

To: **Secretariat of the Committee against Torture**
UNOG-OHCHR, Palais Wilson, 52, rue des Pâquis
Office of the United Nations High Commissioner for Human Rights
(OHCHR)
CH-1211 Geneva 10
Schweiz

Electronic Submission: cat@ohchr.org
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Information from Sex-Worker Forum
to the United Nations Committee against Torture
for the examination of the State party report of Germany
at the 47th Session

Eingabe von Sexworker Forum
an den Fachausschuss gegen Folter der Vereinten Nationen
zum Bericht Deutschlands
bei der 47. Session



**SHADOW
REPORT
UN'CAT
GERMANY
2011**

EINGABE VOM SEXWORKER-FORUM AN UN'CAT

Gemäß der Konvention der Vereinten Nationen von 1984 gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung berichten die Staaten regelmäßig dem Fachausschuss gegen Folter über die Umsetzung. Deutschland hat 2009 einen Bericht abgeliefert, ergänzt 2011 um Antworten auf Fragen des Fachausschusses. Die Vereinten Nationen haben NGOs eingeladen, die Beratungen des Fachausschusses durch Informationen (Schattenberichte) zu unterstützen. Das *Sexworker-Forum*, www.sexworker.at, hat diese Stellungnahme an den Ausschuss verfasst. Das Forum ist ein eingetragener internationaler Verein mit Sitz in Wien, der sich für die Achtung der Menschenrechte der erwachsenen Frauen, Männer und transsexuellen Personen im Umfeld der freiwilligen und selbstbestimmten Sex-Arbeit einsetzt.

Dieser Schattenbericht kritisiert, dass Sex-Arbeiter durch faktische Kriminalisierung im Genuss der Menschenrechte aus dieser Konvention benachteiligt werden. Das Prostitutionsgesetz 2002 hatte die Intention, die Arbeitsbedingungen in der Sexarbeit zu verbessern, insbesondere durch die Abschaffung der Sittenwidrigkeit. Auf Länder- und Kommunalebene, insbesondere im süddeutschen Raum, wird diese Intention hintertrieben und Sex-Arbeiter werden regelmäßig Opfer von Polizeiübergreifen.

Art 2 und Art 16 CAT:

- Als direkte Folge einer Politik, legale Sex-Arbeit durch Verwaltungsmaßnahmen und den Missbrauch von Polizeibefugnissen zu kriminalisieren, werden von der Polizei grundrechtlich sensible Fahndungsinstrumente eingesetzt, wie verdeckte Ermittlungen, um damit Verwaltungsübertretungen von Sex-Arbeitern aufzudecken, obwohl solche Instrumente nur bei konkretem Verdacht auf

schwere Verbrechen rechtlich zulässig wären. Dies hat zu einer administrativen Praxis geführt, welche die Menschenrechte von Sex-Arbeiterinnen gefährdet.

- Obwohl die Strafprozessordnung das Eindringen von verdeckten Ermittlern in private Wohnungen ermächtigt, gibt es dabei keine Folterprävention durch unabhängige Beobachter. Dadurch werden Sex Arbeiter, zumeist Frauen, dem Risiko von Folter durch sexuelle Erniedrigung und der Befürchtung von sexuellen Übergriffen in ihren Wohnungen ausgesetzt.

Dieser Missbrauch der Instrumente gegen Menschenhandel führt dazu, dass Opfer von Menschenhandel oder anderen Verbrechen der Ausbeutung von Prostitution doppelt viktimisiert werden, einerseits als Opfer von Verbrechen, andererseits als Opfer von gegen Sex-Arbeiter gerichteten Menschenrechtsverletzungen durch die Behörden. Darüber hinaus verhindert die Stigmatisierung und faktische Kriminalisierung jegliche vertrauensvolle Zusammenarbeit der Behörden mit einer Gruppe, deren Mitarbeit für die effektive Bekämpfung des Menschenhandels unverzichtbar wäre.

Submission from
Sex-Worker Forum
to the

UNITED NATIONS COMMITTEE AGAINST TORTURE

pertaining to

Germany's 5th periodic report CAT/C/DEU/5
at the 47th session

Vienna, 12 October 2011

SUBMISSION OF SEX-WORKER FORUM TO UN'CAT

1. Executive abstract

The author, Sex-Worker Forum, is an international incorporated non-governmental not-for-profit organization, chartered at Vienna, Austria, and 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. This author's website www.sexworker.at contains supporting material.

The Prostitution Act, in force since 01.01.2002, aimed at a better protection of sex workers' civil and human rights. However, as this report points out in the context of torture, the policy of the provinces (Länder) to *de facto* criminalize sex work creates deficiencies in respecting, protecting and fulfilling the human rights obligations towards persons in voluntarily sex work and towards persons trafficked and exploited as prostitutes. There are differences between provinces, those in the South (Baden-Wurtemberg, Bavaria, Rhineland-Palatinate) marginalize and stigmatize sex workers most.

Specifically, this report points out that the factual criminalization leads to an abuse of police instruments, which are applied to discover petty crimes of sex workers under the pretext of fighting trafficking. Aside from private life intrusions, e.g. when undercover officers enter private homes, these investigations put persons (mostly women) in sex work under the risk to suffer violations of this Convention by these officers, including torture through rape. This threat to women persists due to the lack of torture prevention mechanisms, where an independent institution closely and in person supervises the undercover investigations. The German government is unwilling to introduce effective measures to stop abuse by undercover officers of women in their private homes.

2. Background: Legal regulation of sex work

In Germany, voluntary sex work of adults is not a crime, but an accepted form of labor. When the United Nations urged Germany to protect the labor and social rights of sex workers (CEDAW/C/DEU/2-3 of 04.02.2000), the State Party introduced the Prostitution Act of 20 December 2001, in force since 1 January 2002. 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). This protection extends to citizens of other member states of the European Union: 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 (European Court of Justice, *Jany et al v Justitie*, C-268/99 of 20.11.2001). Other 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.

However, at the provincial level, legislation by the Länder and their administration by communities may restrict and *de facto* prohibit and criminalize (section 184d Penal Code) voluntary sex work by defining narrow conditions. 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". Even first time offenders may face criminal charges, if police suspects repeated violations. Thereby in the southern provinces, in particular in Baden-Württemberg, Bavaria and Rhineland-Palatinate, and at the level of the local government, in particular in Munich, building codes and zoning prevent unobtrusive sex work within "forbidden zones", and penalize even certain private sexual activities between consenting adults in private homes. By contrast, northern provinces, e.g. Berlin, permit sex work also in certain private apartments, and some other provinces tolerate unobtrusive sex work, but do not permit it.

3. Administrative practice of misusing police powers

It is well-known that police of the Länder (provinces) conflates voluntary sex work with trafficking (German Center of Gender Research: *Der involvierte Blick: Zwangsprostitution und ihre Repräsentation*, Humboldt University Berlin Bulletin 35/2010). The human rights implications have been pointed out by the German National Institute for Human Rights (DIM: Deutsches Institut für Menschenrechte): At the level of the provinces (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*, DIM, Berlin 2009). Therefore, concerns arise about human rights violations on the pretext of fighting trafficking (loc. cit. p 14).

Examples from 2010 in two cities illustrate the abuse of police instruments for administrative purposes and prevention of petty crimes in the context of otherwise legal sex work. For human rights reasons, these intrusive instruments would only be tolerable in the fight against serious crime; their application therefore was illegal, but police officers enjoy impunity:

- Germany introduced profiling in 1994 to fight terrorism (*Kant*, CILIP 65/2000). Its application 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). However, German police repeatedly abused racial profiling to enforce immigration laws and provincial administrative regulations about prostitution under the pretext of fighting trafficking. Thus, in 2010 Cologne police searched a legal bordello 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 (source: *Rundschau-Online* of 26.03.2010). Also the United Nations are concerned (A/HRC/14/43/Add.2 of 22.02.2010, 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".
- Undercover operations are known to be highly sensitive from the viewpoint of human rights. There is a well-developed international jurisprudence, according to which this

instrument is only justified in the fight against serious crime, and only, if certain procedural guarantees are safeguarded. However, German police repeatedly abused undercover operations to enforce provincial administrative regulations about prostitution under the pretext of fighting trafficking. Thus, 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 21.05.2010), they lured three sex workers from outside Munich into hotels within the forbidden zone, with the intention to prosecute them for prostitution within the forbidden zone (source: Abendzeitung of 22.04.2010), and they went to meeting places of homosexuals within the forbidden zone and prosecuted 17 men, who agreed to sex for money (source: Abendzeitung of 24.01.2010).

This abuse of instruments amounts to treating migrants and sex workers (many of whom are migrants) like criminals. Thus, despite the intentions of the Prostitution Act, Germany *de facto* criminalizes sex work. This makes sex workers vulnerable both to police brutality and to exploitation by criminals, with negative implications to all aspects of their life.

- For, as United Nations observed (CEDAW/C/DEU/CO/6 of 06.02.2009, para 49):
“The Committee [on the Elimination of all forms of Discrimination Against Women] 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.”

- Thereby, United Nations are aware of the negative implications of criminalization of sex work (A/HRC/14/20 of 27.04.2010), in particular regarding health, as
“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.”

These concerns, voiced by United Nations instruments, still apply to Germany:

- Zoning by German provinces and municipalities pushes sex workers to unsafe industrial zones, outside of their or their customers’ homes or of protected business premises, making them vulnerable to criminal attacks. Local courts support this policy by restricting sex workers civil rights, declaring contracts of sex workers to lease apartments to be void (Amtsgericht Düsseldorf, case no 52C15529/10). Because of fear of police harassment, even a sex worker, who survived attempted murder, could not report her case to police of Baden-Wurtemberg. Thus, the situation of sex workers in Germany is comparable to the situation in Canada, where the Superior Court of Ontario observed (*Bedford v Canada*, 2010 ONSC 4264 of 28.09.2010, para 504):
“By increasing the risk of harm to street prostitutes [several were murdered], the communicating law is simply

too high a price to pay for the alleviation of nuisance.”

Thus, sex workers in Germany's southern provinces have the dire choices between dangerous working conditions or criminalization.

- In Germany, criminalization of illegal migrants is known to be a key factor that affected health of migrants adversely, even in the more liberal northern provinces (*Castaneda*, Social Science Medicine 68/2009, p 1551). Thereby, Germany has established a system akin to Apartheid that diminishes the capabilities of migrants and even more of migrant sex workers; for (*Scott*, Electronic Journal Sociology, 2004)

“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.”

In terms of the definition of torture in the Inter-American system (“Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish”), this policy of criminalization may amount to torture. Even if this Committee might not consider to assess this situation as torture under Art 2 CAT, such a criminalization of voluntary sex work of adults is not compatible with accepted European humanitarian standards (Council of Europe, Parliamentary Assembly, 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.”

4. Resulting sexual violence against sex workers

In a typical undercover operation, as reported in section 3 above, police 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 undercover agents regularly entered the private homes of their targets. (Here, in United Nations terminology, the term home “is to be understood to indicate the place where a person resides or carries out his usual occupation”, see document A/43/40 of 1988, Annex, p 181 ff). This intrusion affected also persons, mostly women, who were not in commercial prostitution: Seeking unusual sexual adventures, they occasionally accepted money for sex (*LeMonchek*, Loose Women, Lecherous Men: A Feminist Philosophy of Sex, London, 1997), whence their sexual behavior was private sexual life, not visible in the public, but exposed by an illegal undercover stint (*Wildhaber/Breitenmoser*, Internationaler Kommentar zur EMRK: Kommentierung des Artikels 8, Cologne 1992, margin no 114).

In such operations, police is using sex as a weapon and this makes their targets vulnerable to police misconduct:

- Specifically, this author is concerned about several cases, reported to this Forum, where women were duped to be nude or in sexy lingerie in the presence of male undercover officers. Police did not take precaution against exposing these women to nudity, and there were no sanctions against the police officers, either.
- In addition, the author is concerned about the complete lack of measures by the State party to prevent duping these women into sexual intercourse with the undercover officer. There are also no precautions to prevent police brutality in the private homes of the affected persons, and victims of such police abuse would be in a position, where they cannot prove their allegations, as there are no independent witnesses.

As will be explained below, duping a woman into nudity is degrading treatment (Art 16) and duping her into sexual intercourse is torture through rape (Art 2).

These concerns are aggravated, as sex workers are a marginalized group of society. Therefore they are amongst the first, who are affected by lenient attitudes of the government towards torture and police brutality, which seem to emerge, for:

- There is a culture of impunity for police abuses, that *Amnesty International* observed for Germany (Täter unbekannt, Berlin, 2010): One can no longer consider police misconduct to be an exception.
- Moreover, in Germany police officers face no deterrent penalties, not even for inhuman treatment, as the European Court of Human Rights observed in a recent Grand Chamber judgment (*Gaefgen v Germany* of 01.06.2010, para 124, para 125).
- In addition, the War against Terror has begun to weaken Germany's stance against torture. This is illustrated by the discussion in intellectual circles, reported by the State party, and also by the collusion of German authorities with CIA (United States Central Intelligence Agency). There, information from Germany about the German citizen *Khaled El-Masri* led to his abduction by CIA to a torture camp in Afghanistan (case 39630/09 pending at European Court of Human Rights).
- Finally, there is a large body of literature that reports of worldwide police misconduct against women, whom police suspects of illegal prostitution: In recent years, examples from Azerbaijan, Cambodia, China and Hong Kong, Fiji, Guatemala, Kirghistan, Russia, Turkey, Ukraine and USA have been reported to the United Nations human rights instruments. In Papua New Guinea UNAIDS considered it a success, that police officers changed their regular gang rape

practices ("line ups") of sex workers – they are now using condoms for this purpose (*Jenkins*, Lessons learnt from Papua New Guinea, India and Bangladesh, UNAIDS Best Practice Collection, Genf, 2000). Many more cases are reported in the medical literature about HIV policies. Why should the situation in Germany be radically different?

5. Sexual violence as violations of Art 2 and Art 16 CAT

As to the assessment of such police conduct, the author refers to the Statute of Rome of the International Criminal Court and to its Elements of Crimes (ICC-ASP/1/3 of 09.09.2002 at The Hague). These documents distill the bottom line of the deep legal analysis of *ius cogens* in the context of rape and other forms of sexual violence by several United Nations Criminal Tribunals. As the US Court of Appeals, 4th Circuit, explained (*Aziz v Alcolac Inc* of 19.09.2011, pp 21 ff), this feature gives these documents high priority.

The relevant definitions of the Elements of Crimes 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.
- Sexual Violence: The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse

of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

- Footnote 20: It is understood that “genuine consent” does not include consent obtained through deception.

The common key features are the violation of sexual integrity of the women and the absence of her “genuine consent”. These features were repeatedly supported by the Council of Europe (Committee of Ministers, document Rec/2002/5, appendix, para 35, and Parliamentary Assembly, rec. 1777/2007, para 6.2.6, and rec 1887/2009), whereby the Parliamentary Assembly proposes to define consent through an (doc. 12013 of 14.09.2009, para 5.2.2):

“agreement by choice when having the freedom and capacity to make that choice.”

As to the qualification of the acts of section 4 under this Convention, it follows::

- If a sex worker agrees to a sexual penetration with an undercover agent, who does not reveal his true identity in order to prove prostitution, this is rape. International criminal law requires that the undercover agent be punished for such act. Moreover, this act is torture (Art 2 CAT) or inhuman treatment (Art 16 CAT). This follows from case law of this Committee (*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). This Committee considered at its 41st session about Hong Kong an expertise by *Simon Young*, which elaborated on these points (Univ. Hong Kong, LC Paper No. CB2-1678/0506 of 04.04.2006).

- If a sex worker agrees to other sexual acts with an undercover agent, e.g. presenting herself in lingerie, because the agent did not reveal his true identity in order to prove prostitution, this is sexual violence (e.g. forced nudity). International criminal law requires that the undercover agent be punished for such act. Moreover, such act is degrading treatment, at least. There is a rich body of case law of the European Court of Human Rights supporting this point (*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). Thereby, the case *Hellwig v Germany* of 07.07.2011 concerns degrading nudity under responsibility of the State party. If there are 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 Inter-American Court of Human Rights the act may qualify as inhuman treatment.

6. Conclusion: Deficiencies concerning Art 2 and Art 16 CAT

In Germany, there are serious deficiencies in implementing this Convention:

- Sex workers face the risk of being tortured. For, as was documented in section 3, the State party criminalizes sex workers systematically, as police fights suspected petty crimes of sex workers by means of instruments that are reserved for the investigation of serious crimes (terrorism, trafficking, etc.). As pointed out in section 4, this puts sex workers and persons suspected of illegal prostitution under the risk, to become targets of undercover investigations. Thereby these persons may be deceived to agree to sexual acts. As pointed out in section 4, these persons thereby suffer from sexual violence, which according to section 5 classifies as torture in the case of sexual penetrations, and degrading treatment, otherwise.
- It follows from this, that this Convention confers a positive obligation upon the State Party to set up a mechanism of prevention of sexual acts between undercover agents and the persons, whom this investigation targets. However, the State party does neither have provision in its Criminal Code to punish torture, nor is sexual violence a crime in Germany, if the perpetrator uses deception. Moreover, and for this reason, the State party does not recognize a need to prevent torture by undercover officers in private homes, even though section 110c Code of Criminal Procedures permits undercover operations in private homes.

signed:

Aoife Nic Seáin O'Neill, public relations officer, Sex-Worker Forum
admina_aoife@sexworker.at

Christian Knappik, executive manager, Sex-Worker Forum
Verein: Sexworker Forum, ZVR-Zahl 699583522
Pannaschgasse 5-7/14, A-1050 Wien, Austria



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