

Situation in Switzerland regarding the non-punishment of VOTs

The Plateforme Traite – Swiss Platform against Human Trafficking is an initiative of four Swiss NGOs, all of which are active against human trafficking (MayDay, FIZ, CSP, ASTRÉE). All four advise and support victims of human trafficking. The common basic principles are: respect for human rights and a focus on the needs of those affected (victim-centered approach). Their services and political work is based on these principles.

The Plateforme Traite would like to inform the UN special rapporteur about shortcomings in the implementation of the non-punishment clause in Switzerland.

For this purpose, we are sending you some excerpts or summaries of recent reports and papers from our member organisations. The situation described in these reports is still valid for today.

- Excerpt from the NGO shadow report for the second evaluation round of GRETA (Group of Experts on Action against Trafficking in Human Beings from the Council of Europe), which was written mainly by the FIZ Advocacy and Support for Migrant Women and Victims of Trafficking in June 2018.
- Short report from ASTRÉE from 2019 (not published)

In addition, we describe summarized cases of trafficked persons whose right of non-punishment was not respected.

Excerpt GRETA alternative report¹

In Switzerland, nowhere in the law does it explicitly state that victims of human trafficking cannot be punished for crimes they committed during the exploitation situation. In the NGO alternative report from 2018 says the following about this situation:

In the first evaluation round, the Swiss government deflected GRETA's critique of the lack of an explicit non-punishment clause by pointing out that this guarantee is already implemented through Art. 19 and 52-55 of the Penal Code.² Also, in the follow-up report, they stated that:

"[...] If a person is convicted, it means they have not been recognised as a victim. Therefore, it is primarily an error in identification, not ignorance of the

¹ The excerpt can be found on page 27 of the alternative report from 2018: https://www.fiz-info.ch/images/content/Downloads_DE/Publikationen/Monitoring/2018_GRETA_alternative_report.pdf

² Art. 19: a perpetrator can only be convicted if he or she acted with criminal intent, Art. 52-55: conditions in which persons may be exempted from punishment.

legal situation that leads to a victim being unjustly punished. The identification guidelines and training will help ensure that victims can be identified more easily and not be convicted, usually for illegal stay.¹⁵

We welcome the efforts of Action No. 16 of the National Action Plan, 'Non-punishment of victims of trafficking in human beings,' in which law enforcement services are introduced, inter alia, to the topic of exemption from punishment for victims. Nevertheless, we are very concerned that this combination of legal provisions and training is not enough to prevent criminalization of victims. Current developments on the ground suggest as much: Victims of THB are still being punished for offences against immigration legislation (such as the possession of falsified documentation), labour laws, or regulations on prostitution. (...)

Since there is no clear provision, there remains leeway for interpretation and no clear standards on when it should be applied. Rather, it is currently at the discretion of the public prosecutor's office to waive prosecutions for acts that have been committed under the influence of traffickers. In some cases, orders of summary punishments are not waived completely but only deferred and could be re-activated any time, especially once the victim ends collaboration with authorities.

Police officers are obliged to report offenses (e.g. against immigration law) and they have to initiate steps for preliminary investigation without instituting criminal proceedings. Only the public prosecutor's office has the power to waive these. This is even more concerning since in police controls, if potential victims do not immediately disclose their story to the police and are thus not detected as potential victims, they can receive fines, are expelled and/or banished from Swiss soil. Therefore, it is even more important that the specialized victims' organizations are included at the earliest stage possible and that at least a recovery and reflection period can be obtained rather than a criminalization. Prosecutor's offices must receive training on THB.

The instructions for reporting offenses implies that cooperation with authorities can be used as leverage in case the victim ends collaboration, and that illegal residence may be held against the victim in case of non-cooperation. In fact, this attitude can be observed in several cantons: In some cases, proceedings for offenses against immigration laws or labour laws are withheld until the closure of a case against the traffickers. Once the victim ends collaboration however, the victims of THB receive fines or are extradited from Swiss soil.

As a result, it is not primarily the lack of identification, as mentioned in the NAP (National Action Plan), which leads to violations of the non-punishment provision, but rather that victims' offences are intentionally held against them for leverage.

³ Report submitted by the Swiss authorities on measures taken to comply with Committee of the Parties Recommendation CP(2015)13 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings November 2017, p. 13. Available at: <https://rm.coe.int/cp-2018-1-rr-che-en/16807902df>.

This is in stark contrast to the intention of the provision as another pillar of protection.⁴

At the same time, it is true that gaps in identification remain a sore point in the implementation of Art. 26 of the Convention, especially in the context of exploitation for criminal activities such as theft, fraud or illicit begging, but also in the context of trafficking for labour exploitation. CSP Genève alone reports 5 cases in which victims were not considered as such but rather, once they turned towards authorities, were considered offenders against labour or immigration laws and received fines or were expelled from the country.

The reformation of the Swiss Criminal Procedure Code⁵ offers the unique possibility to outweigh the shortcomings and resulting cantonal discrepancies of the current provisions in Switzerland by anchoring the principle of non-punishment for offences committed under the influence of traffickers in a legally binding way.⁶ Its goal should not be the complete immunity of victims, but rather it should secure their protection, prevent re-victimization and encourage them to give evidence against their traffickers.

Demands

- *Training on the non-punishment provision – not only for law enforcement officers, but especially for public prosecutor’s offices. The non-punishment provision must be seen as a form of victim protection; there must be a definite exemption from punishment*
- *In case of suspicion, inclusion of specialized victim’s organizations at the earliest stage possible (and thus obtaining a recovery and reflection period) as it is not very likely that a victim would disclose her or his story to the police immediately.*
- *Anchoring of the principle of non-punishment in the reformation of the Swiss Criminal Procedure Code and elaborate standardized mechanisms, including: Criteria which offences are neither prosecuted nor punished and guidance as how to proceed in an individual case for the evaluation of a punishment exemption claim.*

Update February 2021: the parliament will discuss in spring 2021 the new Swiss Criminal Procedure Code. So far, the insertion of the non-punishment clause is not foreseen⁷.

⁴ Background Paper of the UN Working group on Trafficking in Persons, Non-punishment and non-prosecution of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking, CTOC/COP/WG.4/2010/4, p. 3: “Para. 12 (a) A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons. (b) A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.”

⁵ Parliamentary Motion 14.3883: Adjustment of the Swiss Criminal Procedure Code.

⁶ See also the position paper of FIZ on the reformation of the Swiss Criminal Procedure Code, 2017. Available at: https://www.fiz-info.ch/images/content/Downloads_DE/Publikationen/Stellungnahmen/FIZ_STN_2018-Aenderungen_StPO.pdf.

⁷ <https://www.parlament.ch/press-releases/Pages/mm-rk-n-1-2020-11-06.aspx>

Report from ASTRÉE from 2019

In 2019, Astrée accompanied four victims of human trafficking whose right to non-punishment was not respected. They received fines or even served time in prison for breaking the law during the time they were exploited. They would be fined for illicit prostitution or for a violation of the immigration law.

Some were fined before they were identified as victims of trafficking. Some, however, were already identified as such and still received a sanction (e.g. when applying for a residence permit to participate as a witness in the criminal case against the exploiter, they received a sanction because they had previously stayed in Switzerland irregularly).

The following problems arise in particular:

- The police do not identify the victims during controls, although there would be several indicators that point to this (barely of age, from Nigeria, engaged in sex work, indebted).
- The status of the victim is not taken into account by the public prosecutor's office when sentencing for the violation of the immigration law.
- No Swiss law states that victims of human trafficking may not be treated as criminals.

Cases of trafficked persons whose right of non-punishment was not respected

The above-described problems we witnessed many times during the last years. The following cases are just illustrating the problems (it is not an exhaustive list):

1. A victim of human trafficking was controlled by the police while she was being exploited and they fined her for illegal residence and unauthorized prostitution. She was put in detention and Astrée went to see her in prison for the first identification. After she was accommodated in the Astrée's shelter and obtained a residence permit (within the asylum procedure). However, since she now had an official address, she received the fine (2600 francs) that had been notified during the exploitation period. As the opposition period was already expired, she had to pay this fine despite her victim status and her precarious economic situation
2. A legal representative in the accelerated Swiss asylum procedure contacted FIZ because she identified one of her clients as a potential victim of human trafficking. In the initial discussions with the FIZ counselor, the suspicion was clearly confirmed: The woman was a victim of human trafficking in France. As a result, the client was brought in for questioning by a cantonal police officer about the incidents in France. She was not provided with a victim advocate and was not given sufficient time to prepare for the interview. During the interrogation, she was informed that she had already been fined for illegal entry into Switzerland. The fine was several hundred francs or 30 days in prison. The legal representative as well

as the FIZ counsellor did not know about the previous penalty order for illegal entry. However, the legal representative was worried that an appeal to this penalty order could have a negative impact on the victim's pending asylum application. The victim herself was also very afraid that a revocation request could be interpreted negatively towards her, influence the asylum procedure or lead to other complications with the authorities. Therefore, no appeal of the unlawful penalty order (due to non-punishment clause) was filed. We observe this situation again and again with trafficked persons.

3. H.T. was recruited by her perpetrator in her country of origin and brought to Switzerland. Here he exploited her both sexually and as a domestic worker. He forced her to perform sexual acts almost daily by using and threatening violence. After a few months, she was able to escape from the exploitative situation and turned to the police. She was connected with the FIZ and was able to enter the protection program for trafficked persons. The police initiated proceedings against the perpetrators. But the public prosecutor's office decided not to pursue the case. In turn, they issued an order of punishment for illegal entry of the country, illegal stay and working without a permit. H.T. was found guilty of everything and sentenced to a penalty of several thousand francs and a fine. An appeal against this has been filed. The decision is still pending.

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