

SMUGGLING AND TRAFFICKING IN PERSONS: WHAT IS THE DIFFERENCE?

The words 'smuggling' and 'trafficking' are often expressed by policy makers, the media and human rights organisations. These two words, which are sometimes used interchangeably, have very different definitions under both international and Maltese law, and therefore have different implications for the individuals being smuggled and trafficked, and those who perpetrate the crimes of smuggling and trafficking.

Malta is a signatory to the UN Protocol on Trafficking and the UN Protocol on Smuggling. The Maltese legal framework criminalises both crimes separately, although there appears to be some conflation between the two even in legal provisions.

TRAFFICKING

Trafficking is regulated through Subtitle VIII Bis ('Of the Traffic of Persons') of the Criminal Code. It is defined as 'the recruitment, transportation, sale or transfer of a person, or of a minor, as the case may be, including harbouring and subsequent reception and exchange or transfer of control over that person, or minor (...)' for exploitation in 'the production of goods or provision of services; or slavery or practices similar to slavery; servitude or forced labour; or activities associated with begging; prostitution, pornographic performances, the production of pornographic material or other forms of sexual exploitation and organ removal or any other unlawful activities . (...)', and involving the following means: 'violence or threats, including abduction; deceit or fraud; misuse of authority, influence or pressure; the giving or receiving of payments or benefits to achieve the consent of the person having control over another person; abuse of power or of a position of vulnerability'.

In addition, although it does not specifically address crimes of trafficking, the White Slave Traffic Ordinance includes provisions on the prostitution of others and the sexual exploitation of children. In line with Malta's obligations under international and European law Malta's



KEY QUESTIONS

What is the difference between smuggling and trafficking?

Which legal provisions regulate smuggling and trafficking?

What are the similarities and difference in prosecution, redress and safeguards?

The People for Change Foundation (Pfc) is a Malta-based human rights think tank with a Maltese, European and global scope.

definition of trafficking was amended in recent years to become more comprehensive.

SMUGGLING

Smuggling is regulated under Sub-title IV B ('Of Piracy') of the Maltese Criminal Code. Article 337A provides that 'any person who with the intent to make any gain whatsoever aids, assists, counsels or procures any other person to enter or to attempt to enter or to leave or attempt to leave or to transit across or attempt to transit across Malta in contravention of the laws thereof or who, in Malta or outside Malta, conspires to that effect with any other person shall (...) be liable to the punishment of imprisonment from six months to five years or to a fine (*multa*) of twenty-three thousand and two hundred and ninety- three euro and seventy-three cents'. The crime is not described as 'smuggling' but rather as 'Traffic in Persons to enter or leave Malta illegally'.

The Immigration Act provides that whoever 'aids or assists any person to land or attempt to land in Malta, or to reside in Malta, or to land or attempt to land, or to reside in, or to leave any other State contrary to the law on entry, residence and exit of that State' is punishable by a fine or by imprisonment. However, the act makes no reference to the purpose of profit/ material benefit - a defining feature of the international definition of smuggling - and again, does not adopt the term 'smuggling'.

SIMILARITIES AND DIFFERENCES – PROSECUTION AND REDRESS

The use of the term 'traffic' to describe both crimes it is likely to contribute to the conflation of the two crimes, which may have consequences in terms of prosecution and redress for victims. Despite the widespread confusion surrounding the two terms, 'smuggling' and 'trafficking' account for distinct criminal offences in both international and domestic law. While trafficking is understood as coercive and exploitative, smuggling is intended as a consensual act, whereby the migrant and the smuggler enter into a 'mutually beneficial' agreement under which the smuggler facilitates the migrant's illegal border crossing in exchange for compensation. Accordingly, although the UN Protocol on Trafficking makes reference to 'victims' and considers a vulnerable person's consent to exploitation as irrelevant, the UN Protocol on Smuggling eschews mention of victimisation, preferring the term 'migrants' to describe smuggled persons.

As opposed to trafficking, which hinges on an ongoing exploitative relationship between the trafficker and the trafficked person, the smuggler's relationship with the migrant ends once the border crossing is effectuated and the payment made. Moreover, while smuggling is by definition transnational in nature, trafficking can also take place within a single jurisdiction.

SIMILARITIES AND DIFFERENCES – LEGAL SAFEGUARDS

Trafficking and smuggling differ in terms of the legal safeguards and practical support granted to smuggled migrants and trafficked persons. The UN Protocol on Trafficking includes several guidelines



on the provision of assistance for trafficked persons. It urges signatory states to protect their privacy and identity, to provide them with information concerning their case, and assistance in presenting their views in criminal proceedings. Further, it calls on States (albeit in a non-binding way) to ensure victims' physical, psychological and social recovery, offering them assistance in securing decent housing, access to counselling, medical/psychological care, and employment. It also recommends that State actors take action to raise awareness on trafficking, prevent revictimisation, as well as to tackle the multiple vulnerabilities - particularly poverty, underdevelopment and lack of equal opportunity - which expose children and women to the risks of trafficking in the first place. Such protections have been further developed under the Council of Europe Convention on Action against Trafficking in Human Beings and the European Union Framework.

The UN Protocol on Smuggling comprises significantly fewer safeguards for smuggled migrants. It states that migrants should not be criminalised for having been the objects of smuggling, urges States to ensure their safety during search and rescue operations and to respect their rights to life and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

AREAS OF OVERLAP

The differences between 'smuggling' and 'trafficking' are contested. Distinguishing between 'trafficking' and 'smuggling' on the grounds of consent constructs an image of migrants as free-willing subjects, underplaying the vulnerabilities they face both in their home countries and in the course of their perilous journeys. Speaking of 'consent' or 'voluntariness' in a context where the only option available to those escaping persecution, war, human rights violations and poverty is to rely on the 'services' of smugglers, is problematic, if not altogether misguided.

A related issue concerns the 'timing' of consent. Because of high smuggling fees, it is not uncommon for people to pay smugglers at the point of departure and fall victims to trafficking at a later stage, due to economic constraints. As the law provides no precise guidelines as to when or how to ascertain a person's consent, it is not always clear whether smuggling or trafficking (or both) have occurred. While by definition smuggling can be distinguished from trafficking in that the smuggler's relationship with the migrant is not ongoing, migrants are often exploited and subjected to smugglers' regular threats after their arrival in the host country. Moreover, the fees charged by smugglers and the risks they force migrants into undertaking can also be seen as exploitative. Increased costs for smuggling can result in a greater risk of 'travel now - pay later' situations that often turn exploitative, transforming a situation into one of trafficking (bearing in mind that 'abuse of a position of vulnerability' is one of the means of trafficking catered for in both the international and domestic legal frameworks). Furthermore, in practice, traffickers will sometimes use the services of smugglers in order to move persons across international borders.

There are also evident gaps between law on the books and law in action. Controversially, the upsurge in border control and the lack of legal avenues to enter Europe have contributed to boosting the smuggling industry and increased the risks of exploitation and trafficking, leaving the root causes of migration and displacement unaddressed. Not only are migrants embarking on expensive, life-threatening journeys, but they are also being criminalised upon arrival in the host country. In fact, even

if the Protocol on Smuggling calls for the non-criminalisation of smuggled migrants, policies and practices in numerous States are in tension with international law and human rights standards.

CONCLUSION

The distinction between ‘trafficking’ and ‘smuggling’ is of crucial importance, mainly because it allows those subjected to these crimes to receive tailored support and assistance. At the same time, it can help obscure the multiple vulnerabilities faced by migrants before, during, and after embarking on life-threatening journeys. The grey areas that exist between the two realities hint to the urgent need to revise and expand current understandings of consent and vulnerability. Implementation gaps are a window into the adverse effects of border control and over-reliance on criminal law to tackle immigration offences, and highlight the need for a more human-rights based approach to both smuggling and trafficking and a more humane approach to migration and asylum.

REFERENCES & FURTHER READING

Legislation

Chapter 9 of the Laws of Malta

Chapter 63 of the Laws of Malta

TRAFFICKING

GRETA Report

The Council of Europe Convention on Action against Trafficking in Human Beings

US-TIP Report

SMUGGLING

Chapter 217 of the Laws of Malta

Mallia, P. & Gauci, J-P. ‘The Migrant Smuggling Protocol and the Need for a Multi-Faceted Approach: Intersectionality and Multi-Actor Cooperation’

Gerard, A. (2014) The Securitisation of Migration and Refugee Women

This issue paper is intended for discussion purposes and does not purport to be an authoritative statement of the international or Maltese law. For legal advice please consult a lawyer or the text of the provisions.

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