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Submission from Sex-Worker Forum of Vienna  
to the United Nations Committee on Economic, Social and Cultural  
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Eingabe von Sexworker Forum Wien  
an den Ausschuss der Vereinten Nationen für wirtschaftliche, soziale  
und kulturelle Rechte



# Shadow Report UN'CESCR Germany 2010

## EINGABE VOM SEXWORKER-FORUM AN UN'CESCR

Gemäß dem „Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte“ berichten die Staaten regelmäßig dem Ausschuss über wirtschaftliche, soziale und kulturelle Rechte über die Umsetzung. Deutschland hat 2010 einen Bericht abgeliefert, über den eine Arbeitsgruppe des Ausschusses im November 2010 beraten wird um abzuklären, zu welchen Punkten die deutsche Regierung nähere Auskünfte erteilen soll. Die Vereinten Nationen haben NGOs eingeladen, eigene Stellungnahmen (Schattenberichte) dazu abzugeben.

Das Sexworker-Forum ([www.sexworker.at](http://www.sexworker.at)) hat eine Stellungnahme verfasst. Das Forum ist ein eingetragener internationaler Verein mit Sitz in Wien, der sich für die Achtung der Menschenrechte der Frauen, Männer und transsexuellen Personen im Umfeld der freiwilligen und selbstbestimmten Sexarbeit einsetzt.

In diesem Schattenbericht wird kritisiert, dass Sexarbeiter zwar Steuern und Sozialabgaben leisten müssen, dass sie aber durch Stigmatisierung und faktische Kriminalisierung im Genuss der Menschenrechte benachteiligt werden, insbesondere Artikel 6, 7, 9 und 12 des Pakts. Das Prostitutionsgesetz 2002 hatte die Intention, die Arbeitsbedingungen in der Sexarbeit zu verbessern, insbesondere durch die Abschaffung der Sittenwidrigkeit. Von einzelnen Ländern, insbesondere von Bayern, wurde diese Intention hintertrieben.

1) Durch Sperrbezirksverordnungen, wie in München, wurde Sexarbeit auf Industriegebiete verbannt, wo Sexarbeiter kriminellen Angriffen ungeschützt ausgesetzt sind. Sexarbeiter werden bestraft, wenn sie z.B. in ihren Wohnungen oder den Wohnungen ihrer Kunden tätig sind, obwohl dort die Arbeitsbedingungen sicherer wären. Als negative Folge für Dritte schränken diese Verordnungen das Sexuelleben von

Behinderten ein, die dadurch keinen Zugang zu Sexualassistenten haben.

2) Um die Sperrgebietsverordnungen durchzusetzen, missbrauchen die Polizeibehörden der Länder die Befugnisse zur Bekämpfung des Menschenhandels. Gegen Sexarbeiter werden systematisch verdeckte Ermittlungen eingesetzt, wobei sogar Sexarbeiter von auswärts nach München gelockt wurden. Die Begleitumstände dieser Ermittlungen sind vielfach erniedrigend, insbesondere durch erzwungene Nacktheit von Frauen vor männlichen Polizeibeamten. Es gibt weder *ex post* wirksame Beschwerdemöglichkeiten für die Frauen, auch nicht gegen ungerechtfertigte Hausdurchsuchungen (ein Fall in Landshut), noch *ex ante* irgendwelche Vorkehrungen, um sie vor Traumatisierung durch solche Polizeimaßnahmen oder sexuelle Übergriffe durch Polizeibeamte zu schützen. Auch Frauen mit aktivem Sexuelleben (z.B. Swinger) erleiden dadurch regelmäßig ungerechtfertigte Eingriffe in ihr Privatleben.

3) Ausländische Sexarbeiter leiden zusätzlich unter rassistischen Vorurteilen bei den Polizeibehörden. Bei einer Aktion im Jahr 2009 gegen Sexarbeiter, vorwiegend aus Rumänien, und ihre Kunden in Fellbach, Heidelberg, Schönefeld und Wuppertal wurden 440 Frauen und Männer durch erzwungene Nacktheit erniedrigt und somit in ihrer Menschenwürde verletzt. In Köln richteten sich Schleierfahndungen regelmäßig und gezielt gegen Sexarbeiter aus Afrika. Statt Menschenhandel aufzuklären, können solche Maßnahmen die Opfer von Menschenhandel in Furcht vor Kriminalisierung versetzen und sie davon abhalten, sich an die Polizei zu wenden.

4) Diese Politik der Länder führt nachweisbar zu Gesundheitsfolgen für Sexarbeiter. Insbesondere ausländische Sexarbeiter wagen aus Angst vor den Behörden nicht einmal, die öffentlichen Gesundheitsdienste in Anspruch zu nehmen: Die Politik der Länder stellt eine faktische Zugangshürde dar, die zu einem schlechteren Gesundheitszustand führt.

5) Diese Politik der Länder verstärkt die Stigmatisierung der Sexarbeit. In bezug auf die Rechte aus dem Pakt ergeben sich dadurch Benachteiligungen für Sexarbeiter: Banken können Sexarbeitern die Kontoführung verweigern und so ihren Ausschluss aus dem sozialen Leben einleiten. Rechtliche Sonderregelungen, wie das „Düsseldorfer Verfahren“, unterstellen Sexarbeitern die Absicht zu Straftaten und Steuerhinterziehung. Sexarbeiter haben auch nur einen eingeschränkten Zugang zum Recht: Opfer von sexueller Ausbeutung, wie eine als Kind im Bordell missbrauchte Frau aus Dresden, oder Polizeibeamte, die Opfern helfen – wie in Würzburg, riskieren Bestrafung, wenn sie gegen die Peiniger vor Gericht aussagen, weil vor Gerichten Sexarbeiter von vorne herein als unglaubwürdig gelten.

Das Sexworker-Forum ist auch besorgt über Vorhaben der Länder, Sexarbeiter zu registrieren und eine Untersuchungspflicht einzuführen, weil solche Maßnahmen internationalen Richtlinien widersprechen und die Menschenwürde der Sexarbeiter beeinträchtigen können.

Das Sexworker-Forum schlägt deshalb vor, dass der Ausschuss den Umgang der deutschen Regierung mit Sexarbeit hinterfragen möge: Welche Maßnahmen plant die Regierung, um die sozialen Rechte und Arbeitsbedingungen der Sexarbeiter zu verbessern und sie besser vor kriminellen Übergriffen zu schützen? Wie wird die Regierung die Achtung der Rechte von Sexarbeitern im Umgang mit Behörden fördern und insbesondere den behördlichen Missbrauch von Maßnahmen gegen Menschenhandel eindämmen?

Submission from  
**Sex-Worker Forum of Vienna**  
to the

**UNITED NATIONS**  
**COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL**  
**RIGHTS**

pertaining to  
**Germany's 5th periodic report E/C.12/DEU/5**  
at the 45th pre-sessionial working group (22 November to 26 November,  
2010)

Vienna, 1. September 2010

## SUBMISSION OF SEX-WORKER FORUM TO UN'CESCR

### 1. Executive Abstract

The author, Sex-Worker Forum, is an incorporated non-governmental not-for-profit organization, chartered at Vienna, Austria, and working to protect and promote the human rights of voluntary sex workers in Central Europe, with a particular focus on the German speaking countries and regions.

This report concerns the situation in Germany of women, man and transgender persons in voluntary sex work. Although the Prostitution Act, in force since 1 January 2002, accepts the protection of sex workers' rights under Articles 6 and 7 of this Covenant, the policy of the Länder (provincial governments) undermines this protection (see section 2).

- At the federal level, the Prostitution Act 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 laws replace formerly mandatory health checks by anonymous and voluntary public health services. Criminal law severely penalizes activities relating to the "exploitation of prostitution", such as pimping and trafficking in persons.
- At the provincial level, the Länder restricted the Prostitution Act by defining narrow conditions for sex work: 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".
- In general, sex work is voluntary, but about 0.2% of sex workers may be victims of trafficking. (In 2006, German Federal Police

alleged 775 victims amongst the estimated total of 400,000 sex workers.) By misusing the instruments against trafficking to enforce prohibitions against sex work, the Länder *de facto* criminalize voluntary sex work (section 3) and discredit the fight against trafficking. *A fortiori*, this policy of the Länder criminalizes victims trafficked into prostitution.

The website [www.sexworker.at](http://www.sexworker.at) contains supporting material about concrete cases, where sex workers describe their situation to the public (including a press review with details of the newspaper articles referred to below). The website [www.donacarmen.de](http://www.donacarmen.de) collects specific information about sex work in Germany. The website of the TAMPEP network, [tampep.eu](http://tampep.eu), a pan-European network for the production of resources for sex workers, has material for a comparison of the situation of sex workers across Europe.

This communication uses the following abbreviations:

**CAT:** International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

**CCPR:** International Covenant on Civil and Political Rights

**CEDAW:** International Convention on the Elimination of All Forms of Discrimination against Women

**CERD:** International Convention on the Elimination of All Forms of Racial Discrimination

**CRC:** International Convention on the Rights of the Child

**CRPD:** International Convention on the Rights of Persons with Disabilities

**ECtHR:** European Court of Human Rights

**ICESCR:** International Covenant on Economic, Social and Cultural Rights

## 2. General Situation of Sex workers

Since the Prostitution Act of 1 January 2002, the State Party accepts voluntary sex work as labor, i.e. as “decent work” in the meaning of Article 6 ICESCR. Also the International Labor Organization recognizes voluntary sex work as a form of labor (*Lim*, The Sex Sector: the economic and social bases of prostitution in SE Asia, ILO 1998), as does the Committee on the Elimination of all Forms of Discrimination Against Women, urging Germany to protect the labor and social rights of sex workers (CEDAW/C/DEU/2-3 of 4 February 2000). The European Court of Justice (*Jany et al v Justitie*, C-268/99 of 20 November 2001), made it clear that sex work is labor in the full juridical sense, whence citizens of other member states of the European Union, who are able to support themselves as self-employed sex workers, must be given residents’ permits.

However, there arise concerns under Articles 6 and 7 ICESCR.

- Although sex workers are required to pay taxes and social security contributions, they still do not enjoy the full protection of labor and social security law. This was also observed by the recent report of the Committee on the Elimination of all forms of Discrimination Against Women (para 49 of CEDAW/C/DEU/CO/6 of 6 February 2009): “The Committee takes note of the results of the evaluation on the effects of the 2002 Prostitution Act and expresses concern that the Act has only succeeded in realizing the intended goals to a very limited extent. In particular, the Committee regrets that the Act has not been able to improve the social security of prostitutes nor the working conditions in terms of health and hygiene, nor to reduce prostitution-related crime.”
- In particular, the state party failed to effectively implement this Committee’s recommendation (E/C.12/1/ADD.68, para 36 of 31 August 2001) to “take immediate necessary measures to continue to address high level of unemployment, especially among youth and in particular in Länder faced with higher levels of unemployment” and

still “social assistance provided to poor and socially excluded [...] is not commensurate with adequate standard of living” (para 27). Consequently, in economic crisis it is young women, who enter sex work due to their unemployment. They do not know the complexities of prostitution-control-legislation of the Länder and risk criminalization (cases in section 3).

- At the level of the Länder, in particular in Bavaria, and at the level of the local government, in particular in Munich, the positive effects of the Prostitution Act are on purpose limited through building codes and zoning, preventing unobtrusive sex work and even certain private sexual activities within “forbidden zones” (cases in section 3 below). For example, zoning of Munich forces sex workers to offer their services at unsafe industrial zones, outside of their or their customers’ homes or of protected business premises, making them vulnerable to criminal attacks – and criminalizing them, if they seek safer working conditions. For sex workers, such regulations led to excessive intrusions into their rights under Articles 6 and 7 ICESCR (cases described in section 3). Thus, as concerns the positive obligations under Articles 6 and 7 ICESCR (General Comment 18 of this Committee), there are still deficiencies in fulfilling the right of sex workers to just and favorable conditions of work, in particular to safe working conditions.
- The author acknowledges that regulations of sex work are different outside of Bavaria. In Berlin, for example, court orders permit sex work in certain private apartments (“Salon Prestige” case; source: Berliner Morgenpost of 2 June 2009). The fact that there are different provincial regulations in similar situations corroborates the author’s observation that regulations, which amount to a *de facto* criminalization (see section 3 for e.g. Bavaria), are apparently not intended to serve public interests. Instead, they penalize sexual behavior deviating from traditional gender roles. This affects also men and women not in sex work (section 3).

This failure of the State Party may also affect the right of sex workers “to the enjoyment of the highest attainable standard of physical and mental health” (Article 12 ICESCR).

- That a policy of *de facto* criminalization may have human rights implications, follows from a more general observation by *Anand Grover*, Special Rapporteur on the right to health (A/HRC/14/20 of 27 April 2010), who reports that “the failure of legal recognition of the sex work sector results in infringements of the right to health, through the failure to provide safe working conditions, and a lack of recourse to legal remedies for occupational health issues. 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.” Moreover, from recent data there “is no doubt that the work conditions of sex work have a significant impact on the mental health of the involved women” (*Rössler et al.*, *Acta Psychiatrica Scandinavica*, 122/2010, pp 143 ff). “Even if prostitution is not illegal, sex workers can be treated as criminals. Criminalization leads to violence; police harassment; increased HIV and STI risk; reduced access to services; psychological disease; drug use; poor self-esteem; loss of family and friends; work-related mortality; and restrictions on travel, employment, housing, and parenting” (*Rekart*, *Lancet* 366/2005, pp 2123 ff).
- The author is also troubled by policy papers of the Länder demanding registration and compulsory medical inspection of sex workers as an undue means to simplify the fight against trafficking. In this context, the author would like to remind to the conclusion of the Committee against Torture in its 44<sup>th</sup> session (para 22, CAT/C/AUT/CO/4-5 of 14 May 2010), that compulsory inspections may lead to a degrading treatment (Article 16 CAT, Article 7 CCPR). Moreover, a mandatory HIV testing as part of such inspections could deprive sex workers of the rights guaranteed by Article 12 ICESCR (also Articles 2 and 3 together with Article 6), as mandatory HIV

testing is incompatible with UNAIDS/WHO standards (c.f. World Health Organization, *Scaling up HIV testing and counseling in the WHO European Region as an essential component of efforts to achieve universal access to HIV prevention, treatment, care and support. Policy framework.* Copenhagen 2010). It is known for decades, “that regulatory efforts such as mandatory HIV testing and treatment for sexually-transmitted infections (STIs) and detention seem ineffective. Mandatory testing is against the principles of human rights, and furthermore, these approaches chase sex workers away, when what is needed is cooperation” (*Wolffers/vanBeelen*, *Lancet* 361/2003, p 1981). The OHCHR/UNAIDS/WHO International Guidelines on HIV/AIDS and Human Rights (2006 Consolidated Version) confirm this: “Public health, criminal and anti-discrimination legislation should prohibit mandatory HIV-testing of targeted groups, including vulnerable groups. (Footnote 18: In addition to vulnerable groups, specific employment groups should also be protected from such targeted testing, e.g. truck drivers, sailors, hospitality/tourist industry workers and the military.)”

Moreover, there emerge serious concerns that the ongoing stigmatization of sex workers may narrow their capabilities (*Sen*, *Commodities and Capabilities*, Amsterdam 1985) to the point of leaving them no choice other than sex work to secure their livelihood.

- With regard to Article 9 ICESCR, sex workers are vulnerable to financial exclusion, i.e. the risk of exclusion from mainstream financial services. According to the European Commission (consultation document: “Financial Inclusion: Ensuring Access to Basic Bank Account”, MARKT/H3/MI D of 6 February 2009), financial exclusion “is also part of a much wider social exclusion as it affects the overall quality of life of individuals – their patterns of consumption, participation in economic activities or access to social welfare and distribution of incomes and wealth. The widespread move from cash to electronic payments makes the situation more

difficult as the inability to access a bank account makes payment of bills costly [...] More importantly, without a bank account, it is virtually impossible to access employment in most Member States as one of the pre-conditions for signing an employment contract for the future employee is having a bank account number.” Amongst the risk groups are people in a vulnerable position in the society, living on insufficiently low incomes, being unemployed, single parents, recipients of social assistance, or immigrants. For them, access to housing, education, health care, employment and basic financial services may become harder. It may lead to their social exclusion, barring them from the regular job market. For sex workers this problem is aggravated due to the ongoing social stigmatization of their work. Thereby, even sex workers in stable economic and social conditions with access to financial services risk the termination of a contract with their bank. There are only very few institutes, whose statutes for social reasons require them to offer minimal financial services for everyone (e.g. saving accounts without credit card access).

- There is also legal uncertainty in the field of taxation, discriminating sex workers in the enjoyment of Articles 6 and 7 ICESCR. For, some communities introduced specific regulations that they apply to sex workers only (“Düsseldorfer Verfahren”) and which, in addition to the regular tax prepayment on the basis of the past income, require a supplementary prepayment on the basis of days in sex work, independent of the actual income. This regulation places sex workers under the general suspicion of tax evasion. Even worse, authorities fail to communicate clearly that this prepayment does not dispense sex workers of the obligation to fill in the tax return forms. Failure to do so may result in fines and extra payments. Considering their precarious situation, this may push sex workers below the subsistence level. Even the classification of income from sex work is contested – causing legal costs. (Tax offices classify the income as commercial, systematically ignoring the ruling by Federal Finance Court of 23 June 1964, BStBl 1964 III S 500.)

### 3. The Impact of Measures against Trafficking on Sex work

Relating to the 4<sup>th</sup> periodic report of the State Party, this Committee observed among the principal subjects of concern (para 25 of the concluding comments, E/C.12/1/Add.68 of 31 August 2001): “The Committee is concerned that the victims of trafficking in persons, and in particular women, are doubly victimized, owing to a lack of sensitization of police, judges and public prosecutors, a lack of appropriate care for victims, and the risks and dangers awaiting them upon deportation to their home countries.”

This section concerns the State Party’s answer (section 6 of E/C.12/DEU/5) to this Committee’s comment. The authors of this report acknowledge that there have been training programs and other measures at the federal level to improve the care for victims. However, policies at the level of the Länder undermine the protection of sex workers’ human rights, in particular Articles 6 and 7 ICESCR. Due to the policies of the Länder, there is a *de facto* criminalization of voluntary sex work (see below), which harms victims of trafficking, too.

- The political discourse in the Länder conflates voluntary sex work with trafficking (*Cusick et al*, Critical Social Policy 29/2009, pp 703 ff); this observation is confirmed by Center of Gender Research (Humboldt University Berlin, Bulletin 35/2010: Der involvierte Blick. Zwangsprostitution und ihre Repräsentation). The Länder ignore the fact that there are women, who enjoy the thrill of the red-light experience, who make conscious and rational decisions to go into voluntary sex work, and who also migrate for this purpose (see *Agustín*, Sex at the Margins: Migration, Labor Markets and the Rescue Industry, London 2007).
- Accordingly, at the level of the Länder, “in some contexts measures against trafficking are used as a pretext for restrictive and repressive measures, touching migration, security policing or prostitution control” (p 14 in *Follmar-Otto/Rabe*, Menschenhandel in Deutschland, German Institute of Human Rights, Berlin 2009). Thereby, women in sex work and their customers became targets of

police operations that violated their dignity (see below). This misapplication of anti-trafficking measures is corroborated by the fact that most police operations were only effective to discover petty offences by sex workers, but at the same time failed to discover traffickers or victims of sexual exploitation.

- Such a policy may lead to a *de facto* criminalization of voluntary sex work, as it promotes myths that equate voluntary sex work with oppression (*Weitzer*, Sexual Research & Social Policy 7/2010, 15-29). Such a criminalization is not compatible with accepted European humanitarian standards (see Parliamentary Assembly, Council of Europe, doc. 11352 of 9 July 2007): “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.” Moreover, a policy of criminalization of sex work may force victims of trafficking to go underground and forfeit their legal rights (e.g. right to a fair compensation by Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings).
- In particular, regulations of Bavaria apparently intend to enforce moral values that a political party embodies, which rules Bavaria without interruptions since 1957. As the Committee against Torture observed (General Comment, CAT/C/GC/2 of 24 January 2008, para 22), and as cases of undercover investigations referred to below illustrate, policies to enforce conformity with dominant values may put deviants at risk to suffer from police harassment, privacy violations, and even degrading or inhuman treatment.
- Thus, criminalization of sex work neglects the right to sexual self-determination (Article 17 CCPR) in two aspects. This right enshrines both the right to engage in wanted sexuality and the right to be free and protected from unwanted sexuality (*Graupner/Tahmindjis*, Sexuality and Human Rights, New York 2005). Wanted sexuality is restricted through zoning and policing, and at the same time

undercover-policing weakens protection against unwanted sexuality, against sexual abuse and sexual violence, as there is neither sufficient awareness amongst officers nor effective protection against perpetrators, in particular those from police.

**Concerns arise about human rights violations on the pretext of fighting trafficking** (*Follmar-Otto/Rabe*, loc. cit. p 14, and the cases below). In particular, since several years, police applied undercover methods for prostitution control. Such methods carry a high risk of privacy intrusions and other human rights violations, which the State Party does not properly address. There are also indications of ethnic/racial and/or religious profiling (Voodoo cult) as a “police method” to fight trafficking.

- Racial profiling as a police method was already introduced 1994 (“Schleierfahndung”) in Bavaria and is now common throughout the territory of the State Party (*Kant*, CILIP 65/2000). The Special Rapporteur on racism reported (A/HRC/14/43/Add.2 of 22 February 2010, para 31), that “with regard to racial profiling, minority associations and non-governmental organizations expressed concern regarding the widespread perception that in the aftermath of 11 September 2001, the police engaged in racial and religious profiling against certain groups, including people of African descent, Arabs and Muslims”. In the context of sex work, Voodoo-motivated searches of Cologne police were reported already in 2008 (source: Suedwest-Aktiv of 24 November 2008). In 2010 Cologne police searched a legal bordello for women of African descent “to obtain background information about Voodoo” and arrested two women for illegal immigration (source: Rundschau-Online of 26 March 2010). In 2010, also Federal Police (BKA) targeted women of West-African descent as a method to fight trafficking (source: Spiegel-Online of 3 February 2010). In the context of sex work, such racial profiling contravenes Article 5 CERD and Article 2 ICESCR with respect to Articles 6, 7 ICESCR, as the very method presumes that racial (or religious) minorities are expected to commit more crimes. This

amounts to racial discrimination that in addition may reinforce xenophobia in the general population.

- A serious incident was a police operation in 2009 against four so-called flat-rate clubs at Fellbach near Stuttgart, at Heidelberg, at Schönefeld near Berlin, and at Wuppertal (source: Stuttgarter Nachrichten of 27 July 2009). This operation was prepared by a political stir about alleged trafficking. However, only one woman was identified (but not as a result of this operation), who might have been trafficked, whereas prosecution later withdrew these allegations during court proceedings (source: Stuttgarter Nachrichten of 22 and 23 July 2010). This operation, while completely ineffective in terms of fighting trafficking, nevertheless subjected 270 men and 170 women at these locations to humiliating circumstances during the investigation. The level of humiliation of these 440 persons by police reached the threshold of degrading treatment (Article 16 CAT, Article 7 CCPR), as for several hours, during which they were deprived of their liberty (see also Articles 9 and 17 CCPR and ECtHR in the case of *Gillan v United Kingdom* of 12 January 2010), they were forced to remain nude in the presence of about 700 police officers, many of the opposite sex (for forced nudity c.f. *Amann*, American J. International Law 93/1999, 195-199). The circumstances of this incident resemble the case of *Miguel-Castro-Prison v Peru* of 25 November 2006 at the Inter-American Court of Human Rights. The classification of such police conduct as a degrading treatment is based on the jurisprudence by ECtHR (*mutatis mutandis* e.g. *Aydin v Turkey* of 25 November 1997; *Iwanczuk v Poland* of 15 November 2001; *Valasinas v Lituvia* of 15 July 2002; *Lorse et al v The Netherlands* of 4 February 2003; *Wieser v Austria* of 22 February 2007; *Musayeva v Russia* of 3 July 2008; *Witorko v Poland* of 31 March 2009).
- Undercover operations to discover petty offences are a less visible, albeit persistent violation of the dignity of sex workers. Only few of them are made public, e.g. the following ones in the first half of 2010 concerning the city of Munich: On 19 Mai 2010 Munich

undercover officers discovered two women, who practiced oral sex without a condom (there are no reports, how this could be verified without privacy violations), and three women, who offered sexual services in their private apartments within the forbidden zone (source: tz-online of 21 Mai). In April 2010, undercover officers of Munich police lured three sex workers into hotels within the forbidden zone, with the intention to prosecute them for illegal prostitution (source: Abendzeitung of 22 April 2010). With respect to out-of-town sex workers, who barely know the zones, such police conduct bears a resemblance to trafficking. In January 2010, Munich police sent undercover officers to meeting places of homosexuals within the forbidden zone and prosecuted 17 men, who agreed to sex for money (source: Abendzeitung of 24 January 2010). Similar incidents were reported from other cities. In all of these undercover operations, police resorted to trickery and deceit for the sake of proving prostitution within the forbidden zone or proving certain sexual practices without a condom. Officers disguised themselves as customers, approached someone they suspected of prostitution, and solicited their services, until this person was deceived into agreeing to perform sex for money. Thereby, police resorted to entrapment (Article 14 CCPR), to an intrusion into private lives and private homes (Article 17 CCPR), and to the use of discriminatory tactics (Article 26 CCPR) on the basis of race (see above) and/or sexual orientation.

- The author wants to emphasize that sex workers shouldn't be systematically excluded from the privacy protection by Article 17 CCPR (*Fellmeth*, William & Mary Law Rev 50/2008, *Wintemute*, Sexual Orientation and Human Rights, Oxford 1995, p 100). As the term home in Article 17 CCPR "is to be understood to indicate the place where a person resides or carries out his usual occupation" (Human Rights Committee, General Comment 16 of 23 March 1988, para 5), also the working place of sex workers deserves some protection by the law.

There are additional aggravating factors of current policies of the Länder to criminalize sex work:

- A serious concern about undercover operations arises, as in several cases women were duped by male undercover officers to anticipate a sex date and greet the officers naked or in lingerie in their homes. Police did not take precaution against exposing these women to such degrading nudity (Article 16 CAT, Article 7 CCPR, see above jurisprudence by ECtHR). As such police actions specifically target – and discriminate against – women in sex work, there arise also concerns under Article 3 together with Articles 6 and 7 ICESCR.
- In order to prove the petty offense of prostitution within the forbidden zone, police also searched private homes of suspected prostitutes, in some cases with traumatizing effects on the women. Details of a recent case from Landshut district, Bavaria, are in the confidential area of the author’s website. As to searches of private homes, ECtHR noted (*Buck v Germany* of 28 April 2005, paras 47, 51) that in the context of petty crimes such searches are disproportional intrusions into private homes and in addition, in small communities (as for the Landshut case) such searches are likely to have adverse effects on personal reputation.
- There is a spill-over-effect to women in general, also to those living in smaller villages. Even women who do not engage professionally in sex work face the risk of police intrusions, as an active sex-life suffices to let police suspect illegal prostitution. This is illustrated by a recent case of two women from district Erding, Bavaria (source: *Süddeutsche Zeitung* of 29 July 2010). Undercover police actively seeks women with a clandestine swingers lifestyle, who occasionally agree to sex for money (for this lifestyle see *LeMonchek*, *Loose Women, Lecherous Men: A Feminist Philosophy of Sex*, London, 1997). In these cases, the sexual behavior that undercover methods exposed was not visible in the public – it was private sexual life (*Wildhaber/Breitenmoser*, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention: Kommentierung des Artikels 8*, Cologne 1992, margin no 114). This

situation is also a concern under Article 1 CEDAW, as any factual interference into a human right that specifically impairs the enjoyment of this right by women, even if it is couched in neutral terms and affects only a minority of women, is a “discrimination against women”.

- There is another spill-over-effect to persons with disabilities, as contrary to Article 4 CRPD, and also contrary to Article 15 ICESCR about the right to full participation in cultural and recreational life (see General Comment 5 of this Committee of 9 December 1994, paras 37 ff), this policy of the Länder prevents immobile persons, who live in the forbidden zone, from developing private sexual life with the assistance of sex workers. This obstacle is both a legal one (both customers and providers of pay-sex in the forbidden zone are punished) and a practical one (a sexual assistant, who knows the police practice, will deny service to a handicapped person living in the forbidden zone, as this request could be entrapment by police). 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, although Rule 9 of the United Nations’ Standard Rules of 1993 on the Equalization of Opportunities for Persons with Disabilities does not allow denying persons with disabilities the opportunity to experience their sexuality.
- Women, who migrated for job opportunities in sex work, are particularly vulnerable to such policies of criminalizing sex work. For, these women are often undocumented and fear expulsion. “By ‘illegalizing’ undocumented migrants, criminalizing assistance to them and requiring their ‘denunciation’ by all governmental and public institutions, the German government has created a web of laws that effectively exclude undocumented migrants from claiming their human rights, including their right to health” (*Scott*, *Electronic*

Journal Sociology, 2004). A recent study in a Berlin clinic has shown, that the health status of this group is affected in the negative by such legal barriers to access health services (*Castaneda*, Social Science Medicine 68/2009, p 1551), which contravenes Article 12 ICESCR.

A related point of serious concern is the lack of *ex officio* investigations of the police conduct during undercover operations. Moreover, the law enforcement system often perceives sex workers (and therefore also victims of trafficking into prostitution) as *pariahs*, whence there are shortcomings to protect them against sexual exploitation and sexual violence, in particular, where perpetrators are aligned to police officers.

- Police does not take precaution to protect persons affected by undercover methods against sexual assaults by the police officers, even though literature reports about such assaults in similar situations (e.g. *Raymond*, Violence Against Women 10/2004, 1156-1186). According to independent research about international police conduct, in some countries up to 60% of sex workers experienced sexual assaults by undercover officers (*Watts/Zimmermann*, Lancet, 359/2002, pp 1232 ff). Thus, precautions would have been necessary. This need is even more urgent, as literature warns about high rates of mental illness of undercover officers (*MacLeod*, Internat. J. Law & Psychiatry, 18/1995, 239-247). Moreover, literature reports about police officers, who systematically apply or tolerate aggressive practices (*Carlsmith/Sood*, J. Experimental Social Psychology 45/2009, 191-196). Potential victims of such assaults by police do not enjoy the protection of the law. For, if they complain about sexual violence, their complaint will not succeed; instead they may face defamation charges, as courts assess policemen as more credible (see below: Dresden, Villingen and Wurzburg cases).
- As a case of child prostitution in Dresden illustrates, in addition to stigmatization for prostitution, which in that case contravenes Article 39 CRC, victims of sexual exploitation may face defamation charges, if they later identify high-ranking perpetrators (“Jasmin-

case”; source: TAZ of 28 April 2009). There arise additional concerns under free speech protection, Article 19 CCPR (ECtHR, *Bezymyanny v Russia* of 8 April 2010).

- Remedies against sexual assaults by police officers turn out to be ineffective. For example, an officer of Wurzburg police, who in 2006 investigated an alleged sexual assault by another police officer, was reprimanded (source: Main Post of 23 July 2010).
- The policy of criminalizing voluntary sex work may weaken law enforcement efforts to fight sexual exploitation, as police may mistake perpetrators for partners in controlling illegal prostitution. This is illustrated by the recent Villingen-bordello case: Of seven atrocious pimps, two face lenient prison terms, three are on probation, and two key persons could escape, as police warned them (source: Schwarzwälder Bote and dpa of 26 July 2010). Thus, police may confuse victims with perpetrators – persecuting victims for prostitution-related petty crimes and at the same time supporting perpetrators to abscond.
- Federal police concedes weaknesses of law enforcement to fight trafficking (source: Deutsche Welle of 26 November 2009). In the view of the author, this ineffectiveness is a systematic drawback, as it is lacking awareness of police officers, if according to international data only 26% of victims freed are freed by law enforcement, while at least 95% of victims are in sexual contact with one or more police officers, considering that 9% of in average 35 customers per week of victimized women are police officers; the data are from the largest global database on victims of trafficking (*Tommaso et al*, European J Political Economy 25/2009, pp 143 ff). Thus, due to lacking awareness and due to complicity in exploitation for their own consumption, law enforcement does not recognize victims of trafficking and instead criminalizes them for illegal prostitution, whence victims are unable to seek help from police, not even from the officers, who are their customers.

There is an emerging culture of impunity for police abuses (Amnesty International report “Täter unbekannt”, Berlin, 2010). This observation is in line with the alarming degree of impunity that accompanies police abuses worldwide, as pointed out in a joint statement of 26 June 2010 of four United Nations’ mechanisms, namely Committee against Torture, Subcommittee on the Prevention of Torture, Special Rapporteur on Torture, and Fund for Victims of Torture.

- Even police brutality is not investigated efficiently – and police officers face no deterrent penalties for inhuman treatment (ECtHR, Grand Chamber judgment *Gaefgen v Germany* of 1 June 2010, paras 124, 125). In particular, the Atlas of Torture (Ludwig Boltzmann Institute of Human Rights, Vienna) points out in the country profile of 1 October 2008, that in Germany, despite an essentially functioning justice system, “torture and ill-treatment by the authorities remains a current topic [...] also daily conduct of police officers.”
- Moreover, high-ranking perpetrators enjoy protection and impunity in a systematic way, as was also criticized in a joint letter (A/HRC/12/NGO/29 of 7 September 2009) of religious NGOs in special consultative status to the United Nations’ Secretary General. The letter informs about a practice of debt bondage and widespread physical and psychological abuses of migrant workers in diplomatic circles in Germany. The State Party pretends diplomatic immunity as a reason for insufficient protection of the concerned migrant workers, although immunity does not apply where the victims have no access to classified documents (ECtHR, Grand Chamber judgment *Cudak v Lithuania* of 23 March 2010).

As these cases illustrate, in the context of sex work the State Party still failed to implement the following more general recommendations by the Human Rights Committee (para 16 of CCPR/CO/80/DEU of 30 March 2004):

“While appreciating the reduction in the number of complaints made public in recent years, the Committee expresses its concern about

continuing reports of ill-treatment of persons by the police, including foreigners and members of ethnic minorities. It is concerned that despite the previous concluding observations of the Committee, the State party has not found ways to monitor the situation effectively and still lacks the necessary statistical information on police misconduct (art. 7).

(a) The State party should promptly, thoroughly and impartially investigate all allegations of police ill-treatment and, where appropriate, bring those responsible to justice.

(b) The State party should protect persons who bring complaints of ill-treatment against police officers against intimidation and provide full reparation, including fair and adequate compensation, and rehabilitation to victims and their families.

(c) The State party should improve monitoring of police misconduct by designating a central governmental agency to maintain and publish comprehensive statistics on ill-treatment and other relevant misconduct, including racist abuse, the measures taken in such cases and the results of investigations and disciplinary or penal proceedings. Furthermore, the State party should establish independent bodies throughout its territory to investigate complaints of ill-treatment by the police.”

#### 4. Conclusion

For voluntary sex work, this report indicates deficiencies in the protection of the Articles 6, 7 rights and also concerns under Articles 9, 12, 15 of ICESCR. A persistent source of violations of these rights is the stigmatizing policy of the Länder, in particular their misuse of measures against trafficking for other purposes: Instead of protecting the rights of potential victims of trafficking, the State Party *de facto* discriminates against victims for racial reasons (profiling) and *de facto* criminalizes them, e.g. for illegal border crossing, for the condition of being undocumented migrants, or for illegal prostitution in (excessively defined) forbidden zones. Due to the described policies viz. migrant sex workers, victims of trafficking and sexual slavery for good reasons may fear police more than they fear their criminal masters (observation corroborated by para 118 of *Siliadin v France*, ECtHR of 26 July 2005). Despite the positive measures, which the State Party report mentions in section 6, victims are often not identified and treated as victims (for the same conclusion: *Follmar-Otto/Rabe*, Menschenhandel in Deutschland, German Institute of Human Rights, Berlin 2009).

**In view of the above observations, the Committee might want to ask:**

- **What sort of measures does the State Party plan to improve the social security and the working conditions of sex workers, in particular their protection against crime?**
- **What kind of procedural safeguards does the State Party plan to (1) improve the protection of sex workers' and migrants' human rights, and (2) to prevent misuse of the instruments against trafficking?**

signed:

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