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1211 Geneva
Switzerland

Advance E-Mail: cescr@ohchr.org
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Submission from Sex-Worker Forum of Vienna
to the United Nations Committee on Economic, Social and Cultural Rights

Eingabe von Sexworker Forum Wien
an den Ausschuss der Vereinten Nationen für wirtschaftliche, soziale und kulturelle Rechte

Shadow Report UN'CESCR Germany 2011

EINGABE VOM SEXWORKER-FORUM AN UN'CESCR

Gemäß *Internationalem Pakt über wirtschaftliche, soziale und kulturelle Rechte* berichten die Staaten regelmäßig dem Fachausschuss für wirtschaftliche, soziale und kulturelle Rechte über die Umsetzung. Deutschland hat 2010 einen Bericht abgeliefert, eine Arbeitsgruppe des Ausschusses hat ihn im November 2010 geprüft und der Ausschuss wird im Mai 2011 darüber beraten. Die Vereinten Nationen haben NGOs eingeladen, diese Beratungen durch Stellungnahmen/Schattenberichte zu unterstützen. Das *Sexworker-Forum*, www.sexworker.at, hat sowohl eine Stellungnahme an die Arbeitsgruppe verfasst, als auch diese Stellungnahme an den Ausschuss. 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 Sexarbeit einsetzt.

Dieser Schattenbericht kritisiert, dass Sexarbeiter zwar Steuern und Sozialabgaben leisten müssen, dass sie aber durch weitgehende, von Staatsorganen aktiv geförderte, Stigmatisierung und faktische Kriminalisierung im Genuss der Menschenrechte aus dem gegenständlichen Pakt 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. Folgende neun Punkte sind die direkte Folge dieser Politik, legale Sexarbeit durch Verwaltungsmaßnahmen und den Missbrauch von Polizeibefugnissen zu kriminalisieren.

- Schleierfahndungen gegen Voodoo diskriminieren Sexarbeiter aus Afrika und ihre Familien, die als kriminell hingestellt werden.
- Der Einsatz von grundrechtlich sensiblen Fahndungsinstrumenten im Verwaltungsrecht (z.B. verdeckte Ermittlungen), die nur bei konkretem Verdacht auf schwere Verbrechen zulässig wären, hat zu Verletzungen der Privatsphäre von Personen geführt, die der Prostitution verdächtigt wurden, womit Artikel 6 des Pakts missbraucht wurde.
- Weil die Polizei Sexarbeiter als Kriminelle ansieht, verwechselt sie oft Opfer und Täter zum Nutzen derjenigen, die Prostitution anderer verbrecherisch ausbeuten.
- Derartige Polizeiübergriffe und der resultierende Vertrauensverlust in den Schutz durch die Polizei drängen Sexarbeiter in den Untergrund.
- Immer mehr junge Arbeitslose, die Zwangsarbeit (Ein Euro Jobs) ablehnen und so staatliche Unterstützung verlieren, werden in die Sexarbeit unter den dargestellten nachteiligen Bedingungen gedrängt.
- Die Kriminalisierung der Sexarbeit führt zu systematischen Verschlechterungen der Arbeitsbedingungen, wo Sperrbezirksverordnungen Sexarbeiter in unsichere Gebiete abdrängen und ihre Tätigkeit unverhältnismäßig gefährlich machen.
- Sexarbeiter erwartet beim Ausstieg wegen der staatlich geförderten Stigmatisierung und Kriminalisierung sozialer und finanzieller Ausschluss, somit ein Leben in Armut.
- Diese Politik der Kriminalisierung kann Sexarbeiter und Migranten krank machen, wie Publikationen in angesehenen Fachzeitschriften wissenschaftlich nachgewiesen haben.
- Die Kriminalisierung der Sexarbeit wirkt sich auf Behinderte aus. Ihnen wird sexuelle Assistenz faktisch verwehrt, womit sie kein Sexualleben entwickeln können.

Opfer von Menschenhandel oder anderen Verbrechen der Ausbeutung von Prostitution werden dadurch doppelt viktimisiert, einerseits als Opfer von Verbrechern, andererseits als Opfer von gegen Sexarbeiter 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 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
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SUBMISSION OF SEX-WORKER FORUM TO UN'CESCR

1. Executive abstract

In 2010, the author submitted a report to the pre-sessional meeting of the Working Group of this Committee about the situation in Germany of voluntary sex work. The present report extends it with a view on the list of issues identified by the Working Group. Although the focus of this report is narrow, its implications concern German society at large, as only the consideration of the situation of vulnerable groups, such as sex workers, leads to a reliable picture of a country's human rights situation. Moreover, "vulnerable groups often found in poverty, such as children, women, displaced people, different minorities, domestic workers, or sex workers, all merit a comprehensive approach to their problems" (*Holden*/*Walter*, Poverty initiatives in the ILO: review of past and present approaches, 2004).

The Prostitution Act, in force since 1 January 2002, aimed at a better protection of sex workers' civil and human rights. However, as this report points out in the context of the cultural, economic and social rights, 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. Specifically, this report points out the following nine human rights issues, which result from the current policy of criminalization. There are differences between provinces, whereby provinces in the South (Baden-Wurttemberg, Bavaria) marginalize and stigmatize sex workers most.

- Racial profiling by police discriminates against sex workers of African descent and against their friends and families (Article 2 ICESCR).
- Abuse of instruments to fight serious crimes (e.g. trafficking) for the enforcement of administrative regulations causes intrusions into private sexual life that reach the threshold of human rights violations (Article 5 ICESCR).
- Due to the criminalization of sex workers, police views them as criminals and thereby may fails to identify victims of crimes. This supports traffickers and other criminals exploiting prostitution, as they may abscond (Article 6 ICESCR).
- Privacy intrusions and other abuses by police, as well as failure of police to support victims of crimes, pushes sex workers into the informal sector (Article 6 ICESCR).
- Young unemployed persons, who loose unemployment benefits, as they do not accept forced labor, are left with no alternatives to secure their livelihood, except sex work (Article 6 ICESCR).
- Where criminalization of sex work is a policy of the provinces, they artificially generate poor working conditions through zoning, resulting in making sex work more dangerous (Article 7 ICESCR).
- Sex workers wishing to retire face financial and social exclusion, caused by stigmatization and criminalization, which may push them below subsistence level (Article 11 ICESCR).
- Policies to criminalize sex work may make sex workers and migrants ill, as publications in SCI-indexed journals document (Article 12 ICESCR).
- Criminalization of sex workers spills over to persons with disabilities, who are denied the opportunity to develop sex life (Article 15 ICESCR).

A fortiori, persons forced into prostitution may become doubly victimized, on the one hand through forced labor in prostitution, on the other through the above human rights violations, which migrants and sex workers face.

2. Author and sources

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 report collects information published in government or international sources, in scientific papers and in the press. This author's website www.sexworker.at contains supporting material about concrete cases, where sex workers describe their situation to the public. It also contains links to the newspaper articles referred to below. The website www.donacarmen.de collects specific information about sex work in Germany. The website of the TAMPEP network, 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
ILO: International Labor Organization

3. Background about the legal regulation of sex work

When the Committee on the Elimination of all Forms of Discrimination Against Women, urged Germany to protect the labor and social rights of sex workers (CEDAW/C/DEU/2-3 of 4 February 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 November 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.

Thus, the author acknowledges that in theory and at the level of federal legislation, the State Party accepts voluntary sex work of adults as labor, protects sex workers from exploitation, and safeguards their social security. However, this protection exists in theory, only. Although sex workers pay taxes and social security contributions, they still do not enjoy the full protection of labor and social security law, as the Committee on the Elimination of all forms of Discrimination Against Women observed recently (para 49, 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 the view of the author, this failure is due to the policies of the provinces. 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-Wurttemberg and 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 within "forbidden zones", and penalizing even certain private sexual activities 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.

4. African sex workers face racial discrimination by profiling (Article 2 ICESCR)

The Working Group asked the State Party to clarify, why the General Equal Treatment Law of 2006 does not include language, national or social origin, political or other opinion, property or birth as prohibited grounds of discrimination.

This issue affects sex workers of African origin, whom police targets by ethnic/racial and/or religious profiling (Voodoo-motivated searches). The very method of racial profiling (Schleierfahndung) presumes that racial (or religious) minorities are expected to commit more crimes. This amounts to racial discrimination that may create or reinforce xenophobia in the general population (Article 2 ICESCR, Article 5 CERD, Article 26 CCPR). Schleierfahndung was introduced 1994 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".

As is indicated by the outcomes of these searches, as far as published in the press, police used racial profiling to enforce immigration laws and provincial 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 March 2010). Similar cases across Germany are documented at the websites referred to in section 2. By such claims police links Africans and an African religion systematically to crime, which is discriminatory. For, neither is the typical sex worker of African descent a victim of trafficking or exploitation, nor are the friends of sex workers pimps that exploit them. In general, sex workers enjoy the thrill of the red-light experience, made conscious and rational decisions to go into sex work, and they also voluntarily migrated for this purpose to Germany (*Agustín*, Sex at the Margins: Migration, Labor Markets and the Rescue Industry, London 2007).

Thus, instead of protecting the rights of potential victims of trafficking, the State Party discriminates against them for racial or religious reasons (profiling) and *de facto* criminalizes them, e.g. for illegal border crossing, for the condition of being undocumented migrants, or for the petty crime of illegal prostitution in forbidden zones.

5. Article 6 is abused to restrict the privacy protection of sexual life (Article 5 ICESCR)

While Article 6 ICESCR obliges the State Party to fight forced labor, such as trafficking, forced prostitution or other crimes of exploitation, at the same time it obliges the State Party not to abuse this Article to restrict other established human rights (Article 5 ICESCR). The following observations of the German National Institute for Human Rights (DIM: Deutsches Institut für Menschenrechte) confirm a deficiency in the implementation of this Covenant. DIM observed that, 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, DIM, Berlin 2009). Therefore, for DIM concerns arise about human rights violations on the pretext of fighting trafficking (loc. cit. p 14).

As the State Party pointed out in the report to this Committee, DIM is based on the Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights. However, as the State Party report made it clear, observations or recommendations of DIM are not binding. Consequently, despite the 2009 criticism by DIM, the abuse of instruments against trafficking persisted in 2010.

As the author reported to the Working Group of this Committee, in 2010 sex workers and clients became targets of police operations, e.g. undercover stints, that violated their privacy and dignity. There is no justification to systematically exclude sex workers from the privacy protection by Article 17 CCPR (*Fellmeth*, William & Mary Law Rev 50/2008). In particular, the pretext of fulfilling Article 6 ICESCR does not suffice for this purpose, as 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. 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 privacy of the working place of sex workers is protected.

In particular, this author's report to the Working Group referred to press reports about undercover operations in 2010, where police resorted to trickery and deceit for the sake of proving prostitution within the forbidden zone or proving certain sexual practices. Officers disguised as customers approached someone they suspected of prostitution and solicited their services, until this person was deceived into agreeing to perform sex for money. Even women not in commercial sex work faced such police intrusions, as 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 private sexual life not visible in the public (*Wildhaber/Breitenmoser*, Internationaler Kommentar zur Europäischen Menschenrechtskonvention: Kommentierung des Artikels 8, Cologne 1992, margin no 114). Thereby, police resorted to entrapment (Article 14 CCPR), to an intrusion into private lives and private homes (Article 17 CCPR), to the use of discriminatory tactics (Article 26 CCPR) on the basis of race (see above) and/or sexual orientation. Police also searched private homes of suspected prostitutes, although it is known that such intrusion is disproportional for the purpose of investigating petty crimes (ECtHR, *Buck v Germany* of 28 April 2005, paras 47, 51). Moreover, police deprived the suspects for several hours of their liberty (Articles 9 and 17 CCPR may also be violated through a police action of one hour, see ECtHR, *Gillan v United Kingdom* of 12 January 2010). None of these operations helped to identify victims of trafficking or of other exploitation.

A serious concern about undercover operations arises, as in several cases women were duped to be nude in the presence of male undercover officers. Police did not take precaution against exposing these women to nudity, forced through deception. This is degrading treatment (Article 16 CAT, Article 7 CCPR), as follows from jurisprudence of international criminal tribunals (*Amann*, American J. International Law 93/1999, 195-199), by the Inter-American Court of Human Rights (*Miguel-Castro-Prison v Peru* of 25 November 2006) and by ECtHR (*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).

As such police actions specifically target women assuming their right to a non-mainstream sex life, there arise also concerns under Article 3 ICESCR and Article 1 CEDAW, as such police actions *de facto*

discriminate against women (*mutatis mutandis* ECtHR, *Zarb Adami v Malta* of 20 June 2006).

This policy of criminalizing sex work by trying to control prostitution with instruments solely appropriate for fighting severe crime neglects the right to sexual self-determination (Article 17 CCPR) in its two core aspects (*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 from police. In addition to such intrusions into private life and private homes by police, sex workers suffer also from intrusions by other authorities (tax office, communal administration, etc.) that as local institutions consider themselves not restrained by international human rights obligations.

6. Criminalization weakens protection against criminal exploitation (Article 6 ICESCR)

The author acknowledges that the State Party is determined to combat crimes related to the exploitation of the prostitution of others, such as trafficking into prostitution and forced prostitution. Fortunately, only a small fraction of estimated 400,000 sex workers in Germany are at risk. The criminal statistics of Federal Police (BKA) and Federal Office of Statistics (Statistisches Bundesamt) confirm this; e.g. data for section 180a Penal Code (exploitation): 79 suspected perpetrators and three convictions in the year 2009.

However, as the State Party misuses trafficking as a pretext for prostitution and immigration control (section 5), there are weaknesses of law enforcement to fight trafficking. Federal Police conceded this (source: Deutsche Welle of 26 November 2009). Police Labor Union (GdP) confirmed problems due to lacking respect for sex workers' and victims' rights (*Gewerkschaft der Polizei*, Handeln gegen Menschenhandel, GdP, April 2008). In particular, GdP mentioned sex workers' rights from the prostitution law and victims' rights from European Directive 2004/81/EC. In the view of the author, this ineffectiveness is a systematic drawback due to lacking awareness of police officers. Lacking awareness and even complicity in exploitation is an international phenomenon (*Raymond*, Violence Against Women 10/2004, 1156-1186), as worldwide 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, as follows from the fact that 9% of in average 35 customers per week of victimized women are police officers (*Tommaso et al*, European J Political Economy 25/2009, pp 143 ff). Thus, there is a ladder of exploitation: Lacking awareness (police officers fail to recognize victims), consumption of forced sexual services (police officers as customers of victims), complicity in exploitation (police officers socialize with pimps), and participation in crime (even top police officers may assume leading roles in crime, as documented in Sweden by the 2010 case of Göran Lindberg, source: Wikipedia).

As a consequence, law enforcement may not recognize victims of trafficking and instead may criminalize them for illegal prostitution or illegal immigration. Victims may fear police more than they fear their criminal masters (corroborated by ECtHR, *Siliadin v France* of 26 July 2005, para 118). Such victims are unable to seek help from police, not even from the officers, who are their customers. Rather they might go underground and forfeit their legal rights. This observation is also confirmed by the shadow report of the Alliance for Economic, Social and Cultural Rights in Germany to the Working Group of this Committee: Victims of trafficking cannot access courts to obtain compensation, as they do not have residence permits, which are required for such proceedings. Thus, the right to a fair compensation by Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings exists on paper, only.

Moreover, where police efforts focus on preventing illegalized prostitution, law enforcement may confuse victims of exploitation with perpetrators, persecuting victims for petty crimes (e.g. illegal prostitution) and at the same time supporting perpetrators to abscond. There are also recent cases, where law enforcement officers have been perpetrators, and victims, who testified against them, have been convicted for defamations. In yet another case, a police officer has been reprimanded, as he investigated against such officers. This author's report of 2010 to the Working Group of this Committee supports these allegations with references to press reports about these cases.

There is an alarming degree of impunity that accompanies police abuses worldwide (joint statement of 26 June 2010 of Committee against Torture, Subcommittee on the Prevention of Torture, Special Rapporteur on Torture, and Fund for Victims of Torture). Many police officers systematically apply or tolerate aggressive practices (*Carlsmith/Sood*, J. Experimental Social Psychology 45/2009, 191-196). Also in Germany, there is an emerging culture of impunity for police abuses (*Amnesty International*, Täter unbekannt, Berlin, 2010), as police officers face no deterrent penalties, not even for inhuman treatment (ECtHR, Grand Chamber, *Gaefgen v Germany* of 1 June 2010, paras 124, 125). Sex workers are particularly vulnerable to police abuse, e.g. forced unpaid sexual services (rape). This, too, is a worldwide phenomenon. According to international surveys about police conduct, in some countries up to 60% of sex workers experienced sexual assaults by police officers (*Watts/Zimmermann*, Lancet, 359/2002, pp 1232 ff). As the problem of impunity for police abuse illustrates, the State Party still failed to implement relevant recommendations by the Human Rights Committee (para 16 of CCPR/CO/80/DEU of 30 March 2004).

7. Sex workers experience pressures to work in the informal sector (Article 6 ICESCR)

The Working Group asked the State Party to describe the impact of the legislative steps taken to reduce the number of people working in the informal sector and to provide information on steps taken to ensure that people working in the informal sector have access to their rights.

Sex work is concerned, as the current policies to *de facto* criminalize sex work result in failure to recognize sex work as labor. Such policies are known to be a factor that may pressure women in sex work going underground and become undocumented workers (*Phillips*, ILO International Labor Conference, 2004), who as a consequence may not enjoy full legal protection. To avoid such pressures, ILO asks to aside on the one hand voluntary adult sex work, which ILO recognizes as a form of labor, and on the other intolerable exploitation, such as child prostitution, trafficking into prostitution, or prostitution through coercion (*Lim*, The Sex Sector: the economic and social bases of prostitution in SE Asia, ILO 1998). However, the political discourse in many countries conflates voluntary sex work with exploitation and trafficking (*Cusick et al*, Critical Social Policy 29/2009, pp 703 ff). Such policies are based on myths that equate voluntary sex work with oppression (*Weitzer*, Sexual Reseach & Social Policy 7/2010, 15-29). As the German Center of Gender Research confirms, this observation applies to the policies of the Länder, too (Der involvierte Blick: Zwangsprostitution und ihre Repräsentation, Humbold University Berlin Bulletin 35/2010). This results in criminalization of sex work, as these policies justify the use of intrusive police instruments for administrative purposes and prevention of petty crimes in the context of otherwise legal prostitution, although for human rights reasons these instruments are only tolerable in the fight against serious crime (undercover investigation, secret surveillance).

Such a criminalization of voluntary sex work of adults 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." In addition, an excessive use of intrusive police methods bears the danger of abuse to enforce, upon society at large, conformity with dominant moral values. This may put nonconformists at risk to suffer from police harassment, privacy violations, and even degrading treatment (Committee against Torture, General Comment, CAT/C/GC/2 of 24 January 2008, para 22).

8. Compulsory labor forces unemployed youth into sex work (Article 6 ICESCR)

ILO experts regularly criticize the State Party for deficiencies in the implementation of the convention against forced labor (see ILOLEX document 062009DEU029 of 2009). Thereby, forced or compulsory labor is defined by Article 2 para 1 ILO Convention No 29 of 1930. General Comment 18 of this Committee confirms this definition, as does ECtHR (e.g. *van der Mussele v Belgium* of 23 November 1983).

Moreover, ILO experts expressed their concern about an emerging international tendency that makes unemployed benefits contingent on acceptance of forced labor (*Committee on the Application of Standards*, Report, Part 1, para 88, 96th Session of the International Labor Conference, 2007). The State Party introduced such regulations in section 16 Book II German Social Code (SGB II) for long-term recipients of unemployment benefits (Arbeitslosengeld II): They may loose these benefits, if they refuse to work for a merely symbolic wage (1 Euro Job). A legal expertise on behalf of the German Trade Unions (Deutscher Gewerkschaftsbund) identified this as compulsory labor (*Kern,* Zur Frage der Vereinbarkeit von Recht und Praxis der Arbeit nach § 16 Abs 3 SGB II iVm § 31 SGB II mit dem IAO-Übereinkommen Nr 29 über Zwangs- oder Pflichtarbeit, Hans Böckler Stiftung, 2009).

Sex work is indirectly affected by this regulation, as 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". Moreover, still "social assistance provided to poor and socially excluded [...] is not commensurate with adequate standard of living" (para 27). This is also pointed out by the shadow report of the Alliance for Economic, Social and Cultural Rights in Germany and has given rise to various requests by this Committee's Working Group in the context of Articles 9 and 11 ICESCR. Consequently, in economic crisis it is young people, mostly women, who due to their unemployment face the alternatives, either to accept compulsory labor (1 Euro Job), which with respect to their educational or cultural background is often degrading (e.g. PhDs separating waste at a garbage dump), or to enter sex work (and risk criminalization due to the prostitution-control-legislation of the Länder).

Concerning the apparent lack of alternatives for unemployed women, the author considers that the German Social Code may *de facto* force young women into prostitution. (The author wishes to clarify, that this forced prostitution is not due to job centers placing women in bordellos. Supreme Social Court jurisprudence prohibits this.)

9. Provinces deliberately make sex work dangerous (Article 7 ICESCR)

As sections 4 to 7 of this report pointed out, the policy of the Länder to criminalize sex work weakened the protection of economic and social rights of sex workers. The Länder amplified their destructive policy by excessive use of zoning.

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 sex workers, who seek safer working conditions (e.g. their own apartments). Thus, as concerns the positive obligations of the right to work (General Comment 18 of this Committee), there are still deficiencies in promoting just and favorable conditions of work, in particular safe working conditions for sex workers.

Moreover, jurisprudence by local (administrative) courts still declares sex work as contrary to public moral (sittenwidrig), making contracts about sex work and even contracts with sex workers unenforceable. A recent example is a verdict of Amtsgericht Düsseldorf (no 52 C 15529/10), declaring an agreement with a sex worker to lease an apartment to be void *ab initio*. This situation contravenes the intention of the Prostitution Act: Instead of empowering sex workers, local institutions (administration, courts) effectively restrict sex workers civil rights and thereby also prevent the evolution of safe working conditions in sex work.

In addition, the very policy of criminalizing sex work may put sex workers at a higher risk of crime. For police harassment prevents reporting of crime and criminals may carry on. Countries, where prostitution has been decriminalized (e.g. New Zealand) have seen a drop in violence against sex workers, whereas countries that criminalize prostitution, such as Canada, face high level of crimes against sex workers. This was also considered by the Ontario Superior Court, Canada, in the decision of 28 September 2010 to annul anti-prostitution regulations. Corroborating evidence from the province of Baden-Wurttemberg has just come to the notice of the author. A sex worker, who survived attempted murder, is not willing to report her case to police, because she already has experienced harassment. For, when she reported a client paying with forged money, police reacted by fining her for illegal procurement of prostitution (c.f. Article 14 section 3g CCPR about the right not to be compelled to testify against oneself). Thus, factual criminalization of sex work has a negative externality on society as a whole.

10. Former sex workers suffer from social exclusion and poverty (Article 11 ICESCR)

The Working Group asked the State Party to provide information on the impact and effectiveness of measures taken to reduce poverty among disadvantaged and marginalized groups.

This issue affects persons, who propose to retire from sex work. For, the ongoing stigmatization of sex workers, spurred by *de facto* criminalization, narrows the capabilities (*Sen*, Commodities and Capabilities, Amsterdam 1985) of these persons to the point, where they have no choice other than to continue sex work to secure their livelihood.

Vulnerability to financial exclusion (exclusion from mainstream financial services) is a decisive factor and the ongoing social stigmatization of their work puts active and former sex workers at risk. For, even active or former sex workers in stable economic and social conditions with access to financial services faced 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 ser-

vices for everyone (e.g. saving accounts without credit card access). This problem affects society at large, as according to European Commission (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 preconditions 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 – and forcing them into sex work.

Sex workers face also legal uncertainty in the field of taxation. 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 discriminates against sex workers, as it places them under the general suspicion of tax evasion. In addition, this regulation may cause private life intrusions, as illustrated by a recent case: Tax office asked a sex worker to submit a written justification, why she did not continue sex work through the last two month of 2010. Moreover, tax 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. Cumulative income tax charges and social security contributions may also force retired sex workers to resume sex work. This problem has already been considered at ECtHR (*Tremblay v France* of 11 September 2007), but economic and social rights are outside the competency of ECtHR.

Even the very classification of income from sex work is contested, which may cause legal costs that sex workers can barely afford. (Tax offices classify the income as commercial, systematically ignoring the ruling by Federal Finance Court of 23 June 1964, BStBl 1964 III S 500.)

11. State Party policies make migrants and sex workers ill (Article 12 ICESCR)

The Working Group asked the State Party to clarify, whether there is universal access to primary health care and whether disadvantaged and marginalized groups have access to medical services and prevention programs for sexual and reproductive health.

This issue is of core importance to persons, who migrated for job opportunities in sex work. They are particularly vulnerable to the described policies of criminalizing sex work. For, these persons are often undocumented and fear expulsion. As a result, they have no *de facto* access to health services, with proven effects: "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 migrants is affected in the negative by such legal barriers to access health services (*Castaneda*, Social Science Medicine 68/2009, p 1551).

In addition, a policy of *de facto* criminalization is known to have health implications, as observed by *Anand Grover*, Special Rapporteur on the right to health (A/HRC/14/20 of 27 April 2010), 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." 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 plans of the Länder to re-introduce 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 (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, mandatory HIV testing is incompatible with UNAIDS/WHO standards (*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 [amongst them sex workers]."

12. Persons with disabilities are denied sex life assistance (Article 15 ICESCR)

The Working Group asked the State Party to provide information about steps to encourage participation of vulnerable groups in public life.

This issue affects sex work, as 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. However, the policy to criminalize sex work denies persons with disabilities full participation in cultural and recreational life (Article 4 CRPD, Article 15 ICESCR, see General Comment 5 of this Committee of 9 December 1994, paras 37 ff), as it prevents immobile persons, who live in a 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). In the report to the Working Group, this author provided references about an ongoing political discussion in Munich of this discrimination against handicapped persons. In other cities of Bavaria, there is not even a political discussion about this issue.

13. Conclusion

In the view of the author, the described deficiencies in the implementation of ICESCR result from unwillingness of local and provincial authorities to accept international human rights obligations, and from their lacking awareness about such responsibilities. In particular, the problems mentioned in this shadow report seem to result from the lack of acceptance of the right to sexual self-determination. Rather than respecting the free decisions of voluntary sex workers and their clients to supply and demand pay-sex, the State Party deeply intrudes into the private spheres of consenting adults to control their most intimate behavior. As a result, the State Party criminalizes, stigmatizes and discriminates against women, for whom sex work is a manifestation of their sexual orientation. To overcome this situation within the federalist structure of the country, a holistic approach should be adopted, coordinating between different federal, provincial and local state organs, and enhancing efforts towards cooperation of state organs at all levels with civil society, including stakeholders from sex work. The goal of such an approach should be awareness rising about the need to consider economic, social and cultural rights, including the right of all persons to sexual autonomy, in everyday decision-making at all levels of state institutions.

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
Blumauergasse 4, A-1020 Wien, Austria