from Parliamentary Correspondence 190 of 09.03.2009)

prostitutes (e.g. case 22) and lenience toward pimps. Today, 85 years later, the discrepancy and resulting discrimination remains.

As concerns sexual exploitation: ***In Austria 99.1% of pimps and traffickers enjoy factual impunity***: As explained in the statistics section, annually there are 2,200 cases of sexual exploitation and trafficking, compared to 20 convictions (0.9%). This factual impunity does not mean that in Austria there would be insufficient legislation, as the sexual exploitation of women by pimps, traffickers, or procurers is prohibited by criminal law (sections 104, 104a, 214, 215, 215a, 216, 217 Penal Code). Rather, ***criminal law regulations to protect women against sexual exploitation are flagrantly violated***. Amongst the causes are serious flaws in law enforcement.

- There is manifest inactivity in protecting women against exploitation. Authorities deny protection even to those women, whose whereabouts are known, as they registered as prostitutes and work in official brothels. This indifference, even where there are alarming signs of exploitation, is evident in cases 09 and 10, as well as in case 24.
- As case 11 illustrates, due to this indifference, victims do not trust Austrian authorities: If they manage to escape their criminal slave masters, they rather leave the country to seek help. Police conduct

against sex workers (cases 17 to 24) and degrading health checks (cases 01 to 03) are factors that destroy trust, as does forced sex with police officers (statistics section). From case 09 (and many similar cases with less media coverage) victims learned the lesson that ***Austrian authorities are not prepared to protect victims of sexual exploitation***.

“Laws and policies on immigration designed to combat or prohibit illegal migration or migrant smuggling may cause or contribute to trafficking by lessening access to legal measures by trafficked parties.”

United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, 2000

- This apparent disinterest in the prosecution of (in generally known) perpetrators is in stark contrast to the efforts of authorities to identify illegal prostitutes. These efforts were out of proportion, as case 22 illustrates. Moreover, these efforts did not aim at protecting women against exploitation, but law enforcement focused on the identification of illegal prostitutes and illegal immigrants. Trafficked women were not perceived as victims, but as potential criminals, while pimps were not perceived as criminals, but as “auxiliary police” to better control prostitutes.
- These false priorities in law enforcement deter victims of trafficking or other sexual exploitation from contacting authorities, as in cases 11 and 24. If they do, they are penalized: If a trafficked woman with an illegal residency status reports to police that she has been exploited in illegal prostitution, she faces administrative fines for illegal prostitution (which she necessarily admitted) and she has to leave the country (she admitted illegal

immigration, too). However, as in case 09 there is barely any law enforcement action against the pimps and traffickers, as the testimony of a victim is not considered as sufficient proof.

- Further, in Austria the promise of compensation for victims of trafficking by the Victims of Crimes Act is just illusory: If a woman is not recognized as a victim, because the trafficker is not prosecuted, she is not entitled to compensation. Even recognized victims may not receive a fair compensation, unless they are legal residents (reference: note 58). Cross-border trafficked women can barely fulfill this condition.

“Rape and other sexual forms of abuse are intended to violate the dignity of the victim in a very specific manner. Beyond the actual physical pain, sexual violence results in severe psychological suffering and leaves most victims traumatized for very long periods of time.”

United Nations Special Rapporteur on Torture & other Cruel, Inhuman or Degrading Treatment or Punishment, 2010

As concerns rape, in Austria 99.2% of rapists enjoy impunity. As explained in the statistics section, annually there are 15,000 cases of rape of adult women, compared to 100 to 120 convictions (0.8%).

- Thereby, cases 12 and 13 illustrate that there is virtually no protection of sex workers against rape. This has also negative repercussions for women in general: As it may be a successful defense for a rapist to allege that the victim was a prostitute, rape victims first need to prove that they are not prostitutes or likewise

⁵⁸ Source: Planitzer/Probst/Steiner/Unterlerchner, Entschädigung für Betroffene des Menschenhandels in Österreich, Vienna 2011.

“immoral”. This discourages women from reporting rape cases (only 5% of rapes are reported to police).

- Moreover, as noted in the statistics section, estimated 200 of the 2,200 sexually exploited women provide forced sexual services to police officers. Each officer, who utilizes such services, in

particular, if he is offered them for free by a pimp, is a rapist, as he should be aware of the sexual exploitation (case law: note 59). However, in Austria such police conduct is tolerated and not considered a sexual crime.

- According to Supreme Court of Justice, it is acceptable for a client to rape a sex worker through deception, if “he just wanted save money” (citation and related case law: note 60). Thus,

impunity for rapists of sex workers is in part a result of the stigmatization of sex workers, but in part it is also due to a

⁵⁹ ICTY Appeals Chamber, *Prosecutor v Kunarac, Kovač & Vuković*, IT-96-23 of 12.06.2002 at §§ 151, 218: case of witness D.B. in a similar situation.

⁶⁰ Citation from Supreme Court of Justice, 100s182/84 of 07.11.1984: In Austria, rape (section 201 Penal Code) still depends on outdated conceptions that *de facto* require proof of physical force. For instance, in Austria it is neither considered to be rape nor damage to the health of the victim, if a perpetrator applies date-rape drugs (Supreme Court of Justice, 130s102/05g of 14.12.2005). There are lesser sexual crimes (e.g. section 218 Penal Code), but jurisprudence interprets them restrictively, too. Sexual acts by deception are not penalized, either.

misogynic judicial interpretation of section 201 Penal Code, which does not take into account the definition of rape in international law.

As cases 13 and 15 illustrate, women in sex work are particularly vulnerable to hate crimes. However, the State Party ignores this risk.

- For women with lesbian or bisexual orientation, and for transsexual persons, the European Community Agency for Fundamental Rights noted the inadequate State Party responses (reference: note 61): Homophobic intent is not an aggravating factor in common crime.
- Immigrant women from conservative cultures, who enter sex work or fail otherwise to live up to her male relatives' ideals of female chastity, are under this risk, too. In two cases of 2007 this Committee analyzed the (still ongoing) neglect and failures by Austrian judicial authorities to protect immigrant women; in 2011 the Inter-American Court of

"We also recommend that police raids on sex workers be stopped. SWAN's survey found a direct correlation between the absence or low frequency of police raids, violence and abuse [...] and the willingness of sex workers to report crimes to the police and seek their protection."

Crago et al., HIV/AIDS Policy & Law Review 13/2008

⁶¹ European Agency for Fundamental Rights: Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, II. Brussels, 2009, pp 37 ff.

Human Rights cited them as exemplary cases of serious institutional failure (sources: note 62).

2.5. Sexual Harassment by Federal Police

Austrian authorities routinely treat women in sex work like criminals, whereby police uses instruments that are reserved for the fight of the most atrocious crimes, such as terrorism. *As a consequence, a vulnerable group of women suffers from private life violations, sexual violence and other torturous acts by police.* However, women have no effective remedies. This Committee considers sexual harassment under Article 6 of this Convention (General Comment 19 of 1992).

Sexual harassment by police, in particular, has negative repercussions to women in general: For fear of police harassment, women are hindered in exploring their private sexual life.

In Austria, young women risk police harassment, if they wish to explore their sexuality and experiment with pay sex in a way, which is nowadays even recommended in guidebooks for better sex

⁶² This recalls views by this Committee: *Akbak v Austria* of 01.10.2007 and *Goekce v Austria* of 06.08.2007. The judgment by the Inter-American Court is *Jessica Lenahan v USA* of 21.07.2011 (IACHR report 80/11).

(references: note 63). In particular, in addition to the rape of about 200 sexually exploited women by police officers, analyzed in the previous section, several hundred women experienced intolerable police conduct in the form of sexual violence by forced nudity (cases 16 to 22) and violations of private life, namely by intrusions of federal police into private homes, by spying out the sex life and ignoring sexual integrity, and by violations of data protection; further in cases 17, 20, 21 there are indications of torture by rape to obtain confessions about illegal prostitution (Articles 7 and 17 International Covenant on Civil and Political Rights).

- Typically, police harassment is a consequence of unlawful undercover investigations. Such sensitive police methods require certain procedural guarantees, such as independent supervision. Although national law foresees such safeguards, they were not applied in cases 16 to 22, targeting more than 730 women.
- Further, undercover methods are only justified to prevent or resolve serious crime, but not to identify unknown women suspected of a vice, as in cases 16 to 22. As the identity of these women was not known to police, when investigations started, *a priori* there was no reasonable suspicion at all concerning these women. The State Party acknowledged this explicitly in case 18: The Law on Security Police prohibited undercover methodology, as there was no reasonable suspicion of crime (comment: note 64).

⁶³ For example, *Easton/Liszt*, *The Ethical Slut: A Guide to Infinite Sexual Possibilities*, 1997; *LeMonchek*, *Loose Women, Lecherous Men: A Feminist Philosophy of Sex*, London, 1997; *Vance*, *Pleasure and Danger. Exploring Female Sexuality*, 1993; more references: *Tyler*, *Women's Studies International Forum*, 31/2008, pp 368 ff.

⁶⁴ Administrative Court, ruling VwGH 2005/06/0125 of 20.10.2008.

- These investigations secretly spied out the sex lives of women and produced files, which were distributed and stored, ignoring data protection (case law: note 65). This was unreasonable, as police did not even consider, if less intrusive and humiliating methods of investigation could be used (comment: note 66). Further, in cases 16, 19, 21 the State Party finally confirmed the private character of the sex lives, which were subject to such intrusions. In addition, cases 20 and 24 document other violations of data protection (comment: note 67).
- Moreover, in all cases 16 to 22 the undercover investigations led to the intrusion of police into private homes and business premises under a false pretense (prohibited by section 131 Code of Criminal Procedures, introduced 2004); in several cases police entered by force, too. In none of these cases was the intrusion reasonable, as the identity of the women could have easily obtained by other means, such as asking their landlords (comment: note 68). Nor was any intrusion justified by judicial authorization. In case 20 the

⁶⁵ The storing of sensible data can violate privacy protection; in the context of sex work: European Court of Human Rights, *Khelili v Switzerland* of 18.10.2011.

⁶⁶ Police had an obligation (sections 28a and 29 Law on Security Police) to apply less intrusive methods first.

⁶⁷ Apparently police ignores private life protection of sex workers in a systematic way; this is highly problematic (c.f. *Fellmeth*, *William & Mary Law Rev.* 50/2008; *Wintemute*, *Sexual Orientation and Human Rights*, Oxford, 1995, p 100).

⁶⁸ By United Nations Human Rights Committee, General Comment 16, privacy protection of homes includes business premises. Moreover, unlawful privacy interferences are prohibited, as well as lawful, but arbitrary interferences (which are unreasonable under the specific circumstances), because police should restrain their powers to obtain only “such information relating to an individual’s private life, the knowledge of which is essential in the interests of society”.

State Party explicitly acknowledged the unlawful character of such intrusions. Case 23 documents another intrusion, where the State Party acknowledged, that intimidating nightly visits were unreasonable.

- Although intrusions of federal police into private homes of women carry a significant risk of sexual harassment, deliberate sexual humiliation and other maltreatment of the women (e.g. case 20), and although this risk is well-documented in literature, police did not take precautions to effectively protect the women (references: note 69). In all cases 16 to 22 (evident in case 17) it is a concern that undercover officers deliberately duped women to be naked, as they wanted prove their illegal prostitution. In several cases women were forced to be naked in the presence of other police officers, too (case 19). This was degrading treatment by forced nudity (case law: note 70). In cases 17, 20 and 21 there is the

⁶⁹ The core of the problem is that officers operate in the privacy of the sex worker's premises but there is neither an independent surveillance of the officers, nor are there independent witnesses. Worldwide, there is an abundance of reports of sexual assaults by police officers in that situation (*Raymond, Violence Against Women* 10/2004, pp 1156 ff, *Watts/Zimmermann, Lancet*, 359/2002, pp 1232 ff). Moreover, literature warns about high rates of mental illness of undercover officers, who apply aggressive practices, and reports about the tolerance of superiors for such practices (*Carlsmith/Sood, J. Experimental Social Psychology* 45/2009, pp 191 ff; *MacLeod, Internat. J. Law & Psychiatry*, 18/1995, pp 239 ff). Specifically for Austria, brutality of undercover officers was observed by United Nations Committee against Torture (CAT/C/AUT/CO/4-5 of 14.05.2010 at § 20).

⁷⁰ As to the jurisprudence of the European Court of Human Rights: *Iwanczuk v Poland* of 15.11.2001; *Valasinas v Lituvia* of 15.07.2002; *Lorse v The Netherlands* of 04.02.2003; *Salah v The Netherlands* of 06.07.2006; *Wieser v Austria* of 22.02.2007; *Frerot v France* of 12.07.2007; *Musayeva v Russia* of 03.07.2008; *Witorko v Poland* of 31.03.2009; *Yazgül Ilmaz v Turkey* of 01.02.2011; *Duval v France* of 26.05.2011; *Hellwig v Germany* of 07.07.2011. If victims have reasons to

additional concern that undercover agents practiced sex to prove prostitution, either by using a false pretense (cases 17, 21), or by force (case 20). Such police conduct is torture by means of rape (case law: note 71). Case 03 illustrates another degrading treatment by forced gynecological inspections, cases 01 and 02 illustrate systematic humiliations at the health checks (see criticism by United Nations Committee against Torture for case 01), and case 24 illustrates humiliating practices at police operations against street prostitution (see criticism by National Human Rights Advisory Board).

fear rape (e.g. the undercover officer bears a weapon), then by the case of *Miguel-Castro-Castro-Prison v Peru* of 25.11.2006 at the Inter-American Court of Human Rights forced nudity is inhuman treatment.

⁷¹ The following is a sample of international cases:

- A case of Hong Kong undercover agents, who practiced sex to prove prostitution, was considered by the Committee against Torture, 41st session (c.f. *Young, Univ. Hong Kong, LC Paper No. CB2-1678/0506* of 04.04.2006).
- In a similar case in the USA, the Pennsylvania Supreme Court (*Commonwealth v Sun Cha Chon* of 27.04.2010) confirmed lower courts that it was outrageous government conduct in violation of the due process of law that agents paid by police systematically engaged in sex with women to prove their prostitution.
- In Italy, the Corte Suprema di Cassazione confirmed (3rd Chamber, case 8286 of 17.12.2009, published at 03.03.2010) that the consumption of sexual services by a sex worker without paying her is a criminal act of sexual violence.
- Committee against Torture confirmed that rape and similar sexual violence is torture or cruel or inhuman treatment (*VL v Switzerland* of 22.01.2007, danger of rape by policemen in case of extradition). So did Inter-American Court of Human Rights (*Mejia v Peru* of 01.03.1996, rape by military police in her home), and European Court of Human Rights (*N v Sweden* of 20.07.2010, danger of rape by the husband in the case of extradition).

- Further, in all cases 16 to 24, police used harassment as a weapon to obtain self-incriminating confessions by the concerned women about their alleged illegal prostitution. In cases 16 to 22, police used sex as a weapon, in case 23 police harassed the baby of an alleged prostitute, and in case 24 police applied a humiliating administrative procedure. In blatant violation of the due process of law such dubious confessions were used as proof in subsequent administrative proceedings against the women. This confirms the intentional character of the applied torturous practices.

2.6. Lack of Remedies against Police Harassment

In none of the above cases of police misconduct was a police officer brought to criminal court.

- First, this situation is caused by the lacking surveillance of police, which makes abuse of police powers possible and which allows to cover it up. As the more than 730 documented incidents of cases 16 to 22 show, a key issue is misapplication of criminal law instruments for prostitution control and administration of immigration laws (explanation: note 72). Such abuse is only possible, as the legally prescribed safeguards are ineffective. (The State Party introduced these safeguards, as this police method is known to be highly sensitive from the viewpoint of human rights.)

⁷² Article 18 Austrian Constitutional Law foresees a strict separation between administrative law and criminal law: Prostitution is regulated by administrative law under the responsibility of district authorities, whereas trafficking and sexual exploitation is prohibited by criminal law under the responsibility of courts. There are institutional safeguards for the application for criminal law instruments for criminal law purposes, but not for their misapplication for administrative purposes.

Thereby, a single dishonest federal police officer gains almost unlimited potential for sexual harassment of any women, whom he alleges to be an illegal prostitute.

“No national human rights institution in Austria meets the requirements of the Principles Relating to the Status of National Institutions (the Paris Principles).”

*United Nations Independent Expert
in the Field of Cultural Rights, 2012*

- Second, there is a police culture of lacking respect for privacy. For instance, the very fact that police uses undercover methods to randomly spy out the sex life of women and thereby treats them like criminals is in stark contrast to the international consensus (United Nations Human Rights Committee, *Toonen v Australia* of 31.03.1994) that criminalization of sexual relations between consenting adults is a violation of their right to privacy. However, neither police officers (several are the same, who rape trafficked women) nor investigators of complaints about police misconduct are aware of that problem. Superiors of police officers hinder investigations of police misconduct, as they consider that they should protect officers.
- Third, there is a structural problem, as complaints about police misconduct are actually investigated by serving, seconded or retired police officers at Federal Ministry of the Interior. The public prosecutor is acting according to their recommendations.

Thus, evidence is collected and screened by colleagues of the perpetrators, who are only formally and often only temporally assigned to a different body. There are obvious concerns about the lacking effectiveness of such a complaints mechanism, as the European Commissioner for Human Rights observed (explanation and references: note 73).

- Fourth, as concerns administrative complaints mechanisms about police misconduct or discrimination (Independent Administrative Panel of each province, national Data Protection Commission, Equal Treatment Commission, national Ombudsman Board), these institutions are ineffective in human rights protection (source: note 74).
- Therefore fifth, if there are complaints, to whatever mechanism, as a rule the investigations are based on the premise that authorities acted correctly. Investigations rather focus on victims and witnesses, who per default are suspected of defamation. For one conviction of a police officer for maltreatment there are five convictions of alleged victims for defamation (source: note 75).

⁷³ Although prosecutors are *pro forma* in charge to investigate complaints about abuse of office (section 302 Penal Code), they merely issue general directives to the actual investigators at the Federal Bureau of Anti-Corruption (BAK, formerly BIA) at the Federal Ministry of the Interior. Its investigators are recruited from police. This did raise concerns about lacking impartiality of investigations (*Smith*, Internat. J Law, Crime & Justice, 38/2010, pp 59 ff). For Austria, such concerns were voiced also in the Report by the European Commissioner for Human Rights, *Thomas Hammarberg*, on his visit to Austria (21 to 25 May 2007).

⁷⁴ *Farida Shaheed*, Independent Expert in the field of cultural rights, Report on the mission to Austria (document A/HRC/20/26/Add.1 of 10.04.2012 at § 41).

⁷⁵ The statistics about defamation charges is from Federal Ministry of the Interior, security police report to the Parliament of 02.03.2009, p 479. This statistics is

Consequently, ***misconduct of police officers is rarely brought to court in Austria***, nor does it have other notable consequences for the officer. This was pointed out by United Nations Committee against Torture in 2010 and the Committee on the Elimination of Racial Discrimination in 2012 (references: note 76).

2.7. Denial of Economic and Social Rights

Under Article 6 of this Convention, this Committee consistently requested governments to implement measures aimed at improving the economic situation of women so as to eliminate their vulnerability to sexual exploitation (reference: note 77). In the considered period since 2004, ***Austrian policies, laws and regulations with respect to prostitution contributed to stigmatization and ignored or even denied economic, social and cultural rights to women in sex work.***

Stigmatization is a consequence of the “immorality status” of sex work, referring to a judicial interpretation of section 879 Civil Code.

corroborated by information of Amnesty International (AI, Austria: Victim or suspect, a question of color, London, 2009).

⁷⁶ Committee against Torture, CAT/C/AUT/CO/4-5 of 20.05.2010 at § 20; Committee on the Elimination of Racial Discrimination, CERD/C/AUT/CO/18-20 of 31.08.2012 at § 13.

⁷⁷ For instance, recommendations concerning Bolivia: CEDAW/C/BOL/CO/4 of 01.02.2008 at § 27.

- According to a key ruling by the Austrian Supreme Court of Justice of 1989, the contract to exchange sex for money between a sex worker and her client was contrary to public moral (cited case law of this paragraph: note 78): If a customer did not pay, the sex worker could not initiate a civil action. In another ruling the court took criminal responsibility away from such customers (whose behavior under international case law would qualify as rape). Moreover, the court denied sex workers protection against exploitation by pimps (the owner of a brothel may determine the conditions of sex work). Moreover, the court assessed sex work as anti-social behavior and a “degradation of the performer’s intimate sphere”. The court also developed similar perceptions about women in general: A woman lacks “sexual honor”, if she had three or more sexual partners in her life. Sexually active women are thereby perceived as kind of prostitutes and they are not entitled under section 1328 Civil Code to receive compensation, if a perpetrator deceived them to have sex (which under international case law would be rape).

⁷⁸ This paragraph refers to the following rulings by the Austrian Supreme Court of Justice: 3Ob516/89 of 28.06.1989 about immorality of prostitution, 10Os182/84 of 07.11.1984 about the right to rape sex workers, 4Ob78/93 of 29.09.1993 about the right to pimp sex workers, 1Ob728/85 of 15.01.1986 about the anti-social character of sex work, 2Ob23/03a of 12.06.2003 about the degradation of the intimate sphere, 5Ob385/60 of 03.11.1960 about the lacking honor of sexually active women in general.

- As a consequence, there was no legal option to negotiate contracts based on sex work, sex work was not recognized as a trade, a profession, or another gainful occupation and sex workers did not have any legal remedy, if clients denied them the payment of their services. Moreover, the “immorality status” of sex work was a legal reason to exclude sex workers from their legal rights to inheritance (section 768 Civil Code), it was a legal reason for divorce, friends of sex workers lost their jobs in civil service, and authorities could remove the children from a sex worker and place them under foster care.
- Such regulation influenced also the perception of sex workers in society at large. Women in sex work became outcasts and cases 06 to 08 demonstrate this: Friends may be forced to leave them (either by law or by social pressure); landlords may not tolerate them; business may reject them as customers. This stigmatization puts sex workers under the risk to become jobless, homeless and socially isolated. As these cases illustrate, this risk extends even to women not in sex work, if their sexual life appears suspicious.
- As a consequence, women wishing to leave sex work face discrimination in the labor market due to the stigma attached to prostitution. And some lack skills for qualified jobs, but the State Party did not offer them vocational training. (Some charities offer training, but as women in sex work are not entitled to paid vacations, many cannot afford to take part.) In such a situation

“Countries must reform their approach towards sex work. Rather than punishing consenting adults involved in sex work, countries must ensure safe working conditions”

Global Commission on HIV and the Law, UNDP, 2012

there remain only low-paying, low-prestige dead end jobs without prospects for a better life (comment: note 79).

- Only recently did the Supreme Court of Justice partially revoke a key ruling (see 3Ob45/12g of 18.04.2012), but up to date, there has been no case in Austria, where a woman successfully sued a customer to pay for her sexual services.

As to the resulting socio-economic situation, in Austria there is a problem of poverty driven prostitution. The net incomes of these women are low and they have little opportunity for movement up the status ladder. The Austrian legal framework does not foresee their empowerment, but increased vulnerability to sexual exploitation.

- As to the economic background, Austrian subsistence level is defined by the minimal monthly *per capita* social assistance benefits, in 2010 this was 744 € In 2010 poverty was defined by an income of less than 1,031 € per month (see statistics section).
- Asylum seeking women are a particularly vulnerable group, as in average Austria provides even 41% less than this subsistence level to cover their most basic needs only (sources and comment: note 80). Their financial means do not suffice e.g. for legal

⁷⁹ This is also a problem at the international level. Women rescued from sexual exploitation often find themselves in jobs with worse working conditions than their previous situation (e.g. case study in Thailand: *Shih*, Humanitarian Work: The Production and Consumption of Jewelry Made by Trafficked Women. MA thesis, UCLA, Los Angeles, 2009).

⁸⁰ As concerns the support, in 2010 Austria spent 100 million € for 19,000 asylum seekers (source: TAZ of 25.07.2010). This figure includes support in cash and in kind (substandard accommodation). Thus, in average Austria provides 439 € per month for each asylum seeker (100 million € / 12 month / 19,000 beneficiaries), compared to the minimal social assistance in 2010 of 744 € (*supra note 24*).

assistance during their asylum procedure. (They receive free legal aid, but at such poor quality, resulting in deportation.) However, they are not permitted to accept any “regular” form of employment, except begging or sex work (section 7 Federal Support to Asylum Seekers Act). Although such institutional pressures driving women into prostitution have been criticized in the public discourse, Austria is not willing to grant asylum seeking women access to the labor market.

- Poverty driven prostitution is in the low price segment, such as street prostitution. Affected women have not much chances to escape poverty, as follows from considering their expected income (statistics section): Working fulltime, under optimistic conditions a woman in poverty driven prostitution would generate a monthly average income of 900 € but the actual average income is likely to be much lower (explanation: note 81).
- Although women in sex work pay social insurance, insurance coverage often is insufficient, especially in the case of pregnancy: Many sex workers cannot afford to take maternity leave. Moreover, in view of their income from sex work they are not eligible to receive social assistance, even if the income is small.
- Moreover, sex workers in general are not insured for unemployment, even if they are in brothels or in other forms of *de facto* employment. They are not protected against arbitrary dismissal from a brothel, and are not entitled to severance pay.

⁸¹ Their precarious social situation does not allow women in poverty driven prostitution working fulltime. For example, children of single mothers in sex work may not be admitted to kindergarten in view of the “immorality” of the mother.

PART 3: CONCLUSION AND RECOMMENDATIONS

3.1. Conclusion

This submission relates to Article 6 of the Convention and reports about the human rights situation of women in sex work. Austrian policies cause the social and economic marginalization of women in sex work (section 2.4). Thereby, Austria created a special stigma by forcing women in sex work to register as prostitutes and undergo mandatory vaginal inspections (section 2.2). As a consequence, if women in sex work become victims of sexual exploitation by pimps and sexual violence (section 2.1), or police harassment (section 2.3), Austria does not effectively investigate these crimes, resulting in *de facto* impunity for the perpetrators. Moreover, Austria pays insufficient attention to international human rights instruments, including this Convention, as the provisions of these instruments are not applied by domestic courts (case law and comment: note 82).

⁸² Recent judgments by the International Court of Justice oblige states to fulfill all of their international human rights obligations, see: *Guinea v DR Congo* of 30.11.2010 (case of *Ahmadou Sadio Diallo*, a victim of violations of the Covenant on Civil and

Paradoxically, in Austrian a dense web of laws regulates sex work, but it leaves women in sex work without the protection of the law.

The causes for this human rights disaster may be summarized as follows:

- *Policies towards sex work generate a vicious circle of stigmatization of women in sex work.* Provinces and municipalities inhibit sex work through repressive administrative regulations, which may make women in sex work dependent on pimps (for a working place in a brothel, for protection in unsafe areas outside the cities). Such regulations obviously meet resistance and police intensifies law enforcement, using more intimidating methods. The political

“Sex workers are often targeted for harassment and violence because they are considered immoral and deserving of punishment. Criminalization legitimizes violence and discrimination against sex workers (particularly from law enforcement authorities and health care providers). Criminalization makes sex workers reluctant to report abuses and makes authorities reluctant to offer protection or support to sex workers.”

UNDP, Sex Work and the Law, 2012

Political Rights) and *Belgium v Senegal* of 20.07.2012 (case concerning the obligation to prosecute or extradite *Hissène Habré* for the crime of torture). This obligation to fulfill would apply also to Austria with respect to this Convention. However, Austria does not honor this obligation, since the Constitutional Court ruled e.g. in 1975 (VfSlg 7.608) that international law does not establish individual rights at the national level; also Article 9 Austrian Constitutional Law could not be interpreted in this way. Austria is thus one of those countries, whose ratification of manifold human rights instruments is not correlated with the intent to improve the actual human rights situation (*Neumayer*, J Conflict Resolution, 49/2005, pp 925 ff; *Hathaway*, Yale Law J, 111/2002, pp 1935 ff).

discourse supports this by promoting myths equating voluntary sex work with oppression and conflating voluntary sex work with trafficking; sex work becomes thus criminalized. This in turn makes women in sex work appear as outcasts to the general public and reinforces policies to banish sex work from the communities (references: note 83).

- ***These policies resulted in manifold discriminations against women:*** Austria makes women responsible for public health, for public moral, and for public order, but tolerates irresponsible behavior of men. As women in sex work are perceived as inherently immoral, legislation and jurisprudence diminished them to the status of pariahs without effective access to the law. As a consequence, police does not hesitate to enforce administrative regulations by excessive means, even by torturous practices.
- These serious deficits in human rights protection did not remain confined to sex workers, only. ***Austrian prostitution policies have chilling effects on women, who wish to explore unconventional lifestyles.*** Even women not in sex work did face discrimination in everyday life, as their sexual life style did not accord to role stereotypes, and several experienced police harassment.
- ***Trafficked and sexually exploited women can barely discern who does more harm to them, their criminal masters or Austrian police,*** considering on the one hand a perplexing lenience towards pimps, on the other a culture of police harassment of women in sex work and rape of sexually exploited women by police officers. If Austria does not fundamentally change the societal attitudes

⁸³ At the international level: *Cusick et al*, *Critical Social Policy*, 29/2009, pp 703 ff; *Weitzer*, *Sexual Reseach & Social Policy*, 7/2010, pp 15ff.

against women in voluntary sex work, who are perceived and dehumanized as “commodity”, it is unlikely that the evil of trafficking and sexual exploitation can be successfully eradicated, as under the current approach trafficked women would be perceived as just another “commodity”.

3.2. Recommendations

Austrian policies towards voluntary sex work should change in agreement with the international consensus that sex workers and other marginalized populations should not be denied the protection of the law (references: note 84). Thereby, Austria needs to break the above described vicious circle that causes stigmatization of women in sex work. ***The author therefore recommends that Austria uses the United Nations Human Rights Based Approach*** (comment: note 85) and revises at all levels the legal regulations related to sex work accordingly. ***Respect for the human rights of women in sex work needs to become a founding principle of Austrian prostitution policies.*** In detail, Austria needs to address twelve provisions:

- (1) All laws need to be repealed that criminalize sex work, implicate its immorality or in any other way do not respect the sexual autonomy of women. In particular the obligation to register as a

⁸⁴ UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*, Geneva, 2006; UNAIDS, *Guidance Note on HIV and Sex Work*, Geneva, 2009.

⁸⁵ New Zealand applied this approach with Prostitution Reform Act 2003/28. As requested by this Committee (CEDAW/C/NZL/CO/6 of 10.08.2007), the law was positively reviewed in 2008 (Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, Ministry of Justice, Wellington, 2008). *UNDP*, *supra note 11*, commended the positive development.

prostitute and undergo regular health checks *per se* violates the dignity of women and needs to be revoked.

- (2) Sex work that is invisible to the public (e.g. an independent escort visiting clients, or a single sex worker in her own apartment) should be respected as private life. Where sex work is visible to the public, it might be regulated, but not through policing that leads to criminalization. Rather, Austria needs to empower women in sex work and reduce their vulnerabilities.
- (3) The law enforcement capacities and resources that are thereby set free from currently excessive prostitution control should be redirected for fighting criminal exploitation of women.
- (4) In order to better protect women (not only those in sex work) against rape and other forms of sexual violence, Austria should criminalize severe violations of the sexual integrity against the will of the victim, in particular interferences without the genuine consent of the victim, be it sex by deception or sex by the application of date-rape drugs. In particular, Austria should take immediate penal action against police officers for accepting offers by pimps of free sex with victims of sexual exploitation.
- (5) Moreover, Austria ought to incorporate into criminal law the crime of torture, as required under the International Covenant on Civil and Political Rights. Further, Austria needs to accept the international consensus that sexual violence is torture (which the current drafts of section 312a Penal Code does not consider).

- (6) Austria ought to set up a mechanism to protect women in sex work against criminal acts of state actors, to implement measures preventing *de facto* impunity for all forms of sexual violence against these women, to educate police, public prosecutors and judges about the need of protecting the rights of women in sex work, and to remove from office all state actors, who do not obey.
- (7) In order to ensure that police misconduct is effectively investigated, Austria should adopt as legally binding the recommendations of the United Nations Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Istanbul Protocol*, UN document HR/P/PT/8/Rev.1 of 2004).
- (8) In particular, in view of the evidence of widespread private life violations and even of torturous acts, an objective and impartial investigation of all cases since 2004 is needed, where police filed charges against women for illegal prostitution (comment: note 86). Following the recommendation of § 85 Istanbul Protocol, a high level commission of inquiry needs to be established for this task.
- (9) The State Party should offer victims of such torturous acts by police full reparation and redress, including fair and adequate

⁸⁶ The relevant data are stored by police and by district administrative offices and therefore investigators can and should interview these women about police conduct.

financial compensation and provision of the means for medical care and rehabilitation.

- (10) For the implementation, Austria should reconsider the current interpretation of Article 9 Austrian Constitutional Law and allow that all ratified international human rights agreements become part of the domestic legislation (including this Convention), and that individuals may directly invoke the provisions of these agreements before national courts.
- (11) Victims of sexual exploitation should receive a fair compensation from the perpetrators, for which Austria should always provide advance payment (widening the scope of currently ineffective section 373a Code of Criminal Procedures). Moreover, as redress for the failure to protect them, Austria should give victims of trafficking permanent residency status and working permits instead of deporting them to countries, where they may face retaliation by perpetrators and stigmatization.
- (12) Thereby, Austria should offer trafficked and sexually exploited women (including those with academic background) realistic options for their integration into society. To this end, Austria should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UNESCO Convention against Discrimination in Education.

Approved by Sex-Worker Forum of Vienna

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PART 4: APPENDIX (24 CASE STUDIES)

4.1. Registration and Mandatory Vaginal Inspections

The following five cases (comment: note 87) concern the legal obligation to register as a prostitute and undergo weekly health checks. Their implementation varies for the provinces.

- **Case 01:** In 2010, the United Nations Committee against Torture was concerned about the implementation of the compulsory health checks for sex workers at the Vienna Communal Health Office. In Vienna sex workers must visit that office and there is no alternative: If they consult doctors on their own, this is not acknowledged. The mandatory vaginal inspections were characterized by a “lack of privacy and humiliating circumstances amounting to degrading treatment during medical examinations”. Subsequently, journalists visited the office and confirmed the criticism (sources: note 88): Health Office is only accessible for 20 hours a week, and grossly understaffed with three to four

⁸⁷ Links to media sources are referred to in note 3. As to the identification of village names: In the legal information system, these were abbreviated by initials, but the relevant authorities were not. The author selected village names that fit best to both the initial and the authority.

⁸⁸ **Case 01**, gynecological checks in Vienna, is an ongoing concern for this author: The reference to the Committee against Torture is CAT/C/AUT/CO/4-5 of 20.05.2010 at § 22. The Austrian Parliament inquired Austrian government about measures to stop this degrading treatment (interpellation by *Schwentner et al.* to the Federal Minister of Women’s Affairs, 5874/J XXIV. GP of 24.06.2010), but government declared no interest. Information is from “Kurier” of 20.05.2010 and “Falter” of 09.06.2010.

doctors on duty, who have to handle each gynecological examination in about 1 to 2 minutes (source and explanation: note 89). As a result, journalists reported about lacking hygiene, use of non sterile instruments, and they interviewed sex workers, who suffered from physical injuries and pain as a result of the medical inspection. Of course, under such working conditions STIs may not be recognized, either (e.g. there seems to be no inspection for *condyloma*). There is thus the concern that Health Office does not respect the dignity of women, who abide to a legal obligation. Up to now, the only improvement was the provision of multilingual brochures of sex-worker-support organizations. However, these are not intended to inform properly about the medical interventions. For instance, a woman developed late stage of cervical cancer, as she was not warned that the health checks do not replace regular cancer screenings.

- **Case 02:** The situation of health checks is not better at other Austrian cities (sources: note 90). For instance, the public health officer of Klagenfurt, Carinthia, requests sex workers to undress and line up in a row of 40 women, so that he can complete the “health check” in an hour or less. In Salzburg, a certain health

⁸⁹ The opening hours are from the homepage of the Health Office (20 hours per week, namely Monday to Friday between 8 am and 12 am). According to „Die Presse“ of 01.06.2010 and of 11.07.2010, in 2010 between 2,200 and 2,500 women in sex work regularly consulted the Vienna Health Office, whereby of seven doctors only three to four were on duty per day. This means that in average doctors spent between 1.5 minutes (=3 doctors times 20 hours times 60 minutes / 2,500 sex workers) to 2.2 minutes (=4 times 20 times 60 / 2,200) per gynecological check.

⁹⁰ **Case 02** summarizes information from the author’s homepage. The deficiencies of this system have also been discussed by the Working Group on Prostitution (see supra note 1), but not resolved.

officer injures the vagina of sex workers checked by her, but the office ignores complaints. Further, in Salzburg sex workers need a brothel as intermediary (comment: note 91), which may lead to the dependency of sex workers on brothel owners and to exploitation by pimps. (The brothel owner also gains access to the sensible personal data that go with the control card.) Further, sex workers have to pay the costs of health checks, although this would be an obligation of the authority (reference: note 92). Cost sharing would only be reasonable, where sex workers may consult specialists of their own choice.

- **Case 03:** As journalists observed, there are involuntary examinations at the Vienna Communal Health Office, where police accompanied handcuffed women to gynecological examinations against their will and even watched these examinations. International jurisprudence qualifies involuntary gynecological examinations as torturous acts reaching the level of degrading treatment (source and case law: note 93). There are also reports that all over Austria asylum-seeking adolescent girls below age 15 routinely have to undergo such embarrassing forced gynecological examinations in order to supplement carpal X-ray

⁹¹ This regulation of Salzburg is clearly incompatible with self employed sex work.

⁹² As health check is an obligation that was introduced to protect society against sex workers, sex workers should not bear the costs, as the Office of the Federal Chancellor confirmed already in 1981 (*supra* note 39).

⁹³ As to **case 03**, information is from “Kurier” of 20.05.2010 and “Falter” of 09.06.2010. The European Court of Human Rights qualified forced medical investigations of the intimate sphere as degrading treatment (*Yazgül Ilmaz v Turkey* of 01.02.2011, *Duval v France* of 26.05.2011), and as violation of the private life (*Y.F. v Turkey* of 22.10.2003, *Juhnke v Turkey* of 13.05.2008).

exams and establish their age. Victims of such acts have no effective remedy (explanation: note 94).

- **Case 04:** Migrant women in sex work risk deportation, if they do not register as prostitutes, whereas registration would put them under the risk of the above described torturous treatment and xenophobic humiliations. This concern is illustrated by a ruling of the Administrative Court in April 2010 confirming the deportation of a woman to Nigeria due to illegal prostitution (source: note 95). *De facto* punishment of illegal prostitution by deportation may amount to racial discrimination, as without a working permit the woman had no legal means to secure her livelihood in dignity (reference: note 96); she did not receive sufficient other support, either.
- **Case 05:** In 2006 from one moment to the next, Austria turned migrant sex workers from outside the European Union from legal residents to illegal immigrants, who had to leave the country. This had the same effect as a collective expulsion of women in sex work would have had. For, although migrant sex workers in theory could apply for visa of type C or D to work for three to six

⁹⁴ In view of the media reports, public prosecutor had enough information to begin *ex officio* criminal investigations against health officials. This was not done, which indicates that instead victims complaining would risk defamation charges.

⁹⁵ The source for the deportation **case 04** is Administrative Court, VwGH 2007/18/0610 of 30.04.2010. The court did not consider that the women was in the danger of suffering from degrading treatment at the health checks, although sections 41 and 32 of the Law about the Functioning of the Administrative Court would have obliged the court to consider all legally relevant aspects of the case.

⁹⁶ The concern about racial discrimination is based on General Comment No 31 of 17.08.2005 of the United Nations Committee against Racial Discrimination.

months as registered sex workers, it is practically impossible to obtain such visa. This is illustrated by the following case: In September 2006, a sex worker from Russia applied at the Austrian embassy in Moscow for visa to work in a brothel in Salzburg. Authorities denied visa, claiming that sex work in a brothel cannot be self employed, whence an employment permit would be needed. However, such a permit cannot be issued for sex work, as it is self employed. In 2011 the Administrative Court confirmed this, referring to established case law (sources: note 97). Moreover, authorities did not consider the personal ties to Austria that these women developed and thus did not protect private life. As a consequence, many women re-entered with tourism visa, whereby they became illegal prostitutes (illegal immigrants cannot register as prostitutes) and illegal immigrants against their will.

4.2. Lacking Protection by the Law

Of the following ten cases, three illustrate the lacking protection of sex workers under civil law. In particular, there is a stigmatization of women registering as prostitutes. This stigmatization extends to all aspects of private life and it spills over to women with unconventional sex life. Reducing stigma and discrimination against sex workers would also make it easier for women, who wish to leave sex work, to

⁹⁷ The information about **case 05** concerning Schengen Visa is from Administrative Court, VwGH 2008/21/0515 of 30.08.2011. Concern about the sudden change of residency status of women in sex work was also voiced internationally (*Sukthankar, Sex Work, HIV and the Law, Working paper prepared for the Third Meeting of the Technical Advisory Group Global Commission on HIV and Law, 2011, p 15*). The urgency of such concern is due to the illegal nature of collective expulsions (Article 4 Protocol 4 European Human Rights Convention).

actually do so. Seven cases illustrate the lacking protection of sex workers under criminal law. Whatever their legal status, sex workers deserve as much safety against physical and sexual assault as any other persons, but in Austria sex workers are often not recognized as victims, resulting in deficiencies in the protection of sex workers against sexual exploitation, rape and murder.

- **Case 06:** Austria prohibits social contacts of civil servants to sex workers by law. This makes the social status of sex workers even worse than the status of pariahs. For instance, in 2006, Vienna police fired a police apprentice, who socialized with women in sex work, “for being in contact with the red-light scene”. This decision was based on section 10 Law on the Conduct of Civil Servants (BDRG). However, the Administrative Court quashed the decision in 2007, as the apprentice did not know of the sex work of his later wife, who also left sex work. Still, this very reasoning does confirm the concern that sex workers are seriously restricted in their social contacts: The apprentice would have lost the job, if his wife would not have left sex work (source and comment: note 98). While it is reasonable that police officers should not socialize with pimps, who are criminals, and that they should not force trafficked women to sex, as this would be rape, it is less reasonable that they should not meet sex workers, who are not criminals, but potential victims of crime.

⁹⁸ **Case 06** about the finally not fired apprentice is taken from the Administrative Court ruling VwGH 2006/12/0169 of 14.06.2007. As to the comparison with pariahs, social contacts with pariahs can be offset easily through ceremonial purgation, but in view of this jurisprudence, social contacts with sex workers cannot.

- **Case 07:** The stigmatization of sex work affects women in general. Women exploring their sexual self easily risk gossip about their alleged prostitution. Landlords could then evict these women from their apartment for immoral conduct. This is illustrated by the following case from 2010: The city of Vienna asked a female tenant to prove conclusively that (unproven) allegations about her prostitution were false, as otherwise the city would terminate the rental agreement and she would become homeless. As it is impossible to prove, not to be a clandestine sex worker, the woman could only retain her apartment, as her case stirred a public controversy. A registered sex worker in her situation would have lost the apartment (sources: note 99).
- **Case 08:** Financial exclusion is a related risk for women with an unconventional life style. This is illustrated by the experiences of the author. From 2010 till present, this author wished to open a bank account for purposes of charity, but all banks refused, as they disapproved of the name “Sex-Worker Forum”, which they associated with immorality. Neither was it helpful to explain to them that the forum is a human rights defender, as now banks feared negative repercussions for their business with public bodies. This case gives rise to the concern that in Austria there are no regulations that would hinder a financial institution to exclude anybody at any time from financial services for whatever reasons. It suffices that a bank managers disapproves of the sexual conduct of a woman to close her bank account and warn other banks about her alleged immorality. As a consequence, the woman may lose a

⁹⁹ Sources for the Vienna tenant **case 07** are “Kurier” of 03.08.2010 and “Der Standard” of 03.08.2010.

- decent job, because “without a bank account, it is virtually impossible to access employment [...] as one of the pre-conditions for signing an employment contract for the future employee is having a bank account number” (sources: note 100).
- **Case 09:** While the author acknowledges that the state party pays lip service to a better treatment of victims of trafficking and sexual exploitation, there remains the concern that too often victims of crimes are not recognized. For instance, in January 2011, another woman was deported to Nigeria. She allegedly was a victim of trafficking and sexually exploited by pimps in Vienna. She witnessed against the traffickers and pimps, but her complaints about her situation had no consequences, except for putting the woman under considerable risk of retaliation by pimps. However, Austrian authorities did not protect her as a possible victim of an international crime, but treated her as an illegal immigrant and prostitute (source and comment: note 101).

¹⁰⁰ **Case 08** about financial exclusion concerns the author. The citation is from: European Commission consultation document. Financial Inclusion: Ensuring Access to Basic Bank Account, MARKT/H3/MI D of 06.02.2009.

¹⁰¹ The source of **case 09** about the deportation of a trafficked woman is from “News” of 20.01.2012. The following circular pattern for such trafficking cases was observed (*Sibylle Hamann* in “Die Presse” of 31.10.2012): In the first step, traffickers promise women a better life in Austria. Next, women accept debt servitude to cover the travel costs, or their relatives pay. Upon arrival in Austria, the job market is closed for them and in order to remit travel costs they work in illegal prostitution. When they have earned travel costs, police discovers them (e.g. hint by the trafficker) and they are sent back to Nigeria. This is beneficial for traffickers, as after deportation victims are not available to testify against the traffickers, and their places are taken by the next group of trafficked women.

- **Case 10:** In 2007, journalists visited the office for the registration of prostitutes in Graz, Styria. A 19 year old woman from Rumania showed signs of anxiety, whence there arose the suspicion that a pimp forced her to register as a prostitute. The officer noted this but did not take appropriate action, as for the officer only the registration mattered (source: note 102); compare also case 24. Obviously, at least in this case, authority was not interested in protecting a woman against sexual exploitation.
- **Case 11:** For her shocking text „About Animals“, *Elfriede Jelinek* (Nobel Prize in Literature, 2004) used authentic information about a Vienna based criminal organization that for many years kept women in sexual slavery. However, in 2010 Hungarian police discovered a much more brutal gang of Vienna based pimps (source: note 103). For over a decade the gang kidnapped women in Hungary and tortured them. When their resistance was broken, they were trafficked to Austria, where the gang operated several official brothels in Vienna. Police considered these brothels as excellent, as all women registered as prostitutes and regularly attended the health checks. Finally, in 2010 a 19 year old woman managed to escape. She fled from Austria and informed Hungarian police about this crime; subsequently 13 more women were freed from brothels in Vienna. In view of this case there is the concern that more vigilance is needed in protecting women

¹⁰² The source of **case 10** about the practice of registration in Graz is “Falter” of 27.06.2007. This case illustrates lacking training of law enforcement officials in issues of trafficking (CEDAW/C/AUT/Q/7-8 of 03.08.2012 at § 11).

¹⁰³ The account of **case 11** about the 2010 discovered Vienna based gang of pimps and traffickers is based on information from “News” of 20.11.2010.

- against criminal exploitation, in particular those, who did register as prostitutes, as in this case. For they are known to police and so there is no reason to deny them such protection, even if they may be too terrorized to ask police for help. Moreover, there is the concern that these women in sexual slavery may have had good reasons not to trust Austrian police that regularly inspects all official brothels.
- **Case 12:** In January 2005, a rapist developed the defense that the protection of the Penal Code against rape does not apply to his victim, as she was a registered sex worker. The public prosecutor in charge of the case at Vienna Regional Court supported this. He asked the court to consider that prostitutes, unlike virgins, would not suffer much from rape. The rapist received a lenient sentence (source: note 104). However, this case was insofar exceptional, as a journalist with a track record as human rights defender reported about it. The resulting public debate led to the intervention of the Minister of Justice, who reprimanded the public prosecutor.
 - **Case 13:** In another case of Mai 2005, it was the judge, who considered that a sex worker cannot be raped (source: note 105). A woman from Cameroon was raped in Traiskirchen refugee camp, Lower Austria, by a security guard. She reported the case to police and the case went to court. There, the guard alleged falsely, that the woman had been a sex worker in Cameroon, which led to

¹⁰⁴ The source of the Vienna rape **case 12** is “Wiener Zeitung” of 06.07.2005.

¹⁰⁵ The source of the Traiskirchen rape **case 13** is the doctoral thesis *Altinisik, Zivilrechtliche Aspekte der Flüchtlingsbetreuung*, Univ. Innsbruck, 2010. According to this thesis, for women in refugee camps rape by security guards, police and other officers is a permanent threat and perpetrators enjoy impunity.

the acquittal of the guard. Subsequently, the woman was prosecuted for defamation, but in the meantime the case stirred a public debate and the prosecutor withdrew the defamation charges. However, the judge successfully sued a critical journalist and his print medium (comment: note 106). Here, the main concern (as in case 12) is the fact that the State Party tolerates that the judiciary distinguishes between “immoral” sex workers and “respectable” women, where only the latter group is somewhat protected against rape. This is a discrimination against women, even though the discrimination concerns only a small group (case law: note 107). For, actually this differentiation weakens the legal protection of all women, because it is the decisive factor, why 99% of rapists enjoy impunity (see this section 2.1).

- **Case 14:** In February 2012, the Eisenstadt Regional Court, Burgenland, sentenced a police officer for abuse of office and sexual coercion of women in sex work (source: note 108). The officer asked at least six sex workers of brothels for sexual services and money, threatening them with administrative penalties for alleged flaws of their registration as prostitutes. This case confirms the concern that the obligation to register as a prostitute makes women vulnerable to crime. This case was

¹⁰⁶ Another issue in this case concerns the protection of the freedom of press against the judiciary, whereby in this case the European Court of Human Rights considered that it was in the public interest to discuss an alleged error of the judge, but the claim that this error was the deliberate result of racist bias by the judge was excessive (*Falter v Austria* of 18.09.2012).

¹⁰⁷ The legal assessment cites a Nepal Supreme Court judgment, 56/2058, 2059.1.19 B.S. of 02.05.2002, which repealed the “*Muluk Ain*” rule.

¹⁰⁸ The source of the Eisenstadt **case 14** of 2012 is “*Der Standard*” of 20.02.2012.

insofar exceptional, as the misconduct was done over a long period of time and always in the presence of independent witnesses, who confirmed the incidents. (Austrian courts do not trust witness reports by sex workers.) Nevertheless, the perpetrator received a lenient sentence.

- **Case 15:** In May 2010, a sex worker from Rumania was almost burned to death in public. Although she repeatedly complained about threats by the perpetrators, police and public prosecutor remained inactive (sources: note 109). After the attack, the perpetrators absconded, but public interest in this outrageous case forced police to start an international search. Finally in 2011 the main perpetrator was sentenced to a prison term for attempted murder. There is the concern in this case, that police does not effectively protect women in sex work against pimps. Rather police considers complaints as conflicts that the “red-light milieu” ought to resolve “internally”. Women in sex work might be sacrificed for the sake of good police relations to pimps.

4.3. Police Harassment

The following sample of nine case studies (starting from 2004), comprised of more than 730 incidents, relates to the enforcement of the obligation to register as a prostitute. In Austria, sex workers are routinely insulted, harassed and assaulted by police officers who know that they will enjoy impunity and backing by their superiors. Moreover, as the case studies show, too often Austrian police

¹⁰⁹ Information about the 2010 **case 15** of the burning of a sex worker is in “*Der Standard*” of 05.08.2011.

pretended to investigate trafficking, but in the end an immigrant woman was deported for illegal prostitution, while police did not even attempt to identify a pimp or a trafficker.

- **Case 16:** In February 2004 an undercover officer of Vienna Police Department contacted a young woman under the false pretense to be a customer for pay sex and was invited to an apartment. After his visit, the police officer filed administrative charges for illegal prostitution against the woman, whereby he offered as evidence for prostitution, that the deceived woman had a sexually explicit conversation about her sexual services (other alleged sex workers were present). The woman was fined. In 2008 the Administrative Court annulled the fine, as police could only prove that the woman was willing to offer sex for money, but not, that she was in commercial sex work. For this case there is the additional concern of privacy protection, namely the manifest police intrusion into the apartment, which the Administrative Court did not address (sources: note 110).
- **Case 17:** In March 2004 an undercover officer of Upper Austria Criminal Police Department contacted a sex worker in Linz under the false pretense to be a customer for pay sex and was invited to her apartment. After his visit, the police officer filed administrative charges for illegal prostitution against the woman, whereby he offered the following evidence for prostitution: During his visit the deceived woman was almost naked, namely in transparent lingerie, had a sexually explicit conversation and

¹¹⁰ The source of the Vienna **case 16** is Administrative Court, VwGH 2004/09/0219 of 20.11.2008.

finally arrived with him at her sleeping room. The woman was fined and in 2006 the Administrative Court confirmed the fine (source: note 111). For this case there are concerns about the evident violation of a private home, the sexual humiliation of the woman through nudity, and the worry that the officer might have engaged in sexual acts to prove prostitution. (The woman could not allege such acts, as she then would have faced defamation charges.) Despite this concern that torturous acts (degrading treatment) may have been used to obtain evidence, Austrian authorities did not consider these aspects of the police conduct (comment: note 112).

- **Case 18:** In December 2004, an undercover officer of Innsbruck Police Department contacted a sex worker under the false pretense to be a customer for pay sex and was invited to her apartment. There, he used his cell phone as a device to let his colleagues intercept his sex talk with the woman, as he wished to use this as a proof for illegal prostitution. Moreover, he allowed his colleagues to enter the apartment against the will of the woman. She complained at the Administrative Panel of Tyrol about the illegal

¹¹¹ The source of the Linz **case 17** is Administrative Court, VwGH 2005/09/0033 of 29.05.2006.

¹¹² The prohibition of torture would have obliged the State Party to carry out a thorough investigation and not use the evidence against the woman (Article 15 Convention against Torture); this prohibition applies to evidence obtained from degrading treatment as well (Committee against Torture, General Comment 2 of 23.11.2007 at § 6; Human Rights Committee, General Comment 7 of 30.05.1982 at § 1, General Comment 20 of 03.04.1992 at § 12; European Court of Human Rights, *Jalloh v Germany* of 11.07.2006, and *Iordan Petrov v Bulgaria* of 24.01.2012). Thereby, sections 41 and 32 Law about the Functioning of the Administrative Court would have obliged the court to consider all legally relevant aspects of the case.

intrusion of police into her private home and about the illegal interception of a private conversation. In 2007 the Administrative Court confirmed the decision by the Panel that the interception of the conversation was illegal. Moreover, the court confirmed that the law about security police does not authorize police to conduct investigations about administrative offenses, such as illegal prostitution. Police referred to this law, as it is the only legislation that could authorize undercover methods and interceptions, but only in the context of criminal law (sources: note 113).

- **Case 19:** In March 2005, an undercover officer of Innsbruck Police Department contacted a woman under the false pretense of being interested in sex. He was invited to her apartment and thereafter filed administrative charges against the woman; she was fined for illegal prostitution. In 2007 the Administrative Court annulled the fine, as police could not even prove that the woman asked for money in exchange for sex. In particular (as the court repeated in later rulings), a conversation in the woman's home was private and therefore could not be used as a proof of "public prostitution" (source: note 114). Apparently the woman rather had a swingers' lifestyle. For this case there are concerns about excessive violations of private homes, where police and

¹¹³ The source of the Innsbruck case 18 is Administrative Court, VwGH 2005/01/0039 of 26.03.2007, concerning the case 2004/23/228-5 of 17.01.2005 at the Administrative Panel of Tyrol.

¹¹⁴ The source of the Innsbruck case 19 is Administrative Court, VwGH 2005/09/0181 of 22.11.2007 concerning the case 2005/29/2476-1 of 12.10.2005 at Administrative Panel of Tyrol. In 2008 the court referred again to this case: VwGH 2006/09/0044 and 2006/09/0045 of 15.05.2008, concerning cases 2005/23/2382-2 of 13.12.2005 and 2005/14/3469-1 of 03.01.2006 at the Administrative Panel Tyrol.

administrative authorities at the lower levels penalize all forms of unconventional sex life as "illegal prostitution".

- **Case 20:** In May 2005, an undercover officer of Innsbruck police contacted a sex worker, *Monika A.*, under the false pretense to be a customer for pay sex and was invited to her home. He subsequently used force to stay. The violence escalated, leaving Ms. A. handcuffed, with bare breasts, and bruised. These facts were confirmed by witness reports. There are obvious concerns about rape, but Ms. A. could not allege this, as otherwise she would have faced defamation charges. Instead, she complained to the Administrative Panel of Tyrol about the illegal intrusion of police into her private home and about degrading treatment. The Panel confirmed that the intrusion of the undercover officer was illegal, but for formal reasons the Panel did not investigate the complaint about degrading treatment. Moreover, the panel published her name (which this report does not disclose). Ms. A. remained seriously traumatized and she deceased on 07.07.2010, age 48, under suspicious circumstances (sources: note 115). In this case, there is the concern of possible rape and of privacy violations (private home, data protection).
- **Case 21:** In 2007 yet another officer intruded into the home of a woman of Tulln, Lower Austria, to investigate her alleged illegal prostitution. Later on the woman complained about "blatantly

¹¹⁵ The source of the Innsbruck case 20 is Administrative Panel of Tyrol, case number 2005/22/1335-23 of 29.12.2005. As the panel violated the privacy of the woman and published her name, local press could observe her suspicious death and in an obituary acknowledged her as a human rights defender. There were also allegations about murder of Ms A by a police officer; see "News" of 29.03.2012.

illegal” methods to obtain information from her (source: note 116). In 2012, the Administrative Court confirmed a ruling of the Vienna Fiscal Panel of 2008, that the unconventional sex life of this woman was private life, although she occasionally offered sex for money (her “income” from sex was not subject to income tax). For formal reasons, however, the court did not decide about her allegations of maltreatment. In this case there are concerns about evidently illegitimate privacy violations: Authorities spied out the undoubtedly private sex life of a woman and to this purpose also violated her private home. In addition, there are concerns about other serious police misconduct that the court did not investigate.

- **Case 22:** Media reports about intrusions of undercover officers in private homes confirm that the above cases are just the tip of an iceberg (sources: note 117). The following summarizes several reports:
 - In an interview of April 2007, the Director of Public Security for Vorarlberg (responsible for the application of the Law

¹¹⁶ The source of the Tulln case 21 is Administrative Court, VwGH 2009/13/0011 of 25.01.2012.

¹¹⁷ In case 22, the information about the situation in 2007 in Vorarlberg refers to the interview in „Echo“ of 26.04.2007 with *Dr. Elmar Marent*, the information about the situation in 2008 in Graz is based on “Kleine Zeitung” of 13.11.2008, the information about Vienna in 2009 is from “Vienna Online” of 13.10.2009, the information about the situation in 2010 in Klagenfurt is “Österreichischer Rundfunk” of 15.02.2010, and the information about the situation in 2011 in Innsbruck is from “Kurier” of 31.07.2011. For complaints of women to the Administrative Panel Tyrol, where police intruded into private homes, see: 2005/22/1206-4 of 04.11.2005, 2006/20/0194-6 of 03.04.2006, 2008/12/1562-4 of 13.08.2008, 2008/30/3219-2 of 12.11.2008, and the cases 18 to 20 above.

about Security Police) confirmed that in Vorarlberg police systematically investigates, if women offer pay-sex in their private homes.

- In November 2008, police of Graz, Styria, filed administrative charges against 12 women for illegal prostitution in their homes. Journalists reported about “undercover operations”.
- In October 2009, Vienna police filed administrative charges against 135 sex workers within just three days in merely two districts. (There is no information about the police method, whence these women are not included in the count of 730 instances of police harassment of this report. However, this case illustrates an emerging problem that police may hinder democratic control by not informing the press about its methods.)
- In 2010, police reported about administrative charges against women in Klagenfurt, Carinthia, who offered illegal prostitution in 12 apartments; subsequent prostitution-related investigations would focus on 150 more apartments.
- In the first six month of 2011, Innsbruck police, Tyrol, filed administrative charges against 700 women for illegal prostitution in their homes or business premises. This seems like a massive violation of private homes in a relatively small city and Innsbruck police apparently over-performed (comment: note 118). In addition, since 2004 in Tyrol there

¹¹⁸ Based on the estimate on the number of sex workers in the statistics section, amongst a population of Innsbruck of 120,000, there are approximately 450 women in sex work, which includes women with commercial and with unconventional private behavior. Thus, 700 alleged prostitutes is almost twice that estimate.

were regular complaints of women about police misconduct (see cases above).

- For all reports there is the concern that police apparently used undercover methods, while at the same time the Federal Ministry of the Interior, which is in charge of their supervision, was completely unaware about them. It follows that police did not apply the foreseen legal mechanisms to protect private life. Such investigations therefore were illegitimate private life violations *ab initio* (source and case law: note 119).
- **Case 23:** Another typical form of police harassment was reported by the Austrian Ombudsman Office. In 2004, Vienna police regularly intimidated a mother and her eight years old daughter by nightly visits that were caused by a false suspicion of the woman's illegal prostitution; the suspicion in turn was the result of careless investigations in another case. The police conduct traumatized the child. This was a violation of private life (source: note 120).

¹¹⁹ Undercover methods are reserved for the investigation of serious crimes (Section 54 Law about Security Police) and police is obliged to activate in each case the independent surveillance at the Ministry of the Interior. (This implements jurisprudence by the European Court of Human Rights: *Klass v Germany* of 06.09.1978, and *Liberty v United Kingdom* of 01.07.2008.) That nevertheless the responsible Ministry of the Interior was not aware of this large number of undercover investigations, is documented by an interview in *Planitzer/Sax*, Chapter 1: Austria, in *Rijken*, Combating Trafficking in Human Being for Labor Exploitation, Tilburg 2011, p 30, footnote 201. There the Ministry denies that there would be a substantial number of undercover investigations against sex workers.

¹²⁰ Intimidating nightly visits by police are a regular concern. The source of **case 23** is: Austrian Ombudsman Board (Volksanwaltschaft), Bericht an den Wiener Landtag, Vienna 2005, p 31 (VA W/666-POL/04, BPDion P92/f/05). A related case

Instead of introducing safeguards against such intrusions, Vienna Prostitution Law of 2011 authorizes police to forcefully enter the private home of any woman; it suffices that police suspects that the woman might wear sexy lingerie (source and comment: note 121).

- **Case 24:** In September 2011, members of the National Human Rights Advisory Board (Menschenrechtsbeirat) observed police measures against illegal street prostitution in Vienna (source: note 122). The board was appalled by the degrading treatment of the women, and by their discrimination: Women were fined for illegal prostitution, but their customers were not, or the fines were substantially lower. Further, the board observed violations of the due process of law, as the women did not even understand the

is Constitutional Court, VfSlg 18.302 of 05.12.2007 (violation of the private life of a Chinese woman by a nightly visit).

¹²¹ Section 15, point 4, Vienna Prostitution Law, authorizes the use of force to enter a private home. It suffices that police suspects a woman in this home is dressed "like a prostitute" (section 2, point 5, Vienna Prostitution Law). The woman is then obliged to prove that her home is not a brothel (section 2, point 5, Vienna Prostitution Law). In view of European Court of Human Rights, *Buck v Germany* of 28.04.2005, such violations of private homes to merely enforce administrative provincial regulations are unreasonable private life interferences.

¹²² The source of **case 24** is National Human Rights Advisory Board, Bericht des Menschenrechtsbeirates zu Identifizierung und Schutz von Opfern des Menschenhandels, Vienna, 2012. On p 27, the report summarizes (translation by the author): "The observed interaction between the officers and the sex workers is not only an example of the degrading treatment of sex workers. It illustrates as well a lack of awareness on the part of officials in dealing with potential victims of trafficking [...] In this situation, the privacy of women was violated by the circumstances and nature of the questioning. Therefore, there is little opportunity that victims of trafficking would identify themselves as such."

accusations against them (there were no interpretation services) and violations of data protection.

4.4. Supplement: Legal Terms

A key concern of this report is the obligation of the State Party under Articles 2, 5, 11, 12 and 16 of the Convention to protect women against violence of any kind. Police harassment against women in sex work is a manifest violation of this obligation. Thereby, this submission focuses on sexual violence, as torturous acts against women typically involve a sexual component.

- By *torturous acts* this report means acts or omissions that may violate the international prohibition of torture or cruel or inhuman or degrading treatment or punishment, whereby the considered acts are manifest private life intrusions, at least (clarification: note 123).
- By *sexual violence* this report means torturous acts in the context of sexual life, such as rape and forced nudity. Thereby, these are defined through international law, namely the relevant clauses of the Elements of Crimes under the Statute of Rome of the International Criminal Court (definitions: note 124).

¹²³ This refers to the International Convention against Torture, to Article 7 of the International Covenant on Civil and Political Rights, to Article 3 of the European Human Rights Convention, and with respect to evidently unlawful or unreasonable private life violations to Article 17 International Covenant on Civil and Political Rights, and to Article 8 European Human Rights Convention.

¹²⁴ The definitions of rape and sexual violence are from Document ICC-ASP/1/3 of 09.09.2002 at the International Criminal Court, The Hague.

- **Rape:** The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the

- The key features of sexual violence are violations of the sexual integrity of the victim and absence of her *genuine consent*, by which this report means consent through an “agreement by choice when having the freedom and capacity to make that choice” (sources: note 125). Consistently with this definition, footnote 20 of the Elements of Crimes explains that “genuine consent” does not include consent obtained through deception.

The importance of identifying gendered forms of torture is generally accepted, as lacking awareness for gender issues may systematically weaken women’s rights for protection against maltreatment

perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

- **Other sexual violence:** The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
- **Forced nudity** is a particular instance of sexual violence, where the said act is nudity, i.e. being naked or dressed in underwear or lingerie in the presence of a fully dressed perpetrator.

¹²⁵ This definition of consent is from Parliamentary Assembly of the Council of Europe, document 12013 of 14.09.2009 at § 5.2.2. Other relevant authorities are Committee of Ministers of the Council of Europe, document Rec/2002/5, appendix at § 35, and Parliamentary Assembly of the Council of Europe, recommendation 1777/2007 at § 6.2.6, and recommendation 1887/2009.

(reference: note 126). Thereby, also the suffering of women from “merely” mental pain may reach the threshold of severity that is characteristic of torture by physical pain. This view is supported by research in forensic psychiatry (reference: note 127).



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¹²⁶ *Edwards, Leiden J. International Law, 19/2006, pp 349 ff.*

¹²⁷ *Basoglu / Livanou / Crnobaric, Archive General Psychiatry, 64/2007, pp 277 ff*