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MONIKA SIMMLER / LORENZ BIBERSTEIN

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Regulating Desire: The Impact of Law and Policy on Demand for Sexual Exploitation in Europe

AMY WEATHERBURN / CHLOÉ BRIÈRE*

KEYWORDS

prostitution – trafficking in human beings – sexual exploitation – demand

ABSTRACT

Prostitution has always been a sensitive issue for national legislators in charge of enacting laws either to regulate or ban this activity. Whereas in some countries the decision has been made to treat prostitution as a normal activity subject to regulations, prostitution is, in other countries, banned. Regardless of the legal status of prostitution in a given country, the activity may amount to trafficking in human beings for the purpose of sexual exploitation if all constitutive elements of the offence are present. Indeed, traffickers may circumvent national rules regulating prostitution and offer sexual services outside the legal framework designed by the legislator. They may also, in countries where prostitution is not allowed, find loopholes and alternatives in order to illegally offer sexual services. Considering that trafficking in human beings constitutes a serious criminal threat, and its victims suffer from serious violations of their human rights, efforts are required not only to protect its victims and prosecute its perpetrators, but also to prevent it. The present contribution will focus on a specific aspect of its prevention: the issue of demand for sexual services and how to address it. The national policies and laws on prostitution may have an impact on such demand, as for instance when in some countries, the criminalisation of the use of sexual services might dissuade potential clients from having recourse to such services. However, determining how to best address demand for sexual services remains a highly sensitive issue. In the absence of strong obligations at international or European levels, national legislators benefit from a large margin of discretion. With the aim of partially filling the gap in research about this issue, the two authors provide a comparative analysis of national legislations in selected countries, and present preliminary conclusions on the impact of legislation and policies on prostitution on the prevalence of trafficking in human beings.

ZUSAMMENFASSUNG

Prostitution war immer schon ein sehr sensibles Thema für nationale Gesetzgeber, die für deren Regulierung oder Verbot zuständig sind. Während in einigen Staaten die Entscheidung getroffen wurde, Prostitution als eine reguläre Aktivität zu behandeln und zu regulieren, ist sie in anderen Staaten verboten. Unabhängig von der Rechtsstellung der Prostitution im jeweiligen Staat kann es sich dabei auch um einen Fall von Menschenhandel zum Zweck der sexuellen Ausbeutung handeln, wenn alle Tatbestandselemente erfüllt sind. Menschenhändler können gesetzliche Bestimmungen, die die Prostitution regulieren umgehen und sexuelle Dienste ausserhalb des gesetzlich vorgegebenen Rahmens anbieten. In Staaten, in denen Prostitution verboten ist, können sie Gesetzeslücken und Ausweichmöglichkeiten finden, um illegal sexuelle Dienste anzubieten. Wenn man berücksichtigt, dass Menschenhandel eine gravierende kriminelle Gefahr darstellt und die Opfer schwerwiegende Menschenrechtsverletzungen erleiden, sind Anstrengungen nicht nur im Bereich des Opferschutzes und der Verfolgung der Täter, sondern auch im Bereich der Prävention erforderlich. Dieser Beitrag behandelt einen spezifischen Aspekt der Prävention: Die Nachfrage nach sexuellen Diensten und wie mit dieser umzugehen ist. Nationale Strategien und Gesetze zur Prostitution können sich auf diese Nachfrage auswirken, z.B. wenn in manchen Staaten die Kriminalisierung der Inanspruchnahme sexueller Dienste potentielle Kunden davon abbringen kann, solche Dienste in Anspruch zu nehmen. Wie am besten mit der Nachfrage für sexuelle Dienste umzugehen ist, bleibt ein sehr sensibles Thema. Mangels verbindlicher Verpflichtungen auf internationaler oder europäischer Ebene verfügen nationale Gesetzgeber über einen sehr weiten Ermessensspielraum. Um die Lücke in der Erforschung dieses Gegenstands zumindest teilweise zu füllen, liefern die beiden Autoren eine rechtsvergleichende Analyse der nationalen Gesetzgebungen in ausgewählten Staaten und präsentieren erste Ergebnisse betreffend die Auswirkungen nationaler Strategien und Gesetze zur Prostitution auf die Verbreitung des Menschenhandels.

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RÉSUMÉ

La prostitution a toujours été un sujet sensible pour les législateurs nationaux, qui sont chargés d'adopter des lois pour réguler ou interdire cette activité. Tandis que dans certains pays, le choix a été fait de traiter la prostitution comme une activité normale, soumise à des règles spécifiques, dans d'autres pays, la prostitution est interdite. Quel que soit le statut de la prostitution dans un pays donné, cette activité peut correspondre à la traite des êtres humains à des fins d'exploitation sexuelle, lorsque les éléments constitutifs de l'infraction sont réunis. En effet, les trafiquants peuvent détourner les normes nationales réglementant la prostitution et offrir des services sexuels en dehors du cadre légal. Ils peuvent aussi, dans les pays où la prostitution n'est pas autorisée, trouver des lacunes et des alternatives leur permettant de proposer illégalement des services sexuels. Étant donné que la traite des êtres humains constitue une menace criminelle sérieuse, et que ses victimes souffrent de violations graves de leurs droits, des efforts sont requis non seulement pour protéger les victimes et poursuivre les malfaiteurs, mais aussi pour la prévenir. Cette contribution se concentre sur un aspect spécifique de sa prévention : la question de la demande pour des services sexuels et la manière de l'aborder. Les politiques et lois nationales sur la prostitution peuvent avoir un impact sur cette demande, comme par exemple dans les pays où l'incrimination de l'usage de ces services peut dissuader des clients potentiels. Cependant déterminer comment aborder au mieux la demande de services sexuels demeure un sujet très sensible. En l'absence d'obligations claires aux niveaux international et européen, les législateurs nationaux bénéficient d'une marge d'appréciation large. Poursuivant l'objectif de combler partiellement le manque de recherche sur le sujet, les deux auteures réalisent une analyse comparée de lois nationales dans des pays sélectionnés, et elles présentent leurs conclusions préliminaires sur l'impact éventuel de telles lois et politiques sur l'importance de la traite des êtres humains.

I. Introduction**

Trafficking in human beings (hereafter human trafficking) constitutes a widespread phenomenon, which entails severe violations of human rights of its victims, and which is considered as a serious form of crime. For more than 15 years, states, acting at national, regional or international levels, have adopted and implemented measures aiming at combating this phenomenon. They have engaged in a step-by-step approach, building upon existing instruments and attempting to correct their identified weaknesses to a later stage. They have moved from a purely criminal justice approach, focusing mainly on criminal law measures, aiming at improving the prosecution of traffickers, at a more comprehensive approach, also addressing the prevention of trafficking and the protection of its victims. Among the measures aiming at preventing trafficking, one deserves

particular attention, especially given its sensitiveness and the lack of consensus surrounding it. This measure consists in the criminalisation of clients who use the services provided – or goods produced – by victims of trafficking. It is envisaged as a way to reduce the demand for cheap labour and services, which is recognised as a root cause of human trafficking¹ and a driving force behind the proliferation of the phenomenon across Europe.

The complexity of the notion of demand is beyond doubt, especially in the context of human trafficking. Demand has not only different historical and economic implications, but also the way in which it is dealt with in the human trafficking context must be tailored according to the form of exploitation that is being tackled. Therefore, demand for sexual services must be distinguished from demand for other forms of human trafficking, including labour exploitation, forced begging, forced/servile marriages, forced criminal activities and illegal organ removal. And also, it is important to be aware of external factors, such as the impact of migration, in particular of restrictive immigration policies that are often driving irregular migrants into the hands of human traffickers.

Because of this complexity, it is important to define what type of demand will be discussed in this contribution: demand *for what* and *from whom*. Our focus will be on the measures adopted to address the demand *for sexual services*, i.e. services that are sexual in nature and whose purpose is to sexually gratify the person who receives it.² Within this contribution, these sexual services would be limited to those implying physical contacts between the client and the service provider, e.g. sexual in-

** The views reflected in this article are personal to the two authors and do not engage the consortium involved in the project DESIrE, DEmand for Sexual Exploitation In Europe, EU Funded project, January 2017-December 2018, project is coordinated by FRC, Vrij Universiteit Brussels and includes partners Intervict, Tilburg University; FLIGHT; Human Trafficking Studies Centre, University of Warsaw & Department of Women's and Children's Health, University of Uppsala.

1 Principle 4, United Nations, Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

2 Source: <http://www.justice.gc.ca/eng/rp-pr/other-autre/c36faq/>, accessed 31st March 2017.

tercourse, masturbation, massages, etc., and thus exclude for instance those provided online, such as live chats and webcams. This type of demand can be considered a root cause of trafficking in human beings for the purpose of sexual exploitation (hereafter sex trafficking), as these sexual services may be provided by victims of sex trafficking.³ Defining *from whom* this demand emanates proves to be a more delicate exercise. An expansive approach of demand implies exploring the demand coming from the individuals who pay for sexual services, the individuals and groups facilitating the exploitation and, finally, the gender, social, cultural, economic and institutional constructs that contribute to creating an environment in which sexual exploitation is either ignored, tolerated, or even accepted. If this approach of demand was followed, measures addressing demand for sexual services would be very wide-ranging, and their analysis would be too ambitious for this contribution. The authors thus choose to focus on the measures addressing one dimension of demand for sexual services: the measures aiming at reducing the demand *from the clients*, i.e. those with the willingness to use sexual services in exchange for a gain, and the ability to do so.⁴ These measures consist in the criminalisation of the clients of sexual services, and concern, depending on national laws, either all clients, or only those who use sexual services provided by victims of sex trafficking. A practical difficulty arises as the clients buying sexual services do not differentiate between the prostitutes who have been trafficked, those who do it voluntarily and those who are forced. Nevertheless, such criminalisation may have a dissuasive effect on the clients, who may abstain from purchasing sexual services, leading to the reduction of demand. However, the adoption of this measure in a given country is particularly sensitive, as it is inextricably linked to the national position on prostitution,⁵ and whether national legislators have enacted laws either to regulate or ban such activity. No consensus exists on the status given to prostitution, and each state has its own position on the topic, as well as on the opportunity to criminalise the use of sexual services.

Academic research has been regularly conducted with the aim to describe, analyse and evaluate the impact of measures addressing demand.⁶ This is especially true in economics, a field in which researchers have attempted to model their impact.⁷ The present contribution serves another purpose: it aims at understanding the diversity of approaches of European states concerning the criminalisation of the use of sexual services, through the use of a comparative approach. Four case studies will be discussed: Switzerland, Croatia, Sweden, and Poland, which were selected based upon their representativeness of the diversity of the different models. This paper seeks to de-

termine whether the criminalisation of the use of sexual services has an impact on the demand for sexual services from clients in the countries implementing such criminalisation. However, it does not attempt to determine whether one model is better than another.

After stressing the diversity in approaches towards the reduction of demand for sexual services in Section II, we will analyse the four case studies mentioned above in Section III, via a focus on their current legislative framework on prostitution and measures taken to reduce demand for sexual services. This paper will conclude by reinforcing the importance of an evidence-based analysis of the impact of measures addressing demand on sexual exploitation, such as the criminalisation of clients, as it may assist policy makers in assessing the relevance of anti-trafficking measures.

II. How Best to Address Demand for Sexual Services: A Sensitive Question with Diverse Answers

Demand for sexual services is complex to address, in particular because of the existence of divergent approaches on how to tackle it.⁸ The position of national legislators

3 The authors do not consider that every person providing sexual services is a person in a situation of exploitation, and therefore we distinguish between persons involved in prostitution and persons providing sexual services in the framework of their exploitation. To say in different terms, the authors do not consider that prostitution is *per se* bad.

4 NORBERT CYRUS/DITA VOGEL, Demand Arguments in Debates on Trafficking in Human Beings: Using an historical and economic approach to achieve conceptual clarification, DemandAT Working Paper No. 1, June 2015, 23.

5 It is important to pinpoint that prostitution does not always amount to trafficking in human beings for the purpose of sexual exploitation, but it may do so when all constitutive elements of the offence are present.

6 For an overview of research conducted in this field, see PETER V. VAN DER LAAN/MONIKA SMIT/INGE BUSSCHERS/PAULINE AARTEN, Cross-border trafficking in human beings: prevention and intervention strategies for reducing sexual exploitation, Campbell Systematic Review, 2011 No. 9.

7 See a. o. VANESSA E. MUNRO/MARINA DELLA GIUSTA (eds), Demanding Sex: Critical Reflections on the Regulation of Prostitution, London 2016; ALAN COLLINS/GUY JUDGE, Differential enforcement across police jurisdictions and client demand in paid sex markets, European Journal of Law and Economics 2010, Vol. 29, 43 et seqq.; NIKLAS JAKOBSSON/ANDREAS KOTSADAM, The law and economics of slavery: prostitution laws and trafficking for sexual exploitation, European Journal of Law and Economics 2013, Vol. 35, 87 et seqq.

8 UN Special Rapporteur on Trafficking in Persons, Interim report, A/65/288, 9th August 2010, § 34.

varies from one country to another. At the one end of the spectrum, some national legislators consider that sex trafficking is seen as inextricably linked to prostitution and cannot be prevented without curbing demand for prostitution.⁹ Although prostitution remains legal, Sweden was

the first country to introduce legislation that criminalises buying or soliciting of sexual services in general.¹⁰ France passed a similar law in 2016 criminalising the use of sexual services.¹¹ A middle ground has been adopted in ten EU Member states criminalising the use of services which are the objects of all forms of exploitation (e.g. sexual and labour exploitation) of victims of human trafficking.¹² On the other end of the spectrum, the free choice advocates draw a clear distinction between prostitutes who are voluntarily involved in prostitution and trafficked persons who are forced into prostitution.¹³ In countries supporting this approach, the criminalisation of clients of prostitutes is not viewed as an adequate solution to address sex trafficking, and it is legal to sell and purchase sexual services. For instance, in Germany, the 2002 Prostitution Act legalised the contractual relationship between clients and persons involved in prostitution, and provided persons involved in prostitution with the right to enforce payments in courts.¹⁴

The diversity of national positions on the issue has somehow prevented the emergence of a strong consensus at international and regional level. In instruments related to human trafficking, measures addressing demand are always part of preventive measures,¹⁵ and they concern indistinctly demand for all forms of exploitation, be it demand for sexual services, for cheap labour, etc. Some instruments refer to the importance of addressing demand in general terms, such as the United Nations' Protocol against Trafficking in Persons¹⁶ or the OSCE's Action Plan to combat trafficking.¹⁷ In these two frameworks, the criminalisation of the use of services provided by trafficking victims has been mentioned, but only in non-binding policy documents.¹⁸ In contrast, other instruments refer explicitly to the criminalisation of the behaviours of clients, and more particularly those who use the services or goods provided by a person with the knowledge that this person is a victim of trafficking. Both the Convention adopted within the Council of Europe¹⁹ and the European Union's Directive²⁰ envisage that States shall consider establishing as criminal offences the use of services which are the object of exploitation. The EU's Directive also foresees the submission of a report assessing the impact of existing national laws criminalising the use of such services, on the prevention of trafficking in human beings (Art. 23 [2] European Commission Report, December 2016 [see fn. 12]). When reading this provision together with the EU Strategy towards the Eradication of Trafficking in Human Beings,²¹ which foresees concrete efforts towards a better understanding and reduction in demand,²² one can but only notice that the favoured position in Europe looks towards the criminalisation of the use of services of victims of trafficking in human beings.²³

⁹ UN Special Rapporteur on Trafficking in Persons (fn. 8), § 34.

¹⁰ Act Prohibiting the Purchase of Sexual Services 5SFS 1998:408).

¹¹ Law n°2016-444 of 13th April 2016 to strengthen the fight against the prostitution system and accompany prostitutes, JORF No 0088 of 14th April 2016.

¹² European Commission, Report assessing the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, COM (2016) 719 final, 2nd December 2016, 3.

¹³ UN Special Rapporteur on Trafficking in Persons (fn. 8), § 34.

¹⁴ MADALINA ROGOZ, Responses to demand in the context of trafficking in human beings: regulatory responses from twelve national contexts, DemandAT Working Paper No. 6, April 2016, 15.

¹⁵ The type of measures that are encouraged also include: research into new forms of trafficking in human beings (Para 25, Recital, EU Directive 2011/36), best practices, methods and strategies (Art. 6 COE Convention, 2005), awareness raising and information campaigns, and education (Para 25, Recital, EU Directive 2011/36; Art. 6 COE Convention, 2005).

¹⁶ United Nations, Protocol against Trafficking in Persons especially women and children, to the Convention against Transnational Organized Crime, 2000. See in particular Art. 9 (5) which envisages the adoption of measures to discourage the demand, while leaving a broad margin of discretion to States parties (CYRUS/VOGEL [fn. 4], 14). This provision is close to the provision on prevention (Art. 16) of the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

¹⁷ OSCE Ministerial Council, Declaration on Trafficking in Human beings, MC (10).JOUR/2, Porto, 7th December 2002, Annex 2.

¹⁸ United Nations, Report on the meeting of the Working Group on Trafficking in Persons, 2013, CTOC/COP/WG4/2013/5, para. 35; and OSCE Permanent Council, OSCE Action Plan to combat trafficking in human beings, Decision No. 557/Rev.1, 2005, 10.

¹⁹ Art. 19 of the Council of Europe's Convention, Warsaw, 16th May 2005.

²⁰ Art. 18 (4) of Directive 2011/36/EU of the European Parliament and of the Council of 5th April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ L 101/1.

²¹ European Commission, EU Strategy towards the Eradication of Trafficking in Human Beings (2012–2016), Brussels, 19th June 2012 COM (2012) 286 final.

²² European Commission (fn. 21), Priority B, Action 1, 8.

²³ European Commission (fn. 21), Priority B, Action 2, 8. One of the proposed methods for achieving this end result was the development of models and guidelines on reducing the demand for services provided by victims of trafficking in human beings, in particular in high-risk areas, including the sex industry, but also for other known at-risk economic sectors such as agriculture, construction and tourism. NB at the time of writing, the guidelines have not yet been published.

This impression is further reinforced when looking at the positions taken by the European Parliament, which has for instance in July 2016 called on the Member states to criminalise the knowing use of the services of a victim of trafficking.²⁴

Addressing demand is thus considered as one of the key preventative tools, notably from the perspective of the European Commission, which has funded projects to assist Member states willing to engage in the criminalisation of clients. Two projects were funded to develop lists of objective indicators for clients/users of sexual services to reasonably judge whether someone is trafficked or not. These projects contribute to convincing Member states that it is possible to criminalise use of services and to establish probable knowledge that the individual was using the services of a victim of trafficking based on evidence, rather than relying only on victim statements.²⁵

However, it is important to highlight that the wording of the provisions and of the policy documents mentioned above, remain «soft». Their formulation, i.e. the fact that they only invite states to «consider» the adoption of such measures, indicates that they are more of an optional value. This thus illustrates the extreme sensitiveness of the issue and the difficulty to agree on a binding provision, including among European countries.

III. Diversity in National Laws and Policies as Illustrated by Case Studies

International and European standards leave a broad margin of appreciation to states in deciding what would be the most appropriate measures to address demand for sexual services. The decision to criminalise clients of services provided by persons trafficked into sexual exploitation is thus a very sensitive and political issue. National authorities are considered as the only ones competent to balance the advantages of a potentially dissuasive and extremely symbolic measure against the risk that it would push traffickers and their victims to go further underground to protect their clients. The importance of the national context justifies a brief analysis of case-studies in order to present an overview of the different solutions adopted and implemented at national level.

Four countries have been selected: Switzerland, Croatia, Sweden, and Poland. They constitute representative examples of the diverse positions/solutions implemented by European states. For each state, the status of prostitution and the current legislative framework will be presented, followed by an analysis of the national measures adopted and implemented to address demand.

A. Switzerland: the legalisation model

1. Prostitution: the current legislative framework

In Switzerland, practising prostitution is legal, and revenues from prostitution are subject to taxes. For foreign prostitutes, residence and work permits are required. Nevertheless, this does not preclude the existence of criminal law provisions aiming at sanctioning abuses. This is for instance the case for sex trafficking,²⁶ or incitement to prostitution.²⁷ Yet the regulation of prostitution is a competence attributed to the cantons, i.e. the federated entities, leading to certain divergences throughout the country, and limited power for the Federal State. The cantons are indeed responsible for the adoption of directives concerning the fight against violence, or the improvement of hygiene, and they assume the responsibility for the legal status of prostitutes.²⁸

The distinction is thus made between the persons, Swiss or foreigners, who voluntarily choose prostitution as their legal professional activity, and those who are victims of sexual exploitation and thus forced to prostitute themselves.²⁹ The victims of trafficking identified in Switzerland are mostly victims of sexual exploitation.³⁰

2. Measures addressing demand

The first National Action Plan against Trafficking in Human Beings approved in 2012 aimed at raising public awareness and improving the level of information about the phenomenon, and at broadening knowledge about human trafficking in Switzerland and the reasons why people are trafficked.³¹ National information campaigns

24 European Parliament, Resolution of 5th July 2016 on the fight against trafficking in human beings in the EU's external relations (2015/2340(INI)), § 9.

25 European Commission, Study on comprehensive policy review of anti-trafficking projects funded by the European Commission, 23rd September 2016, 72.

26 Art. 182 Swiss Criminal Code of 21st December 1937 (SCC), CC 311.0.

27 Art. 195, b) to d), Swiss Criminal Code.

28 Conseil Fédéral, Prostitution et traite d'être humains à des fins d'exploitation sexuelle, Rapport du Conseil fédéral en réponse aux postulats 12.4162 Streiff-Feller, 13.3332 Caroni, 13.4033 Feri et 13.4045 Fehr, 5th June 2015, 3.

29 Conseil Fédéral (fn. 28), 15

30 Council of Europe, Group of Experts on Action against Trafficking in Human Beings, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Switzerland, GRETA(2015)18, 11, § 10.

31 KSMM Steering Committee, National Action Plan to Fight Human Trafficking 2012–2014, 1st October 2012, 4.

were difficult to conduct in the absence of a legal basis for federal authorities to fund preventive measures. Yet federal authorities organised activities aimed at raising awareness amongst a broad target audience, and since 2014, they have had a legal basis to fund large-scale campaigns.³² More activities have been conducted at cantonal level, such as activities concerning risks of sexual exploitation, sometimes carried out by local NGOs providing assistance to persons engaged in prostitution.

Concerning measures addressing demand for sexual services *per se*, in response to an ongoing debate, the Parliament requested the Federal Council, i.e. the Swiss Federal Government, to prepare a report analysing the legal framework about prostitution in the country, and discuss measures that can be taken to improve the protection of prostitutes.³³ Some of the proposed measures aim at improving prevention, for instance through a better data collection on prostitution and human trafficking for the purpose of sexual exploitation. The introduction of a provision targeting clients was discussed, but the majority of the experts working on this report rejected the introduction of such a provision criminalising clients in the Swiss Criminal Code.³⁴

This does not mean that clients of sexual services are ignored by criminal legislation. They are criminally liable if they use services provided by minor prostitutes,³⁵ and

the offence is punishable by deprivation of liberty of up to three years. For clients of adult prostitutes, who provide sexual services as a consequence of their exploitation, the legislator has not adopted a provision explicitly foreseeing criminal sanctions. However, if a client knows that the prostitute acts under constraint, or if the client considers such exploitation possible and puts up with it, he may be criminally liable for abuse of state of distress (*abus de détresse*).³⁶ This offence potentially covers situations where no other criminal provision applies, and to engage the criminal liability of the clients, it would be necessary to establish that certain signs may have indicated that the prostitute was forced to provide his/her services.³⁷

3. Preliminary comments

The situation of prostitution in the country is marked by a high heterogeneity. Some civil society organisations have voiced their concerns and stress the importance for public authorities to strike again the balance between the protection of public space against prostitution, as habitants complain about the presence of prostitutes in the streets, and the defence of a commercial activity particularly lucrative, and for which demand is still present.³⁸ Such a position must be nuanced against empirical research, which notably established that street prostitution only represents around 5 % of the persons active in this sector.³⁹ The profile of the sex workers seems to change, turning from a permanent occupation into a temporary short-term job without long-term commitment.⁴⁰ As a consequence, managers of sex clubs and other businesses have indicated that they frequently receive applications from women desiring to work in their premises for a few weeks/months before returning to «normal activity». Although this may suggest that sex workers voluntarily engage in prostitution, one third of the managers interrogated has nevertheless reported having knowledge of situations of forced sex labour in other businesses, and some indicated having regularly received applications from women «under pressure».⁴¹ The distinction between voluntary and pressured applications can be difficult to make for managers.

In this context, the question was addressed to determine whether the punishment for the clients of forced/exploited prostitutes may dissuade them from denouncing trafficking situations. A study published in 2010 concluded on the absence of such correlation: the absence of punishment of clients does not lead to more denunciation of forced prostitution or situations that may be identified as such, even though the clients do not risk to engage their criminal liability.⁴² Discussions could address the opportunity to incite clients to cooperate with law enforcement authorities, or to adapt the sanctions for known use of sex-

32 Council of Europe (fn. 30), 26 et seq., § 89 et seqq.

33 Conseil Fédéral (fn. 28).

34 Conseil Fédéral (fn. 28), 130.

35 Art. 196, Swiss Criminal Code.

36 Art. 193 al. 1, Swiss Criminal Code. Confirmed by Swiss authorities in Council of Europe (fn. 30), 29, § 101.

37 Conseil Fédéral (fn. 28), 62 – such indicators are the availability of the person 24 hours a day, basic knowledge of the language, absence of ID documents or money, being under drug influence, signs of violence, etc.

38 PAULINE JEANNE, «Prostitution en Suisse: grand malaise et petit bricolage», June 2016, <http://www.prostitutionetsociete.fr/politiques-publiques/legislations-nationales/article/prostitution-en-suisse-grand-malaise-et-petit-bricolage> (revue of the Mouvement du Nid-France, pro-abolitionist), accessed on 30th October 2016.

39 LORENZ BIBERSTEIN/MARTIN KILLIAS, *Erotikbetriebe als Einfallstor für Menschenhandel?*, Eine Studie zu Ausmass und Struktur des Sexarbeitsmarktes in der Schweiz, Untersuchung im Auftrag des Bundesamtes für Polizei fedpol, version of 10th April 2015, 16, https://www.ksmm.admin.ch/dam/data/ksmm/dokumentation/berichte/15_Erotikbetriebe_als_Einfallstor_fuer_Menschenhandel.pdf, accessed on 31st March 2017.

40 BIBERSTEIN/KILLIAS (fn. 39), 15.

41 BIBERSTEIN/KILLIAS (fn. 39), 15.

42 DANIELA DEMKO, *Die Strafbarkeit der Freier von Zwangsprostituierten – gangbarer Weg oder Irrweg im Kampf gegen Zwangsprostitution?*, RPS 03/2010, 279 et seqq.

ual services provided by trafficking victims and restrain it to cases of neglect, i.e. when the client could or should have been aware of forced prostitution. Yet on the use of criminal law, the same study stresses the importance of the effective sanction of behaviours defined as criminal offences. Without concrete cases, a provision criminalising clients would fail to have a dissuasive effect.⁴³

B. Croatia: the full criminalisation model

1. Prostitution: the current legislative framework

Croatian women and girls, some of whom respond to false job offers online, fall victim to sex trafficking within the country and throughout Europe. Women and girls from the Balkans and Eastern Europe are also subjected to sex trafficking in Croatia.⁴⁴ The situation of trafficking in human beings has been evolving: the country is increasingly becoming a country of origin as well as being a country of destination and transit for victims of human trafficking. Most of the victims identified are female victims trafficked for the purpose of sexual exploitation, including for the purpose of child abuse images for social networks.⁴⁵ The national authorities have received reports of increased risks of forced prostitution on the Adriatic coast during holiday season, but this has not yet led to the identification of victims.⁴⁶

From a legal perspective, Croatia is the only EU Member State in which prostitution is illegal. The persons who work as prostitutes are punished as misdemeanour offenders;⁴⁷ whereas pimping and organising prostitution are considered serious offences.⁴⁸ Analysis of police reports for offences related to prostitution and of the numbers of convicted persons seems to indicate that prostitution is considered a lesser crime, and prison sentences are typically reserved for recidivists or cases involving coercion or juvenile persons.⁴⁹

2. Measures addressing demand

Very little non-legislative measures have been implemented to address demand. The Office for Human Rights and the Rights of National Minorities has conducted a campaign in 2013 with the slogan «Real men don't buy women». The campaign aimed at raising awareness of potential users of services of victims of trafficking in human beings. In order to present the campaign to the public, the Office organised a public event on the Flower Square in Zagreb on the occasion of the EU Anti-trafficking day. During this event, the competent institutions, civil society organisations and international organisations in the Republic of Croatia, presented their projects and activities in the field

of combating trafficking in human beings. The campaign lasted for a year and included the creation of flyers, city light posters, and jumbo posters, and launching a Facebook page.⁵⁰

In contrast, legislative measures are more developed. The known use of services of trafficked persons has been criminalised for a long time under Art. ex-175 (4), now Art. 106 (4), of the Croatian Criminal Code. The provision relating to trafficking in human beings has been amended by the Act on Amendments and Supplements to the Criminal Code, which came into force on 1st January 2013.⁵¹ The severity of sanctions has been increased over time: whereas under Art. ex-175 (4) the applicable sanction was a prison sentence from three months to three years,⁵² Art. 106 (4) provides for prison sentences from one to 10 years.⁵³ In other terms, under the current regime, the sanctions applicable to users of services provided by victims of trafficking are the same as those provided for the offence of trafficking in human beings. Yet no convictions have been delivered under this provision.

3. Preliminary comments

The Croatian authorities have followed the recommendations formulated in the European instruments, as they

⁴³ Conseil Fédéral (fn. 28), 62.

⁴⁴ US Department of State, Trafficking in Persons Report, Country narratives, Croatia, 2015, <http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243422.htm>, accessed on 30th October 2016.

⁴⁵ Council of Europe, Group of Experts on Action against Trafficking in Human Beings Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Croatia, GRETA (2015) 33, 7, § 13.

⁴⁶ Council of Europe (fn. 45), 7, § 14.

⁴⁷ PERO MIHALJEVIC, Sentencing and imprisonment practices in prostitution cases in Croatia, presentation made at the occasion of the conference «Imprisonment in the Balkans», held in Sarajevo between 17th and 19th September 2015.

⁴⁸ Pimping is criminalised under Art. Ex-195 (new numbering missing) of the Croatian Criminal Code, and organising prostitution under Art. 157 (ex-178) on International Prostitution.

⁴⁹ MIHALJEVIC (fn. 47).

⁵⁰ Council of Europe (fn. 45), 17, § 76.

⁵¹ Council of Europe (fn. 45), 29, § 143. The Croatian Parliament adopted the new Criminal Code on 21st October 2011, which was published in the «Official Gazette» No. 125/11 of 7th November 2011 and which came into force on 1st January 2013.

⁵² Council of Europe (fn. 45), 14, § 35.

⁵³ Council of Europe (fn. 45), 30, § 149. The provision now reads as follows: 4) The punishment from paragraph 1 of this Article shall be imposed on anyone who, knowing that a person is the victim of trafficking in human beings, uses their services which are the result of one of the forms of exploitation of them listed in paragraphs 1 and 2 of this Article.

have conducted awareness-raising campaigns targeting demand for sexual services (prospective clients), and they have criminalised the known use of services provided by a victim of trafficking. However, one may question the dissuasive effect of such a provision, if no conviction has been pronounced since its introduction.

Discouraging demand may require more proactive efforts than the mere adoption of criminal provisions and GRETA is not satisfied with the efforts of the Croatian authorities. The latter are indeed invited to strengthen their efforts for all forms of exploitation and in particular sexual exploitation.⁵⁴

C. Sweden: the Nordic Model

1. Prostitution: the current legislative framework

The Swedish approach to prostitution is founded on the understanding that it is an unacceptable form of gender-based violence, a cause of serious harm to individuals and to society as a whole, and a serious obstacle to social equality, gender equality, and the enjoyment of human rights.⁵⁵ Thus, since 1st January 1999, Swedish legislation penalises purchasing – or attempting to purchase – sexual services, including in cases where the payment has been promised or made by someone else. The criminal offence is punishable by fines or up to six months imprisonment.⁵⁶ The Swedish Penal Code introduced the offence of trans-

national human trafficking in 2002 and, with subsequent amendments, now criminalises human trafficking (internally and transnationally) for the purposes of sexual exploitation, forced labour, removal of organs and involvement in armed conflicts.⁵⁷

2. Measures addressing demand

Sweden does not have a national anti-trafficking action plan,⁵⁸ however, the institutional framework consists of components that are mandated to discourage human trafficking by promoting the reduction in demand and in particular the prostitution policy model. In 2009, the National Coordinator against Prostitution and Trafficking was established to coordinate the implementation of the action plan and the activities of public bodies throughout Sweden with regards to combating prostitution and trafficking in human beings for sexual exploitation.⁵⁹ Equally, the National Task Force against Prostitution and Trafficking was established in 2009 with the purpose of coordinating the anti-trafficking response in Sweden at the operational level.⁶⁰ More recently, in spring 2016, Sweden appointed an Ambassador against Human Trafficking.⁶¹ The Ambassador will focus on improving the effectiveness of international efforts and cooperation against human trafficking and promoting the Swedish model, i.e. discouraging demand by criminalisation of purchasing sexual services and promoting equality and gender mainstreaming.⁶²

The principal measure that is applied in Sweden is the legislative framework that has been reinforced by the policy and institutional framework. In addition, information campaigns, such as the NGO-led «Reducing Demand Campaign», was aimed at decreasing demand for sexual services through sensitising potential buyers and victims of trafficking in human beings. The campaign material containing information, fictional and real-life stories and issues for discussion, was disseminated to interested youth centres and schools throughout Sweden. The campaign was conducted by the NGO «1 000 opportunities», with the financial support of the County Administrative Board of Stockholm.⁶³

3. Preliminary comments

Official reports by the Swedish government state that since the introduction of the criminalisation of the use of services, there has been a significant reduction in demand. However, in reality, the discourse regarding the effectiveness of the Swedish model is polarised. For example, the criminalisation of purchasing sexual services provides law enforcement agencies with an added line

⁵⁴ Council of Europe (fn. 45), 17, § 77.

⁵⁵ MAY-LEN SKILBREI/CHARLOTTA HOLMSTRÖM, *Is There a Nordic Prostitution Regime?*, *Crime and Justice*, Vol. 40 No. 1/2011, 479 et seq., 490; Council of Europe, Group of Experts on Action against Trafficking in Human Beings Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden, GRETA (2014)11, 31.

⁵⁶ Section 11, Chapter 6, Swedish Penal Code.

⁵⁷ Section 1a, Chapter 4, Swedish Penal Code.

⁵⁸ Council of Europe (fn. 55), 12 et seq.

⁵⁹ Council of Europe (fn. 55), 14 et seq.

⁶⁰ Council of Europe (fn. 55), 14 et seq.

⁶¹ Council of Baltic Sea States, THB Task Force, Human Trafficking Round Up 2016, November 2016, <http://www.cbss.org/introducing-latest-human-trafficking-2016-baltic-sea-round-report/>, accessed on 30th November 2016.

⁶² Gender mainstreaming means that policy makers should look at the human implications of any activity, highlighting the differences between women and men, and thus the potential differential impacts, and they should design the activity to ensure that both men and women will benefit equally (UNODC, *Gender mainstreaming in the work of UNODC*, June 2013, 4).

⁶³ Council of Europe (fn. 55), 31.

of enquiry for criminal investigations that may assist in ensuring the effectiveness and success of prosecutions.⁶⁴ However, there are concerns that the prostitution policy model in fact forces the sex industry to become even more clandestine as it is driven underground. This can also impact the willingness of persons involved in prostitution to cooperate with authorities as they are stigmatised.⁶⁵

Overall, the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (GRETA) appear to be supportive of the legislative framework adopted by the Swedish, and that it should be further enhanced to strengthen protection for all victims of human trafficking by establishing as a criminal offence the use of services which are the object of labour exploitation, with the knowledge that the person is a victim of trafficking in human beings.⁶⁶

D. Poland: the Partial Criminalisation Model

1. Prostitution: the current legislative framework

Prostitution in Poland is legal, however, under the Criminal Code, forced prostitution of adults⁶⁷ and minors,⁶⁸ facilitating prostitution through operating brothels or other forms of pimping⁶⁹, deriving a material benefit from the prostitution of others⁷⁰ and enticing or abducting a person with the aim of having him/her engage in prostitution abroad⁷¹ are prohibited. In 2010, the national legal framework was amended⁷² to include a definition of trafficking in human beings⁷³ and the legal classification of human trafficking.⁷⁴

2. Measures addressing demand

The 2013 National Action Plan outlines a number of measures that are aimed at the prevention of human trafficking, including numerous information campaigns and awareness raising initiatives,⁷⁵ which was positively noted by European experts.⁷⁶ In 2015, the results of a public opinion poll were launched regarding the level of social awareness of the risks posed by human trafficking: again, the results showed that the public was heavily focused on prostitution, with this being seen as the most prominent form of exploitation that predominantly affects women.⁷⁷ A New Action Plan has been adopted for 2016–2018, and it envisages similar preventive measures.⁷⁸

Despite the apparent public awareness of the link between human trafficking and prostitution, it appears that the relevant law enforcement agencies rarely identify the link between forced prostitution and human trafficking.⁷⁹ Similarly, there appears to be a lack of knowledge amongst the legal profession regarding the international human

trafficking framework and its implementation domestically.⁸⁰ Such a lack of knowledge can be detrimental to efforts made towards the reduction of demand, especially where the approach adopted by law enforcement and the judiciary fails to secure the appropriate protection and assistance for victims when prosecuting cases of human trafficking for sexual exploitation. For instance, the fol-

64 Prohibition of the purchase of sexual services. An evaluation 1999–2008 (SOU 2010:49) to the Government, available at: <http://www.regeringen.se/sb/d/12634/a/149142>, in English at: <http://www.government.se/sb/d/13420/a/151488>, accessed on 30th October 2016 and quoted in Council of Europe (fn. 55), 31.

65 ANN JORDAN, The Swedish Law to Criminalize clients: A failed experiment in social engineering, Issue Paper 4, April 2012, Centre for Human Rights and Humanitarian Law, American University Washington College of Laws, <http://rightswork.org/wp-content/uploads/2012/04/Issue-Paper-4.pdf>, accessed on 30th October 2016, in Council of Europe (fn. 55), 31.

66 Council of Europe (fn. 55), 32.

67 Art. 203, Polish Criminal Code.

68 Art. 204 (3), Polish Criminal Code.

69 Art. 204 (1), Polish Criminal Code.

70 Art. 204 (2), Polish Criminal Code.

71 Art. 204 (4), Polish Criminal Code. This provision was repealed in 2010.

72 Act of 20 May 2010 concerning changes to the Criminal Code.

73 Art. 115, para. 22, Polish Criminal Code.

74 Art. 189a, Polish Criminal Code.

75 National Action Plan Against Trafficking in Human Beings for 2013–2015, Draft adopted on 19th February 2013 by way of Resolution No 3 of the Committee for Combating and Preventing Trafficking in Human Beings, 8 et seqq.

76 Council of Europe, Group of Experts on Action against Trafficking in Human Beings Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Poland, GRETA (2013)6, 31 et seqq.

77 Polish Ministry of the Interior, Social awareness of human trafficking threats and threats regarding taking up a job abroad 2015 Research report, 11, 15, <http://www.handelludzmi.eu/hle/institutions/our-projects/improving-polands/project-actions/6586,Public-opinion-poll.html>, accessed on 31st October 2016.

78 National Plan of Action against Trafficking in Human Beings for 2016–2018, August 2016, 10 et seqq. Available only in Polish at: <http://www.handelludzmi.eu/hl/baza-wiedzy/krajowy-plan-dzialan/6875,Krajowy-Plan-Dzialan-przeciwko-Handlowi-Ludzmi-na-lata-2016-2018.html>, accessed on 31st March 2017.

79 DOMINIKA BORG JANSSON, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons*, Leiden 2014, 239.

80 European Network Against Trafficking in Women for sexual exploitation, Implementing gender equality principles to combat trafficking and to prevent sexual exploitation of women and children (date unknown), 36.

lowing are examples of the lack of protection of victims that have been sexually exploited due to their involvement in prostitution: i) a reduction of a trafficker's sentence because victims were considered by judges to have been «voluntarily exploited» or had a past history of engaging in prostitution, and ii) prosecutors pursuing cases on the basis of exploitation of prostitution and not human trafficking, resulting in suspended sentences and the deportation of foreign human trafficking victims.⁸¹

Both examples illustrate an institutional trend towards placing less importance on instances of forced prostitution, which can be detrimental to efforts aimed at reducing demand and future prosecutions of human trafficking offences, as victims will be less likely to cooperate with law enforcement authorities.

3. Preliminary comments

A large number of information campaigns and awareness raising initiatives have been taken by the Polish authorities and civil society, and there are no legislative provisions that criminalise the use of services of human trafficking victims. In addition, it is important to note that none of the proposed activities in the Action Plan are specifically aimed at addressing a reduction in demand. This reflects the diversity among European States, as Poland constitutes one example of a country that does not necessarily consider addressing demand as a priority.

IV. Conclusion

The four case studies analysed above illustrate the diversity in the national legislations and policies on the link (or the absence of a link) between prostitution and human trafficking for the purpose of sexual exploitation. Measures aiming at addressing demand further reflect this diversity and whereas the criminalisation of clients often attracts most of the attention, it constitutes a measure limited to certain countries. Nevertheless, the diversity demonstrated by these case studies shall not prevent us from providing some remarks on the challenges arising when attempting to determine the impact of measures addressing demand.

In most of the countries analysed in the present article, demand is addressed through the conduct of campaigns aiming at raising awareness about sexual exploitation in the field of prostitution, or at discouraging the use of sexual services obtained against payment. This type of measure is also widespread in other countries, as it is often conducted together with campaigns aiming at raising awareness against trafficking in human beings,⁸² and it is thus less sensitive than the criminalisation of the use of sexual services provided by victims of trafficking. However, regardless of the primary objective of these campaigns, authorities face an important challenge: the difficulties in evaluating their impact or the absence of evaluation of these campaigns. This issue shall not be overlooked, since it may give the impression that national authorities only «tick the box» of addressing demand, without paying concrete attention to the impact of the measures implemented.

In the countries that have chosen to criminalise the use of sexual services, assessing the impact of this criminalisation is equally necessary to determine whether this measure remains of a symbolic nature, or whether it achieves its objectives, either reducing prostitution in countries like Sweden criminalising the purchase of all sexual services, or reducing trafficking in human beings for the purpose of sexual exploitation in countries criminalising the purchase of sexual services provided by victims of trafficking. Such assessment seems a delicate task, as the sensitiveness of the issue endures the adoption of national legislation criminalising the behaviours of clients.⁸³ As a consequence, supporters and opponents to the measure take this exercise as an opportunity to repeat their arguments. Other difficulties can be encountered, and one may, for instance, wonder whether the number of convictions can be considered as an indicator of the success (or failure) of the measure. It is in any case clear that only a sanction effectively applied against clients in application of national law can have a dissuasive effect.⁸⁴

⁸¹ Council of Europe (fn. 76), 50; JANSSON (fn. 79), 239.

⁸² Similar campaigns have been conducted for instance in the United Kingdom (Council of Europe, Group of Experts on Action against Trafficking in Human Beings Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, GRETA (2016) 21, 33, § 128) or in Germany (Council of Europe, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany, GRETA (2015) 10, 32, § 107).

⁸³ Example of the evaluation conducted in Sweden: an independent Commission appointed by the government concluded that the ban had a positive impact (Statens Offentliga Utredningar, Förbud mot köp av sexuell tjänst. En utvärdering 1999–2008, 2010, SOU 2010:49, 36). The study was criticised and accused of being biased, i.e. based on the idea that the law would remain and was not to be challenged. Some persons involved in prostitution were disinclined to submit their reflections, as they felt that their testimony, if it was critical of the criminalisation of the purchase of sexual services, would not be presented on an equal footing (JAY LEVY/PYE JAKOBSSON, Sweden's abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden's sex workers, *Criminology and Criminal Justice*, 2014, Vol. 14 (5), 593 et seqq., 594).

In certain countries, the issue of proving the knowledge of the clients about the situation of exploitation of the person providing sexual services has not been mentioned as an important barrier. Solutions inspired from other crimes, such as conjugal rape, can be used, e.g. the use of indicators.⁸⁵ Sometimes clients also have no difficulties in admitting the offence.⁸⁶ Furthermore, it has been argued that the criminalisation of clients of sexual services has mainly a symbolic value,⁸⁷ and its effective implementation does not matter as such.

More generally speaking, counter-trafficking measures addressing demand for sexual services are often used as buzzwords. They remain envisaged in international and European instruments in vague terms, leaving a broad margin of discretion to states to define and adopt measures that they consider the most suited to their national context. The analysis of these policies often results in a listing of diverse measures, pursuing different objectives, of which the impact on prostitution and/or trafficking in human beings for the purpose of sexual exploitation is delicate to assess. Further research on this issue is essential, notably for three reasons: firstly, to generate a better understanding of the impact of sex work legislation and policies on the prevalence of human trafficking for sexual exploitation; secondly, to reflect upon methodological tools to evaluate as objectively as possible the impact of such measures, and finally to foster an informed, less ideological and more evidence-based debate. Ideological considerations would be difficult to exclude completely from the debate, as some would always consider that demand for sexual services shall be addressed as a whole, thus banning all forms of sexual services, including those offered by persons voluntarily involved in prostitution. Nevertheless, continued evidence-based scientific reflection upon the criminalisation of clients as a way to discourage them from using sexual services, in general, or those provided by victims of sexual exploitation, is required.

For instance, one gap that needs to be pursued is the material scope of the criminalisation. National legislators seem to limit criminalisation to situations where its victims physically meet their clients, thus failing to address how the Internet has broadened the market⁸⁸ and offered new forms of sexual exploitation.⁸⁹ Further reflections shall thus be necessary to identify which measures may address these new forms of demand for sexual services. Secondly, the application of objective indicators⁹⁰ in order to differentiate between persons involved in prostitution and possible trafficked persons who are experiencing sexual exploitation could be another solution. The language of business could be adapted to the specific context of sexual exploitation and forced prostitution, meaning that it would i) take into account the added vulnerabilities of

those who are forced into prostitution, and ii) facilitate an objective understanding of prostitution that recognises that not all persons involved in prostitution are forced, and some choose the profession. This solution would furthermore have the merit of preserving the margin of discretion of national authorities. However, the direction of the European policy appears to be shifting towards an understanding that focuses on reduction of demand, thus favouring the Nordic model, which impacts all providing sexual services whether they are forced or not.

Overall, primary research focusing on the reduction of demand for sexual services, envisaged as a root-cause for sex trafficking, is justified and necessary to determine the relationship between law, policy and demand. There is indeed an international consensus on how measures to discourage demand can contribute to the prevention of trafficking, and further research on this issue may assist policy-makers at European or national levels to assess the relevance of introducing or abrogating certain measures.

84 Conseil Fédéral (fn. 28), 63.

85 Conseil Fédéral (fn. 28), 63.

86 Statens Offentliga Utredningar (fn. 83), 39: «Eight out of ten cases in which purchasers of sexual services are prosecuted involve situations in which the offence has been admitted to.»

87 Assemblée Nationale (France), Rapport d'information sur la prostitution en France, 13th April 2011, 224, http://www.assemblee-nationale.fr/13/rap-info/i3334.asp#P2783_612168, accessed on 30th October 2016.

88 On this issue, see FELICITY GERRY/JULIA MURASZKIEWICZ/NIOVI VAVOULA, The role of technology in the fight against human trafficking: reflections on privacy and data protection concerns, *Computer Law and Security Review*, Vol. 32 2/2016, 206 et seqq.; MARK LATONERO, The rise of mobile and the diffusion of technology-facilitated trafficking, *Research Series on Technology and Human Trafficking*, Centre on Communication Leadership and Policy, Los Angeles, CA, University of South California, 2012.

89 Europol, Trafficking in human beings and the Internet, *Intelligence Notification*, October 2014, 2.

90 See Section II.