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Concerns:

Information from Sex-Worker Forum
to the United Nations Human Rights Committee
for the examination of the State party report of Germany
at the 106th Session

Eingabe von Sexworker Forum
an den Menschenrechtsausschuss der Vereinten Nationen
zum Bericht Deutschlands bei der 106. Session



**BERICHT VON / SUBMISSION OF
SEXWORKER-FORUM**

**AN / TO
UN'HRC**

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

Stigmatisierung nimmt Sexarbeitern die Möglichkeit, ohne nachteilige Konsequenzen auf erlittenes Unrecht hinzuweisen. Dies gilt insbesondere für Sexarbeiter mit „zivilen“ Berufen. 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 UN-Menschenrechtsausschuss basiert auf diesen Kenntnissen. Um die Identität der Auskunftspersonen zu schützen, beruft sich dieser Bericht jedoch nach Möglichkeit zu allen Vorkommnissen auf bereits veröffentlichte vergleichbare Berichte (siehe Endnoten).

Dieser Schattenbericht kritisiert, dass Sexarbeiter durch faktische Kriminalisierung im Genuss der Menschenrechte gem. internationalem Pakt für bürgerliche und politische Rechte (CCPR) benachteiligt werden. Das Prostitutionsgesetz 2002 hatte die Intention, die Arbeitsbedingungen in der Sexarbeit zu verbessern, insbesondere durch die damals erfolgte Abschaffung der Sittenwidrigkeit. Während diese Intention auf Bundesebene weiterhin sichtbar ist, wird sie von Behörden auf Länder- und Kommunalebene hintertrieben, im süddeutschen Raum bewusst und systematisch. Obwohl Sexarbeit in Deutschland legal ist, werden Sexarbeiter von diesen Behörden wie Kriminelle behandelt und dadurch regelmäßig Opfer von Polizeiübergriffen bis hin zu Verletzungen des Folterverbots. Als weitere Folge führt diese Behandlung durch Behörden zu einer Stigmatisierung in der Gesellschaft. Sexarbeiter werden dadurch bis

ins Alltagsleben hinein diskriminiert. So verweigern Banken die Kontoführung, sobald sie von der Sexarbeit erfahren (finanzielle Exklusion). Sexarbeiter bleiben auch von den Mechanismen der politischen Entscheidungsfindung durch Bürgerbeteiligung ausgeschlossen, selbst bei Angelegenheiten, die sie selbst betreffen (etwa lokale Regelung der Sexarbeit).

Submission from
Sex-Worker Forum
to the

UNITED NATIONS HUMAN RIGHTS COMMITTEE

pertaining to

Germany's 6th periodic report CCPR/C/DEU/6
at the 106th session (15 October - 2 November 2012), Geneva

SUBMISSION OF SEX-WORKER FORUM TO UN'HRC

1. Executive abstract

This report criticizes that in Germany sex workers are disadvantaged in the enjoyment of their human rights under the International Covenant on Civil and Political Rights by *de facto* criminalization that is a consequence of local policies.

- At the national level, the German Prostitution Act, in force since 01.01.2002, aimed at a better protection of sex workers' civil, political, economic, social and cultural rights. The author acknowledges that at the national level this goal is still respected.
- At the local level of the provinces (Länder) and municipalities, the implementation of this goal met resistance. This led to a contradictory policy of theoretical tolerance at the national level and *de facto* criminalization at the local level, creating deficiencies in respecting, protecting and fulfilling the human rights obligations towards persons in voluntary sex work as well as towards persons trafficked and exploited as prostitutes. The author acknowledges that these deficiencies vary between the provinces, whereby the

economically strong provinces in the South (Baden-Württemberg, Bavaria, Rhineland-Palatinate) marginalize and stigmatize sex workers systematically.

- The persisting stigmatization of sex workers means in particular, that if they become victims of sexual violence or are victims of other crimes (e.g. trafficking), authorities would ignore or deny their victim status and they would rather penalize them for administrative offenses related to prostitution. This factual criminalization of sex workers through local policies has led to an abuse of police instruments, as is reported below. Thereby, victims of crimes may become victimized a second time by such police methods.

This report informs about an indiscriminate use of secret police methods, such as intimidation or coercive interrogation, to suppress unconventional sex life in certain German provinces and the resulting negative repercussions on human rights. Specifically, this report points out systematic private life violations: Persons experimenting with their sexuality face the risk of being humiliated or even raped by undercover police officers, who enjoy impunity due to systematic deficiencies in the German legal system. Such kind of police misconduct can sustain, as Germany does not protect sex workers effectively against violence, not even against rape. This factual impunity has a structural reason, as the German Penal Code does not recognize a sexual assault, where the perpetrator deceived the victim to tolerate sexual acts (e.g. consumption of sexual services without paying the promised fee). A police officer, who rapes a sex worker, will use this as an obvious defense and in general, courts will give a higher weight to a police officer's account of events than to those of a sex worker.

In the author's perception, the lacking acceptance of German society for sexual self-determination is at the root of these problems: Although LBGT orientations are legally and politically accepted, sexual experiments with pay-sex still entail the risk of stigmatization. Thus,

although sex work is legal in Germany, sex workers are treated like criminals who regularly face police harassment. This results in stigmatization and discrimination that impacts all aspects of daily life, such as e.g. financial exclusion, where banks refuse sex workers bank accounts. As a consequence, sex workers are also excluded from local political decision-making through public participation, whence sex workers may not even participate in decisions that concern them.

2. The author

Sex-Worker Forum, is an international incorporated non-governmental not-for-profit organization, working to protect and promote the human rights of adult women, men and transgender persons in voluntary sex work, with a particular focus on the German speaking countries and regions.

In Germany, sex workers risk stigmatization and this risk muzzles sex workers, especially those with “decent jobs” that they could lose. This is an obstacle in obtaining reliable information about their actual situation. Sex-Worker Forum overcomes this obstacle by using modern media, connecting sex workers through the Internet platform www.sexworker.at. There, in an area closed to the public, sex workers, whose real identity is verified, are offered a forum where they can provide authentic information about human rights violations affecting them. This report is based on this knowledge. However, to protect the identity of respondents, this report will refer, whenever possible, to material of the public domain. The above mentioned website contains supporting material (related information: endnote [A]).

3. Background on the legal regulation of sex work

In Germany with a population of about 82 Million there are about 200.000 to 400.000 persons in sex work, most of them women, which is consistent with academic studies that in Europe about 1.5 percent of the adult female population in the reproductive age is engaged in some form of sex work (references: endnote [B]). According to these studies, the percentage of women in sex work is a constant that is independent of the legal situation; sex work persists even under the threat of capital punishment. This indicates that for certain women, but also for man and transgender persons, voluntary sex work may be a fulfillment of their innermost inclinations. States may react to this either by respecting such most intimate personal decisions. Or they may act like

moralist Taliban, use secret police methods, and spy out even the most hidden sexual activities of anyone suspected of an unconventional sex life.

Germany uses both approaches simultaneously, thereby creating a discrepancy between tolerance in national law and bigotry in its local implementation, resulting in discriminatory and inhumane practices against sex workers.

- Policies at the national level accord to the international consensus that sex workers and other marginalized populations should no longer be denied the protection of the law (reference: endnote [C]). In Germany, voluntary sex work of adults is not a crime, but an accepted form of labor. When a United Nations committee urged Germany to protect the labor and social rights of sex workers (CEDAW/C/DEU/2-3 of 04.02.2000), Germany introduced the Prostitution Act of 20.12.2001, in force since 01.01.2002. In theory, it permits voluntary sex work of adults, allows employment of sex workers, grants sex workers access to a court, if clients fail to pay for their services, and gives sex workers access to social security (sick pay, pension, unemployment benefits). Other national laws replaced formerly mandatory health checks and registration of sex workers by anonymous and voluntary public health services, open to sex workers and their clients. Criminal law severely penalizes activities relating to the “exploitation of prostitution”, pimping and trafficking in persons (see sections 180a, 181, 232 and 233a Penal Code), and it prohibits the abuse of children or adolescents in pornography or prostitution. As Germany is a member of the European Union (EU), there is also international protection of citizens of other member states of the EU: If they are able to support themselves as self-employed sex workers, then they must be given residents’ permits, as sex work is labor in the full juridical sense (judicial authority: endnote [D]). This level of protection does not apply to sex workers, who are immigrants from non-EU countries.

- At the local level, legislation by the provinces (Länder) and administration by communities may restrict sex work by defining narrow conditions and interpreting other regulations (building code) restrictively: At a communal administration's request the provincial government (Landesregierung) is authorized to completely prohibit sex work in communities with less than 50,000 inhabitants. In communities with more than 20,000 residents, and in districts without communities, sex work may be confined to "red-light zones", whereby zoning may also prescribe the tolerated forms of sex work (e.g. in 2011 Dortmund, North Rhine-Westphalia, prohibited street prostitution). Provinces enforce these restrictions differently: Authorities in Berlin are more tolerant and permit sex work also in certain private apartments; some other provinces tolerate unobtrusive sex work, but do not officially permit it.
- However, in three Southern provinces with about half of the German population these administrative regulations are applied excessively: Baden-Württemberg, Bavaria, Rhineland-Palatinate. Thereby for instance in Munich, Bavaria, zoning prevents sex work, almost everywhere in the city ("forbidden zones"), even if it is unobtrusive, which in fact constrains also certain private sexual activities in private homes. In order to keep an eye on the clandestine sex life of citizens, provinces regularly use intimidating secret police methods under the pretext of fighting human trafficking. Even first time offenders against administrative regulations may face criminal charges, as police by default suspects repeated violations, applying section 184e Penal Code about repeated administrative offenses. As a consequence, these three provinces *de facto* prohibit and criminalize voluntary sex work and most of the reported deficiencies in the human rights protection are from these provinces.

Such a *de facto* criminalization of voluntary sex work of adults through intrusive police methods is not compatible with accepted European

humanitarian standards (reference: endnote [E]): "Council of Europe member states [...] must avoid double standards and policies which force prostitutes underground or into the arms of pimps, which only make prostitutes more vulnerable – instead they should seek to empower them. In particular, member states should refrain from criminalizing and penalizing prostitutes."

4. Empirical evidence: Twelve selected cases of police misconduct against sex workers

According to the few academic studies in this field (references: endnote [F]), in Germany rates of sexual violence against women in sex work are extremely high; up to almost 70% of these women experienced sexual violence by state actors or non-state actors. Thereby attrition rates for rape are high, too: Only 20% of rapes (involving also women not in sex work) reported to police are prosecuted and (as a consequence) only 5% of rapes are reported to police.

This statistics is corroborated by the following cases (sources: endnote [G]).

- Case 1: In 2011 a sex worker from Constance, Baden-Württemberg, survived attempted murder by a client, but did not report her case to police, because she feared police harassment, which she experienced in the past. This case illustrates the concern that sex workers, who became victims of crimes, may become victimized a second time by German police. Thereby undocumented immigrants, who found job opportunities in sex work, are particularly vulnerable, as they fear expulsion. There is scientific evidence for negative health impacts on this population (references: endnote [H]).
- Case 2: Mistreatment of sex workers by police officers is largely ignored by German authorities. As is outlined below, this concern is aggravated by an administrative practice of intimidating and sexually humiliating undercover methodology: Actually, this author

knows of only one recent case in Hannover, Lower Saxony, where in 2012 a police officer was sentenced for the rape of a sex worker.

- Case 3: Usually sex workers, who complain about misconduct of state officials, risk prosecution for defamation. This is illustrated by the following case from Dresden, Saxony: A woman, who as a girl was sexually abused (child prostitution), later identified a judge as perpetrator (Jasmin-case). This resulted in defamation charges. In this situation, in addition to concerns about the positive obligations of the State Party to protect Article 7 and Article 17 rights, there are concerns about free speech protection (Article 19 CCPR).
- Case 4: Another case from Würzburg, Bavaria, reaffirms this concern: In 2010 a police officer was reprimanded, because in 2006 he investigated an alleged sexual assault by another police officer.
- Case 5: In addition, violence against sex workers by private actors may in fact be attributable to state actors, as is illustrated by a case from 2010 in Villingen, Baden-Württemberg: There, German police respected a gang of seven atrocious pimps as partners in enforcing the administrative regulations on prostitution. When finally criminal investigations started, as the gang brutally exploited women for prostitution in a bordello, police investigated without enthusiasm. As a consequence, two pimps face lenient prison terms, three are on probation, and two bosses could abscond, as police warned them.

In addition to such cases of random violence, there is the concern of systematic state sponsored maltreatment of sex workers, which is a consequence of an abuse of highly sensitive police instruments, such as searches of private homes, raids of bordellos, undercover investigations or racial profiling. These police methods are highly sensitive from the viewpoint of human rights, in particular the protection of privacy. For instance, undercover operations by police against sex workers carry a significant risk of maltreatment of the

targeted sex worker by the undercover agent, as is well-documented in literature (references: endnote [I]). However, in Germany this danger is ignored and there is an administrative praxis of unjustified sexual humiliations of young people in the course of police operations.

To the author's knowledge, the following cases are the tip of an iceberg (sources: endnote [J]).

- Case 6: In a case from 2008 in district Landshut, Bavaria, police searched the private home of a woman in order to prove the petty offense of prostitution within the forbidden zone. She met occasionally with fellow swingers in an apartment of a friend and the swingers contributed to the rent, which police considered as sufficient evidence for illegal prostitution. This search had traumatizing effects, as the woman was humiliated in the presence of her husband and her children. In addition, for such type of operations there is the concern that a search of a private home, its negative effect on the personal reputation (especially in a small town), and the stigmatizing effect of alleged prostitution, is out of proportion, when compared to the suspected petty crime (judicial authority: endnote [K]).
- Case 7: In another case from district Erding, Bavaria, in 2010 two women with a swingers' lifestyle began to experiment with clandestine sex for money. Police suspected illegal prostitution and started an undercover operation to discover the identity of these women. Thereby an undercover agent posed as a swinger friend and using this false identity he intruded the private homes of the women. Subsequently the women were publicly shamed by media coverage. For such type of operations there is the concern that police uses sex as a weapon. Women, who are duped by male undercover officers to anticipate a sex date at their own home, may expect their guests naked or in lingerie. The anticipated date then turns into humiliating forced nudity for them, when they discover that the swinger friend is in fact a police officer, who spies out their sexual life. This concern relates to a systematic deficiency of

German law: While section 110c Code of Criminal Procedures permits undercover operations in private homes, there are no specific safeguards against sexual aggression by undercover officers.

- Case 8: In Munich, Bavaria, police runs similar undercover operations in private homes on a routine basis. For instance, in 2010 at one such operation they discovered three women who occasionally offered sex for money in their private apartment that was within the forbidden zone, and in two cases women practiced pay-sex without condom, which in Bavaria is prohibited. In addition to the above-mentioned concern about humiliation by nudity, for such type of operations there is the concern that police may engage in sexual acts (e.g. oral sex to prove oral sex without a condom).
- Case 9: In another case from Munich of 2010, an agent provocateur of police lured sex workers from out of town, who could not know the complex Munich zoning for sex work, into hotels located within the forbidden zone. In addition to using sex as a humiliating weapon, there is the additional concern, that if it would not have been for the active incitement by police, these sex workers would not have violated the administrative regulation, as they had no intention to come to Munich on their own (Article 14 of this Covenant).
- Case 10: In a third undercover operation from Munich in 2010, undercover agents of police went to meeting places of homosexuals within the forbidden zone and identified 17 young men, who were adventurous enough to be willing to accept money for sex. In addition to the sexual humiliation, there is the concern of discrimination (Article 26) that police actually targeted these men because of their sexual orientation.
- Case 11: In a case from Cologne, North Rhine-Westphalia, in 2010 police raided a legal bordello, searched for women of African descent “to obtain background information about Voodoo”, alleging that Voodoo would be instrumental in the exploitation of

the women, and arrested two women for illegal immigration. In view of this allegation (it has been repeated in other cases), German society now perceives followers of the Voodoo cult and people of African descent as potential criminals. Thus again there arises the concern of discrimination (Article 26). For, racial profiling is amongst the highly sensitive police methods whose application is only warranted in exceptional cases, but not in the enforcement of administrative regulations (references: endnote [L]).

- Case 12: In a police operation in 2009 against so-called flat-rate bordellos at Fellbach near Stuttgart, Baden-Wurtemberg, and at three other locations, 270 men and 170 women at these locations were subjected to humiliating circumstances. For several hours, during which they were deprived of their liberty (c.f. Article 9 of this Covenant) they were forced to remain naked or almost naked in the presence of about 700 police officers, many of the opposite sex. The purpose of the operation was the investigation of trafficking. It would not have jeopardized the investigation, if police had allowed the affected men and women to dress. However, police used this humiliation deliberately, apparently to punish them for their unconventional sex life.

German authorities handled these cases as follows:

- Most victims of police misconduct were fined for alleged administrative misdemeanors or expelled as illegal immigrants (or left Germany on their own, as the women in case 12), which in the view of German authorities retrospectively legitimized the police operations. As will be shown in the assessment below, most police actions that followed the above described pattern resulted from a deliberate misapplication of the law, and the sexual humiliations had no legal basis at all.
- On the other hand, German authorities failed to realize that sexual humiliations of young people by state officials need to be prevented. In theory, the German Penal Code would provide

instruments to investigate alleged police misconduct, e.g. section 123 about intrusion into private homes in contradiction to Article 17 of this Covenant, sections 240 and 241 about unfair procedures in violation of Article 14 of this Covenant, section 164 about deliberate misrepresentations of facts to give private sexual life the appearance of commercial prostitution, or section 339 about deliberate misapplication of the law. However, neither in the above cases, nor in any comparable case, did the German government accept accountability and therefore victims of such police intrusions did not obtain redress. (In the Landshut case, in the meantime police officers were replaced, as there have been other public scandals, such as unauthorized computer espionage.)

5. Method of assessment

The following assessment of these cases uses the following definitions.

- The term *sex work* has a broad meaning. However, this report focuses on the provision of explicit sexual services involving physical contacts with clients in exchange for monetary gains. Service providers are termed *sex workers* and they are addressed by the German regulations of prostitution. There is a difference in law between on the one hand sex work for commercial purposes and on the other occasional sexual experiments with “sex for money”, e.g. swingers’ lifestyle. The latter does not have a commercial substance despite the commercial appearance. In particular, if such sex conduct is not visible to the public, it lacks commercial character and is private life of consenting adults (references: endnote [M]). In theory, it should not be affected by regulations about commercial prostitution, however, this difference is ignored in practice: Most of the above reported cases in fact concern police harassment of women experimenting with a swingers’ lifestyle. Moreover, the sexual practices in the cases under consideration did not involve brutality (e.g. extreme S&M), or exhibitionistic sex in the public, nor were other aspects present that might have legitimized police interventions, such as drug use.

- By *sexual violence* this report means mainly rape and forced nudity in violation of Article 7 and Article 17 of this Covenant. This report focuses on sexual violence in the specific forms of rape and forced nudity, as the policy of the State Party with respect to this type of aggression by state actors can be considered as indicator that is specific for the protection of the civil and human rights of sex workers. Thereby, in the context of the present report, *rape* and *forced nudity* are not defined through national law, but through the relevant clauses of the Elements of Crimes under the Statute of Rome of the International Criminal Court (reference: endnote [N]). The definitions are as follows.
- *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 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.
- *Forced nudity*: 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. Thereby, for the purpose of this paper the said act is nudity, i.e. being naked or dressed in underwear or lingerie in the presence of fully dressed perpetrators.
- The key feature in both definitions is the violation of the sexual integrity of the victim and the 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: endnote [O]). Consistently with this definition, footnote 20 of the Elements of Crimes explains that “genuine consent” does not include consent obtained through deception.

6. Assessment of the empirical evidence: Violations of Article 7, Article 17

The key concerns in all cases are violations of Article 7 and Article 17 of this Covenant, either in cases 1 to 5 through the failure of the State Party to protect sex workers against maltreatment or in cases 6 to 12 through direct maltreatment by police.

Cases 1 to 5 concern the positive obligations of the State Party under Article 7 and Article 17. The author acknowledges that case 2 illustrates that in some German provinces sex workers are protected by the law, whence in principle in all German provinces there would exist legal means to protect sex workers against random sexual violence, in particular if the perpetrator is a state official. However, case 2 is the only such case known to the author. Case 4 explains the reason: If police officers do not show solidarity with their colleagues, even if they are perpetrators, they may face disciplinary consequences. In case 5, solidarity with perpetrators approaches the level of complicity. Case 1 and case 3 illustrate that therefore usually sex workers are denied the protection of the law. Thus, except for singular cases, Germany does not effectively investigate sexual violence of police officers against sex workers.

This situation is aggravated, as German authorities do not take sufficient precautions to prevent sexual violence of police officers against sex workers, although such precautions would be needed in the view of an emerging culture of impunity for police abuses (references: endnote [P]).

Cases 6 to 12 concern systematic and widespread violations of Article 7 and Article 17 of the Covenant by the State Party.

As concerns the deliberate humiliation of sex workers by police, in several of the cases 6 to 12 these humiliations reached the threshold of Article 7. The use of evidence from such investigations against the victims was unfair (Article 7 and Article 14).

- If a woman agrees to a sexual penetration with an undercover agent (a concern for case 8, but also for cases 7 and 9), whereby the agent did not reveal his true identity in order to prove prostitution, then this is rape. International criminal law requires that the undercover agent be punished for such act. Moreover, this act amounts to torture, cruel, or inhuman treatment in the meaning of Article 7 of this Covenant and the use of the outcomes of an investigation based on such acts in legal procedures against the victim is unfair and violates Article 7 together with Article 14, as follows from international case law (judicial authorities: endnote [Q]).
- If a woman agrees to other sexual acts with an undercover agent (cases 7 to 9, e.g. presenting herself in lingerie, because the agent did not reveal his true identity in order to prove prostitution), this is sexual violence, here forced nudity. The same applies, if the woman is forced to do so (as happens for raids, cases 11, 12). Forced nudity qualifies as degrading treatment. International criminal law requires that the perpetrator be punished for such acts. There is a rich body of international case law supporting this point (judicial authorities: endnote [R]).

The privacy intrusions (Article 17) in the above cases are evident, namely intrusions into private homes (cases 6 to 8) or lacking respect for the sexual integrity (cases 6 to 12) by sexual humiliations and spying out the sex life.

In none of these cases did the intrusions serve a legitimate aim.

There is a well-developed international jurisprudence, according to which sensitive police methods, in particular undercover methods, are only justified in the fight against serious crime, and only, if certain procedural guarantees are safeguarded. For, Article 17 of the Covenant prohibits unlawful privacy interferences as well as lawful, but arbitrary interferences (e.g. interferences which are unreasonable under the specific circumstances).

- Thereby, in all cases 6 to 12 the deliberate sexual humiliations could have been easily avoided and therefore they were not reasonable.
- In addition, as was indicated for case 6, the search of a private home to enforce prostitution laws was out of proportion, even if it may have had a legal basis.
- As was indicated for case 11, also the use of racial and religious profiling for such a purpose was out of proportion.
- The use of undercover methods in cases 7 to 10 was lawless or resulted from a misapplication of the law. For, in these cases undercover methods were used to find out the identity of the targeted persons. This identity was not known to police, when it started the investigations (whereby in case 10 police tested the virtue of homosexual men at random). Moreover, because the sex life of the targeted persons was not visible to the public (otherwise the identity of the persons would have been known and undercover methods would not have been needed), the sex life lacked commercial character (as explained previously), whence actually the undercover officers spied on private sex life. Even if police suspected illegal prostitution, there was no indication of a crime. In particular, there was no justification to base the undercover investigation upon section 184e Penal Code about repeated offenses against administrative regulations of prostitution: Without knowing the identity of the targeted persons, there was *a priori* no hint for a proven criminal intent of the targeted persons to willfully ignore these regulations (judicial authority: endnote [S]).

Thus, in all cases 6 to 11 the use of sensible police methods (searches of private homes, undercover investigations, racial profiling) was an abuse of police powers to enforce administrative regulations about prostitution.

- Even if police might have considered a need for upholding public order or moral, the sex life of the targeted persons could not have had any noticeable impact on public order, as it was clandestine. Thus, the application of these sensible methods was unreasonable in these cases, 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 as understood under the Covenant” (General Comment 16 of this Committee).
- This conclusion is confirmed by German scholars (references: endnote [T]), who voiced concerns about human rights violations against sex workers, as “in some contexts measures against trafficking are used as a pretext for restrictive and repressive measures, touching migration, security policing or prostitution control”. Thereby police conflates unconventional private sexual life as well as voluntary sex work with criminal conduct, such as trafficking. This gave rise to the additional concern, that such policing of sex work also may hinder the State Party in fulfilling its positive obligation to protect young people against sexual exploitation and trafficking, as due to such excessive use of police powers victims of crime distrust police (illustrated by cases 1 and 3).

7. Other impacts: Violations of Article 14, Article 3 and Article 26

As the cases 1 and 3 to 12 illustrate, German authorities treat sex workers like criminals, whereby police uses instruments that are reserved only for the fight of the most serious crimes, such as terrorism. This policy of criminalization generates a vicious circle: As

sex workers are treated like criminals, communities wish to banish them from their cities. Zoning pushes them to unsafe industrial zones, outside of their customers' homes or of their own protected business premises, making them vulnerable to criminal extortion by the pimps that run bordellos and to violence by sociopaths. As the enforcement of such administrative regulations obviously meets resistance, police in turn intensifies their application of intimidating secret police methods against sex workers, making them appear even more as outcasts to the general public.

This fact, namely that sex workers are treated like criminals, is illustrated by the failure of German authorities to realize that the use of evidence that was obtained through violations of core human rights (Article 7, Article 17) is in itself a new violation of these rights and of Article 14 of this Covenant. This happened in cases 6 to 11, where such evidence was used in legal proceedings against the victims of maltreatment. Moreover, cases 9 and 10 illustrate another violation of Article 14 by entrapment.

As a consequence of this criminalization, in Germany, sex workers still do not enjoy the protection of the law and they suffer from stigmatization, with negative implications to all aspects of their life (references: endnote [U]). For instance (sources: endnote [V]), German courts declare the contracts of sex workers to lease apartments to be void, whence sex workers face the permanent risk of becoming homeless. If the sex work of a woman becomes known to her bank, her account may be closed. This financial exclusion may make it impossible for her to obtain a decent job or to receive social security payments. Even in communities that are pro-sex workers, sex workers are denied the participation in decision-making processes that concern their own interests. Instead such communities invite social workers as proxies for sex workers to round tables and other participative instruments.

Taken together, this situation together with the assessment of the above cases illustrates a discrimination of women (Article 3 and Article 26 of this Covenant). For, sex work is a profession, which is typically chosen by women. Hence, the described police actions in general victimize women. Thus, although the regulations for prostitution are couched in neutral terms and affect only a minority of women, in their practical application they specifically impair the enjoyment of core human rights (Article 7, Article 17) by women. Therefore, by tolerating undercover operations and secret police methods against sex workers, Germany systematically discriminates against women (judicial authorities: endnote [W]). In addition, case 10 illustrates discrimination because of the sexual orientation and case 11 discrimination for reasons of race and religion. This criminalization and discrimination of sex workers extends even to their customers, as for instance handicapped persons, who ask for the assistance of sex workers to experience their sexuality, may be punished, if they live in a zone or city, where prostitution is prohibited (sources: endnote [X]). This is discrimination for the other reason of being handicapped.

8. Conclusion and recommendation

In Germany, there are serious deficiencies in implementing this Covenant, which are due to a policy of certain provinces and cities to prohibit sex work or restrict it to small and dangerous enclaves. As a result, police builds up more pressure in enforcing the administrative regulations about prostitution and treats sex workers like criminals. Therefore sensible police methods are abused and very often such police operations cause privacy violations (Article 17) and even sexual humiliations reaching the threshold of Article 7. In addition, this criminalization leads to stigmatization and discriminations in all aspects of life (Article 3, Article 26).

In order to overcome this situation, Germany needs to break the vicious circle that is caused by the intolerance against sex work at the local level. The author therefore recommends that Germany uses the human rights based approach (it is applied e.g. by FAO or WHO) and revises the provincial and municipal regulations of sex work accordingly. For instance, sex work that is barely visible to the public (e.g. an independent escort, or a sex worker in her own apartment) should be treated as private life. Where sex work is visible to the public, it might be regulated, but not through policing that leads to criminalization.

In addition, Germany needs to set up a mechanism to prevent sexual violence by state actors against sex workers, and ensure that such violence is effectively investigated, based e.g. on the recommendations of the Istanbul Protocol.

signed:

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Endnotes (references and comments)

[A] Incomplete list of potentially relevant links: Aidshilfe: www.aidshilfe.de; BASIS: www.basis-projekt.de; BUFAS, www.bufas.net; Dona Carmen, www.donacarmen.de; Global Network of Sex Work Projects: www.nswp.org; HYDRA: www.hydra-berlin.de; Kassandra: www.kassandra-nbg.de; Kober: www.ksd-dortmund.de; Madonna: www.madonna-ev.de; Mitternachtsmission Dortmund: www.standort-dortmund.de/mitternachtsmission; Nitribitt: www.nitribitt-bremen.de; Phoenix: www.phoenix-beratung.de; TAMPEP: <http://tampep.eu>; ZEFRA: www.diakonischeswerk-frankfurt.de/zefra.

[B] This information is from a study commissioned by the Federal Minister for Family Affairs (Auswirkungen des Prostitutionsgesetzes, IV – Internationale Perspektive, Sozialwissenschaftliches Frauenforschungsinstitut, Univ. Freiburg, 2005), a study commissioned by the European Community (TAMPEP, Final Report TAMPEP 8 / European Network for HIV/STI Prevention and Health Promotion among Migrant Sex Workers, October 2009) and the following scholarly publications: *Harcourt/Donovan*, Sexually Transmitted Infections, 81/2005, pp 201 ff; *Vandepitte et al*, Sexually Transmitted Infections, 82/2006, Suppl 3, pp 18 ff. To check consistency: About 50% of 82 Million Germans are female and about 50% of them are in the reproductive age, i.e. 20.5 Million women. About 90% of the 400,000 sex workers are women, i.e. 360,000 or 1.8% of 20.5 Million.

[C] See, for instance, UNAIDS: Guidance Note on HIV and Sex Work. Joint United Nations Program on HIV/AIDS, Geneva, 2009.

[D] European Court of Justice, *Jany et al v Justitie*, C-268/99 of 20.11.2001

[E] Council of Europe, Parliamentary Assembly, document 11352 of 09.07.2007

[F] The information of this paragraph is based on the following research: *Goedelt*, Vergewaltigung und sexuelle Nötigung, Univ. Göttingen, 2010; *Leopold/Steffan/Pant*, Evaluierung unterstützender Maßnahmen beim Ausstieg aus der Prostitution, Berlin, 1997; *Schröttle/Müller*, Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland, Univ. Bielefeld, 2004; *Zumbeck*, Die

Prävalenz traumatischer Erfahrungen, Posttraumatischer Belastungsstörungen und Dissoziation bei Prostituierten, Hamburg, 2001.

[G] The source of the attempted murder case is a personal communication to the author. A report of the Hannover case is in Hannoversche Allgemeine of 09.03.2012, of the Dresden case in TAZ of 28.04.2009, of the Würzburg case in Main Post of 23.07.2010, and of the Villingen case in Schwarzwälder Bote and dpa of 26.07.2010.

[H] In Germany, there are legal barriers for this vulnerable group to access health services (*Scott*, Electronic Journal Sociology, 2004). These barriers have been shown to be effective, as they significantly affect the health status of immigrants in the negative (*Castaneda*, Social Science Medicine 68/2009, pp 1551 ff). Moreover, working conditions of sex workers, such as stigmatization and fear of police harassment, are known to have a significant impact on their mental health (*Rössler et al*, Acta Psychiatrica Scandinavica, 122/2010, pp 143 ff). These observations confirm the negative implications of the factual criminalization of sex work, as it is also known in the international context (quotation from United Nations document A/HRC/14/20 of 27.04.2010): “Additionally, the distinction between sex work and trafficking is considered, in particular with respect to legislation and interventions that, by failing to distinguish between these groups, are increasingly infringing sex workers’ right to health.”

[I] The officer operates in the privacy of the sex worker’s premises and therefore there is no independent surveillance of the officer. Worldwide, there is an abundance of reports of sexual assaults by the police officers in that situation (e.g. *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 systematically apply or tolerate aggressive practices (*Carlsmith/Sood*, J. Experimental Social Psychology 45/2009, pp 191 ff; *MacLeod*, Internat. J. Law & Psychiatry, 18/1995, pp 239 ff).

[J] The sources are in the Landshut case confidential information from the author’s website, in the Erding case Süddeutsche Zeitung of 29.07.2010, in the first Munich case tz-online of 21.05.2010, in the second Munich case Abendzeitung of 22.04.2010, in the third Munich case Abendzeitung of 24.01.2010, in the Cologne raid Rundschau-Online of 26.03.2010, and in the Fellbach raid Stuttgarter Nachrichten of 27.07.2009.

[K] European Court of Human Rights, *Buck v Germany* of 28.04.2005, § 47, § 51

[L] In particular, racial and religious profiling has caused systematic discriminations against certain racial and religious groups, such as Arabs and Muslims (United Nations document A/HRC/14/43/Add.2 of 22.02.2010, § 31). Therefore, profiling requires striking a fair balance between the human rights of individuals and the interests of the police (Council of Europe, Committee of Ministers, Recommendation CM/Rec/2010/13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling of 23.11.2010).

[M] Where sexual behavior is not visible in the public, it is private sex life (*Wildhaber/Breitenmoser*, Internationaler Kommentar zur Europäischen Menschenrechtskonvention: Kommentierung des Artikels 8, Cologne 1992, margin no 114). In the context of section 184e German Penal Code, also the Administrative Court of Bavaria (24CS07.3011 and 24CS07.3012 of 18.12.2007) emphasized the criterion of public visibility, which distinguishes commercial sex work from private life. The need for such a differentiation of private vs commercial sex life arises from the decisions of the European Commission of Human Rights (*F v Switzerland* of 10.03.1988, appl. no. 11680/85; *Reiss v Austria* of 06.09.1995). These decisions have been criticized by human rights scholars (*Fellmeth*, William & Mary Law Rev. 50/2008; *Wintemute*, Sexual Orientation and Human Rights, Oxford, 1995, p 100), considering that even information about commercial income is protected under private life (European Commission of Human Rights, *X v Belgium* of 07.12.1982, appl. no. 9804/82).

[N] Document ICC-ASP/1/3 of 09.09.2002 at the International Criminal Court, The Hague

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

[P] As to the culture of impunity, the author refers to Amnesty International, Täter unbekannt, Berlin, 2010. Already in 2008, the Atlas of Torture (country profile of Germany, 01.10.2008, Ludwig Boltzmann Institute of Human Rights, Vienna) pointed out that in Germany “torture and ill-treatment by the authorities remains a current topic [...] also daily conduct of police officers.” This continuing problem was also confirmed by the European Court of Human Rights: *Gaefgen v Germany* of 01.06.2010; *Hellwig v Germany* of 07.07.2011).

[Q] A case of undercover agents, who practiced sex to prove prostitution, was considered by the Committee against Torture at its 41st session about Hong Kong; the expertise by *Simon Young* pointed out that such police behavior was rape (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 the assessment of the 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. That rape and similar acts of sexual violence are torture or cruel or inhuman treatment was confirmed by the Committee against Torture (*VL v Switzerland* of 22.01.2007, danger of rape by policemen in case of extradition), the Inter-American Court of Human Rights (*Mejia v Peru* of 01.03.1996, rape by military police in her home), and the European Court of Human Rights (*N v Sweden* of 20.07.2010, danger of rape by the husband in the case of extradition).

[R] As to the jurisprudence of the European Court of Human Rights, the author refers to *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. The case *Hellwig v Germany* of 07.07.2011 concerns degrading nudity under responsibility of this State Party. If victims have in addition reasons to 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 an act of forced nudity may qualify as inhuman treatment.

[S] This condition would be required to apply section 184e Penal Code, as is stated in a judgment of Federal Court of Justice, BGH 3StR87/11 of 05.07.2011.

[T] References: *Follmar-Otto/Rabe*, Menschenhandel in Deutschland, Deutsches Institut für Menschenrechte, Berlin; 2009, p 14; German Center of Gender Research: Der involvierte Blick: Zwangsprostitution und ihre Repräsentation, Humboldt University Berlin, Bulletin 35/2010; *Tommaso et al*, European J Political Economy, 25/2009, pp 143 ff. According to the latter source, only 26% of victims of sexual exploitation and trafficking, who were freed, were freed by law enforcement.

[U] This observation is confirmed by the United Nations document CEDAW/C/DEU/CO/6 of 06.02.2009 at § 49. In Canada, a similar vicious circle has been identified to increase the risk of harm to sex workers (Superior Court of Ontario, *Bedford v Canada*, 2010 ONSC 4264 of 28.09.2010, § 504).

[V] Sources are personal communications to the author, judgment of Amtsgericht Düsseldorf, case no 52C15529/10, and European Commission, consultation document MARKT/H3/MI D of 06.02.2009.

[W] This conclusion is based on the definition of the discrimination of women by the European Court of Justice (case of *De Weerd v Bestuur van de Bedrijfsvereniging voor de Gezondheid*, C343/92 of 24.02.1994). Specifically concerning the regulation of prostitution, the European Court of Human Rights considered that it may cause discrimination (*Zarb Adami v Malta* of 20.06.2006, § 87), and in an interpretation of 06.11.2009 the Supreme Court of Taiwan confirmed that criminalization of sex work is indeed a discrimination of women.

[X] This discrimination against handicapped persons has been discussed in Munich for several years, but not resolved by the authorities of Munich, seeking solutions, and those of Bavaria that don't (source: *Abendzeitung* of 7 May 2007, *tz-online* of 7 July 2010, *Süddeutsche Zeitung* of 14 July 2010). In other cities of Bavaria, there is not even a political discussion about this issue.