Beyond the dichotomy between migrant smuggling and human trafficking: a Belgian case study on the governance of migrants in transit

Massol de Rebetz, R.M.F.A. de

Beyond the Dichotomy between Migrant Smuggling and Human Trafficking

Beyond the Dichotomy between Migrant Smuggling and Human Trafficking

A Belgian Case Study on the Governance of Migrants in Transit

PROEFSCHRIFT

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr.ir. H. Bijl,
volgens besluit van het college voor promoties
te verdedigen op donderdag 25 mei 2023
klokke 11.15 uur

door

Roxane Marie Françoise Astrid de Massol de Rebetz

geboren te Luik, België

in 1991

Promotoren:	Prof. dr. mr. M.A.H. van der Woude Prof. dr. M.J. van Meeteren (Radboud Universiteit Nijmegen) Prof. dr. J.P. van der Leun
Promotiecommissie:	Prof. dr. mr. J.M. ten Voorde Prof. dr. A. Triandafyllidou (Toronto Metropolitan University, Canada) Prof. dr. G. Vermeulen (Universiteit Gent, België) Dr. A.E. Campos Delgado

This research could not have even been initiated without the generous grant of the National Dutch Police.

Omslagontwerp: Primo!Studio – Delft
Opmaak binnenwerk: Anne-Marie Krens – Tekstbeeld – Oegstgeest
Drukwerk: Ipskamp Printing – Enschede

ISBN 978 94 6473 099 9

'Nearly every discussion of trafficking turns, at some point, to the distinction between human trafficking and human smuggling'[1]

Dauvergne (2008: 89)

1 This observation remains nonetheless confined to the academic world. As will be highlighted throughout the dissertation, the overlap between legal categories and phenomena remains underexplored and only limitedly critiqued at the policy and public levels.

Acknowledgments

This research enterprise can be best described as the results of fortuitous encounters, weird coincidences (is there even such a thing?) and unforeseen events, in which several protagonists played a crucial role and should therefore be acknowledged and warmly thanked.

I would like to start by thanking my three supervisors, Maartje van der Woude, Masja van Meeteren and Joanne van der Leun, without whom this dissertation would not have seen the light of day. I often refer to these three inspiring women as the 'holy(stic) trinity' in light of their (almost) mystical research powers, their benevolent and continuous trust and support, and of course, their complementarity. Throughout this process in which you granted me full independence, I strongly benefited from your guidance, expertise, honesty, availability, and your always sharp and thorough insights. Research aside and singling out my main supervisor and mentor Maartje who never ceases to lead by example, I'm immensely grateful that our paths have crossed. Your kindness, sense of humour, contagious energy and ambition truly helps me to continue growing both as a woman and as a researcher. I can only hope for many more fruitful and exciting future collaborations.

Continuing on the collaboration front, my gratitude goes to Pinar Ölçer, whose ECHR expertise and creativity gave rise to a long lasting yet rewarding interdisciplinary partnership. Your vibrant ideas and savvy knowledge allowed the last chapter of this research to unfold. I'm also grateful for the members of the doctoral committee for their respective assessments of this manuscript.

Writing about generosity, I'm particularly thankful for the precious time and insightful participation of all the expert respondents from the Belgian organisations mentioned in this dissertation who kindly took part in the interviews. My appreciation also goes to one of my gatekeepers, Steven de Ridder, who made the access to the Belgian field easier and enjoyable.

It's equally important to mention that this work emerged in a unique and eclectic place within the Leiden Law School, where benevolence and kindness can be found from the Secretariat to the Board: the VVI. I feel utterly fortunate to work, discuss and continue to share ideas with such wonderful and thoughtful former and current colleagues. As daily sources of inspiration and support, I would like to particularly thank Maryla Klajn, Julia Rootenberg, Amalia Campos Delgado, Isotta Rossoni and Anne Jonker for their priceless friendship, brightness, courage, and it goes without saying, their inimitable wit.

I'm perhaps the most indebted to my formidable parents for their nurturing, love, work ethic, and their perpetual encouragement since the beginning. Thank you both for instilling the importance of generosity, hard work and for always pushing me to finish what I initiate. To maman, even if you sometimes fail to apply it yourself, thank you for trying to bolster my inner confidence and, when fighting your perfectionist tendencies, for repeating this quote: 'Don't let the perfect be the enemy of the good'. Little do you know, this proved to be handy when writing this dissertation. To papa, even if we often or almost always disagree on migration related issues, thank you for providing counterpart to my arguments which is a useful exercise.

I'm extremely grateful to my down-to-earth and pragmatic brother Xavier and my strong-willed sister-in-law Inès for cheering me up and, with the happy arrival of Emile and Laszlo, for bringing more joy into my life. I also keep in mind the kind encouragements of the 'bigger' family constituted by my close cousins, as well as my aunts and uncles whom I cherish very much.

My appreciation goes to all my fabulous friends who will recognise themselves and who bring in the necessary dose of fun, wonder and gaiety in my day-to-day. On the career 'advising' front, I would like to specifically thank Morgane, Victoria, Julie, Jess, and Doris for keeping on encouraging me to trust myself through our vibrant and honest talks. You all are a true source of motivation.

To finish on a 'tarte à la crème' note, to my (for life now) partner Michael, who probably is the protagonist that I encountered in the most absurd manner and who ended up playing the most significant behind the scenes role in this whole journey. From proof-reader, argument tester, creativity booster, tear dryer, epicurean promoter to sarcastic commenter, I cannot thank you enough for your constant and loving support. Your infinite curiosity, sense of humour, intelligence, effectiveness, and humanity makes your companionship truly invaluable.

Table of contents

1 Introduction

1 Contextualization and Impetus for the Research

1.1 Globalisation, Sovereignty, and the Securitization of Migration

Catherine Dauvergne's words help to frame this dissertation, which situates itself at the nexus between human trafficking and migrant smuggling, both complex phenomena intrinsically linked with one another and irregular migration and its management. Migration policies at the international, regional, and national levels have been moulded in the last decades through several factors. Two important factors being globalization, on the one hand, and the increased focus and unease on security problems such as (transnational) organized crime and terrorism on the other (Adamson 2006, see below). With regards to globalization, similarly to Dauvergne (2008) who examined the relationships between irregular migration and processes of globalization and the manifold societal changes that the latter entails (Franko 2019; Sassen 2007; Gready 2004), scholarship of the last twenty years has revealed that the control over people's movement through migration and border control has become a cornerstone of state's sovereignty (Geddes 2001; Bosworth 2008). A considerable amount of literature has underlined the eagerness of nation states to protect and uphold their sovereign right to determine who can and cannot enter and henceforth belong to their polity (Aas 2011; Dauvergne 2004). While globalization can be said to have reduced the importance of national and physical boundaries, which consequently weakened the same notion of sovereignty, restrictive and at times 'theatrical' border and migration control policies can also be described as symbolic devices used by states to cope with this perceived erosion of sovereignty (Maier 2016; Bosworth and Guild 2008; Brown 2010). Regarding the second factor, whereas processes of securitization of migration (i.e., the implicit or explicit process through which something is framed or socially constructed as a security threat) were already salient in the early 1990s (Boswell 2003), the 9/11 events are identified as a pivotal moment in portraying migrants as possible security threats, justifying the need to strengthen, via diverse means, the management of migration for the sake of national security (Aradau & Van Munster 2007; Bourbeau 2011, Skleparis 2011; van Liempt & Sersli 2013). Securitization refers to a process (which can be implicit or explicit) through which something is framed or socially constructed as a security threat (Skleparis 2011; van Liempt & Sersli 2013). Often related to securitization of migra-

tion, many scholars observed the increased criminalization of migration which refers to the (increased) mobilization of criminal law and, as Guild (2010) rightfully mentioned, administrative sanctions resembling closely to criminal sanctions, to deal with migration and border control (Palidda 2009).

A considerable amount of literature has traced the genesis and consequences of securitization towards immigration in the European Union (EU) (Bigo 2002, 2005; Huysmans 2000, 2006). The Schengen agreements (adopted in 1985), the Dublin Convention (adopted in 1990), alongside the later shift in immigration policy from the third to the first pillar, following the adoption of the Treaty of Amsterdam in 1997, are key elements in the European integration process, which played an instrumental role in formalizing the link between immigration and security (Huysmans 2000; Boswel 2003; Gabrielli 2014). Already indicated by Huysmans in 2000, the adoption of restrictive migration policies at the EU level goes hand in hand with the more general portrayal or 'social construction' of immigrants as a 'challenge to the protection of national identity and welfare provisions' (751). As this dissertation concentrates on the case of a founding Schengen member (Belgium) and more generally on intra-Schengen migratory movements, several developments on so-called 'borderless Schengen' require further explanation in this introduction.

The construction of the Schengen space as an area free of internal border control is often depicted as one of the EU's main 'historic achievement[s]' (European Commission, June 2021). Yet, as will be discussed below, the freedom of movement enjoyed by EU citizens does not necessarily apply to non-citizens or third-country nationals, who are (can be) subjected to internal border controls (broadly understood) (see Fassin 2011), particularly since 9/11 (Faist 2002). The creation of the Schengen space produced a common EU external border, which is managed as a 'shared responsibility' by the Member States, and a line which demarcates the 'insiders' from the 'outsiders' (Gabrielli 2014; Basilien-Gainche 2015). Member States' curtailed ability to control the movement of people within their own territory, generated by the Schengen agreements, resonates with the abovementioned (perception of) erosion of sovereignty. The latter was henceforth mitigated and compensated by several measures including common stern visa and asylum policies, stricter control at the external borders and the possibility to perform internal border controls (or checks) in circumscribed conditions and circumstances (De Genova 2017; Casella-Colombeau 2019). Whereas significant scholarly attention has been devoted to the management, strengthening and militarization of the EU external borders (Moreno-Lax 2017; Lavenex & Schimmelfenning 2009; Van Houtum 2010; Wilson 2014), the situation and the ways Member States are policing Schengen's internal borders has gained more scientific scrutiny (Maas 2005; Casella-Colombeau 2019; van der Woude 2020; Brouwer 2020; Barbero 2018; Evrad, Nienaber & Somaribas 2020; Weissensteiner 2021; Gülzau 2021; Klajn 2021). This has been particularly the case since the so-called migration crisis in 2015. The 'crisis', together with several terrorist attacks on European soil,

impacted substantially external and internal border controls, fostered anti-immigration sentiment and amplified, at the more general level, the securitization of migration process as freedom of movement was pictured as a latent internal security threat (Guiraudon 2015; Ripoll Servent 2019; Casella-Colombeau 2019). Wolff, Ripoll Servent and Piquet (2020) observed that since 2015, secondary migration movements of non-EU citizens were used by Member States as a justification for the closure of their internal borders (see also Karaminidou & Kasparek 2020). These general developments and the pivotal moment that constitutes the migration 'crisis' of 2015 are important to underline at this stage because this dissertation will delve into their concrete and significant effects on EU counter-smuggling policies and the construction of the migrant smuggler figure as a security threat for the EU (Perkowski & Squire 2019).

1.2 The origin of the legal dichotomy between migrant smuggling and human trafficking

One might wonder how processes of globalization and securitization of migration are directly related with migrant smuggling and human trafficking. It is crucial to highlight that both phenomena are intrinsically linked with irregular migration and revolve around the concept of sovereignty (Dandurand & Jahn 2020). As Miller and Baumeister (2012) explained, the debate on smuggling, trafficking and border control is situated within the broad nexus of globalization and securitization of migration. In particular, (Western) nation states started to 1) discuss and prioritize since the early/mid 1990s the fight against transnational organized crime groups depicted as thriving in a globalized world and 2) the need to adopt new measures which included the tightening of borders to tackle migrant smuggling and human trafficking associated with organized crime (Gallagher 2001, 2015; Scarpa 2020). These concerns and the discussions and negotiations that took place beforehand often referred to as the 'Vienna Process' led to the adoption of the Convention against Transnational Organized Crime (UNTOC) in the year 2000 and its two additional protocols, namely the UN Protocol against the Smuggling of Migrants by Land, Sea, and Air (UN Smuggling Protocol) and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially women and Children (UN Trafficking Protocol). Since its early days, the history and socio-political background steering the adoption of the UNTOC have been widely, comprehensively, and critically investigated in the scholarship from various disciplinary angles. The goal of this dissertation is not to thoroughly retrace these developments as they have been exhaustively researched as mentioned above. Given that 2020 marked the official 20th year of the much-discussed international legal instruments, there has been renewed interest from the scholarship to piece together an overall assessment on their limitations, shortcomings, achievements, and effectiveness (Doezema 2002; Gallagher 2001, 2008, 2010;

Scarpa 2020; Hathaway 2008; Godziak & Vogel 2020; Dandurand & Jahn 2020; Tennant 2021; 2017; see also UNODC 2020). It is nonetheless meaningful to contextualize the impetus for the adoption of the UNTOC within the securitization of migration lens. Particularly, it is of interest to reflect further on one element that has been consistently subject to scholarly debates, which is the established dichotomy between smuggling and trafficking that came into being with these legal instruments.

Delving into the genesis of the legal dichotomy between migrant smuggling and human trafficking is critical for two main reasons. Firstly, even if human trafficking, and migrant smuggling for that matter, existed long ago before the adoption of the UNTOC and its two protocols, these instruments were the first to conceptualize, legally define and distinguish them from one another, as the term *migrant trafficking* was previously used interchangeably to refer to a broad range of behaviours linked to both phenomena (Scarpa 2008, 2020). The UNTOC and its protocols therefore set the tone and were widely ratified by nation states (149 states ratified the UN Smuggling protocol and 173 sates ratified the UN Trafficking Protocol).[1] Regional instruments as well as national legislations were subsequently adopted criminalizing both behaviours following the lines set by the universally recognized UN definitions, with significant alterations as will be discussed in Chapter 2, which focuses on the EU normative and policy level. Secondly, the origin of the distinction between the two crimes is of particular interest because the essence of this dissertation, locates itself at the nexus between human trafficking and migrant smuggling, specifically within the Belgian legal framework. In doing so, it seeks to offer an alternative framework to the strict legal dichotomy as will be further explained and investigated in Chapters 4, 5 and 6.

To avoid any ambiguity from the start, when referring to migrant smuggling and human trafficking and acknowledging that there is no universally agreed definition of migrant smuggling (see Alagna 2020), the UN legal definitions offer nonetheless a general understanding of the principal elements and core differences between both phenomena. Following article 3 (a) of the UN Smuggling Protocol, *migrant smuggling* refers to

> 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'.

Two central elements of this definition are 1) the facilitation of unauthorized/undocumented migration movement 2) in exchange for a financial/material gain. As it will be further highlighted in the chapter, the element in the definition referring to the financial and other material benefits led to heated (scholarly) debates, which departed from the one adopted at the UN level (Mitsilegas

1 Status on ratification lastly checked in February 2022 in https://treaties.un.org/.

2019; Minetti 2020; Carerra et al. 2019). Following article 3 (a) of the UN Trafficking protocol, *human trafficking* (or trafficking in persons) refers to

> 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery, servitude or the removal of organs.'

The three central elements of this definition are the act, the means (relating to the controversial and much discussed notion of consent, which is not applicable when children are involved) and the purpose of exploitation, which should all be present. Simply put, what distinguishes both crimes boils down to three elements: the presence of exploitation in human trafficking cases (implying therewith the absence of exploitation in migrant smuggling cases); the cross-border element necessary present in migrant smuggling cases as signalled above, indicating that victims can be trafficked internally, and finally, the element of consent implying that smuggled migrants always consented to being smuggled as opposed to victims of human trafficking who are coerced to do so via the means highlighted in the definition. It is also crucial to mention that human trafficking can take place at the domestic level and does not necessarily involve the crossing of a border (for an overview of the distinct forms of human trafficking see Winterdyk & Jones 2020). Whereas the blurry lines between smuggling and trafficking and the issues on their conflation will be further and more generally reflected upon, particularly in relation to the concept of *transit migration* in Chapter 3, it is important to mention that the established distinction between migrant smuggling and human trafficking is subject to (scholarly) criticism. Indeed, the dichotomy is often described as not being supported by empirical evidence and is consistently criticized for being at odds with the situation on the ground and based on unrealistic assumptions (Gozdziak & Vogel 2020; Dandurand & Jahn 2020; Gallagher 2001, 2008).

Insofar as the dichotomy between smuggling and trafficking emerged from an empirical vacuum, the context in which the legal distinction materialized needs to be further explained. The choice of the location, in Palermo, for the signature of the UNTOC and its protocol, which resonated with the assassination of anti-mafia judge Giovanni Falcone by an organized crime group, already gives a clue to the general orientation of the first international legal framework focusing mostly on international cooperation with regards to transnational organized crime (see Gallagher 2001). Official UN documents of the time provide concrete illustration of the rising political concerns among western nation states about the need to deal with the 'ever-growing problem of organ-

ized smuggling of illegal migrants' (see for example UN doc, 1994: 2). The unauthorized arrival of migrants helped by 'traffickers' taking advantage of 'porous' borders, which in turn challenged societal well-being and states' authority, oriented the responses enshrined in the international regulatory framework (Jones 2020; van Liempt & Sersli 2013; Gallagher 2017). In that regard, Miller and Baumeister (2012) underlined the increased construction of both smuggling and trafficking as border security issues. This, in turn, can explain the border control emphasis present in both protocols serving as a rationale or justification for wealthy destination countries located in Europe or in North America to restrict the unauthorized arrival of migrants in their territories, which increased in a globalized post-cold War context (Hathaway 2008). What is of interest to shed light upon is the unprecedented and rapid consensus reached at the international level that instigated the widespread ratification of this legal framework, which is integrally linked with the distinction established between human trafficking from migrant smuggling.

Focusing specifically on the UN Trafficking Protocol, the research conducted by Charnysh, Lloyd and Simmons (2015) emphasizes the role of 'issue framing' and the importance of the 'crime fighting frame' in this process of consensus building. The authors discuss how the two global trends were visible prior to the adoption of UNTOC; 1) the increased attention and effort to deal with transnational organized crime threatening state authorities highlighted earlier; and 2) the renewed attention to human rights issues as well as the normative development in this field triggered by a broad range of right advocacy groups since the 1970s. Underlining the rarity of reaching this overarching agreement at such a rapid pace on complex, sensitive and debated issues such as human trafficking, the authors (2015) singled out that the 'crime-fighting' frame (involving representing human trafficking as a common transnational crime threat) was instrumental to reach this consensus. Whereas the 'human rights frame' was still visible and relevant to consider, the latter was weaker and less likely to gather the states' support. This was explained as follows. On the one hand, framing/representing an issue as a human rights problem generates (common) *obligations* on behalf of states to protect the human rights of the individuals involved, who are often (irregular) migrants which, as explained above, was not necessarily attractive for states, which is in line with the concerns of (perceived) sovereignty decline in the current globalized era. Besides, it was necessary to approach the human trafficking issue in a holistic manner by addressing the root causes of the phenomenon. On the other hand, mobilizing the broad transnational crime frame linked *inter alia* with migrant smuggling networks, requiring therewith the criminalization of the behaviour allows states to establish their authority and subsequently justifies and legitimizes the recourse to enhanced police power and the strengthening of border measures. Building notably on the work of Buzan et al. (1998) on the power of 'securitization' in international politics and observing a change in security paradigms from 'war-fighting' to 'crime-fighting' (Andreas & Price

2001), the thorough content analysis produced by Charnysh, Lloyd and Simmons (2015) is enlightening in many regards despite its tight focus on the UN Trafficking Protocol.

The study illustrates in a concrete manner the impact of sovereignty concerns underlying the adoption of the UNTOC and its protocols and the (legal and policy) orientation of the responses. Whilst human rights concerns were not absent in the negotiations (see among others Broad & Muraszkiewicz 2020; Obokata 2015; Gallagher 2015; Raymond 2002 on the general appraisal on the progress made with anti-trafficking initiative and legal frameworks), issues of security were nonetheless the main incentive for the adoption as confirmed by Gallagher (2001). In that regard, and directly linked with the creation of the dichotomy, Dauvergne (2008) goes further as she posits that the consensus 'coincides with the crackdown on illegal immigration' as both trafficking and smuggling represent ultimately 'evasion' of migration laws threatening states' sovereignty and that drawing a clear line between both 'keeps the status quo of migration law in place' (70-71). Looking back at the negotiations preceding the adoption of the UNTOC, Gallagher (2017) underlined that the UN Crime Commission initially planned to draft a treaty on 'trafficking of migrants' although, at the end, the necessity to adopt two strictly separated instruments prevailed. This necessity was the result of a compromise depicted by Dandurand and Jahn (2020) as a 'politically expedient accommodation to bring as many countries as possible to allow them so subscribe either to the border protection or the victim protection, or both' (787-788).

1.3 Consequences of the dichotomy: who deserves protection?

Both human trafficking and migrant smuggling were criminalized as a result of the adoption of the UNTOC and its protocols, which were designed with the goal of punishing smugglers and traffickers. There is a general agreement in the scholarship that while the international legal framework still incorporated protection measures in both protocols (see below), the protection dimension came almost as an afterthought considering the dominant perpetrator-centric orientation of the framework (Crépeau 2003; Doezema 2002; Gallagher 2010; Chuang 2014; Fouladvand 2018). Substantial differences in terms of protection and assistance of individuals subject to these two offences were already visible since the start. Solely focusing on the UN level at this stage, as the EU legal framework and counter-smuggling policies (also shedding light on the main differences between these two levels) will be subject to further scrutiny in Chapter 2, several points need to be made with regards to the approaches prioritized to tackle migrant smuggling (and to a lesser extent human trafficking). The following approaches, which can overlap with one another, are visible when discussing the legal response to these phenomena: the crime-control/law-enforcement approach; the border-control/migra-

tion management approach; and lastly, the human rights/humanitarian (right-based) approach. These distinct approaches are relevant to enumerate as they are intrinsically linked to the protection (or the inadequacy thereof) of the subject of these two crimes. Thus, the line-drawing exercise between smuggling and trafficking is of primary importance as the distinction relies on the fact that unlike victims of human trafficking, smuggled individuals are considered as '*objects*',[2] which generates differentiated treatment in terms of assistance and protection (see Rijken 2016; Dauvergne 2008; Chapkis 2003). The dichotomy is henceforth crucial from a victimization standpoint and the adequate legal response to the latter.

Whilst the initial official records behind the UN Smuggling Protocol revealed a consensus among states that smuggled migrants were victims and should therefore not be criminalized for being smuggled, the notion of 'victim' inserted and used in the UN Trafficking Protocol was purposefully left out, as it was not considered 'appropriate' in the context of the UN Smuggling protocol (Travaux Préparatoires UNDOC 1999, 461). The non-criminalization clause (article 5) and the protection and assistance measures (article 16) are straightforward in that regard and refer to the 'object' of smuggling and related conducts. The former UN Special Rapporteur on migrant's human rights Crépeau (2003) reflected on the choice of the word 'smuggling' and explained that smuggling equates 'symbolically the smuggling of persons with the traditional smuggling of goods' (e.g., drugs/alcohol). Because migrants are considered objects of the smuggling and not victims, the use of both terms (smuggling and object) 'devoid[s] the concept of its intricate human elements, in situations where we should insist on the vulnerability of persons (…)' (181-182). As highlighted by Rodriguez-Oconitrillo (2014), France submitted a proposal which was supported by numerous delegations stating that migrants should not be granted 'full immunity'. This agreement resulted also in the possibility left to states (see article 6) to prosecute migrants for other offences such as the use of fraudulent documents or the mere illegal stay or entry on their territories, according to their own domestic legislations. The discussions found in the *travaux préparatoires* illustrate once more the concerns on migration containment. The differences in the amount of protection clauses in the UN Trafficking Protocol and the UN Smuggling Protocol is also telling as the former contains significantly more clauses dedicated to the protection of victims. The comparison table made by Crépeau (2003, 177) between the clauses, which are aimed at the protection of migrants (1 in article 16) versus migration

2 A recent terminological turn operated at the UN level needs to be mentioned. The 2016 New-York Declaration for Refugees and Migrants leading to the adoption of two Global Compacts in 2018 (however non-binding) refers to smuggled migrants as 'people in a vulnerable situation' and 'victims of exploitation and abuse in the context of the smuggling of migrants' as opposed to 'objects' of smuggling adopted in the UN Smuggling Protocol (Objectives 5, 6 and 23; Gauci & Stoyanova 2018; see also Chapter 6 on the ambiguous conceptualisation of smuggled migrants from a criminal justice perspective).

containment (8 in articles 6,8,10,11,12,14,15,17,18), further demonstrate the security approach and the disregard for migrants' protection. Nonetheless, while more protection-oriented, the UN Trafficking Protocol is also not immune from criticism with regards to victim protection as rightfully signalled by the scholarship (see for instance Scarpa 2020, Fouladvand 2018).

What is important to take away from this sub-section is the underlying ideas of 'deserving' victims of human trafficking victims worthy of protection and assistance, on one side, and on the other, the 'undeserving' object of smuggling resulting from these legal constructions. As already hinted above, the legal dichotomy is strongly criticized with regard to the 'thin line' separating the intertwined phenomena (Schloenhardt 2017; Scarpa 2020). While Dauvergne (2008) and Dandurand and Jahn (2020) agreed on the fact that the dichotomy is sensible from a political and legal stance, the distinction is nevertheless depicted as inadequate in a mixed-migration context (see Sharpe 2018 on the term) where the legal sorting between distinct (overlapping and merging) categories of migrants including asylum-seekers, refugees, irregular migrants and victims of human trafficking is known to be almost unachievable by receiving countries (Reitano 2017; Carling et al. 2015; Joninken 2016, Schloenhardt 2017). Moreover, scholars also questioned the possibility to concretely make the distinction between a smuggled person from a trafficked victim, particularly when elements of abuse, exploitation, deception can be present in a migration journey, which are not necessarily visible when individuals are on the move (e.g., Brunovskis & Surtees 2019; McAuliffe & Laczko 2016; Dimitriadi 2016; Baird 2014; Carling et al. 2015). Gallagher (2009) depicted the dichotomy as a 'strange legal fiction'. According to Merriam-Webster's dictionary, a legal fiction refers to 'something assumed in law to be fact irrespective of the truth or accuracy of that assumption'. These assumptions were singled out by Dandurand and Jahn (2020) and can be summarized as follow: states believed that it would be feasible, in practice, to reserve the claim of victimhood solely to the human trafficking victims whilst excluding from protection smuggled migrants who could also fall victims from abuse and exploitation during their journeys; it was also considered achievable to preserve the human rights of migrants (including the refugee protection regime) and protecting human trafficking victims whilst at the same time protecting national borders and combatting criminal smuggling networks. Baird and van Liempt (2016) further added that the dichotomy rests on the assumption that it is possible to make a distinction between 'voluntary and involuntary processes of migration' (3). The reflections of Dauvergne (2008), in line with the legal fiction comparison, are particularly relevant when considering these issues from the victim perspective. If the dichotomy would cease to exist, which would leave a 'muddle' of complicated overlapping scenarios, it would require changing the legal approach to a 'one-size-fits-all' notion of victimization as there would be a need to concretely assess the elements of victimization and weigh its degrees. As Dauvergne (2008) rightfully noted, this is incredibly

challenging as the dichotomy makes the legal response to hazy scenarios much easier by drawing 'bright lines' which clarify who is to blame and who is worthy of protection (91). In a criminal justice context and departing from a human rights perspective, the last chapter of this dissertation will explore in further detail the potential recognition of *criminal victimization* for smuggled individuals.

1.4 Impetus for the dissertation and main research question

The strict distinction established between the phenomena of human trafficking and migrant smuggling is well-anchored in the European legal and policy framework. Considering the recurrent criticism of the scholarship on the legal dichotomy and the operational links between smuggling and human trafficking previously highlighted (see also Chapter 4), the Belgian legislature, by developing an alternative approach, seemed to have recognized an unjust disparity in treatment and protection of smuggling victims versus trafficking victims. Hence, the Belgian legal framework appears to have gone beyond the strict legal distinction established between the two phenomena. Indeed, according to the Belgian legal framework, migrants can be considered as potential victims and can, under certain conditions, be granted the protective status exclusively reserved for trafficking victims (see Chapters 5, 6 and 7 for further details on Belgian legal framework and its implementation) when aggravating circumstances are found in smuggling cases, for instance, when the life of the migrant is endangered, when the smuggler abuses the situation of vulnerability of the migrant, when elements of fraud, coercion, violence are present). With the exception of the empirical research touching generally upon the criminal policy in place, in the context of judicial investigations on migrant smuggling and human trafficking in Belgium conducted by Boels and Ponsaers (2011) and a Master thesis focusing specifically on the granting (or lack thereof) of the protective status to both victims of human trafficking and victims of aggravated forms of migrant smuggling (see Bracke 2021), no (empirical) research exists on this legal framework and its functioning in practice. The lack of research on the unique Belgian approach, which cannot be found in other jurisdictions[3] seeming to provide a pragmatic solution to the criticism often attached to the strict dichotomy established between migrant smuggling and human trafficking, provided the main impetus to conduct this doctoral research and led to the formulation of the main research question:

3 See however the underused Directive 2004/81 on short term residence permit in Chapter 2 and Rijken (2016).

RQ: How does the alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking developed in Belgium affect the governance[4] *of transit migration?*

The second part of the research question introducing the notion of transit migration, which is explored in Chapter 4, requires further explanation. The choice of Belgium as an empirical case study situates the dissertation in the broader European, and more specifically, in the Intra-Schengen mobility context. The following fictive scenario inspired by the data collected is useful to further contextualize the research and to bring to the forefront of the dissertation the often-forgotten human element of migrant smuggling.

Let us picture the case of Osman who is a young adult man coming from a West African country. Osman started his lengthy migration journey towards the EU by resorting to the services of migrant smugglers. He arrived in the EU via its external borders (e.g., Greece/Italy/Spain) and for diverse reasons (e.g., denied asylum request, ill-treatment by authorities, family reunification plans, work opportunity, distinct original travel plans vis à vis destination country) continued his migration journey onwards to northern Europe. Osman's migration movements can be qualified as 'secondary migration movement', as they encompass onward motions within the EU (here the Schengen Area) and involve further transportation from an EU host country to another EU destination country. Referring to EU terminology (see also Section 4 for a critical reflection), these movements are qualified as 'irregular' because they are done without the prior consent of the national authorities or with the use of fraudulent/false documentation (European Parliament 2017). Crossing several EU borders with or without the help of a migrant smuggler/facilitator at this stage, Osman arrives in 2015 in the North of France, in the Calais region with the desire to reach the United Kingdom (UK) at a later stage. Unfortunately, Osman does not manage to make the desired (and increasingly difficult) crossing.

In 2016, the French authorities decide to dismantle the camps in Calais, and Osman, with other individuals sharing similar circumstances, dispersed into the European territory and many like him reached the neighbouring Brussels. After first gathering in the infamous Maximilian Park, where humanitarian assistance to provide basic needs to migrants was organized by civil society and citizen's initiative organisations, the ensuing Covid-19 crisis led to an evacuation of the zone (see Lafaut & Coene 2019; Vandervoordt & Fleischmann 2021; Mescoli & Roblain 2021).

Since then, migrants dispersed further within the capital but many of them remained in the zone situated close to the park and the Brussel's North station. In reaction to the situation, citizen' movements were also successful in securing the financial support of regional authorities (the Brussel's government in this case) to provide shelters and assist migrants. Nonetheless, many migrants like Osman still experience precarious living conditions due to the shortage of places in shelters or in the families of citizens opening their homes. The state of vulnerability mentioned result, among other things, from the irregular administrative status, the precarious living conditions (also with

---

4 For a definition of the term governance, see Section 5 on terminology.

regards to law enforcement treatment), and the scarcity of financial and social resources. Because their goal is not to stay, they are referred to as 'migrants in transit' and travel from Brussels to other areas in Belgium (e.g., informal settlements along the speedway in the direction to Calais) or in the North of France. During his stay on the Belgian territory, which can vary substantially from days to months/years and involve many back and forth trips to distinct locations within Europe, Osman can deploy distinct strategies. Osman can resort to migrant smugglers which will require financial capital (estimated between 500 and 4000 euros, depending on many factors such as guarantee, etc.). The journey with a smuggler often involves travelling in the concealed compartment of vans or in (refrigerated) lorries and, more recently, boat crossings departing from France. To pay for the journey, Osman might have to work (often in exploitative conditions) on the Belgian territory to gather the required sum. He can also decide to help smugglers, on several occasions, in exchange for a 'free' attempt to cross at a later stage. Finally, Osman can also try his luck by spotting lorries and trying to embark in lorries on his own. This scenario situates this dissertation within the nexus between irregular migration, migrant smuggling and, considering the potential work in exploitative conditions, to a certain extent human trafficking.

Osman's situation illustrates complex and overlapping scenarios where the protagonist can be seen and henceforth treated and governed as a mere irregular migrant, as a victim of human trafficking, as a victim (or object) of migrant smuggling and lastly, as a potential smuggler. This resonates to the hazy boundaries and relationships between these phenomena described *inter alia* by Dauvergne (2009). As signalled in the beginning of the introduction, the migration 'crisis' of 2015 constitutes a pivotal moment in migration governance at the EU level. It is also imperative to underline the growing concern and attention at all levels devoted to irregular migration, border politics and migrant smuggling resulting from the tragic events and border deaths happening across the Mediterranean Sea (see also Chapter 2). A large amount of insightful academic research has been produced in the last few years focusing on the migrant smuggling phenomenon and more generally on the situation at the EU external borders (see Section 2 of this dissertation and Andersson 2016, Fargues & Bonfanti 2014, Jeandesboz & Pallister-Wilkins 2016; Baird 2016a, Petrillo 2016, Achilli 2016, Sanchez 2017; Campana & Gelsthorpe 2021). With regard to the situation at the internal borders, the overall consequences of the 2015 'crisis' have been scientifically scrutinized, notably with regard to: the (collective) securitization of the Schengen Area (e.g., Jabko & Luhman 2019, Ceccorulli 2018); the ensuing reintroduction of internal border controls/checks (see 1.1); the governance of secondary migration movements; and the experiences and individual decision-making of migrants in transit zones (e.g., Brekke & Brochmann 2015; Derluyn et al. 2014, Schwarz 2018; Welander & Ansems de Vries 2016; Picozza 2017; Ansems de Vries & Guild 2018; Belloni 2019; Migliaccio 2020, Tazzioli 2018, Tazzioli & Garelli 2018; Edmond Pettit 2018a & 2018b; Barbero 2020, 2021; Schapendonk, van Liempt, Schwarz & Steel 2020 ; Vandevoordt 2021; Menghi 2021). The last strand of academic scholar-

ship is of particular interest in this dissertation as it takes into account the vulnerability of migrants on the move, which is an essential dimension of this thesis that aims to critically explore how the legal dichotomy affects concretely the governance of migrants in transit. In comparison, research *directly* engaging with migrant smuggling in an Intra-Schengen border mobility context has been relatively scarce since 2015 (see 2.2).

At the policy level, the refocus on migrant smuggling has been particularly visible since 2015 (see European Commission 2015, 2021). As Perkowski and Squire (2019) underlined, the 'crisis' has 'afforded European anti-smuggling efforts a new lease of life' (2167, see Chapter 2 for further details). Whereas the prevention of secondary migration movements was always a central concern for the EU and its Member States (see Schuster 2011), the role of smugglers in facilitating these 'irregular' secondary migration movements is also gaining momentum (e.g., Frontex 2020, EMSC 2019, 2020). The central and dominant discourse on the figure of the smuggler *exploiting* and *abusing* the vulnerability of migrants found in policy documents is particularly relevant in many respects. Not disregarding, by any means, the reported violence and mistreatment that can be experienced by migrants during smuggling processes, the use of the terms abuse and exploitation blurs the legal dichotomy. Chapter 3 will critically examine at a greater length the consequences of the (instrumental) conflation of trafficking and smuggling as such conflation can allow counter-smuggling policies and border control practices aimed at stemming migration flows to gain moral legitimacy and ethical underpinning (e.g., Tinti & Reitano 2016, Streiff-Fénart 2018, Perkowski & Squire 2019, Campana 2020).

The purpose of this introductory section was to contextualize the research and situate it in the current academic and policy debate. The remainder of the introduction consists of four sections. The following section focuses on the scholarly conceptualization of the complex migrant smuggling phenomenon. The third section clarifies the research sub-questions while locating the research within the broader tradition of socio-legal scholarship. The fourth section outlines the methodological approach followed in this dissertation. The fifth section provides terminological clarifications on contested concepts that are used throughout this dissertation. Finally, the last section presents a reading guide which gives an overview of the different parts of the research and their connection with the research questions.

2 Migrant smuggling as a Multi-Faceted Phenomenon

2.1 An Overview of Overviews

Leaving to others the exhaustive and careful recollection and categorization of migrant smuggling research, the aim of this section is to provide a definition of the concept of migrant smuggling, identify contemporary and common

criticism and *research gaps* in order to situate the dissertation in a knowledge production field that has been depicted, for rightful reasons, as 'messy' (see Baird & van Liempt 2016). When researching and writing about migrant smuggling, most scholars agree that the phenomenon has been explored from a rich variety of theoretical, analytical, and focal lenses, reflecting henceforth the complexity of the phenomenon (Baird 2013; Campana & Varese 2015; Baird & van Liempt 2016; Angelli & Triandafyllidou 2016; Zangh, Sanchez & Achilli 2018; Alagna 2020). The broad range of angles is the result of the multi-faceted nature of migrant smuggling, which is located between migration, on the one hand, and crime on the other (Alagna 2020). The difficulty of researching migrant smuggling is also explained by the struggles to obtain reliable data on a hidden and clandestine phenomenon as well as methodological difficulties, notably when it comes to access and ethics (see Baird & van Liempt 2016). The categories used by scholars to sort the research produced to make sense of the phenomenon can vary substantially when examining contemporary overviews on the conceptualization of migrant smuggling. It is important to recall the centrality of the UN and subsequently the EU definitions as the vast majority of research produced starts with a definition of migrant smuggling, which differentiates (critically or uncritically) the phenomena from human trafficking (see 1.1. and Chapter 2 for the EU). Because this dissertation focuses on the legal governance by authorities of migrants in transit, involving therewith an understanding of both phenomena, a working definition is used a starting point. This does not imply that the definitions will not be critically reflected upon in the thesis (see in that regard the merits of using the operational definition of a 'smuggling spectrum' grounded in empirical evidence and acknowledging the complexity of the phenomenon proposed by McAuliffe and Lazkco (2016: 7-8) and further refined by Alagna 2020: 18-20). Furthermore, considering the scope of the research, the orientation of this conceptualization section will mainly examine the literature focusing on Europe.

The recent legal conceptualization of migration smuggling in the late 1990s and the strong linkage existing between policy developments (and growing policy concerns) and academic research (see Sanchez et al. 2021; Sanchez 2021; Alagna 2020) has led to numerous studies in the past 30 years. The following key scholarly work gathering, sorting, and highlighting strength and limitations of the most notable publications, which complement each other, are underlined in this paragraph. The contribution of Baird and van Liempt (2016) presents a valuable review of the most significant studies in the field but needs to be supplemented as seven years have passed since this publication. In their analytic overview of the literature, Baird and van Liempt (2016) created a typology composed of five approaches used by scholars to research migrant smuggling: namely, smuggling as business, crime, networks, global political economy and finally human rights. With regards to the two first approaches (business and crime, see below), Angeli and Triandafyllidou (2016) paired them

together in the broad 'criminological approach' category, which they opposed to the 'sociological approach' that pays attention to the relationship between the multiplicity of actors involved as well as the socio-historical context in which they are rooted and therewith conceptualize migrant smuggling as a 'complex interactive process' (123). Similarly, and more recently, Alagna (2020), unpacking the notion and critically reflecting on the state of the art of migrant smuggling research in his doctoral thesis, also made broad categorizations from studies departing from a pure 'migration' lens to studies adopting a pure 'crime/security' approach (6). Alagna (2020) further sorted the materials from two perspectives: the supply side ('who is a smuggler?') and the demand side ('who is a smuggled migrant?') (12-18). Regarding the former, the figure of the 'archetype' smuggler was deconstructed (see also the overview of Aziani 2021 on the heterogeneity of the smuggler) by referring to research reflecting the diversity of organizational models; the connection of smuggling with other criminal endeavours (or lack thereof, see more recently Achilli & Tinti 2019; Andreas 2021); the variation of smuggling processes depending on routes taken; the existence of coercion (see also below); and the distinct manner used to depict smugglers either as 'altruistic', shedding light on the humanitarian/moral smuggler debate or as mere 'criminals' (15). Regarding the latter, Alagna (2020) examines the field from two important dimensions: the research on migrants' agency in the smuggling processes and, crucial to this dissertation, the work produced on the victimization dimension intrinsically linked with the coercion element mentioned above, which highlights the continuum between migrant smuggling and human trafficking. This overview of the diverse typologies/approaches mobilized in the scholarship to understand the migrant smuggling phenomenon, together with current criticism on the dominance of some approaches over others (see following paragraph), were important to bring forward in order to locate the research in the field and identify the research gaps that the dissertation aims to fill (see 2.2).

To this day, many scholars share the opinion that knowledge production has been problematically dominated by what can be referred to as the criminological/security approach emanating from the legal definitions, while nevertheless saluting the growing number of studies beginning to adopt distinct approaches, debunking henceforth common stereotypes and misunderstanding about the phenomena (Baird & van Liempt 2016; Achilli 2018; Alagna 2020; Sanchez et al. 2021). The crime and business lenses derive from the seminal work of Salt and Stein (1997) 'Migration as a Business', which precedes the adoption of the UNTOC. Following this approach, migrant smuggling is painted as an illegal, lucrative activity within the broader context of irregular migration framed as a profitable market. Consequently, the literature adopting this approach pays attention to organizational structure of migrant smuggling and looks mostly at the modus operandi of smugglers, smuggling routes, prices, migratory flows, etc. This lens is strongly linked with the prototypical depiction of the smuggler as an ultimate 'villain', who is part of a highly structured

mafia/organized crime group. Such depiction is opposed to the conception of the smuggled migrant as a mere 'passive' agent devoid of agency (see Perkowski & Squire 2019: 2177; Van Liempt & Doormenik 2006: 166). These depictions are almost unanimously criticized by the scholarship for lacking empirical grounding and disregarding the complexity of the phenomenon (Liempt 2007; Vermeulen, Van Damme & De Bondt 2010; van der Leun & Staring 2013, Baird and van Liempt 2016, Zangh et al., 2018, Sanchez et al. 2021, see also Chapter 4 on the common stereotypes around migrant smuggling).

Questioning dominant policy and law-enforcement narratives, Sanchez (2021) examined the prevalent use of the notion of 'smuggling network' that is understood differently than Baird and van Liempt (2016)'s notion of 'networks' referring to research unpacking the role of personal and familial networks in the smuggling processes. The (simplistic) reliance on the broad term 'network' which, from a law enforcement perspective and perpetuated in some academic publications, tends to refer to groups that are hierarchical, transnational, and organized was considered unhelpful to understand the phenomenon (see the reports of the EMSC and the risk analysis reports of Frontex). As explained above, the notion of networks, when referring to smuggling processes, is called into question by the scholarship considering the heterogeneity of structures and actors involved (see Vermeulen, Van Damme & De Bondt 2010). Sanchez (2021) who goes against the 'smuggling as a business model' lens also highlights research focusing on 'self-facilitation', referring to migrants solely resorting to themselves or their families without the assistance of smugglers, which resonates strongly with the vignette presented in 1.1.4. In the specific EU context, the ethnographic research performed by Bouagga (2021) in which she pays attention to migrants in a transit situation in the camp of Calais helps to shed light on the complex figure of the smuggler. Bouagga (2021) examines the modalities and tactics of border crossings and the strategies used to circumvent state criminalization and repression from a migrant's perspective (see also the empirical work of Amigioni, Molinero & Vergano 2020 on the material and symbolic role of the Sudanese passeurs as well as their organisation at the French/Italian border). Perkowski and Squire (2019) have also enumerated distinct 'strands' of scholarship and subsequently appraised strands taking a more critical lens than the 'criminological/business' one. The scholars (2019) situated their own research within studies shedding light on the co-relationship between counter smuggling policies and the booming of smuggling networks (e.g., Andersson 2014). For example, contributors looked at the embeddedness of smuggling processes within broader socio-political context and notably cast light on the relationship between smugglers-smuggled (belonging henceforth to the general 'sociological approach' depicted by Angeli & Triandafyllidou 2016; see also Mandic 2017 for the depiction of smugglers as 'guide/helpers/informants' in the Balkan route). In a similar vein as Perkowksi and Squire (2019), who critically ex-

amined the links between border policies and migrant smuggling, Fontana (2018, 2020) underlined the co-relationship between bordering practices and involvement of organized crime groups in smuggling practices in Italy. Using the concept of 'human insecurity', Fontana (2018, 2021) looked at 're-smuggling' practices (facilitation of secondary migration movements) and pointed out the danger and insecurities experienced by migrants that are inherent to the transit situation. I refer the reader to the recollection made by Baird and van Liempt (2016) with regards to the social and political embeddedness, the 'global political economy' approach adopted to research migrant smuggling aiming, among other things, to provide explanation on (global) migration systems, and which takes into consideration the intricate economic, political, and socio-historical relations between regions.

2.2 Locating the Dissertation

In terms of conceptualization, this dissertation locates itself *mainly* in the last 'smuggling and human rights' category/typology of research, which, in a nutshell, pays attention to the protection dimension (or lack thereof) granted to smuggled migrants as vulnerable individuals, which does not however imply that they lack agency in their migration journeys (Baird & van Liempt 2016). Inherent to this analytical lens is the tangible and dynamic tension between the security/border control approach and the human rights/protective approach. Within this broad category, Alagna (2020) further demarcated studies stemming from a criminal law perspective. For example, the author (2020) critically analysed legislations and policies in place and the processes leading to their adoption from studies emanating from a human rights perspective. Related to the latter, many scholarly contributions highlighted in the first part of this introduction on the dichotomy between smuggling and trafficking, notably in light of the securitization process (e.g., Gallagher 2001, 2015; Crépeau 2003, Dauvergne 2008), can be said to have departed from a human rights perspective to examine migrant smuggling.

In regard to the research stemming from a criminal perspective, the following, current and notable research is relevant to briefly enumerate without over expanding as much of the work mentioned will be further discussed in Chapters 2, 4 and 6. Focusing on the EU normative framework, the volume of Guilt et al. (2016) examined the measures aimed to tackle irregular migration and migrant smuggling in the EU and the potential overlap between these phenomena and human trafficking. Mitsilegas (2019) critically analysed the foundation of criminalization of migrant smuggling, which is linked to the work Carrera et al. (2018), Zirulia (2021) and Alagna (2020; 2022) on the broad issue of criminalization of humanitarian assistance in the EU (see also the broader discussions in Fekete 2018, Consumano 2021 on the role and perception of NGOs and Tazzioli & Walters 2019 on crimes of solidarity).

The empirical work of van der Leun and van Schijndel (2016) illustrates the tension between the protective and the migration control approach and is directly connected to the victimization dimension and questions the legal dichotomy, notably with regards to elements of exploitation visible yet disregarded in migrant smuggling case files in the Netherlands. The empirical research of Brunovskis and Surtees (2019), focusing on the challenges to identify trafficking victims and securing their individual rights in the Balkan during the 'refugee crisis' and touching directly upon the legal dichotomy, is also worth mentioning in that regard (see also Chapter 3 collecting empirical research highlighting the blurry lines between the two phenomena). Lastly and directly connected to geographical zone under the scope of inquiry in this dissertation, the discourse analysis on inscriptions made by intercepted migrants 'on the way' in police waiting rooms in Belgium, conducted by Derluyn et al. (2014), illustrates concretely (among other things) how elements of coercion, exploitation and violence can take place during the smuggling processes.

The last three empirical studies mentioned leads to an important observation, which echoes the concerns made by Baird and van Liempt (2016) in their analytical overview. Baird and van Liempt (2016) mention that the 'smuggling as human rights' approach, while valuable in many respects, was nonetheless overfocused on the normative arguments, which tend to be disconnected from the empirical context in which existing laws and policies carefully and critically analysed are embedded. As phrased by the authors (2016), 'empirically grounded socio-legal analyses seem to be missing from the literature' (12). Another gap found in these overviews bears mentioning. Together with Sanchez et al. (2021), Angeli and Triandafyllidou (2016) noted that the focus of migrant smuggling research suffered from geographical imbalance. In their review of the conceptualization of migrant smuggling by EU policymakers, Sanchez et al. (2021) generally problematized, among other things, the dominant Eurocentric perspective which is adopted in research and criticized the fact that most of the attention is going to the Libyan case, preventing henceforth the necessary examination of smuggling processes and dynamics in other regions. In the European case, Angeli and Triandafyllidou (2016) commented on the scarce scientific attention given to intra-European movements (or the facilitation of secondary migration movements) in comparison to the border crossing activities taking place at the EU southern borders. As highlighted in 1.4, this geographical research gap can be said to have remained.

In light of the distinct research gaps identified above, this socio-legal dissertation, which problematizes and reflects critically upon the uneven treatment given to (vulnerable) migrants in Belgium, in light of the legal taxonomies in place, contributes to the migrant smuggling research field in three ways. Firstly and more generally, the study answers to the call of Baird & van Liempt (2016) on the need for more empirically grounded socio-legal research as will be further elaborated in the next section and in the method-

ology section. Secondly, as the knowledge production in the migrant smuggling field is still problematically dominated by the 'criminological/security approach' at the expense of the 'human rights/protective' approach, delving into the Belgian case, which empirically examines a unique legal framework offering additional protection to aggravated smuggling victims (as opposed to objects), is highly relevant. Thirdly, the geographical choice of Belgium entails the need to pay attention to secondary migration to secondary or onward migration movements in northern Europe, which aim to restore (at a small scale) the geographical focus disbalance in research identified above.

3 A Study of the 'Real Law'

In her book *Invitation to Law & Society*, Kitty Calavita (2010) refers to the study of the 'real law', which posits that the law, more than an 'abstract ideal' that can be idealized, is inherently a 'human artifact' (3). Hence, at odds with a more conventional manner of approaching and examining law as a set of coherent principles relating to each other in line with a specific inner legal logic, sociolegal scholars have been preoccupied with studying law as it is lived in society. From that standpoint, and in line with a long tradition of sociolegal scholarship, it becomes clear that an examination of the law circumscribed within the boundaries of the 'black-letter-law/law in the books' is limiting. Indeed, sociolegal scholars have emphasized the need and value to closely examine how decision-makers perceive, interpret, and enforce the 'law in the books' as well as the rationales, constraints and factors triggering their decision-making processes (see Blocq & van der Woude 2018 on the evolution of the field of Law & Society).

Central to (empirical) inquiries focusing on decision-making are studies focusing on the role of discretion (e.g., Dworkin 1977; Hawkins 1995; Galligan 1986; see also Pratt & Sossin 2009 for a critical review of the scholarship on discretion and van der Woude 2016 on the role of discretion in a criminal justice context). Macaulay (1984) acknowledging and categorising accomplishments in the social sciences, reflecting notably street-level bureaucracy theory (see Lipsky 1980), applauded the growing awareness on the following idea: "(L)aw is delivered by actors with limited resources and interests of their own in settings where they have discretion" (152). Research looking at the everyday practices of (frontline) public workers (from border guards, police officers to prosecutors) is crucial to understand the (potentially problematic and uneven) treatment delivered to their (unvoluntary) clients. In that regard, Maynard-Moody and Portillo (2010) explained how street-level bureaucracy theory became a site of scholarly influence and confluence at the junction of many disciplinary fields such as criminal justice, socio-legal studies, and public administration. Going beyond or in combination with (socio-legal) literature on (discretionary) decision-making, scholars have also showed interest in key

sociolegal concepts such as legal pluralism, interlegality, and games of jurisdiction (Moffette 2018; Moffette & Pratt 2020; van der Woude 2020; Weissensteiner 2021). The legal pluralist approach traditionally used to study the coexistence and potential opposition of 'state' versus 'customary law' (e.g., Merry 1988) has evolved to encompass the examination of the impact of coexisting and overlapping scales of law in a globalized world (Benda-Beckmann & Turner 2018). Therefore, this dissertation focuses notably on distinct realms of law, which can be mobilized to govern migrants in transit on the Belgian territory. The important contributions of sociolegal scholars, such as Boaventura De Sousas Santos (1987), on interlegality, and Marianna Valverde (2009; 2014), on jurisdiction and scale, are particularly relevant in that regard.

As mentioned in Section 2, the main research question seeks to unravel how the alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking developed in Belgium affects in practice the governance of migrants in transit. To do so and with respect to the embeddedness of the dissertation into the socio-legal tradition, which does not limit itself to the analysis of the 'law in the books', empirical study is required to provide the reader with a clear understanding of what law 'actually does'. Without going into details, that will be developed in the methodology section (4), it is important to mention that the empirical dimension of the research is built on semi-structured interviews with Belgian experts. The main research question entails four additional research sub-questions which are grafted into this epistemological view on the law. The four research sub-questions which are connected and contribute to answering the main research question are formulated as follows:

SQ1: What are the approaches and narratives commonly identified in EU counter-smuggling and anti-trafficking legislations and policies and how do they translate in the Belgian legal framework?

SQ2: Can the contested concept of transit migration be considered useful in shedding light on the blurred area found at the nexus between migrant smuggling and human trafficking?

SQ3: How does the unique Belgian legal framework dealing with aggravated forms of migrant smuggling operate in practice?

SQ4: Can a mobilization of human rights law mitigate concretely the vulnerabilities (often) experienced by smuggled migrants in transit in an Intra-Schengen mobility context?

The first sub-question evidently relates to the 'law in the book' dimension. Nonetheless, even if focusing solely on the written law, the question takes into account the criticism made to the classical 'gap studies' (see Roscoe Pound

1910), which were described as relying on a 'purposively rational theory of law' (Gould and Barclay 2012: 329). Simply put, and in line with the evolution observed in the Law & Society movement/field/perspective, this research shifts away from the implicit assumption that the objectives decided by law and policymakers are an unproblematic starting point (Blocq & van der Woude 2018). As will be further explained in the reader's guide, the aim is dual; 1) to provide the reader with the international, EU and national legal and policy frameworks in place and 2) to offer a critical overview on the development of counter-smuggling law and policies at the EU and at the Belgian levels. The assumptions of the European law and policy makers will therefore be scrutinized, notably by analysing the dominant (and at times contradicting) narratives emerging from key policy documents in the field. Because this dissertation focuses on the (legal) governance of migrants transiting through Belgium, the second sub-question places the contested concept of transit migration at the centre of the research. Departing from a moderate social constructivist approach (see Mertz 1994), which pays attention to the socially constructed nature of laws implicating therewith that legislations cannot possibly include comprehensively an infinite number of scenarios, the research focuses on the way rules on migrant smuggling and human trafficking themselves are based on construction of constructed realities/truths. The second sub-question aims to assess whether the contested concept of transit migration, which is predominantly used in the literature to depict the situation in the peripheral zones of the EU, can be helpful to shed new light on the vulnerable positions of individuals in a transit situation, often located in the 'blurry zone' between smuggling and trafficking, also in an intra-Schengen mobility context.

The remaining sub-questions relate to the 'law in action' dimension of the research. The chapters providing answers to these sub-questions aim to generate clear and organised understanding of 'what law actually does' based on the empirical data collected and how the practical implementation of the unique Belgian legal framework affects migrants transiting through the territory. By so doing and in light of the multiple legal frameworks and actors involved in the field, the conceptual frameworks mobilized therein draw from legal, criminological, and importantly sociolegal scholarship (see notably above on the use of interlegality/jurisdictional games scholarship).

In their analysis of the Law & Society movement based on presidential addresses of the Law & Society Association, Blocq & van der Woude (2018) also underlined that since the 1990s, social justice became a central concern in the field/movement. Consequently, sociolegal scholars have increasingly focused their research on issues of justice, rights, inequality, and oppression (Darian-Smith 2013). Hence, the last sub-question which deal with the mobilization of human rights law, which targets, among other types of audiences, strategic litigators in the European Court of Human Rights (hereinafter ECtHR), aims to contribute to the general debate on 'legal mobilization' going beyond national jurisdictions. A final remark should be made considering the cross-

border nature of migrant smuggling and the fact that the phenomenon has been regulated at the international, regional, and subsequently at the national levels, and more generally that migrant smuggling is intrinsically linked with the current challenges posed by immigration depicted as the 'human side of globalization' (Dandurand & Jahn 2020: 785). In her *Introduction to Sociolegal Scholarship in the Twenty-First Century*, Darian-Smith (2013) invited scholars to adopt a more 'global sociological approach'. For instance, Darian-Smith (2013) argued for the development and formulation of innovative legal strategies to current challenges posed by globalization, which would consider issues of scales. In that respect, the last sub-question also responds to this call, as well as with Halliday and Schmidt's (2004) observations that sociolegal research on human rights have mainly focused on the Global South.

4 Methodological approach

As it will be further explained in the reader's guide (Section 6), apart from the introduction and the conclusion, this dissertation consists of five substantive chapters, which should be seen as sub-studies within the overarching framework of the dissertation. All these chapters adopt their own distinctive methodology as well as their own theoretical and analytical research logic. Multiple methods and data sources were triangulated, ranging from qualitative content analysis of legal and policy documents, academic literature, grey literature, and investigative journalistic pieces as well as qualitative analysis drawing from expert's interviews. In each chapter, further explanation will be provided on the specific analytical (deriving from distinct theoretical and conceptual frameworks) approach followed for the specific sub-study. Taken together, this multi-method approach allows for a more comprehensive understanding of the legal governance of migrants in transit within the Schengen Area and enhances the validity of the research. As underlined by Bowen (2009), the use of distinct data sources is necessary if the researcher seeks corroboration and convergence. Beside drawing from scholarly literature ranging from diverse streams of discipline (e.g., law, (border) criminology, geography, legal anthropology), which is instrumental to delineate the background and make sense of the primary sources, the distinct sources mobilized can be sorted into two main categories: document source (4.1) and qualitative experts semi-structured interviews (4.2 and following). Because Chapters 3 through 6 draw substantially from the qualitative interviews conducted with Belgian experts and to avoid redundancy and unnecessary repetitions throughout the dissertation, this section aims to shed light on the methodological advantages and pitfalls of conducting qualitative expert interviews (4.2), how the data was collected, which includes the selection of the respondents (4.3), as well as necessary developments on reflexivity and positionality (4.4).

With regards to the time frame, it is of importance to signal to the reader that this dissertation was initiated following a research grant issued by the Dutch National Police in 2018, which aimed to conduct a comparative research project on the intersection between migrant smuggling and human trafficking within the Schengen Area. Hence, with the exception of an additional in-depth interview conducted in late 2021 (see below), the interviews were conducted between 2018 and 2019. Lastly, because migrant smuggling is a fast-changing and highly topical field of inquiry, important limitations connected to avenues for further research linked to these issues will be further clarified in the conclusion of the dissertation (Chapter 7).

4.1 Document sources

The first type of data source mobilized in the dissertation reflects the multi-layered nature of the phenomena under study and combines a collection of official documents publicly available, which have been adopted by national (Belgian), transnational (European) and international (UN) authorities. Document sources are crucial to examine in order to have a comprehensive overview, as that they put forward thorough insights on the issues scrutinized in the dissertation. More specifically, as outlined in Section 1.3, and considering the aim of the first research sub-question, document sources are notably essential to consider due to the examination of the narratives and framing deployed to write about migrant smuggling and human trafficking. Besides, and more generally, qualitative research methods require the researcher to use distinct sources of evidence, including document sources, for triangulation purposes, which can help mitigate the influence of potential biases (as discussed in 4, see also Bowen 2009). As outlined by Stake (1995) and Yin (1994), the method of combining distinct research methods (e.g., qualitative interviews) with document analysis is particularly appropriate when the research focuses on a single case study. The following sub-section does not provide an exhaustive list of all the documents used in the dissertation but aims to present a general overview of the key sources to the reader. In light of the coexistence and overlapping of distinct *scales* (UN, EU, Belgian) and realms of law (e.g., immigration law, criminal law) relevant for the governance of migrants transiting through Belgium, legal instruments adopted at the national, supranational (EU/Council of Europe), and international levels (UN) constitute and integral part of the analysis and together with the operationalisation of the analysis will be further specified in each chapter.

Starting with the Belgian level (examined in Chapters 4 to 6), the documents examined include *inter alia* the annual reports of the Belgian Federal Migration Centre, which is also the National Rapporteur on Human Trafficking (hereinafter the Myria). These comprehensive and detailed yearly reports have the advantage of focusing on both migrant smuggling and human trafficking.

A thematic report on transit migration published by the Myria in June 2020, underlying the social, scientific, and political salience of the topic, was included in the documents under scrutiny. Case law on the phenomena were also considered. This was facilitated by the creation of an up-to-date case law database in the Myria's website, which gathers key jurisprudential cases on migrant smuggling and human trafficking. Paying attention to judicial proceedings is essential to have a better grasp on the interpretation of the legal framework in place. Furthermore, the collection of documents is comprised of country reports created by international organisations, for instance the country reports created by the International Organization for Migration (hereinafter IOM) and the comprehensive country reports on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium conducted by the Group of Experts on Action against Trafficking in Human Beings within the Council of Europe (hereinafter GRETA). Interventions made by Belgian politicians and legislative proposals made in the Belgian House of Representative were included in the document source and can be treated as parliamentary sources. The website of the Belgian House of Representative has the advantage of offering thematic searches. The following themes were of notable relevance for the research: 'migrant'; 'migration'; '*trafic des êtres humains*' (migrant smuggling); '*traite des êtres humains*' (human trafficking); '*aide aux victimes*' (assistance to victim). By clicking on each keyword, a collection of documents ranging from political interventions to legislative proposals related to the theme appeared and were regularly examined. The collection also encompasses the national security plan to deal with migrant smuggling adopted in 2016 as well as the special report issued by the Permanent Oversight Committee on the Police Services (hereinafter Comité P) on the control and detention of so-called 'transmigrants' by the police.

As will be discussed in Chapter 2, the collection of documents at the European level consists of, among other things, official communication from the European Commission on both migrant smuggling and human trafficking retrieved from the EU official website together with the different action plans or strategies/pacts adopted since 2015 to deal with human trafficking, migrant smuggling, migration & asylum, security, and organised crime. Besides, the collection also integrates the annual reports produced by the European Migrant Smuggling Centre (hereinafter EMSC) within Europol, the publications issued on the phenomena by Eurojust and to the extent that the focus remains on the internal EU borders, the communication made by the European Border and Coast Guard Agency (hereinafter FRONTEX). Within the Council of Europe, the general yearly reports of the GRETA were also taken into consideration. Lastly, with regards to judicial proceedings, the selection of relevant case law produced by European Courts of Human Rights (hereinafter ECtHR) on these matters is further outlined in Chapter 6.

At the UN level and besides the distinct reports produced by the IOM, the collection of documents includes, *inter alia,* the *travaux préparatoires* of the

Palermo Protocol (see Chapter 2), the various communication and reports produced by the United Nations Office on Drugs and Crime (hereinafter UNODC), the office of the United Nations High Commissioner for Refugees (hereinafter UNHCR) and official communication made around the adoption of the UN Global Compact for Safe, Orderly and Regular Migration, which touch upon both migrant smuggling and human trafficking (see Chapter 6).

Lastly, another type of source, which is not issued by official state authorities or international organisations, was considered necessary to gather distinct perspectives on the phenomena. The documents include NGO (e.g., le Ciré, La Cimade, Caritas International, The Red Cross, Médecins du Monde, Doctor without Borders) and Think Tank (e.g., CEPS) reports as well as their press releases. They were selected based on their thematic (e.g., migrant smuggling, human trafficking and exploitation of migrants, migrants in transit) and geographical focus (EU, preferably looking into onwards migration movements). General documents which broadly reported on current developments linked to migration in the EU were also included. These reports provide valuable insights as they often present data directly collected in the field, which is not necessarily accessible by authorities and/or academic researchers and can enable further triangulation, which subsequently fosters the convergence of evidence necessary to build credibility (see Bowen 2009). More than only using these reports in a residual manner, these reports provide important and up-to-date insights that need to be scrutinised. Indeed, as it will be explained in further detail in Chapter 6, the ECtHR often resorts to evidence-based adjudication methodology, which notably involves the use of civil society and NGO reports.

Newspaper articles were also *residually* used as relevant sources to integrate to the research findings and, more importantly, as a way to remain up to date with recent developments in the topical and rapidly changing field of migrant smuggling, also in the countries neighbouring Belgium (e.g., the UK, France). Concentrating first on Belgium, I selected key and (relatively) diverse Belgian newspapers: namely, *De Standaard* (centre right), *De Morgen* (centre left), for Flanders, *La Libre Belgique* (centre right), and *Le Soir* (centre left), for Wallonia. With regards to France and the UK, I conducted keyword searches in *The Guardian,* for the UK, and *Le Monde*, for France, to have a broad overview of recent developments. I conducted searches on a regular basis (approximately every three or four months) between 2018 and 2022, using keywords such as migrant smuggling, human trafficking (due to the recurrent conflation of both terms in the media), border crossings, migrant 'crisis', 'transmigration'/ 'transitmigration'/ 'migration de transit', and Maximilian Park (see Section 5 on terminology), in the Belgian case.

4.2 Qualitative Expert Interviewing

Côté-Boucher, Infantino and Salter (2014) strongly invited scholars to supplement their legal, policy and discourse analysis by taking into account *under-examined* 'practices, beliefs and actions of strategists, policy makers and practitioners, particularly street-level decision makers', who are considered 'policy translators' (197). Henceforth, the authors (2014) urged to bear these considerations in mind when setting the agenda for future research on border security, in light of the 'plurality of power-brokers' involved in these fields. The dissertation aims to concretely answer this call by focusing mostly on state actors. To have a better grasp of the functioning of the system 'in action', I conducted semi-structured interviews with respondents working in state institutions involved in and having a key role in dealing with the phenomena of migrant smuggling and to a lesser extent human trafficking in light of the interconnectedness of both crimes. The following sub-section will further elaborate upon the factors at play in the selection of respondents which operate in a field, which I quickly came to realise can be labelled as rather 'niche' on account of the scarce specialised expertise and the working relationships between the actors involved (see also below).

From a general standpoint, the aim of qualitative interviewing is by no means to obtain hard facts but rather to derive interpretations and have a refined understanding of the social reality as well as the shaping of social practices, in this case, the way migrant smuggling was dealt with and perceived in Belgium (Edwards & Holland 2013; Döringer 2021). Simply put, the purpose was to gather perceptions and understand the meaning, the 'experiences and life worlds' given by the respondents as actors operating in the Belgian criminal justice system and migration control apparatus (Warren 2011, 2). Consequently, the perceptions generated by the interviews can only be treated as an *understanding* of the reality, which are inherently subjective, susceptible to change and do not necessarily reflect the manner in which respondents concretely make decisions in practice (Alshenqeeti 2014).

Expert interviews can be a powerful tool to generate specific data and knowledge from a social field of action, which can be difficult or even impossible to access (see Meuser and Nagel 2009; Döringer 2021). A crucial prerequisite is to clarify what is meant by 'expert', or more specifically, 'expert knowledge'. Expert interviews as a method is considered particularly useful due to the expert's professional, technical, institutional/organizational, and interpretive knowledge acquired during the course of their careers (Bogner, Littig & Menz 2018; Döringer 2021). These criteria refined what is to be understood by 'expert knowledge' and were subsequently used to select the expert respondents to be interviewed. More precisely, and in contrast to so-called 'everyday knowledge', technical knowledge broadly refers to field-specific knowledge (e.g., data, fact, information, technical applications, bureaucratic competencies). Processual knowledge is slightly different as it is linked with

the practical and institutional experience gathered by the experts, notably in light of their position occupied in the institutions, which can give precious information on social practices, routines and interactions in a given field (Van Audenhove & Donders 2019). Lastly, interpretative knowledge refers to the subjective interpretation and point of view of the experts (Bogner, Littig & Menz 2009).

I opted for semi-structured interviews as open-ended questions are considered more appropriate and relevant for expert's interviews in contrast to survey type closed-ended questions (Gläser & Laudel, 2014). As underlined by Aberbach and Rochman (2002), open-ended questions are often favoured by experts as they allow them to fully express their worldviews, to partake in thorough discussions, and from the researcher's perspective, generate extensive narratives which are not necessarily prompted by questions positioning the expert on a pre-determined path of reasoning. To that end, and as generally prescribed, I designed thematic interview guides, which contained the key themes of focus (see also an example of the questionnaire in Annex I) but left an ample amount of freedom to the respondents to delve into questions or issues which they had more expertise on or which interested them the most (see Bogner, Littig & Menz 2018). The interview guides were designed following preliminary analysis on migrant smuggling and human trafficking in Belgium and questions were slightly adapted depending on the institutions and roles of each expert respondent while keeping the core theme (see Annex I).

The need to come to the field well-prepared is central to the exercise of conducting expert interviews. Whereas qualitative interviewing suggests the researcher to take on the role of the 'socially acceptable incompetent' (see Lofland & Lofland 1984: 38), this is not the case in an expert interview setting, notably due to the unequal power relations at play (see below). This uneven relation of power can lead to asymmetrical communication and can be explained by the social and/or professional position of experts and their experience of being in control, listened to, and being interviewed (Bogner, Littig & Menz 2018). Entering the field with prior specific knowledge and sensitizing concepts is often advised as a way to mitigate asymmetrical interactions but also to build respect and trust as well as to comfort the experts that they are not 'wasting' their time (e.g., Harvey 2011, Trinczek 2009). Nonetheless, the so-called 'inferior' and naïve yet trustworthy position of the researcher can have several advantages to generate interpretative knowledge (Abels & Behrens 2009; see also 5.4 on positionality).

Another important distinctive feature of expert interviews touches upon the issue of time, as experts often lack either the incentive or time to take part in the interviews (Petintseva et al. 2020). In my specific case, I anticipated the time factor to be an issue but, surprisingly, the vast majority of the expert respondents granted me a considerable amount of their time as the interviews lasted on average two and a half hours.

The interview guide started with demographic questions to put the experts at ease and were directly followed by thematic questions on migrant smuggling and human trafficking in Belgium and Europe. The questions notably touched upon the role experts played in their institutions, institutional collaboration, and repartition of competencies at the Belgian and European level; general, technical/legal questions on both migrant smuggling and human trafficking; and more specific questions on the perceived interaction or separation between these phenomena. Concerning the intersection between migrant smuggling and human trafficking, vignettes or fictional, hazy scenarios were designed to prompt respondents at times (see example Annex I). As both phenomena are often connected to the sensitive and politicized topic of irregular migration and in the Belgian case 'transmigration' (see 1.4), specific prompts were also used to avoid superficial or 'public relations' type of answers which are common in expert interviews. For instance, to gather the expert's insights on the increasing use of the term 'transmigrant' at the mediatic, political and policy level and to not display any personal views on the matter, I chose to read the excerpt of a critical analysis of the work on Claes (2018) (mentioned in 1.4) on the use of the word and asked them to reflect on it.

Lastly, the interviews took place in the respondent's offices and started with information on the research as well as with the completion of a written consent form. All respondents agreed to be audio-recorded and to either have their names or their functions within their organisation cited in the dissertation. As explained above, because the migrant smuggling and human trafficking field is small and specialised, the full anonymisation of the respondents was not possible in this case study. Nonetheless, and despite their consent for doing so, I avoid using the names of my respondents and solely use their functions. The audio recording of each interview was subsequently transcribed verbatim. The interviews were carried out in French, Dutch and English or a combination thereof. Professional transcription services speakers were used for the interviews conducted in Dutch and, for interviews combining distinct languages, a native Dutch speaker was involved to guarantee the accuracy of the transcription.

4.3 Data, access to the field and selection of respondents

Gaining access to experts can be an arduous and time-consuming task, which I experienced in the beginning of the research journey. My preliminary analysis allowed me to identify the 'key actors' in the migrant smuggling and human trafficking field in Belgium, particularly the crucial role played by a specialised prosecutor in the procedure (see below and Chapters 3 to 6). Two 'gatekeepers' were influential in this regard and allowed me to snowball sample other respondents. The first gatekeeper is a specialised prosecutor and a member of the Group of Experts on Action against Trafficking in Human Beings within

the Council of Europe, who kindly agreed to be interviewed following a spontaneous request. The request which explained the research in general terms was supplemented by a letter of recommendation by the National Dutch Police, which might have helped secure the interview. Following our long interview, the respondent shared and further specified the important actors in the field and allowed me to mention his name when contacting them. The second gatekeeper is a former academic who is working in a local unit of the Belgian police and had contact with key specialised prosecutors and members of the Foreigner's Office. His help was both to gaining access to respondents, particularly in Flanders, but also building trust from the experts as he accompanied me in the field on two occasions in his role of policy advisor of a local police zone.

Chapters 3 to 6 draw from 16 semi-structured interviews conducted between 2018 and 2019 with the key members of distinct organizations reflecting the multi-disciplinary approach chosen in Belgium to deal with both phenomena. The selection of these organisations, together with the position of the respondents within these organisations, is not haphazard as will be made clear in the following chapters, which will provide further information on the Belgian legal (Chapter 2) and institutional frameworks (Chapter 4 and 5). The distinct organisations include the public prosecutor's office from different judiciary districts of the country both in Wallonia and in Flanders (3), the federal Prosecutor's office (1), the federal police (3), the local police (3), the certified shelter that specialize in helping/assisting victims of human trafficking/aggravated migrant smuggling victims (hereinafter specialized reception centre for victims of human trafficking and victims of aggravated forms of migrant smuggling) (1), the Ministry of Justice (2) and the Foreigner's Office (3). On three occasions,[5] the interviews gathered between two to three respondents with (slightly) distinct roles and perspectives. Unlike one-to-one interviews, group interviews had a different dynamic but were highly valuable for the research findings due to the interactions and exchanges taking places between the respondents. The selection of participants was performed based on the criteria mentioned in 4.1. As will be further specified in Chapters 4 and 5, the position held by the respondents in each of these organisations, together with their knowledge, experience, and expertise in the specific field of migrant smuggling and human trafficking, were carefully taken into account when granting the label of 'expert'.

To have a broader overview of the phenomenon and to include more diverse (and critical) lenses, an in-depth interview was conducted with an investigative journalist who produced an extensive two-year investigation on

5 The three group interviews took place with the respondents of the Foreigner's Office and the Ministry of Justice. One additional group interview was carried one with one specialised prosecutor accompanied by one local police officer and one gatekeeper.

the topic in 2018. The journalist was able to interview similar respondents but also gathered migrant's perspectives. To remain acquainted to recent developments, also from a distinct perspective, an additional in-depth interview was conducted in 2021 with a project manager of the Citizen Platform 'BXLRefugee' (citizen's initiative organisation) which, since 2016, provides direct humanitarian assistance to migrants in transit in Belgium. The founder and spokesperson of the organization was also present, at times, in the room and contributed to the discussions.

4.4 Reflexivity and positionality

Bogner, Littig and Menz (2018) underlined that whilst expert interviewing has been a long-lasting tradition to make sense of the social order in the field of social sciences, particularly in sociology, there are growing methodological debates and explicit features distinguishing expert interviewing from other forms of qualitative interviewing that should be touched upon. Qualitative interviews involve constant and dynamic social interactions between the interviewer and the interviewee, and, in light of each partaker status and inner characteristics, the respondent's answers can be affected by numerous variables (Bogner, Littig & Menz 2018). Among other important factors of influence in respondents' answers such as age and gender, Bogner, Littig & Menz (2018) underline that the disbalance of power relations, notably vis à vis the professional status of each partaker is also of importance. Whereas this is not unique to qualitative interviewing, Bogner, Littig & Menz (2018) indicate that the dynamics found in expert interview settings make the influence of these variables on respondents' contribution more prominent than in other types of interview settings. It is therefore indispensable to include a reflection on my positionality and the factors shaping my social identities. As phrased by Jacobson and Mustafa (2019), 'the position from which we see the world around us impacts our research interests, how we approach the research and participants, the questions we ask, and how we interpret the data' (1). The following factors are essential to examine in connection to the distinctive feature of expert interviewing: age, gender, nationality/origin (connected with language in a Belgian setting), and the assumptions made about experts before entering the field. More concretely, my position as a 28 old white Walloon (and hence French speaking), highly educated female plays an important role in the collection and interpretation of the data.

Abels and Behrens (2009) underlined how the gender-age bias should be considered as young females conducting interviews with older male experts can lead to paternalistic behaviours and reinforce the asymmetrical power relations which henceforth impact the data. In many of my own interview settings, this disbalance was clear from the start as most of my respondents were indeed older experienced males, who at times underlined the age dis-

crepancy factor in a subtle or 'humoristic' manner. To cope with this asymmetry, I, therefore, had to display field-specific knowledge, for instance when a respondent in answering a rather broad 'basic' question assumed prior knowledge on my behalf, also since I went to law school, with phrases such as 'you're probably aware of/know that already' (sic), to which I replied, 'Yes, of course'. I did so to gain recognition from my respondents as a serious researcher. This type of reply is nevertheless problematic as it prevents the gathering of experts' perceptions and worldviews. Taking the position of a 'naïve' young woman can generate trust and can also be used as an asset. As I often experienced, my age and gender allowed me to appear non-threatening to my respondents which was a significant advantage to eliciting open conversations (see also Bogner et al. 2018). However, I had to find a difficult equilibrium in appearing both non-threatening and knowledgeable, which gave me the leverage to strategically 'pick my battles' when formulating follow-up questions which assumed prior knowledge. The choices to ask questions that might appear too 'basic' to the respondents, who were susceptible of generating interesting answers, together with answering some of their prompts with 'Yes, I'm familiar with X and Z', impacted, therefore, the data collected. Besides, it is also very likely that both my gender and educational background shaped respondents' preconceptions (e.g., 'liberal/leftist' views on immigration) towards me and consequently led them to filter down their replies.

My origin as a French-speaking Belgian Walloon, conducting her PhD in a Dutch University, also had an impact on the data generated, as I interviewed respondents coming from Wallonia, Flanders, and Brussels. This introduction is not the place to delve in-depth into the thorny language issue in the Belgium context (see Vogl & Hüning 2010; Blommaert 2011; Wyllemyns 2010). Nonetheless, it is safe to say that both myself and my respondents held strong cultural and linguistic preconceptions considering the so-called 'language game' played during the interviews. The 'language game' i.e., to demonstrate appreciation and respect for the Flemish language and to put my respondents at ease, meant I started the interview in their mother tongue and then asked if I could formulate my follow-up questions in English in order to engage in more fluid discussion while they could answer in the language of their choice. This often led to discussions where constant switches were made between Flemish, French and English (some would say 'the Belgian way'), as my respondents also wanted to display their knowledge and appreciation for the French language. On several occasions, I was congratulated by several Flemish respondents for my level of English and/or Dutch which they found unusual 'for a Walloon' (sic) which allowed me to build more respect and trust. This language game can seem harmless, however, multilingualism in social research has methodological consequences (see Resch & Enzenhofer 2017 for further details). On the one hand, these switches and the use of English might have hindered more detailed and thorough responses. On the other hand, meeting on so-called

'neutral ground' placed some of the respondents outside of their comfort zone and prevented more 'public relation' type of answers.

Lastly, Mason-Bish (2018) outlined the need to critically reflect on assumptions that are made about respondents. In particular, the term 'elite disillusion' (2018), which arose out of her experience as a young female researcher, resonated strongly with my own experience. The 'elite disillusion' means that researchers/interviewers perceive expert respondents as highly knowledgeable and difficult to access, leading the researcher to position themselves in a certain manner, which consequently affects the exchange and findings. My own preconceptions led me to position myself as a grateful, enthusiastic young female researcher who was both knowledgeable yet unthreatening. In turn, I positioned my respondents as powerful, busy, and highly knowledgeable, which clearly impacted the interactions and mood of the interviews. It also did not occur to me that my respondents were sometimes insecure about their own knowledge, looked for approval and/or for my opinion on the topic or tried to provide an answer 'that I would like to hear' (sic). This addresses the call of Kezar (2002) to see experts as subjects rather than objects from which knowledge should be extracted and to recognize that the positionalities of the researcher and the interviewee are not static but transitory and dynamic. These insights signal the importance of treating your respondents as subjects of the research, as it is the only way to involve them in 'the joint construction of narrative' that can allow for a better understanding of the phenomenon under study (Mason-Bish 2018: 275).

5 Terminology matters

Choices of words are never neutral. This is particularly true when writing about immigration, where many terms can be political, convoluted, disputed and instrumentalized. Therefore, terminological issues need to be briefly addressed. In this section, attention will be devoted to the following terms: irregular/illegal migration, transit migration, secondary migration movements, transmigration (as used in the Belgian context) and finally and concisely, governance.

Diving into what Baird (2013) called a 'conceptual Pandora's Box', the terms 'irregular/illegal migration' need to be clarified (20). Unless used directly by either respondents or official policy documents, the term 'irregular' migrant will always be favoured to the term 'illegal' migrant in the dissertation. The term irregular migration refers broadly to migration processes that occur outside state's legal framework and can therefore be labelled as 'unauthorized' (Baldwin-Edwards 2008; Alagna 2020). The choice of using 'irregular' instead of 'illegal' stems from the fact that only actions and not human beings can be described as 'illegal'. Since the initial recommendation initially made by the UN General Assembly in 1975 on the matter, many other international

organizations, including the European Parliament (2009) and the European Commission (2010), strongly encouraged their Member States to refrain from using the term 'illegal' due to its inaccurateness (also from a legal perspective) and its harmful and negative connotations.[6]

The complex concept or notion of 'transit migration' is thoroughly examined and defined in Chapter 4. Nonetheless, at this stage, the definition given and used by the UNHCR is helpful to quote although there is already an acknowledgment from the organization that no 'authoritative' definition of the term can be found. Very broadly defined, the term 'transit migration' refers to the 'temporary stay of migrants in one or more countries, with the objective of reaching a further and final destination' (UNHCR 2016: 5). In line with the definition adopted in this thesis (see Chapter 3), the notion refers to a *process* rather than a migration 'status', such as refugee or asylum-seeker (see Castagnone 2011).

Directly connected with the term 'transit migration', the notion of 'secondary migration movements' as used in official EU policy documents refers to '(t)he phenomenon of migrants, including refugees and asylum- seekers,[7] who for various reasons move from the country in which they first arrived, to seek protection or permanent resettlement elsewhere' (European Parliament 2017:2). Following this official document and as mentioned in the vignette (1.4), onward movements are often done 'irregularly', without the consent of the authorities, and regularly involve the use of fraudulent/forged documents (European Parliament 2017: 2). The terminology 'secondary migration movements' or 'unauthorized migration movements' as used in EU policy documents can be problematic (Carrera, Marco, Cortinovis & Luk 2019). Following the contribution of Carreral et al. (2019), secondary migration movements are described as a source of considerable insecurity, which jeopardize the Schengen Agreement[8] and the Dublin Convention.[9] The puzzling narrative of equating secondary migration movements to 'voluntary/chosen movements', based on

6 See terminology leaflet made by Picum and used by the UNCHR at https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/09/TerminologyLeaflet_EN_PICUM.pdf.

7 To gain more clarity on the 'refugee/asylum-seeker/migrant' terminology debate, see the insightful contribution of Rijken (2016: 6-8) as well as Pijnenburg & Rijken (2021).

8 See above 1.1.

9 The current Dublin III Regulation establishes a responsibility-allocation system amongst EU Member States with determined criteria having the general aim to rationalise the treatment of asylum claims in the EU. To that effect, one stated purpose of the Dublin system is to guarantee that individuals seeking asylum can have their status determined in a swift manner whilst at the same time preventing them to pursue multiple asylum claims in other countries of the Schengen Area (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; Maiani 2017; for an overview of the current system and the plans for future reforms see Carrera & Geddes 2021).

the preferences of asylum seekers which are established on erroneous assumptions that all EU Member States are equally safe, is rightfully questioned. Furthermore, Tazzioli (2020a) observes that this terminology reinforces the image of a migrant's linear route from A to B as a 'norm of mobility' and equates secondary movements with unruliness, which therefore need to be controlled. While being mindful of these important terminological concerns, I will still refer to the term 'secondary migration movements' when it is described as such either in policy/media/academic documents and by the respondents. For the rest and following both Carrera et al. (2019) and the UNHCR (2019) recommendation, the terms intra-Schengen (onwards) mobility/movement will be preferred.

Related to both notions, the term 'transmigrant'[10] as used in the Belgian context needs to be outlined. In its actual use and since its official entry in Flemish dictionaries in 2016, a transmigrant refers to a 'migrant who is temporarily staying in another country on his way to his country of destination' (Van Dale) or more precisely, as the online Flemish Dictionary defines it, 'a migrant or illegal migrant from Africa and Asia who wishes to go to the UK and stays on the Belgian or the French northern coast in the meantime'. For the sake of precision, 'transmigrant' is not a novel word as it was already utilised in the 1930s in the Netherlands to refer to individuals who did not live in the Netherlands and were passing through the country to reach a non-European territory (Hendrickx 2018). The word was reintroduced by the anthropologist Nina Glick Schiller in the 1990s to describe new types of migrants who 'develop and maintain multiple relations—familial, economic, social, organizational, and political that span borders' between the country of origin, transit, and destination (Glick Schiller, Basch & Blanc-Szanton 1992: 1). In the specific Belgian context, however, and against the background of ongoing securitization of migration in the EU, reinforced by the 'migration crisis' (see 1.1), the term was first employed by the then Minister of the Interior Jan Jambon during a radio interview in October 2015 (Hendrickx 2018). Since then, the word transmigrant is officially used regularly by the members of the executive, in the National Security Plans (2016-2019; 2021-2025),[11] in the Belgian House of Representative (e.g. Belgian House of Representative, 22 December 2020; 3 November 2021: 34), by members of the Public Prosecution Office (e.g. press

10 Parts of this paragraph have been previously published as de Massol de Rebetz (2018).

11 In the new National Security Plan (2021-2025), the blending of the words migrant and transit are still visible in the Flemish version, with visible references to 'transitmigranten' or 'transitmigratie'. In official documents, however, the French translation fluctuates often between 'migrants en transit' or 'migration en transit' which does not contract both words and 'transmigrant' (see 1.5 and Chapters 5 and 6 with the Comité P report). Besides, French speaking politicians in sessions of Q&As in the Belgian House of Representative can also use the contraction 'transmigration' or 'transmigration illégale' (See as an illustration Belgian House of Representative (2021, October 10: p. 320).

interview of Prosecutor Frank Demeester),[12] in the annual reports of the National Police (2017-2022),[13] in the media both in the North and in the South parts of the country, and even in the scholarship (e.g. Melis & Van Gelder 2017). The political and mediatic usance of the blanket term 'transmigrant/transitmigrant' covers a vast array of migratory realities but is wielded to make a distinction between individuals who aim to establish themselves on the Belgian territory and might henceforth be 'deserving' of protection versus the 'undeserving' (economic) migrants who do not wish to lodge an asylum request in Belgium (see also Vandevoordt 2021). In its current use, the word has triggered heated societal and scholarly debates since from a legal standpoint, a transmigrant can be a refugee, a victim of aggravated form of human smuggling, a potential victim of human trafficking, a potential asylum seeker, etc. Summarizing the current criticism, the use of the term 'transmigrant' was considered dehumanizing, as it reinforces the distance between 'us' and 'them', and potentially absolves the Belgian state from its legal obligations towards vulnerable individuals on the move who are not planning to stay (Claes 2018; Farcy & Desguin 2019; Myria 2020). Once again, and considering this valid criticism, unless used by respondents or mentioned in policy documents, the term 'transmigrant/transitmigrant' will be avoided and the notions of migrants in transit or transiting migrants will be favoured.

Lastly, the dissertation touches upon the notion of governance, which can be defined in various manners. I refer to the work of Tully (2001) who defines (broadly) governance as 'any coordinated form of human interaction involving multiple and overlapping relations of power and authority in which the actions of some agents guide the actions of others' (51).

6 Reader's guide

The dissertation consists of seven chapters. Among these seven chapters, which include the introduction and the conclusion, four have been previously published in international peer-reviewed journals. Chapters 4 and 6 were co-authored with me being the first author of both chapters. Prof. dr. mr. Maartje van der Woude contributed to Chapter 4, particularly in the co-development of the analytical frame used to interpret the data. Associate Prof. dr. Pinar Ölçer contributed substantially to Chapter 6, bringing *inter alia* her expertise of ECtHR case law to co-build the innovative legal argument put forward in the chapter (see table 1 for detailed information on the publication status and

12 See for instance Jacobus (2020).

13 See the website of the National Federal Police collecting all the distinct annual reports. https://www.police.be/5998/fr/a-propos/publications/rapports-annuels. The comment made on footnote 13 also applies in the annual reports of the National Federal Police.

original titles). I was nonetheless solely responsible for the data collection and mainly led the analytical process of the data presented in the dissertation.

The current introductory chapter aims generally at providing the reader with the contextual and conceptual/theoretical/methodological foundations of the research and subsequently outline the impetus for the dissertation as well as the research questions. Chapter 2 investigates through a content analysis the current legal and policy frameworks adopted to deal with migrant smuggling at the EU level and pays specific attention to the normative foundations behind the criminal offence of 'facilitation of irregular migration' and how the EU legal and policy framework diverged from the one adopted at the UN level. The chapter also briefly offers background elements on the choice of Belgium as a case study, depicting among other things the Belgian legal framework, which is further developed in the following chapters. Chapter 2 is therefore helpful to answer the first sub-question focusing on the 'law in the books' as it critically shed lights on the purposes and aims stated in the applicable legal and policy frameworks. Located directly at the nexus between migrant smuggling and human trafficking, Chapter 3 aims to answer to the second-sub-question in unpacking the concept of transit migration and reflecting on its usefulness in an Intra-Schengen mobility context. By so doing, the chapter focuses on real-life vulnerabilities and dynamics uncovered by legal and empirical scholarship which, at odds with the stereotypes attached to both phenomena, do not fit the prototypical legal categories of either human trafficking or migrant smuggling.

Chapter 4 to Chapter 6 focus on the 'law in action' and therewith present qualitative findings which are related to the overall research question but are also connected independently to specific research sub-questions. Drawing from border and migration scholarship as well as street-level-bureaucracy theory on decision-making, Chapter 4 shines light on the perspectives of key actors within the Belgian criminal justice system and migration control apparatus on the alternative approach to deal with migrant smuggling and its functioning in practice. The chapter adopts a holistic approach to examine (discretionary) decision-making which looks beyond the individual street-level and notably pays attention to the moral economy of bureaucracies. Still concentrating on the Belgian alternative approach and still seeking to have a better understanding of the social reality and the shaping of social practices involved in the decision-making processes and the functioning of the system in action, Chapter 5 takes a different approach to analyse the data. The chapter combines decision-making literature with socio-legal scholarship on interlegality, jurisdictions and scales in light of the multi-layered nature of the legal governance of migrants in transit present on the Belgian territory, which involves distinct legal regimes and a variety of (state and non-state) actors. Taken together, Chapter 4 and Chapter 5 build on the developments on the 'law in the books' and in connection with sub-question 3 investigate how the unique Belgian legal framework operates in practice (which includes explanatory factors and

rationales). Chapter 6 explores the distinctive human rights protection granted to the human trafficking victim versus the smuggled migrants. Taking the Belgian framework under scrutiny, the legal chapter builds on vulnerability theory and empirical scholarship to assess whether enhanced protection can be crafted for transiting smuggling victims in ECtHR positive obligation case law. Hence, the chapter connects directly with the last sub-questions on the potential consequences of distinct protective frameworks existing migrants in transit within the Schengen Area and human rights mobilization. Finally, Chapter 7 connects the dots of the chapters presented in the dissertation by drawing general conclusions, discussing the overall findings as well as their implications for both academics and practitioners and identifies avenues for further (scientific) inquiries.

Table 1. Outline of the chapters of the dissertation and their relationship with the research questions

Chapter	*Research question*	*Data*	*Publication status*
1 Introduction			- NA
2 Criminalisation of Migrant Smuggling in the EU and in Belgium	SQ1 What are the approaches and narratives commonly identified in EU counter-smuggling and anti-trafficking legislations and policies and how do they translate in the Belgian legal framework?	- Official document sources - Desk research	- NA
3 Transit migration in an Intra-Schengen Mobility Context	SQ2 Can the contested concept of transit migration be considered useful in shedding light on the blurred area found at the nexus between migrant smuggling and human trafficking?	- Official document sources - Desk research	de Massol de Rebetz, R. (2021). How Useful is the Concept of Transit Migration in an Intra-Schengen Mobility Context? Diving into the Migrant Smuggling and Human Trafficking Nexus in Search for Answers. *European Journal on Criminal Policy and Research, 27*(1), 41-63.
4 Protecting Victims of Aggravated Forms of Migrant Smuggling: A Janus-Faced Response	SQ1 (see above) SQ3 How does the unique Belgian legal framework dealing with aggravated forms of migrant smuggling operate in practice?	- Desk research - Expert's Interviews with Belgian (street-level) bureaucrats	de Massol de Rebetz, R., & van der Woude, M. (2022). A socio-legal analysis of the Belgian protective legislation towards victims of aggravated forms of migrant smuggling. *Crime, Law and Social Change*, 1-22.
5 Passing the Buck, Discretion and Jurisdictional Games	SQ1 & SQ3 (see above)	- Desk Research - Expert's Interviews with Belgian (street-level) bureaucrats	de Massol de Rebetz, R. (2023). Jurisdictional games and decision-making: the Belgian approach in dealing with migrant smuggling, *Law & Policy*, 1-22.
6 Mobilizing Human Rights Law	SQ3 (see above) SQ4 Can a mobilization of human rights law mitigate concretely the vulnerabilities (often) experienced by smuggled migrants in transit in an Intra-Schengen mobility context?	- Desk research - Expert's Interviews with Belgian (street-level) bureaucrats - Legal analysis of ECtHR positive obligation case law	de Massol de Rebetz, R. & Ölçer F.P. (2022). Aggravated migrant smuggling in a transit migration context: criminal victimization under ECtHR positive obligations case law. *Annales de la Faculté de Droit d'Istanbul*, 71: 413-480.
7 Conclusion	Main Research Question SQ 1 to SQ 4		- NA

2 Counter-smuggling in the European Union and in Belgium

1 INTRODUCTION

This chapter primarily aims to provide a general overview of the legal and policy framework currently adopted in Belgium to deal with migrant smuggling and human trafficking. The development of the currently applicable legal framework at the EU level will be outlined while paying attention to the foundation and scope of criminalisation of the crime of migrant smuggling. Besides, the ways in which the EU legal framework can be said to have departed from the UN Smuggling Protocol will also be examined. Analysing the European anti-trafficking legal framework and other relevant EU instruments is necessary in light of the link that exists between migrant smuggling and human trafficking but also because of the difficulties in identifying victims of trafficking. More specifically, the identification of victims of trafficking victims' identification is consistently reported to be arduous and complex, as trafficking victims are often (mistakenly) conflated with smuggled migrants. Consequently, victims are frequently left unprotected, or worse, end up being criminalised (e.g., Gallagher 2001, Brunovskis & Surtees 2019, van der Leun & Van Schijndel 2016; see also UNODC toolkit 2008, Ruiz et al., 2019). In discussing the developments of the anti-trafficking framework, the focus will be on those aspects that are relevant with regard to the connection with migrant smuggling. Therefore, this chapter does not claim to present a complete, all-encompassing analysis.

Besides providing the necessary and foundational overview of the applicable legal frameworks lying at the core of the dissertation, this chapter, which focuses on the 'law in the books', also aims to answer the following research sub-question:

> *What are the approaches and narratives commonly identified in EU counter-smuggling and anti-trafficking legislations and policies and how do they translate in the Belgian legal framework?*

By answering the following research sub-question, the distinct commonly identified approaches (crime/migration/human rights) mobilized in the EU and Belgian legal frameworks will be critically examined, as they have a significant influence on the ways authorities perceive and deal with the phenomena (see Section 3). From a methodological perspective, the identification

of the different approaches requires more than a legal analysis, along the lines of scholars who have, since the inception of the dichotomy between migrant smuggling and human trafficking, critically interrogated public policies by paying attention to problem construction and problem representation (e.g., Krieg 2009, O'Brien 2016).[1] Hence, narrowing the scope of the overview to the legal instruments would stand in the way of obtaining a complete picture considering the frenetic adoption at the EU level of various counter-smuggling policy documents in the aftermath of the migration 'crisis' (Perkowski & Squire 2019). In this respect, the policy narratives found in these EU policy documents are important to scrutinize. As such, narratives are more than 'empty rhetoric' but serve to legitimize current EU actions and indicate, moreover, what is to be considered acceptable from a moral, legal, and political standpoint (Fassi 2020). The policy analysis focuses specifically on EU counter smuggling documents presented in this chapter takes the initial critical narrative investigation in three key EU policy documents related to migrant smuggling conducted by Fassi (2020) as a point of departure (see Section 4). The work of Fassi (2020) which outlines a detailed quali-interpretative narrative analysis of EU policy documents adopted in the direct aftermath of the migration 'crisis' of 2015 is relevant for three reasons. First, Fassi (2020) builds on previous scholarly work which focused more broadly on 'securitising narratives of migration' (e.g., Ceccorulli & Lucarelli 2019). This lens which the author further refines is adequate to adopt in this chapter as processes of securitization of migration at large and across the globe have been convincingly and consistently underlined by the scholarship in the last decades (see Introduction). Fassi (2020) refined substantially the scope of his analysis to the depiction of the smuggling phenomenon in the EU context. Second, Fassi (2020)'s analysis offers a complete and rather nuanced overview as he supplemented two additional lenses ('deterrence' – smuggling as a service, and 'multilateral' – smuggling as an international problem) to the two commonly identified narratives in the scholarship ('criminal' – smuggling as crime/security threat and 'humanitarian' – smuggling as abuse) (see Fassi 2020: 10; see also Chapter 1 for the dominant conceptions of the migrant smuggling phenomenon). Lastly, it is of particular interest to build upon an analysis that scrutinised documents adopted in direct response to the migration 'crisis' in order to examine potential changes or evolution on the ways EU policymakers approach migrant smuggling more than five years later. The methodology deployed for the policy analysis builds on the four narratives initially developed by Fassi (2020) but provides the following additions: First, the analysis focuses on the renewed versions of the policy documents previously examined by the author (2020) but adds under the scope of inquiry additional policy documents which are imperative to include in order to have a complete grasp on the EU counter-

1 For more information on problem representation in official policy see the 'What is the Problem Represented to Be' approach developed by Bacchi (2009).

smuggling policy framework (see full list and rationale behind the selection in sub-section 4.2). Second, the analysis also examines the ways in which migrant smuggling and human trafficking are depicted as either linked or disconnected to one another. Considering the central place given to the dichotomy between the two phenomena in the dissertation, this inclusion seemed appropriate to pay attention to the formulations deployed by EU policymakers which can be deemed to blur the lines between migrant smuggling and human trafficking. Third and finally, as the dissertation focuses on intra-Schengen onward movements, references to 'secondary migration movements' will also be scrutinized. Hence, the four initial narratives originating from Fassi (2020)'s work were transformed into analytic codes, to which two additional codes were added namely, 'blurry lines HT/HS' and 'secondary/onwards' migration movements. The set of EU policy documents under the scope of inquiry (see section 4 for the complete list of documents and the rationale behind the selection) were then subsequently manually coded which helped in interpreting the data.

In the legal and policy analysis presented in this chapter, specific attention will be paid to potential gaps, ambiguity or incoherence found between the legal instruments and the policy tools recently adopted at the EU level. Lastly, the unique Belgian legal framework developed to deal with migrant smuggling, aggravated forms of migrant smuggling, and human trafficking will be outlined. The last section, which is a crucial building block for the rest of the dissertation, focuses on the implementation of the UN and EU legal instruments and obligations at the Belgian level. In the conclusion, light will be shed on how the distinct (and potentially conflicting) approaches identified at the UN and EU scales translate in the Belgian legal framework.

2 The EU Facilitators Package

2.1 Context of the adoption

At the time when the former pillar structure was put in place following the adoption of the Maastricht Treaty in 1992, cooperation on migration and border related policies (e.g., asylum policy, rules on crossing EU external borders, judicial cooperation in civil and criminal matters, policy regarding third-country nationals) were formalized within the third pillar (Justice and Home Affairs). This means that policies adopted in the area of Justice and Home Affairs, which touch upon matters directly linked with Member States' sovereignty, relied upon the intergovernmental cooperation method. Importantly, the Amsterdam Treaty of 1997 was a crucial moment in the 'communitisation' of asylum, migration, and border control policies, which became progressively less 'intergovernmental', particularly after the transition phase which ended in 2004 (see Guiraudon 2010). Several notable changes can be outlined since

the Amsterdam Treaty (1997) and the Council of Tampere (1999): the former Justice and Home Affairs was renamed the Area of Freedom, Security and Justice (AFSJ); migration, border and asylum policies shifted into the first pillar; and the Schengen Acquis was fully integrated into the framework of the EU (see protocol B Amsterdam Treaty). One of the main objectives of the AFSJ was to create a common policy based on Member States' solidarity on asylum, immigration, and external border controls (EU Parliament Factsheet 2022). Since the entry into force of the Lisbon Treaty in 2009, the pillar structure was abolished and the acts adopted in the AFSJ are now subject to the ordinary legislative procedure and EU legal instruments: namely, regulation, directive, or decision (see also Mitsilegas 2009). These short developments are important to mention for several reasons. First, the EU legal instruments were introduced before the entry into force of the Lisbon Treaty, which had significant consequences when it comes to the law-making process. Second, in 2017 and against the background of the migration 'crisis' of 2015, the European Commission launched a REFIT[2] evaluation to assess whether the EU legal instruments achieved their objectives and could still be considered 'fit for purpose'. This type of evaluation is crucial, as it opens the opportunity to update or 'Lisbonise'[3] the applicable pieces of legislation.

The foundation of the EU legal framework on migrant smuggling can be traced back to the Schengen Convention of 1990. As article 27 states,

> *'The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens'*

The adoption of the counter-smuggling legal framework can be directly linked with the developments of the EU policy on irregular migration as has been highlighted by Mitsilegas (2019) and Alagna (2020). The linkage between counter-smuggling and the management of irregular migration in the EU is particularly visible in the REFIT evaluation document. Indeed, the REFIT evaluation states that the legal framework established in 2002 (see further) is 'one component of a wider array of tools to counter migrant smuggling and thus *contribute* to reducing irregular migration' (European Commission REFIT 2017:1). In 2002, following a proposal made by the French government, two instruments were adopted which taken together are commonly referred to as the 'Facilitators Package'. The package is composed of the Council Directive 2002/90/EC

2 REFIT stands for 'regulatory fitness and performance programme' and aims generally at simplifying EU legislations and making sure they deliver their 'intended benefits' for EU citizens (see European Commission website on the REFIT Programmes).

3 For general developments on the links between the Lisbon Treaty and human and victims' rights, see the *thorough* work of Mitsilegas on EU criminal law after Lisbon (2016), particularly chapter 6 and 7.

of 28 November 2002 defining the facilitation of unauthorised entry, transit, and residence (hereafter Facilitation Directive) and the Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence (hereafter Facilitation FD). As mentioned above, it is not the European Commission that initiated the proposal but the French government and as Mitsilegas (2019) underlined, the two instruments can be qualified as 'old' EU law, as they predate the adoption the Lisbon treaty. Consequently, and in light of the changes brought back in the EU policy-making process by the treaty of Lisbon, notably with regards to the role of the EU Parliament, the negotiation processes leading to the adoption of the Facilitators Package did not receive the same level of scrutiny and debate as policies falling under the AFSJ received (Mitsilegas 2019). As Carrera et al. (2018) thoroughly reported in their study on the Facilitators Package, the European Parliament, which only had consultative powers at that time, identified numerous deficiencies in the initial proposal and made several amendments, notably with regards to the insufficient or lack of safeguards for individuals providing services and humanitarian assistance to migrants on the one hand and to victims of smuggling on the other. Besides, the European Parliament expressed its concerns with regard to the general legal uncertainty generated by the legal framework and regretted that a more holistic approach to contain irregular migration was overshadowed by the dominant attention given to punishment and deterrence to deal with the phenomenon. Even though the European Parliament rejected the proposal made by the French Government, the Council nevertheless adopted the Facilitators Package, and the latter remains in its original form today (Carrera et al. 2018: 53-57). As will be outlined below, the concerns raised at the time by the EU Parliament (still) echo the criticism made on numerous occasions by scholars as well as by NGO's (see among others Guild & Minderhoud 2006, Guiraudon 2008, ReSoma 2019, Spena 2016, Allsopp 2016, Allsopp & Manieri 2016, Gallagher 2017, Mitsilegas 2017, 2020, Carrera et al. 2018, Alagna 2020, Minetti 2020, Ben Arieh & Heins 2021).[4]

2.2 The facilitation of unauthorised entry, transit, and residence

The title of this sub-section already indicates that the criminal offence of migrant smuggling receives a distinct terminology (facilitation, see also below 2.3. for a criticism) in the EU legal instruments. Looking at the instruments themselves and the incriminated behaviours, the Facilitation Directive describes

4 For more general information on the complex dynamics involved in the EU policy-making process in the counter-smuggling field, the reader is invited to consult Chapter 6 and Chapter 7 of the PhD dissertation of Alagna (2020).

the conducts that should be appropriately sanctioned by the Member States (article 1) and, moreover, the appropriate sanctions required to be taken for attempts, instigation, and complicity (article 2). The Facilitation FD generally directs the Member States to criminalise the conducts described in the Directive in their domestic legislations (article 1). It also contains a general clause on penalties (article 1 (2)) as well as more specific indications on sanctions to be applied if aggravating circumstances apply (article 1 (3)). The wording used in the Facilitation Directive to depict the punishable conducts are of particular interest when looking at the (broad) scope of criminalisation. In its first article, the Facilitation Directive states the following:

> *Each Member State shall adopt appropriate sanctions on:*
> (a) any person *who intentionally assists* a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
> (b) any person who, *for financial gain,* intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.
>
> Any Member State *may decide not to impose sanctions* with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

The nature of the legal instruments (Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA) leaves substantial room for discretion to Member States as to how they implement them in their domestic legal framework. What can be deduced from the adopted legal provision (article 1, see above) is that Member States can make the choice to criminalise the facilitation of unauthorised entry, transit, and even residence and as will be further explained in the following sub-section, in the absence of any financial or material benefit. In addition, it is left up to the Member States' discretion to exempt individuals providing humanitarian assistance from prosecution.

2.3 Departure from Palermo

Several scholarly contributions have (recently) critically examined the Facilitators Package, notably by comparing the EU legal framework with the one adopted at the UN level (see Introduction). Whilst not exhaustively restating what has already been thoroughly investigated and reported elsewhere, it is important to summarize the main points of criticism. Paying attention to the context of adoption in which the Facilitators Package is embedded, i.e., the ongoing securitization of migration processes taking place at the EU level (see also Introduction), scholars have consistently highlighted the preventative dimension of EU criminal law with regard to the broad scope of criminalisation

of the facilitation offence (Mitsilegas 2019; Minetti 2020). The contribution of Spena (2016) is relevant to mention in view of his analysis on legal semantics or semiotics with regards, notably, to the terminological differences found between the UN Smuggling Protocol and the EU Facilitators Package. Whereas the UN Smuggling protocol chose the term 'migrant smuggling' (for a criticism see Crépeau 2003 in Introduction), the EU legal framework opted for the term 'facilitation of unauthorised entry, transit or residence'. Following Spena's (2016) reasoning, this choice of terminology sends a strong signal as to the allocation of 'wrongness' in the migrant smuggling offence. To facilitate/assist/help hints that the behaviour that needs to be prevented is the one made by migrants themselves (as committers of the crime rather than as victims) by migrating irregularly. Decrying the trend towards criminalization and the marginalisation of fundamental rights of migrants, Gallagher (2017) further added that most EU Member States (Belgium included) chose to criminalise the irregular entry and stay of migrants, which is often accompanied with a prison sentence (for an overview see also FRA 2014, Provera 2015). The dominant focus on preventing and managing irregular migration in the Facilitators Package is evidently not hidden. The first two paragraphs of the Facilitation Directive clearly establish that

> *'one of the objectives of the EU is the gradual creation of an area of freedom, security and justice, which means, inter alia, that illegal immigration must be combated. Consequently, measures should be taken to combat the aiding of illegal immigration* both *in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.'*

It can be observed that combatting 'illegal immigration' is mentioned first while combatting networks exploiting migrants is mentioned second. As Minetti (2020) underlined, two types of perpetrators find themselves in the crosshairs: migrants crossing borders in an irregular/unauthorised manner and smuggling networks. The legal interest that the facilitation offence aims to protect, namely the protection of Member States' territorial sovereignty and welfare, appears unambiguous in that regard (Minetti 2020).

Beyond semantics, the Facilitators Package diverges substantially from the UN Smuggling Protocol in many regards. In terms of scope, the UN Smuggling Protocol strictly narrowed the scope of the migrant smuggling offence by including the 'purpose of obtaining a financial or other material benefit' for the crime to be established. The narrow scope adopted at the UN level relates to the general context developed in the Introduction of the dissertation surrounding the adoption, namely the fight against organized crime. In that respect, the conduct targeted is the commodification of the migrant's vulnerability in order to *enrich* oneself. As highlighted above, the EU legal framework enlarged the scope of criminalisation to a significant extent to include (or leaving the possibility to Member States' discretion to include) 'any form of assistance to enter or transit the territory of an EU Member State in breach of

what is essentially administrative law' (Mitsilegas 2019: 78). The criminalisation of humanitarian assistance in several EU Member States (which includes Belgium) has received substantial scholarly attention in the past years. It has generally been condemned for reinforcing the ongoing securitization of migration in the EU by constructing and labelling migrants and the individuals who help them as dangerous. For more information, see the insightful contributions of Carrera et al. (2018), Webber (2018), Carrera et al. (2019), Provera (2015), Mitsilegas (2019), Zirulia (2020). Despite this criticism, the REFIT evaluation of the European Commission of 2017 reached the final decision to uphold the legislative status quo (see Mitsilegas 2020 for more details). Besides the problematic nature of criminalising humanitarian assistance, which is specifically excluded in the UN Smuggling Protocol, two other important differences between the UN Smuggling Protocol and the Facilitators Package need to be underlined. Unlike the UN Smuggling Protocol, which directly indicates that states should refrain from prosecuting migrants for the mere fact of being smuggled, no such clause can be found in the Facilitators Package. As Spena (2016) highlighted, despite the existence of general or more specific EU legal instruments on victims' rights, the absence of direct exemption from prosecution can be seen as a conscious choice, which is particularly problematic because state authorities are often suspicious of migrants' involvement in smuggling activities. Besides, comparing the aggravating circumstances in these two instruments is telling of the attention paid to the rights of migrants or the lack thereof, particularly considering the growing awareness of migrants' potential victimisation during their migration journeys (see also Chapter 4). Whereas the Facilitators Package requires Member States to sanction more heavily conducts that were either committed by a criminal organisation and/or conducts that endangered the lives of the migrants (article 2, 3), the UN Smuggling Protocol *also* invites states to punish more severely conducts that 'entail inhuman or degrading treatment', which explicitly include the exploitation of migrants (see article 6, 3 (b)).

In the conclusion of the REFIT evaluation of the Facilitators Package, which took place after the start of the migration 'crisis' of 2015, the European Commission detailed its decision to not revise the legal framework due to a general lack of evidence justifying a reform. Interestingly, the European Commission explained how the task of disentangling the Facilitators Package from the various 'policy tools' adopted in response to the crisis made the effectiveness assessment particularly complex due to the difficulty to 'capture' the recent effects of the policy tools (REFIT 2017: 34). The EU policy package entails the adoption of the European Agenda on Migration and the first Action Plan against migrant smuggling (hereinafter EU Action Plan). To provide the reader with a complete picture of the legislative and policy framework, this package will be complemented with updated versions of the different plans and other relevant policy documents. It will be subsequently analysed in the third section of this chapter.

What is of interest to underline at this stage with regards to, for instance, the EU Action plan, is a general change of philosophy applauded by scholars (Spena 2016, Mitsilegas 2019). Looking at the formulations deployed in the text, such as 'smugglers treat migrants as goods', Spena (2016) commended the fact that the relationship between the smuggler and the migrants was conceived in a more appropriate manner by leaving behind the 'complicity approach' and by highlighting the profit seeking and exploitation dimension. Nonetheless, Spena (2016) made this remark hoping for a reform of the legal definitions used in the Facilitators Package, hence before the REFIT evaluation, which as was underlined did not consider such changes to be necessary. Mitsilegas (2019) makes similar observations with regard to the narratives used in the documents, which further links migrant smuggling with organised crime as it is done in the UN Smuggling Protocol. While acknowledging that the link is not automatic, Mitsilegas (2019) argued on the necessity to make such connection to provide further clarity and limit the broad scope of criminalisation of migrant smuggling. After briefly discussing developments in other relevant EU instruments dealing with migrant smuggling and against the background of the unchanged Facilitators Package, the third section will critically examine the distinct narratives used in the EU 'policy package'.

3 Other Relevant European Instruments

Looking back at the main research question of this dissertation, which focuses on the nexus between migrant smuggling and human trafficking, a discussion of short developments on the applicable and relevant EU legal framework are required. Because EU Member States and the EU itself are also part of the Council of Europe, a brief sub-section will also shed light on the 2005 Convention on Action Against Trafficking in Human Beings (hereinafter the Warsaw Convention). Considering, nonetheless, the complexity and the vastness of the human trafficking field, the aim is once again to not restate what has been exhaustively developed elsewhere but to give the reader the appropriate legislative frame to situate the dissertation. The section will be divided in two main parts. The first section outlines the European anti-trafficking framework, paying specific attention to the currently applicable Anti-Trafficking Directive[5] and the Residence Permits Directive which leave the possibility to the Member States to extend the assistance and protection to smuggling victims. The second part highlights the general approach adopted in the EU to deal with the phenomenon and its potential consequences, notably with regards to the intersection with the migrant smuggling phenomenon. Shedding light on the applicable legal framework on human trafficking and the general approach

5 For a complete and up-to-date history and analysis of anti-trafficking legislations in the EU, see the contributions of Obokota (2016) and Brière & Weyembergh (2014).

adopted can appear to be a small detour but it is particularly relevant as a considerable amount of human trafficking victims can in fact be wrongly confused with either smuggled migrants, or worse, as perpetrators (van der Leun & van Schijndel 2016, Jovanovic 2017, Villacampa & Torres 2019). As Gallagher (2001) underlined, if a legal framework contains deficiencies when it comes to the thorny issue of victims' identification, then it generates 'a clear incentive for national authorities to identify irregular migrants as smuggled rather than trafficked' (995-995).

3.1 The European anti-trafficking legal framework

3.1.1 European Union

In contrast with the security-crime-migration control approach strongly emphasised in the regulation of the migrant smuggling phenomenon, the adopted approach to deal with human trafficking at the EU level can be said to be more holistic with regard to victim protection and human rights guarantees (Gallagher 2015). It is in the mid-1990s that the need for a unified and common legal response to the phenomenon of trafficking in human beings first appeared in the EU agenda. In 1997, preceding the adoption of the Palermo Protocols, human trafficking was first regulated by a non-legally binding instrument, a Joint Action[6] addressing solely the sexual exploitation dimension and conflating human trafficking with migrant smuggling and sexual exploitation. Five years later, the Joint Action was subsequently replaced by a Framework Decision introducing a clear definition of human trafficking, which was generally consistent with the one developed in the UN Trafficking Protocol (see Introduction).[7] The Framework Decision was criticised for numerous reasons, particularly regarding deficiencies in the original instrument leading to substantial implementation discrepancies at the domestic level and more generally due to the lack of insertion of preventive and protection measures (see Obokata 2016). Following the 3Ps approach that is nowadays still followed (Prevention, Prosecution, Protection), the dominance of the repressive/punitive approach prioritizing prosecutorial interests appeared crystal clear with the Framework Decision (Rijken & de Volder 2009, Brière & Weyembergh 2014; Villacampa Estiarte 2012). In her critical policy analysis of the Framework Decision and using the 'What's the Problem Represented to Be' approach developed by Bacchi (2009), Krieg (2009) made the following observations. The Framework Decision generally lacked information about the problem

6 97/154/JHA. Joint Action of 24 February 1997 to Combat Trafficking in Human Beings and the Sexual Exploitation of Children.

7 2002/629/JHA. Council Framework Decision of 19 July 2002 on Combatting Trafficking in Human Beings

diagnosis (what are the causes of human trafficking?), which is crucial when developing the solutions to deal with the issue at hand. Indeed, as explained by Bacchi (2009), policies and laws are not mere 'reaction' to unequivocal existing societal problems as, by nature, they are 'constructed', interpreted, and represented in a specific way and always contain representation of problems which can be implicit (pp. 1-2). Confirming the general scholarly opinion observing a domination of the crime-control approach, Krieg (2009) nevertheless concluded that the Framework Decision combined a human rights approach as to the cause of the problem (why is human trafficking an issue) and a crime control approach as to the prescribed action/solutions to deal with the problem. In her critical policy analysis framework, Bacchi (2009) also pays attention to silences in policy debates. The silences are crucial to identify as they can indicate what remains 'unproblematic' in the representation of the problem and can help to think about (other) problems that are ignored purposefully or not or can make visible that some silenced issues are best dealt with by other instruments (see Bacchi 2009). In her analysis of silences, Krieg (2009) notices that whereas fighting human trafficking is an essential part of the policy area dealing with irregular migration at the EU level, the latter was simply not addressed nor problematised in the Framework Decision. With regard to the currently applicable legal framework, two crucial instruments still need to be outlined: the Directive 2004/81/EC on Short-Term Residence Permits[8] (hereinafter the Residence Permit Directive) and the Directive 2011/36/EU on Preventing and Combatting Trafficking in Human Beings and Protecting Victims (hereinafter the Anti-Trafficking Directive).

The Residence Permit Directive, which is still in force, is a key instrument for the protection and assistance granted to human trafficking victims. Its main aim is to encourage trafficking victims (and potentially smuggling victims, to turn against their traffickers/smugglers by providing them protection and assistance during the criminal proceedings. Indeed, according to the article 6 of the Residence Permit Directive, Member States have the obligation to grant victims a reflection period (the duration depends on Member States' discretion), which allows victims to '*recover and escape the influence of the perpetrators (…) so that they take an informed decision as to whether to cooperate with the competent authorities.*' During this time/reflection period, appropriate standards of living are to be granted to the victims (e.g., accommodation, psychological/medical treatment, etc.). The above-mentioned reflection period is nonetheless conditional to reasons related to public policy or national security and the necessary cessation of contact with the alleged perpetrator(s). Following the reflection period, as stated in article 8, the granting of the residence permit to

8 Directive 2004/81/EC of 29 April 2004 on the Residence Permit issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or who have been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities.

third-country nationals is dependent on their '*clear intention to cooperate*' in the judicial proceedings.

Several scholars noted how the mandatory cooperation condition indicates the prevalence of prosecutorial interests as the residence permit was created on the assumption that victims who would be treated in a favourable manner would be keener collaborating with the authorities (e.g., Jovanovic 2020, Mitsilegas 2015, 2020). Rubio-Grundell (2015) highlighted that the Residence Permit Directive cannot be fully considered as a victim-centric/human rights instrument with regards to the legal basis on which the latter is based on. Unlike the Anti-Trafficking Directive that is based on article 83 TFEU, which relates to judicial cooperation and approximation of legislations in criminal matters, the Residence Permit Directive is in fact an instrument aimed at combatting irregular immigration, as it was adopted on the basis of former article 63 (3) TEC (now article 79 TFEU), which relates to competences on border checks, asylum and immigration (Rubio Grundell 2015). As noted above, this instrument is particularly interesting also with regards to migrant smuggling. According to article 3 (para 2) of the Directive, Member States '*may apply this Directive to the third-country nationals who have been the subject of an action to facilitate illegal immigration'*. As Rijken (2016) highlighted, this extension can be seen as a realisation in the EU that 'the dividing line between smuggling and trafficking is blurred and that a smuggled person might also deserve victim status' (14). Whereas Belgium made use of this possibility and went even further on the protective aspect (see below and in Chapters 5, 6, 7), this is not the case for most Member States as only nine countries made use of this facultative option (see the report of Picum 2020 for further details).

Before summarizing the general approach adopted by the EU legislator[9] to deal with the phenomenon, it is important to shed light on the legal instrument still in force today, namely the Anti-Trafficking Directive adopted in 2011, which replaces the Framework Decision of 2002. Looking first at the definition, article 2 requires Member States to punish the following conducts:

> '*The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*'

In line with the UN Trafficking Protocol, the Warsaw Convention, and the former definition adopted in the Framework Decision, the definition requires three constituent elements: the acts, the means, and the purpose of exploitation.

9 Or co-legislators as the Anti-Trafficking Directive was the first legal instrument adopted following the rules established by the Lisbon Treaty, see Bière and Weyembergh (2014).

The consent of the victim is also deemed irrelevant either when a minor is involved or when the means mentioned in the article were used. The second article further elaborates on the meaning of the term position of vulnerability defined as a '*situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved*'. Generally, the scholarship has commended the fact that the sanction regime was substantially strengthened and that, in contrast with the Framework Decision, minimum penalties were established (article 4, see also Brière & Weyembergh 2014). Besides, general scholarship appraisal can be found in the more holistic approach adopted to deal with the phenomenon, notably by the inclusion of preventive (article 18) and protective measures (article 11 to 16) (Villacampa Estiarte 2012 see below). With regards to the purpose of exploitation, Obokata (2016) noted that the Anti-Directive broadened its scope of application as article 2 outlines that

> '*(e)xploitation shall include,* as a minimum, *the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.*'

This widening of scope is particularly relevant with regard to the novel inclusion of the 'exploitation of criminal activities.' Considering the migrant smuggling spectrum and looking back at the vignette outlined in the introduction of this dissertation, the situation of Osman could potentially be seen (depending on the domestic legal framework and the interpretation) as one of exploitation. Indeed, if a smuggler or a smuggling network, taking advantage of the situation of vulnerability of Osman, offer him to act as a low-level smuggler by, for instance, spotting and opening the trucks in which migrants can be smuggled and recruiting clients in exchange for a 'free' attempt to cross the border at a later stage, one could see Osman as either a potential victim of human trafficking or as a perpetrator. In a similar manner, the novel inclusion of the non-prosecution or punishment clause for crimes that victims would have committed whilst being exploited can be seen as an advancement with regards to victims' protection (article 8). Nonetheless, the formulation used in the Anti-Trafficking Directive is quite feeble when taking into consideration the room of appreciation left to the Member States on that matter as they are '*entitled* (emphasis added) to not prosecute' (see Obokota 2016). Lastly, a recurring criticism with regards to victims' protection and assistance is linked to the fact that the Anti-Trafficking Directive is complementary to the Residence Permit Directive of 2004 (Villacampa Estiarte 2012, Rubio Grundell 2015). More precisely, paragraph 3 of article 11 contains the following contradiction: on the one hand and in line with the Warsaw Convention, the Member States '*shall take the necessary measures to ensure that assistance and support for a victim are* not made conditional *on the victim's willingness to cooperate*' in the judicial proceedings, whilst on the other hand adding '*without prejudice to Directive 2004/81/EC or similar national rules*.' Hence, the requirements to grant the

residence of the victims can remain conditional on the victim's cooperation with the national authorities. Moreover, the Anti-Trafficking Directive still refrains from fixing a minimum time for the mandatory reflection period, which was fixed at 30 days in the Warsaw Convention (Obokata 2016).

3.1.2 Council of Europe[10]

In 2005, the Council of Europe adopted the Warsaw Convention constituting the first legal instrument framing human trafficking as a human rights issue (see Preamble) and placing henceforth a strong emphasis on states' obligation to protect victims in an appropriate manner (Planitzer & Sax 2020; Scarpa 2008, Gallagher 2006, Sembacher 2005). The Warsaw Convention can be said to have adopted an overall victim-centric and human rights approach to human trafficking for distinct reasons. First, the (numerous) measures on prevention and protection are placed before the measures touching upon criminal law and prosecution (Obokota 2016; see also Planitzer & Sax 2020 for a thorough commentary on each provision). Jovanovic (2020) nonetheless disagrees with that observation and explains how in fact the Warsaw Convention relied mostly on criminal justice mechanisms which are used as a 'vehicle' to guarantee human rights protection (811). Moreover, the Warsaw Convention established an elaborate and independent monitoring system operated by GRETA and the Committee of Parties, which focus on the implementation of the Warsaw Convention by the Member States (Sembacher 2005, Planitzer & Sax 2020). Besides holding states accountable for their obligations, the thorough country and general reports produced by the GRETA are often used in this dissertation as they combine insights of numerous stakeholders ranging from governmental to civil society actors particularly specialised and involved in the field. Such monitoring mechanism cannot be found at the EU level as the European Commission, in its report on Member States' transposition, depends substantially on the information given by Member States themselves, which can be incomplete and often lacks detailed legal analysis as well as external and independent observations (Obokota 2016).

3.2 A Domination of the crime (and migration) control approach to deal with human trafficking at the EU level?

Notwithstanding the general improvements made by the Trafficking Directive and in line with the criticism mentioned above, many scholars share the opinion that the approach adopted by the EU legislator, which is self-labelled

10 The last chapter of this dissertation will develop at more length the positive obligations developed by the European Court of Human Rights, touching upon both migrant smuggling and human trafficking, hence, this sub-section will purposefully remain brief (see Chapter 6).

as '*integrated, holistic, and human rights*' based (paragraph 7 of the Preamble), might in fact be misleading. Villacampa Estiarte (2012) notes that the order of the articles in the Anti-Trafficking Directive as well as the subject matter outlined in the first article already indicates that priority is still placed on prosecution, leaving prevention and protective measures in the background (see also Obokota 2016 on the emphasis of the crime control adopted by the EU legislator). Comparing the ASEAN and the European legislative frameworks (which includes the Warsaw Convention), Jovanovic (2020) goes further and writes about a 'normative bias' towards a crime control logic present in European anti-trafficking framework, which prioritize prosecutorial interests and, generally, a repressive response 'embellished with victim protection rhetoric' (810).

Rubio-Grundell (2015), not limiting her analysis to the legal instruments but combining it with some EU policy documents tackling human trafficking (e.g., Agenda on Migration 2015), made the following observations. Firstly, like many other scholars, she describes the inclusion of human rights concerns made visible within the EU legal framework as a step going in the right direction. However, she argues that the crime and migration control approach to deal with the phenomenon continues to persist, particularly with regard to the conceptualisation of human trafficking as a serious form of organised crime and as a case of irregular border crossing, which has critical consequences. Looking at the general strategy deployed to tackle human trafficking, Rubio-Grundell (2015) highlights how the repressive crime control approach, combined with an emphasis on the cross-border dimension of human trafficking, leads to harmful consequences with regard to prevention and victims' protection. Regarding the latter, Rubio-Grundell (2015) explains how the repressive approach prioritizing the prosecution of criminals (either traffickers or irregular migrants as human trafficking is treated as an irregular border crossing issue) creates a 'hierarchy' requiring the creation of a distinction between 'real trafficked victim' often reserved for extreme cases of victimhood and 'bogus' (smuggled) migrants (see also Lavaud-Legendre 2017 for the concept of 'ideal victim' and Chapter 3 on the stereotypes attached to both smuggling and trafficking). Regarding prevention and in line with the developments made in the following section, Rubio-Grundell (2015) outlines how the crime-control approach constructs human trafficking as an individual crime committed by greedy traffickers and fostered by individuals generating demand (see also Krieg 2009), which subsequently obscures and depoliticises the structural socio-economic causes of the issue (see O'Brien 2016 for a general development on problem construction).

4 Narratives Matter – A Review of the EU 'Policy Package' post Migration 'Crisis'

As already mentioned in the Introduction Chapter, the migration 'crisis' of 2015 constitutes a pivotal moment that 'afforded European anti-smuggling efforts a new lease of life' (Perkowski & Squire 2019: 2167). To illustrate the importance of migrant smuggling in the EU agenda, combatting migrant smuggling was placed as a priority in the European Agenda on Migration (2015-2020) and occupied an important place in the European Agenda on Security (2015-2020). Besides, for the first time, an Action Plan against Migrant Smuggling (2015-2020) emerged together with the creation of a European Migrant Smuggling Centre (hereinafter EMSC) within the EU agency Europol. The creation of the EMSC resonates with the observation of Scipioni (2018) who highlights the reinforcement of the roles taken by EU agencies such as Europol and Frontex (with the strengthening of its mandate) in the aftermath of the 'crisis'. The REFIT evaluation of the European Commission of the Facilitators Package (2017) underlined the importance of the aforementioned policy tools performing an assessment on the effectiveness of the fight against migrant smuggling.

The aim of this section is not to conduct such evaluation but to examine the most recent and distinct narratives mobilized to conceptualise the phenomenon and its consequences on the solutions put forward. By so doing and as explained in the introduction, this section is greatly inspired by the work of Fassi (2020) who conducted a systematic and critical investigation of the multiple narratives used in key EU policy documents related to migrant smuggling.

In her work on migration policies and narratives, Boswell (2011) explained why paying attention to (policy) narratives is relevant with regard to their distinct functions. Besides attempting to depict a specific problem (notably in terms of scope and scale), narratives create assertions about the causes of the problem at stake and they imply that specific policy interventions are likely to solve it. Several scholars working on irregular migration, migrant smuggling or human trafficking have made use of narrative analysis to scrutinize problem construction and representation and the (normative) implications or consequences of such narratives (e.g., Boswell, Geddes & Scholten 2011, Carson & Edwards 2011, O'Brien 2016, Schumacher 2015, Albahari 2018, Ceccorulli & Lucarelli 2017, D'Amato & Lucarelli 2019, Fassi 2020, Ben Arieh & Heins 2021). Narratives can also have interpretative and legitimization functions. Regarding the former, narratives are not mainly sentences devoid of meaning as they serve as a compass indicating what is morally, legally, and politically acceptable (Albahari 2018). Regarding the latter, Fassi (2020) emphasises the usefulness of performing this type of analysis at a later stage of the policy-making process because narratives can also support and legitimize in an explicit or

implicit manner the actions undertaken at the EU level to deal with migrant smuggling.

4.1 2015-2020: Domination of the 'Criminal/Security' Narrative

Fassi (2020), looking at the EU Action Plan against Migrant Smuggling, the EU Agenda on Migration and the EU Agenda on Security, identified four main narratives overlapping with each other and reflecting the multi-faceted and complex nature of migrant smuggling. The first narrative is the *criminal* one. The latter was considered to be dominant in light of its recurrence and widespread use in the different documents. The criminal narrative depicts migrant smuggling as a criminal threat, as a serious crime often committed by a 'ruthless' perpetrator taking advantage of migrants' vulnerability to make enormous profits. To summarize Fassi's argument on the dominance of the criminal narrative to depict the phenomenon, the smuggler(s) is often portrayed as acting within an organised group (network) and these groups are deemed to also be involved in other types of criminality such as terrorism or drug/arm/human trafficking (see also Sanchez 2021 and Introduction, Section 2 on the general domination of the security/criminal approach). Consequently, smuggling networks pose a security threat to the EU and its Member States, requiring henceforth a strong security response. The solution put forward is mostly centred around increased investigation and prosecution (repressive/crime-control approach). The second narrative is the *humanitarian* one where migrant smuggling is not constructed a threat but rather an abuse, which explains why the 'vulnerable migrant' replaces the 'smuggler' as the main actor to focus on. The three policy documents mentioned in the beginning of this sub-section underline the risks of death and exploitation faced by migrants as well as the distinct human rights abuses taking place in the smuggling process. Interestingly, also in line with a common criticism made in the scholarship (see Chapter 4), the agency that migrants can have in their journey is often overlooked or denied. The solution put forward focuses on opening more legal channels for migrants to reach the EU and revising the Residence Permit Directive of 2004 (which is still in force today, see section 2). The third narrative is the *deterrence* one which depicts migrant smuggling as a service. The focus remains on the migrant but not as a passive and vulnerable agent anymore but rather as a cause of the general problem that is irregular migration. As highlighted in the first section and as Fassi (2020) noted, the dual goal of the fight against migrant smuggling (preventing exploitation of migrants by smuggling networks and minimizing incentives to irregular migration) is still clearly outlined in the policy documents. The solution put forward is centred around effective returns and increased support for countries of origin and transit. Finally, the last narrative is the *multilateral* one where migrant smuggling is depicted as

an international issue requiring robust and joint efforts between the EU and third countries (notably by addressing the root causes).

4.2 2021-2025: Idem – Domination of the Criminal/Security Narrative

In this sub-section, attention will be paid to the narratives used to depict migrant smuggling and the solutions put forward to tackle the phenomenon. As explained above, formulations linking migrant smuggling with human trafficking as well as references to Intra-Schengen onwards movements will also be examined. Five years later, in view of the new policy documents issued at the EU level, the salience given to migrant smuggling remains apparent. The following documents will therefore be discussed: the Renewed Action Plan against Migrant Smuggling (2021-2025), the EU Strategy to tackle Organised Crime (2021-2025), the EU Security Union Strategy, the New Pact on Migration and Asylum and finally the EU Strategy on Combatting Trafficking in Human Beings (2021-2025). As explained in the introduction of the Renewed Action Plan (2), these documents should be linked together as they all contribute and support each other.

In line with Fassi (2020)'s research, the criminal/security narrative can be said to remain omnipresent in all documents. Despite a short sentence in the Renewed Action plan stating that 'the profile, organisation and activities of smugglers and smuggling networks (…) differ significantly according to socio-economic, political, and cultural contexts' (4), the phenomenon is still predominantly depicted as a lucrative 'business' (low risk high return) which is often operated by criminal networks (which are estimated to engage in poly-criminality in 50% of the cases) who abuse and exploit migrants' vulnerability (see Achilli & Sanchez 2021 for a criticism). The EU Security Union Strategy keeps on using the rather dated statistics provided by Europol in 2015 to claim that 90% of irregular migrants arriving in the EU have made use of 'criminal networks', who treat migrants like 'commodity'. The document highlights how migrant smuggling 'is often intertwined with other forms of organised crime, *in particular* trafficking in human beings' (18). The crime-centric solutions brought forward refer to both renewed Action Plans, which focus on 'combatting criminal networks, boosting cooperation and support the work of law enforcement' (18). Interestingly, the Action Plan on trafficking in human beings uses similar formulations and frames human trafficking as a 'trans-national crime' and underlines, in light of the intertwinement between both phenomena, that 'victims are also trafficked *in mixed migration flows* to the EU via all routes' (17). In the document, the underlying assumption that both the Renewed Action Plan against Migrant Smuggling and the New Pact on Migration and Asylum 'will contribute to disrupting traffickers' business in moving victims for exploitation to Europe and fight smuggling networks' is visible (17). Within the New Pact on Migration and Asylum, the fight against migrant

smuggling also occupies an important position. Nonetheless, the wording used to describe migrant smuggling indicates conceptual ambiguity with regards to the dichotomy between smuggling and trafficking phenomena, notably with regards to the notion of exploitation. Indeed, the New Pact on Migration and Asylum describes smuggling and trafficking as 'linked' and sates that 'smuggling involves the *organised exploitation* of migrants, showing scant respect for human life in the pursuit of profit' (15). This framing hints at an acknowledgement that migrants are systematically subject to 'exploitation', which is confusing with regards to the definition of human trafficking highlighted in section 2. In contrast with the former Action Plan on Migrant Smuggling, the Renewed Action Plan pays specific attention to 'unauthorised movements within the EU' and considers emerging evidence that 'smuggling networks continue to exploit routes within the EU' by making use of 'rental cars' or 'concealment in closed compartments' (5).

Overall, in terms of solutions mentioned, the strengthening of investigation and prosecution (done via the intensification of implementation of existing legal instruments – see sections 1 and 2), together with an increase in police and judicial cooperation and further research on smugglers modus operandi, are pervasive in the documents. With regards to investigation and prosecution, an interesting sentence needs to be underlined in the Renewed Action Plan as it further clarifies the aim of the EU legal instruments. The document states that 'the focus of law enforcement should *not stop* with the arrest of low-level criminals. It is crucial to scale up the dismantling of organised crime structures (…) that pose a higher risk to Europe's security and on the individuals in the higher echelons of criminal organisation' (22). This sentence can be analysed as an implicit acknowledgement that many investigations and prosecutions do, in fact, target low-level perpetrators, which furthermore 'should not stop'. The departure from Palermo as to who in terms of actors should be mainly targeted by investigations and prosecutions is evident in that regard (see Spena 2016 above). Whereas the Renewed Action Plan mentions that the European Commission will issue a report on the implementation of the Facilitators Package in 2023, which could lead to a potential reform, the document as well as the New Pact on Migration and Asylum nevertheless outline that the current legal framework 'has been effective' in dealing with migrant smuggling (16). A short remark on the lack of clarity with regards to the issue of humanitarian assistance (linked with the mentioning of the REFIT evaluation) can be found with the general guidance that 'carrying out the legal obligation to rescue people at sea cannot be criminalised' (16). Narrowing the scope to 'sea rescue' can be deemed problematic considering the scholarly criticism highlighted in the first section of this chapter. Lastly, the documents also refer to the importance of civilian and military missions which are undertaken under the framework of the Common Security and Defence Policy (e.g., operations EUCAP Sahel Niger, IRINI/EUBAM in Lybia or ATALANTA in Somalia) to prevent both

'irregular migration and combat associated crime'. These missions could also be linked with the criminal/security narrative.

Notwithstanding the dominance of the criminal/security narrative, the three other narratives (humanitarian, deterrence, and multilateral) outlined by Fassi (2020) are also mobilized in the documents. Of particular relevance with regards to the scope of the dissertation is the humanitarian narrative. The third pillar of the Renewed Action Plan aims specifically at 'preventing exploitation and ensuring the protection of migrants', which is linked to the observation that 'smuggled migrants are *at great risk* of losing their lives or experiencing harm during their journey' and that 'their fundamental rights are *often* gravely violated through abuse and exploitation'. However, in terms of solutions brought forward to this specific issue, three comments need to be made. Firstly, the main solution relies once more on the implementation (and potential revision) of existing legal instruments, in particular, the Facilitators Package, the Anti-Trafficking Directive, and the Residence Permit Directive. Nonetheless, a general statement that 'developing legal pathways and attracting skills and talent to Europe' is one way to counter smuggling can be found in the text, although not in direct relation to migrant's vulnerability (11). Secondly, the plan relies on the 'pre-entry screenings' performed at the EU borders to detect and protect individuals in situations of vulnerability (presented in the New Pact on Migration and Asylum). However, as highlighted by the impact assessment of the New Pact on Migration and Asylum of Cornelisse and Campassi (2021), together with the contribution of PICUM (2021), the assessment of vulnerabilities at the individual level is not made mandatory, which can overhaul the effectiveness of such processes. Thirdly, preventing risks of death and exploitation is mostly dealt with 'countering fake narratives promoted by criminal networks' via targeted information and awareness raising campaigns (13). Except for the opening of legal pathways, the pre-entry screenings (generally aimed at the development of a more effective/fast-tracked return policy) and the awareness campaigns solutions could be in fact linked with the deterrence narrative, which reveals that the cause of the problem is generally irregular migration, which needs to be prevented. Finally, the multilateral narrative which depicts smuggling as an international issue is also present in the documents. In that regard, cooperation with 'partner' countries (origin and transit) and international organisation constitutes the first pillar of the Renewed Action Plan. It is worth noting nonetheless, as Fassi (2020) already examined in the previous document, that the cooperation focuses mostly on actions to be taken in the security field, namely efforts to support border management capacity, operational capacity, law enforcement and judicial cooperation of third countries (see 12-14), which rests on the idea that they have 'weak law enforcement capacities' (Fassi 2020: 17). Development cooperation promoting, for instance, education, sustainable and inclusive economic development as well as good governance, which would tackle corruption issues, is nonetheless briefly mentioned.

What can be concluded from this overview of narratives used to depict the complex and multi-faceted phenomenon of migrant smuggling in the EU 'policy package' is the dominance of the crime/security centric narrative together with a growing awareness of risks of victimisation faced by migrants during their journey as well as the intrinsic link (and potential conflation) between smuggling and trafficking. As will be further explained in the next section, the Belgian legal framework can be said to be aligned with regard to the acknowledgement of such victimisation risks. In light of developments made in this section and tying them back with the final observations made by Mitsilegas (2019) and Spena (2016), concerning both the scope of the facilitation offence and the lack of safeguards for migrants' rights, a certain incoherence between the broad conducts targeted within the Facilitators Package and the general depiction of the phenomenon in the policy instruments can be observed.

5 A Belgian Case Study

This last section provides an overview of the legal and institutional framework in place to deal with both migrant smuggling and (to a lesser extent) human trafficking in Belgium. Because the legal framework (and its concrete implementation in practice) as well as the recent policy documents and actions undertaken to deal with the phenomena are discussed in further detail in Chapters 4 and 5, the section will attempt to avoid unnecessary repetitions whilst still providing the reader enough information to locate the research from a legal perspective. Besides, in recent years, both synthetic and detailed analysis of the Belgian legislation on human trafficking (which also pays attention to the distinction between smuggling and trafficking in the law) have been produced. Hence, the reader is invited to consult the detailed book of Clesse (2013) on the matter, who adds a comparative lens with an analysis of the legislation in place in Luxembourg, France, and Switzerland. Unfortunately, this comprehensive work is solely available in French. Brière and De Gellinck (2014), also basing themselves notably on the work of Clesse (2013), issued a synthetic analysis of the Belgian legislation as well as the institutional framework applicable to human trafficking from 1995 to 2014, which is written in English and is freely accessible online. Notwithstanding several new amendments highlighted in the annual reports of the Belgian national rapporteur (hereinafter Myria 2019, 2020a, 2020b, 2021), this research is still relevant today as the most important legal reforms in the field took place in 2005 and in 2013.

Because of its geographical location, its central position in Western Europe as well as its proximity to the United Kingdom, Belgium is a well-known destination and transit country for both human trafficking and migrant smuggling (GRETA 2013, 2017a; Leman & Janssens 2005). Already in 2001, the European

Commission, considering Belgium's location, outlined that the country was a place of choice for migrant smugglers (see also UK Home Office 2012, Myria 2020a). The following map presented by Europol illustrates that the country is still a strategic position for smuggling activities (see also Chapters 4 to 6).

Image 1: Map of 'secondary movements' in the European Smuggling Centre 3d Annual Activity Report (2018: 12).

Focusing now on the legal framework in place within EU Member States, Belgium is known for its pioneer or 'model student' role with regards to its awareness and attention devoted to human trafficking. This is notably due to Chris de Stoop's book 'They're so sweet Sir' in 1994, which focuses on the trafficking of Filipino women in the country and fostered growing public attention given to the phenomenon of human trafficking. At that time, human trafficking was not differentiated from migrant smuggling. This specific awareness can also explain the gradual elaboration of an integrated, protective, and multi-disciplinary legal framework to deal with the phenomenon (Brière & de Gellinck 2014, Clesse 2013). It is also important to underline the fact that Belgium had an important influence on the development of the European legal framework (see Section 3). Belgium was behind the initiative of the first Joint Action adopted in the field (see 3.1.1) and subsequently, the negotiations and the agreements reached to adopt both the Framework Decision of 2002 and the Anti-Trafficking Directive of 2011 took place under the Belgian Presidency at the Council of the EU (Weyembergh & Brière 2013). More is known about human trafficking than migrant smuggling and the analysis of the scholarship on these matters highlighted a cruel lack of empirical research (for notable exceptions on migrant smuggling see Derluyn & Broekaert 2005, Leman &

Janssens 2011, Derluyn et al. 2014). The discrepancy of knowledge between human trafficking and migrant smuggling in Belgium was also strongly signalled in the first National Action Plan against Human Smuggling (NAP – HS 2015-2019; 2021-2025). Even for human trafficking, the scholarship is more focused on normative/legal and jurisprudential analysis. Nonetheless, Belgian investigative journalists have an important role in raising (public) awareness of both smuggling and trafficking and deconstructing stereotypes (see for instance De Stoop 1994, 2005 on sexual exploitation; Loore & Titsaert 2007 on labour exploitation and Loore 2018 on migrant smuggling).

This section is organised into two main parts. Firstly, the legal framework applicable to migrant smuggling, migrant smuggling related offences, and to a lesser extent human trafficking will be outlined. As explained above, the recent counter-smuggling actions and policies will be further developed in Chapters 4 to 6. This sub-section will also pay attention the jurisprudential developments on these matters. Secondly, without going into too many details on the specific (and complex) Belgian institutional framework (see following Chapters), the National Referral/Orientation Mechanism, which is applicable to both victims of human trafficking and aggravated forms of migrant smuggling and the distinct rights and obligations of victims, will be explained.

5.1 Legal definitions

In the implementation of international and European legal instruments, the Belgian legal framework went beyond obligations found in these instruments. Because the historical developments of the Belgian legal framework have been developed elsewhere (see above) and considering the focus of the dissertation which looks into the dichotomy between migrant smuggling and human trafficking, the overview of the legal framework takes the Law of 10 August 2005[11] as a starting point. This law transposed international (UNTOC and its protocols) and European obligations into national law and subsequently differentiated the two offences. Since 2005, the offences are now laid down in different codes (Huberts 2006). The offence of migrant smuggling (*trafic des êtres humains* – term that can also contribute to the confusion around the term 'human trafficking') is enshrined in the Law of 15 December 1980 (article 77*bis*) on the Entry to the Territory, Stay, Settlement and Removal of Foreigners whereas the offence of human trafficking (*traite des êtres humains*) is placed within the Criminal Code (article 433*quinquies*). Prior to 2005, the offences of human smuggling and human trafficking were all covered by the same

11 Law of 10 August 2005 modifying diverse provisions for the purpose of reinforcing the fight against human trafficking, human smuggling and against the practices of slum landlords.

'blanket' legal provision (former article 77*bis* of the Law of 15 December 1980), which only applied to foreign nationals (Huberts 2006).

5.1.1 The Dichotomy

The distinction between the two offences was highlighted in the scholarly and grey literature: and roughly oils down to the necessary transnational character of migrant smuggling; the absence of exploitation; and the different degrees of victimization in human smuggling and migrant smuggling cases due to the consensual dimension or the lack thereof (mutual benefit) (e.g., Clesse 2013; Boels & Ponsaers 2011). In addition, the distinct rationales behind the criminalisation of these two phenomena were also underlined, namely the protection of the Belgian territory, the security of the State against migrant smuggling, the protection of individual rights, and human dignity for human trafficking (Boels & Ponsaers, 2011; National Action Plan against Human Smuggling, 2015-2018). A reading of different reports from the National Rapporteur (Myria 2013-2021), the GRETA (2013, 2017a), articles from the (legal) scholarship (e.g., Algoet 2018; Lafarque 2017; Clesse 2013; Leman & Janssens 2007, 2011) and the recent National Action Plans against human smuggling and human trafficking (referred to later as NAP HS – NAP HT, 2015-2019; 2021-2025) nevertheless indicate the complexity and sometimes intertwinement of the phenomena despite their distinction on paper. The 'cause and effect relationship' between human smuggling and human trafficking and the blurriness between the phenomena is often mentioned (e.g., Algoet 2018: 5, Leman & Janssens 2005). In the specific context of the European migration 'crisis', Algoet (2018), who is also a prosecutor, specifies that victims of migrant smuggling arriving in Europe can be susceptible to exploitation at a later stage due to their vulnerability, which blurs further the lines between the phenomena. The journalists Loore and Tistaert (2007) who researched economic exploitation, immigration and organized crime in Belgium explained how the borders between human trafficking, human smuggling, and illegal employment of migrants in an irregular situation were constantly moving. The journalists(2007) shed light on the simultaneous 'chain or mix of safe-houses, ephemeral collaborators, human smugglers, landlords' in the cases they investigated (67). In some the country's courts, the border between the two phenomena is described as 'so *thin* that one can turn into the other once the *freedom of action* of the victims are put in peril' (Correctional Tribunal of Louvain, 12 May 2015). Nonetheless, as will be further explained below, the harmonization of aggravating circumstances for the offences of migrant smuggling and human trafficking and the specific status that can be granted to victims of aggravated forms of migrant smuggling can be interpreted as an acknowledgement on behalf of the Belgian legislature of the blurred lines between the two phenomena.

5.1.2 *Migrant Smuggling, Aggravated Migrant Smuggling, the 'Facilitation' Offence & Human Trafficking*

(a) Migrant Smuggling Stricto Sensu *vs. Facilitation Offence*

According to article 77*bis*, 'migrant smuggling' is

> '*the* contribution, *in any way, either directly or through an intermediary, to allow the* entry, transit or stay *of a non-citizen of a Member State of the European Union on or through the territory of such a State or of a State Party to an international convention relating to the crossing of external borders and binding Belgium, in violation of the law of that State, with a view to obtaining, directly or indirectly,* a patrimonial benefit.[12]'

The offence is punished by imprisonment of one to five years and a fine of 500 to 50.000 euros. Furthermore, the attempt to commit such offense is also punishable *'by imprisonment from 1 to 3 years and a fine of 100 to 10 000 euros.'*

The term 'contribution' covers a myriad of situations such as the payment of the transportation fees of an individual, vouching for a visa application of another individual, depicting the country of destination as ideal to encourage individuals to go there to gain a financial profit from it, etc. (Clesse 2013). The notion of 'direct or indirect patrimonial benefit' (referring to the for-profit dimension underlined particularly in the UN Smuggling Protocol) constitutes the moral element of the migrant smuggling offence. Whereas, at first glance, the term 'direct or indirect patrimonial benefit' can seem to equate to the term 'lucrative goal', which resonates with the 'financial gain' element found in international instruments, the notion of 'direct or indirect patrimonial benefit' is broader and was not defined in the law (Delgrance & Stein 2019). Whereas the notion of 'lucrative goal' is interpreted in the Belgian jurisprudence as something financial in nature involving a significant profit, the notion of patrimonial benefit was defined in the context of money laundering as 'any economic profit which may be derived from any offence' (van Droogenbroeck 2007 cited in Hardt 2018). Despite the legal uncertainty around the notion of 'direct or indirect patrimonial benefit', the economic nature of the advantage/benefit is still evident for which the magistrate has to prove willingness of the smugglers to 'enrich themselves at the expense of the victim or the family of the victim' (Delgrance & Stein, Clesse 2013: 185, see also Huberts 2006). Following Macq (2018), if a teleological interpretation of the law is mobilised, individuals who habitually/frequently facilitate the entry or residence of migrants with the aim of exploiting them and soliciting large sums of money can clearly be considered as migrant smugglers. However, cases where individuals assist migrants in return for 'reasonable compensation' and 'who have acted without the intention of abusing these migrants' fall outside of the scope

12 Patrimonial can be defined as something having an economic value (Dictionary Larousse).

of art. 77*bis* (9 cited in Hardt 2018). The notion therefore remains uncertain and not clearly defined by the legislature which leaves substantial discretionary power to the judges (Macq 2019). As mentioned, the moral element of the offence is the direct or indirect gain of a patrimonial benefit and that is what constitutes the main difference with the facilitation offence (see below). Quoting Clesse (2013) on the *ratio legis* of the Belgian legislature: 'the aim is to penalize migrant smuggling and not only the help to illegal immigration' (169; see also Vermeulen 2005). In that respect and in line with the UN Smuggling Protocol, the *travaux préparatoires* of the law refer directly to '*organised criminal groups* who have set up highly sophisticated smuggling networks, exploiting human misery and *making considerable profits* while endangering the lives and the safety of migrants during clandestine transportation' (BHR 10 August 2005: 7). The contribution to 'stay' is also of importance as the cases of individuals who are providing work for irregular migrants can be and are often seen in the jurisprudence as cases of migrant smuggling. Indeed, even if no exploitation can be observed, which would turn the case into a human trafficking one, the fact that the employer is enabling irregular migrants to stay in the country by giving them work is sufficient to fit all the constitutive elements of the migrant smuggling offence (Clesse 2013)

The Belgian 'facilitation offence' *stricto sensu* enshrined into article 77 is drafted as follow:

> '*Anyone who* knowingly *assists, or attempts to assist a non-citizen of a Member State of the European Union to enter or stay in the territory of a Member State of the Union or of a State party to an international convention on the crossing of external borders and binding on Belgium or transit through the territory of such State, in violation of the laws of that State or in fact who prepared the entry, transit or residence, or have the facilities, either in the facts that have consumed, shall be punished with imprisonment from eight days to one year and fined 1700 euros to 6000 euros or one of these penalties. Paragraph 1* shall not apply *if the aid is provided for* mainly humanitarian reasons.'

With regards to the room of manoeuvre left to the Member States in the Facilitators Package (see section 1) and unlike, *inter alia*, its French counterpart, the Belgian legislature made the conscious choice to exclude the humanitarian assistance from the scope of article 77. Before 1996, the humanitarian clause applied only when the 'helper' had 'purely' humanitarian reasons to assist or attempt to assist in the irregular border crossing. In 1996, as the term was sometimes interpreted restrictively by courts in the country, the word *purely* was replaced by *mainly* to avoid such interpretations which were contradicting the *ratio legis* of the law (Clesse 2013). By 'mainly humanitarian' reasons, one should understand 'everything that has no criminal or economic purpose' (Clesse 2013: 188). Therefore, when there is no financial gain or material benefit

involved, the magistrate should also look at the 'criminal/delictual'[13] intent of the presumed perpetrator in light of the factual circumstances of the case (Kurz 2018). The legislature indicated that these terms should be interpreted broadly, and that the humanitarian exoneration should also be applied when the 'helpers' received a secondary/side benefit from the help provided (e.g., helping out with the household chores) (Commission Justice & Paix 2010). Nevertheless, it must be underlined that the legal provision still leaves room for ambiguity and that, similarly to its European counterparts, Belgian courts (or Belgian public prosecutor offices to be more precise) also take part in what is often referred to as 'trials of solidarity' (see ReSoma 2019 for an overview of these types of crimes in EU countries). In the last years, one specific legal saga caught the attention of the media and the public. This trial which went to the Brussel's Court of Appeal is commonly referred to in the national media as the 'hosts trial' or 'solidarity trial' and involved the indictment of four individuals, among whom two Belgian journalists who hosted migrants from the Maximilian Park (and lent them money and their cell phones) together with seven migrants for migrant smuggling. The first trial took place in 2018 wherein the attorney general claimed that 'justice needs to publicly set benchmarks/limits to the assistance given to migrants'. In the first instance, the Correctional Court acquitted the four 'hosts' whilst still convicting the seven migrants to 12 to 40 months of imprisonment. The Public Prosecutor Office decided nonetheless to appeal the decision. Bastenier (2021) highlighted that the decision to appeal seemed to serve a dual purpose: on the one hand, to show that justice is not lax nor lenient and on the other hand to send a deterrent message (via the intimidation power of public prosecutor office) to prospective hosts. The Appeal Court of Brussels nonetheless firmly confirmed the acquittal of the four hosts and besides, reduced substantially the sentences of the seven migrants by highlighting that even though they were involved in the smuggling processes, they were also victims of migrant smugglers (see Bastenier 2021, Hardt 2019). Whereas this decision further clarifies the narrow scope of the 'facilitation offence' when it comes to humanitarian assistance, the confirmed conviction of the seven migrants is questionable with regards to the *ratio legis* of the smuggling offence, which will be examined in further detail in Chapter 5.

(b) The Aggravated Smuggling Offence

The Law of 10 August 2005 that changed substantially the legal framework on both human trafficking and human smuggling harmonized the aggravating

13 The English term would be 'criminal' intent; however, there is an important distinction between crime, *délit* and contraventions in Belgian law. In the case of illegal help, we are talking about a 'délit' which is less serious than a crime. Nevertheless, *to proof of* a 'délitieux' motive is sufficient to enter the scope of article 77.

circumstances as well as the sanctions for both crimes. The rationale for this choice can be found in the explanatory statement of the law. The Belgian legislature seemed to acknowledge the risks of victimization faced by smuggled individuals by underlining the 'dramatic consequences' of both smuggling and trafficking are underlined. The text further indicates that this harmonization is made for the sake of consistency (BHR 10 August 2005: 11). Besides, already in 2008, the Circular of 26 September on the implementation of the multidisciplinary cooperation regarding victims of human trafficking and/or certain aggravated forms of human smuggling (replaced in 2016, see below), which organises the national orientation/referral mechanism for victims, already included victims of aggravated forms of migrant smuggling in its application.[14] Article 77*quater* of the Law of 15 December 1980 enumerates the aggravated forms of migrant smuggling. The aggravated circumstances raising the sanction to an imprisonment of 10 to 15 years and a fine of 1000 to 100 000 euros allows the victim to start the procedure and eventually claim the status of victim of human and the accompanying protective rights (see 5.2). The aggravating circumstances are the following:

> *'1 ° when the offense was committed against a minor;*
> *2 ° when the offence was committed by abusing the* vulnerable situation *in which a person is, because of its illegal or* precarious administrative situation, *its precarious social situation, state of pregnancy, illness, infirmity or physical or mental impairment, such that the person has made* no real and acceptable alternative *but to submit to the abuse;*
> *3 ° when it was committed by making use, directly or indirectly, of fraud, violence, threats or any form of coercion; [or by making use of abduction, deception, the abuse of power – since the Law 31 May 2016 putting the Belgian legislation in conformity with its European obligations]*
> *3 bis when the offence was committed via the offer or the acceptation of payment or any advantage to obtain the consent of an individual having authority on the victim [since the Law of 31 May 2016]*
> *4 ° when the* victim's life was endangered deliberately or through gross negligence;
> *5 ° when the offense resulted in an apparently incurable illness, work disability of more than 4 months (since 2016), permanent disability or psychological, the complete loss of an organ or the use of an organ, or serious mutilation;*
> *6 ° when the activity is a usual activity;*
> *7 ° when it constitutes an act of participation in the main or secondary activity of an association, whether or not the offender has the quality of manager.'*

14 The general understanding of a Circular (which could be translated in English as a 'directive') is a document containing an instruction or recommendation, addressed by an authority to officials to help them apply a law or regulation correctly. They are also directly referred to as 'criminal policy directives'.

Before clarifying how several aggravating circumstances are to be interpreted, it is important to signal that Belgian Courts[15] (see below) as well as official documents such as the Circulars mentioned above refer unequivocally to (aggravated) smuggled migrants as *victims* as opposed to objects. Referring to the word victim can be seen as a departure from both the UN Smuggling Protocol and the Facilitators Package. Drawing from the jurisprudence,[16] further clarification on the interpretation of the circumstances is required to have a better understanding of the cases in which the individual might be considered as a victim of 'aggravated' form of migrant smuggling. Whereas some aggravating circumstances do not call for clarifications such as 'when the offense has been committed against a child', the aggravating circumstance linked to the abuse of a situation of vulnerability (article 77*quater*, 2°), the use of fraudulent manoeuvre (article 77*quater*, 3°) and the endangerment of the file for the victim (article 77*quater*, 4°) should nevertheless be elaborated upon as they are more open to distinct interpretation and are particularly salient in migrant smuggling cases.

First, regarding the abuse of a situation of vulnerability, the article refers to a list of situations as to the causes of vulnerability which can appear to be limitative. However, as underlined by Clesse (2013), the list is in fact illustrative. In 2011, the legislature moreover removed the term 'particularly' preceding the vulnerable situation (GRETA 2013). The judge will evaluate the situation of an individual in light of the circumstances of the case and has important discretionary powers to appreciate the notion of abuse as he/she only has to motivate their decision regarding the observation of the abuse without having to specify further the circumstances causing the abuse (Clesse 2013). Following the jurisprudence highlighted by Clesse (2013), the following actions were considered as leading to an abuse of the situation of vulnerability of an individual: the fact of promising help to an irregular migrant in the procedure to obtain administrative documents as it is considered in the jurisprudence as a way for the perpetrator to make the worker docile by making him/her believe that they will have a better life. Indeed, the fact for an individual in an irregular situation to risk an arrest at any at the occasion of a control reduces the individual to work illegally to survive (see Clesse 2013).

Whereas the abovementioned developments are helpful to understand what could constitute an abuse of a situation of vulnerability, there is no legal definition indicating what is to be understood by 'a situation of vulnerability resulting *from a precarious social situation*'. Nevertheless, based on the case-law,

15 Direct references to the word 'victim' are indeed found in Belgian case law on migrant smuggling. See as an illustration: Correctionnal Tribunal of Termonde, 3 November 2017); Correctional Tribunal of Gent, 16 October 2017; Correctional Tribunal of Brussels, 27 June 2012.

16 Most of these jurisprudential developments are drawn from human trafficking cases but are nevertheless highly relevant to precise the meaning and application of the aggravating circumstances which are also applicable for cases of migrant smuggling (Clesse 2013).

scholars mention cases of 'individuals with minimal income or with work opportunities extremely reduced' that it makes it possible to impose working conditions contrary to human dignity (Valoteau, cited in Clesse 2013: 574). The precarious condition can result from having debts, the loss of a job, etc. In that regard, one (aggravated) migrant smuggling case in Belgian case-law[17] refers to the precarious subsistence and dependence of the smuggled victims resulting notably from their irregular situation. This is an important case as the Court of Appeal explained how the victim had no other choice but to continue the smuggling process. The Court added that the fact that the victim had perhaps contributed to their own vulnerability did not take away the fact that they were to be considered a victim (Brussels, 13e ch. Corr, 17 May 2017). Clesse (2013) also gathered jurisprudential examples of other hypothesis that the ones mentioned in the legal provision creating a situation of vulnerability and that are in direct link with the offence of migrant smuggling. The following individuals were considered by the Belgian courts to be in a situation of vulnerability: the individuals who did not know their final destination and the individuals who had their travel documents confiscated by the smugglers. As outlined in the legal provision, this situation of vulnerability has the consequence to leaving the individual with no veritable choice but to submit him/herself to the abuse. This absence of choice does not have to be proven because it is the direct consequence of the situation of vulnerability (Clesse 2013). The public prosecutor does not have to prove the absence of choice; however, the clear knowledge of the perpetrator on the victim's situation of vulnerability has to be proven. Hence, the prosecutor must either prove the knowledge or the appearance of the situation of vulnerability.

Second, the use of fraudulent manoeuvre, violence, threats or any form of coercion, abduction, deception, or abuse of power aggravating the sanction require further explanations. A simple lie is not sufficient to constitute a 'fraudulent manoeuvre' as the lie must be accompanied by external elements or by a fraudulent staging that leads to a fraudulent presentation of reality (Clesse 2013). The violence (both physical and psychological), the threats, the diverse form of constraint (e.g., debt bondage) do not pose interpretation issues (for more information or jurisprudential examples, see Clesse 2013). The same goes for the specific aggravating circumstance on illness and disabilities (Clesse 2013: 598-601).

Finally, the endangerment of the life of the victim deliberately or due to gross negligence as an aggravating circumstance is particularly relevant in a human smuggling context as it has its origin in the Facilitators Package, which aimed at sanctioning harshly the smugglers who put the migrants in dangerous conditions. The notion of gross negligence is not defined in the

17 That case is however not unique as migrant smuggling judgements referring specifically to the abuse of the precarious administrative, social, and financial situation of smuggled victims can often be found (e.g., Corr. Anvers (8e ch.), 8 December 2016).

law or in the jurisprudence. Based on the work of Clesse (2013), combining doctrinal and jurisprudential research, the term can be understood as 'the gross unintentional fault consisting in the non-accomplishment of an act that must have been accomplished' (596). The gross fault is the fault that is 'so coarse and excessive that it cannot have been made by a reasonable person' (Clesse 2013: 596). Consequently, the Belgian jurisprudence considered that migrant smugglers putting migrants in old an overcrowded boats or in overheated trucks without water commits a gross negligence that endangers the victim's life (Clesse 2013).

(c) Human Trafficking

This section will limit itself to two main points, the definition of the trafficking offence as it differs from the international and European one and the non-punishment clause due to its connection with migrant smuggling as explained in section 2. Besides, the next sub-section focuses on the national referral/ orientation mechanism for victims which is applicable to both victims of human trafficking and victims of aggravated forms of migrant smuggling. Hence, these developments will cover a substantial part of the protective measures in place in the Belgian legal framework. The reader is invited to consult the detailed work of the scholars mentioned at the beginning of this section for more information on human trafficking in Belgium which falls outside of the scope of this dissertation.

Since the Law of 10 August 2005, the human trafficking offence is enshrined in article 433*quinquies* of the Criminal Code and is also applicable to Belgian and European nationals (Huberts 2006). The Law of 29 April 2013 which was designed to put the Belgian law in conformity with its European and international obligations is another milestone of the fight against human trafficker as it modified the article to clarify and expand the human trafficking definition (see Brière & de Gellinck 2014). In its actual and following form, the article the Criminal Code defines and punishes the facts of human trafficking as follows:

> *'§ 1 The offence of human trafficking constitutes the recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control over a person for the purposes of:*
> *1° the exploitation of prostitution or other forms of sexual exploitation;*
> *2° the exploitation of begging;*
> *3° carrying out work or providing services in conditions contrary to human dignity;*
> *4° removal of organs in violation of the law of 13 June 1986 on the removal and transplantation of organs, or human tissue in violation of the law of 19 December 2008 on the acquisition and use of human tissue for the purposes of medical applications in humans or scientific research;*

5° or having this person commit a crime or a misdemeanour against his or her will.'

Except in the case covered in sub-paragraph 5, it is immaterial whether or not the person mentioned in sub-paragraph 1 consents *to the envisaged or actual exploitation. (…)*

The Belgian human trafficking offence only has *two* constitutive elements (the acts and the purpose of exploitation), which is a crucial difference with the international/European legal definitions requiring three elements (adding the means, see Figure 1 for a simplified and visual summary of the main distinctions between migrant smuggling and human trafficking at the UN and Belgian level). The means used by the human traffickers are aggravating circumstances in Belgian law. This was decided by the legislature in 2005 despite interrogation and criticism from the GRETA (2013, 2017a), notably regarding the possible difficulties for international cooperation with such a legal discrepancy and the potential conflicts of qualification with other criminal offences resulting from it. The rationale behind this choice is nevertheless interesting to mention as it sheds light on the approach adopted in the Belgian legal framework. First, the task of the public prosecutor is made easier as the latter does not have to prove any coercion/abuse of vulnerability/violence, etc. to prove a situation of human trafficking (Clesse 2013). Second, the aim of the legislature was to objectify the situation of human trafficking by placing the situation of exploitation at the heart of the legal provision regardless of the perception of the victims (Huberts & Minet 2014). This solves the thorny issue of an individual who does not perceive his/her working/living conditions to be contrary to human dignity in comparison to the living/working conditions in his/her country of origin (Huberts & Minet 2014). This choice was considered by Clesse (2013) as a tricky one as it clashes with the right to self-determination of a human being, who can decide to be exploited or to not perceive a situation as being exploitative. In the Belgian legal framework, the emphasis is placed on the purpose of exploitation and on the protection of human dignity of an individual (see Clesse 2013). The central place given to the philosophical notion of 'human dignity' (see definition on labour exploitation which differs from the ones in European and international instruments) calls for further comments. First, scholars highlighted that a legal definition of 'human dignity' is impossible to provide as the notion falls more under the application of natural law and is inherent and intrinsic to human nature (Kurz 2002). Besides, the notion has a spatiotemporal content, which means that it can evolve and vary in time. This latitude is valuable for human trafficking cases that tend to also change shape in time. This broad and vague notion gives nonetheless substantial discretionary power to the judge to appreciate the notion *in casu* and can cause trouble of interpretation in practice but is nonetheless further clarified by the case-law over the years (Brière & de Gellinck 2014, Clesse 2013). It is also interesting to underline the importance given to the prosecutorial interests with regards to the pragmatic explanation

on the burden of proof and the collection of evidence on behalf of the prosecutor's office.

As highlighted in section 2 and in the vignette in the Introduction (Osman's story), the cases of migrants being involved in smuggling activities performing low-level tasks in exchange for money or a 'free attempt' to cross the border are not scarce in the Belgian context. This scenario is located in the grey area between smuggling and trafficking and the appropriate action to be taken will depends greatly on the discretion of the public prosecutor in charge (see Chapter 5). In this type of case, the potential application of the non-punishment punishment lodged in article 26 of the Warsaw Convention and article 8 of the Anti-Trafficking Directive (obligation to non-prosecute) appears relevant. Before 2019, the non-punishment principle was not inserted within the Criminal Code, however, as highlighted by Kurz (2014), the principle was enshrined in the relevant Circulars (confidential COL 01/2015). Since 2019 however, a fifth paragraph was added to article 433*quinquies* to add the non-punishment clause under the form of an '*excuse absolutoire*' (which can approximately translate as an exculpation in English). The 'excuse absolutoire' means that the responsibility of the author of the infraction is established, yet no sanction can be inflicted as the offence was committed as a direct result of the exploitation (Myria 2019).[18] The parliamentary debates in the Belgian House of Representative reveal the three aims (in that order) underlying the adoption of the non-punishment clause: the protection of victims' individual rights who are deprived of their free will, the prevention of secondary victimization and the establishment of a relationship of trust between victims and authorities so that the former can accept to collaborate in the criminal investigation (Belgian House of Representative 2019: 28). In this respect, one can also underline the dual presence of human rights and crime control approaches with this time more attention given to victims' rights than prosecutorial interest, although they are still present. Before the insertion of the clause in the article, which the National Rapporteur sees as positive development to raise the awareness of front-line actors, Kurz (2014) explained how such situations are blurry and difficult to assess for practitioners.

18 For more information on the rare application of the clause and the divergence from European instruments, with regards to the coercion element usually present in this type of clause (coercion being an aggravating circumstance and not a constitutive element of the human trafficking offence in Belgian law), see Myria 2019: 98.

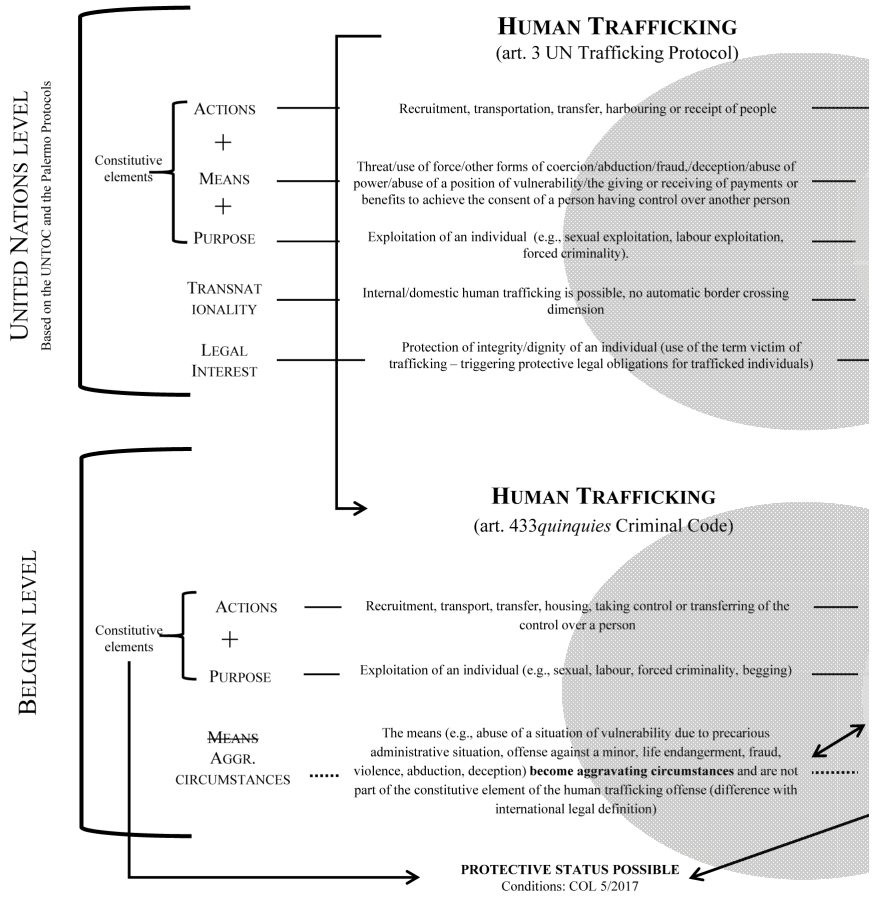
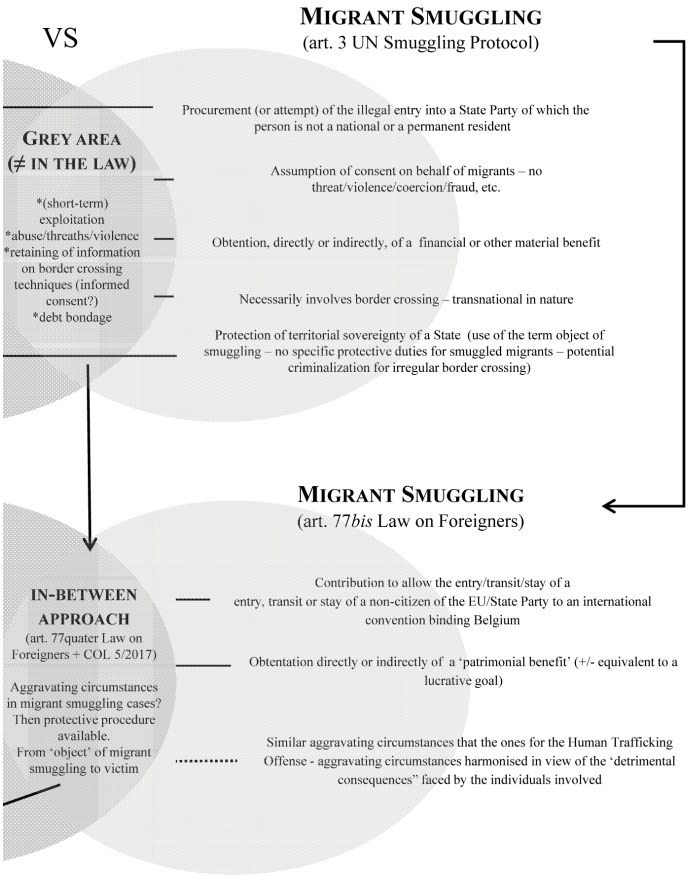


Figure 1. Simplified distinction between human trafficking and migrant smuggling and the 'grey area' between both phenomenon at the UN level and at the Belgian level.

5.2 Protection Dimension

This last sub-section will address the key elements related to the protection dimension in place in the Belgian legal framework and highlight the distinct approaches present in these documents. These procedures and instruments are described in more detail in the country report on Belgium of the GRETA (2013, 2017a) which is available online and in English.



5.2.1 National Orientation Mechanism – A Multi-Disciplinary Approach

The national referral mechanism is part of the multidisciplinary approach chosen in Belgium to tackle both human trafficking and human smuggling and entails the collaboration between different complementary actors such as first line actors (police officers, social inspectors), members of the Foreigner's Office, workers of the specialized reception centres (NGO)[19] for victims and

19 There are 3 state-accredited NGOs in each region of the country in charge of *the victim's support* (*Surya* in Liege, *Payoke* in Antwerp, and *Pag-Asa* in Brussels). Their aim is to offer (at times secretly placed) shelter to the victims when needed as well as legal, psychological, social, and administrative assistance to the (presumed) victim of human trafficking and aggravated form of human smuggling. For the specific cases of unaccompanied foreign children, there are also specialized reception centres (*Esperanto* in Wallonia, *Minor Ndako* in Brussels and *Juna* in Flanders).

the specialised magistrates of the Public Prosecutor Office (see further information on the complex institutional framework in Chapters 5 to 7). The relationship between each of these actors is based on mutual trust that is encouraged and developed during the regular meetings on these specific topics (see GRETA 2013, 2017a; Myria 2016 – 2021). As it is described in detail in the new multidisciplinary circular COL 5/2017 (see above), there is a distinction between the detection of a (presumed) victim and the formal identification which falls under the sole competence of the magistrates. The detection of presumed victims is done by the observation of indicators (described in two confidential circulars – see below)[20] uncovering potential situations of human trafficking and/or of aggravated forms of human smuggling. Once detected, first line actors (e.g., local/federal police officers, labour inspectors) have to first contact the specialized reception centre, then the competent reference/specialised magistrate (public prosecutor), and the Foreigner's Office when the individual is a foreigner with regards to the administrative status of the individual. The magistrate has the monopoly of decision when it comes to the formal identification of the presumed victim. Nonetheless, in light of the multi-disciplinary nature of the approach, the specialised prosecutor consults the different actors involved to make the decision. If the specialized reception centres doubt the victim status of the individual, they should contact the magistrate immediately to determine whether the individual should be considered as a victim or not. If the magistrate estimates with sufficient certainty that the individual is not a victim of human trafficking and/or aggravated form of human smuggling, he/she immediately notifies it to the specialized reception centre and the Foreigner's Office (COL 5/2017). The implementation of this Circular is further supplemented by two confidential Circulars created by the Bench of General Prosecutors and the Minister of Justice. As explained above, these circulars set guidelines to be followed by the specialised prosecutors but are also there to guide the different actors involved in the fight against human trafficking and human smuggling (see also footnote 16).

5.2.2 Rights and Obligations

The focus of this sub-section will mostly be placed on the reflection period and the residence (and work) permits that can be granted to the victims. The compensation and legal redress measures are nonetheless enshrined in the Belgian legal framework (for further information see GRETA 2013: 45 and

20 Circular 1/2015 on the fight against human trafficking and formerly COL 4/2011 on the fight against human smuggling which was replaced recently by the COL 13/2018 due to the evolution of the migrant smuggling phenomenon. The new name 'COL *on the on* the policy of investigation and prosecution of smuggling of human beings and the facilitation of the entry, stay and transit of residence as well as the transit of foreigners refers directly to the problematic of transit migration.

following). The procedure that presumed victims can initiate to potentially be granted the protective status comes with rights and obligations. There are several stages before a possible access to the unlimited residence permit can be granted. As mentioned earlier, the specialised prosecutor has the monopoly of the decision as to whether an individual can be considered as a potential victim of human trafficking and/or aggravated form of migrant smuggling. The following individuals are excluded de facto from the procedure: victims of slum landlords, individuals who benefited from the help of illegal immigration (facilitation offence) and victims of migrant smuggling *stricto sensu*. The benefits of the (temporary) residence permit requires a collaboration of the victim with the judicial authorities by the means of making relevant declarations. The notion of relevant declaration is interpreted in a broad manner (e.g., information given by the victim); therefore, the victim does not have to lodge an official complaint to obtain the specific protection (COL 5/2017). The other conditions (cumulative to the first one) are the obligation to cut off the links and contacts with the presumed perpetrators and to approach a certified shelter that specializes in helping/assisting victims of human trafficking/aggravated migrant smuggling victims (hereinafter specialized reception centres) where victims can receive legal, psychological, medical, and administrative assistance. Clesse (2013) recalls, however, that the right to the residence permit is not unconditional as the sole declaration of the victim is not sufficient to obtain such permit. Indeed, the existence of reasonable grounds to believe that an individual is a victim of human trafficking and/or aggravated form of human smuggling by the magistrate is the first step. Besides, the procedure can stop any time if the magistrate decides that the individual cannot be considered as a victim of human smuggling or a victim of aggravated form of smuggling or when the specialised unit for minors and human trafficking victims within the Foreigner Office (hereinafter MINTEH) informs the magistrate that the victim does not meet one of the conditions anymore. In addition, the procedure can be stopped if the cooperation is considered to be fraudulent or that the complaint is unfounded (COL 5/2017).

Following the European legal framework highlighted in section 2, the procedure starts with a reflection period which is given to the victim to *first* recover and *then* think about the following options: to collaborate with judiciary authorities by making relevant declarations/lodge a complaint against the perpetrator(s) or to prepare him/herself for a voluntary return to his/her country of origin or other alternatives. More specifically, once a victim is identified by first line actors, they have to inform the reception centre, the specialised magistrate who will act as an interface between the police/inspector services and the Foreigner's Office and will decide, based on the police or inspector's reports, on the provisory status of the victim. Simultaneously, the first line actors should inform the victim about the status, inform the Minister or its delegate and put her/him in contact with an official specialised reception centre that will apply for documents to the Foreigner's Office (articles 61/2

to 61/5 Law of 15 December 1980). The workers of the reception centre will provide detailed information on the procedure which will allow the individual to take an informed decision. The Minister or its delegate will deliver a temporary residence permit document of a length of 45 days during which the individuals cannot be the subject of a removal procedure. Following the recommendation of the GRETA (2013), the Belgian legislature changed the former initial delivery of an order to leave the territory within 45 days with a temporary residence permit of the same length. Clesse (2013) noted that from a psychological perspective, the residence permit encourages the victim to speak more so than an order to leave the territory will. Once the victim made his/her decision and for example, made a relevant declaration, the second phase which is the granting of a temporary residence permit of 3 months starts, which can be extended. This can also be supplemented by a working permit (see article 61/3 of the Law of 15 December 1980). The same conditions highlighted above have to be respected by the presumed victim.

The third phase entails a temporary residence permit of 6 months (provisory status of victim of human trafficking and/or aggravated form of human smuggling). The magistrate has the monopoly in the decision to give the individual this provisory status while taking into consideration the advice of the other actors involved who based on their experience can inform the magistrate within the limits of what is possible to be shared considering rules on professional secrecy and deontology. In order to take its decision, the magistrate will have to answer five questions that are issued by the Foreigner's Office:

> *Is the investigation or the judiciary procedure is still ongoing?*
>
> *At this stage, can the individual be considered as a victim of human trafficking or aggravated form of human smuggling?*
>
> *Does the individual manifest their clear willingness to cooperate with judiciary authorities?*
>
> *Did the individual break off the links with the presumed perpetrator?*
>
> *Can the individual compromise public order or national security?*

If the answer to the first 4 questions is positive and the individual does not represent a threat to public order or national security, then the Foreigner's Office can deliver the provisory status of 6 months that will be renewed until the court delivers a judgment in first instance (see article 61/3 Law of 15 December 1980). If the procedure was not ended by the magistrate or the Foreigner's Office (see above) and that the complaint/declaration of the victim lead to a conviction of the perpetrator, *or* if the magistrate chose the charge of human trafficking or aggravated form of migrant smuggling in the trial, then the individual can obtain the unlimited residence permit (article 61/5 Law of 15 December 1980).

6 CONCLUSION

The first aim of this chapter was to provide the reader with a general understanding of the legal and policy frameworks in place to deal with migrant smuggling (and human trafficking when they can intersect) at the EU level and on how these frameworks were subsequently translated into Belgian national legislation. In that regard, the complex and multi-scalar nature (UN, EU, domestic) of the legal frameworks was emphasised. The second aim was to identify the approaches and narratives used in counter-smuggling and anti-trafficking legal instruments and policy documents. The analysis on the normative foundations presented in these lines highlighted how the EU Facilitators Package diverged from the UN Smuggling Protocol. Considering among other things the broad scope of the facilitation offence which is not limited to the fight against organised crime taken together with the lack of safeguards for migrants' individual rights, the analysis provided in the first section made it clear that the EU counter-smuggling response had to be understood within the broader context of securitisation of migration. Besides, considering the overlap between smuggling and trafficking as well as the known difficulties surrounding human trafficking victims' identification, the analysis of the European anti-trafficking framework revealed that the EU approach to deal with human trafficking was dual. Whereas the increased attention towards prevention and victims' protection (human rights approach) was appraised in the scholarship, the emphasis and domination of the crime control approach (combined with a focus on the cross-border element) to deal with the phenomenon was nonetheless underlined and criticised.

The third aim of the chapter was to examine how the previously identified approaches and narratives translated into the Belgian legal framework. In that regard, the following concluding remarks need to be made. At first glance, the Belgian legal framework can be said to be more in line with the UN Smuggling Protocol than with the EU Facilitators Package. From terminological standpoint, the choice of the term '*trafic des êtres humains*' (migrant smuggling) and the creation of a distinct facilitation offence which besides specifically excludes the humanitarian assistance is telling in that regard. The direct reference in the *travaux préparatoires* to organised criminal groups making considerable profit which clarifies the scope and the rationale behind the Belgian legislation is very much in line with the UN Smuggling Protocol. Acknowledging the risks of victimisation faced by migrants during smuggling processes, the Belgian legal framework went also beyond both the relevant UN and EU legal frameworks with the creation of a unique alternative approach which allows victims of aggravated forms of smuggling to benefit from the protective status exclusively reserved to trafficking victims. Besides, the mandatory involvement of specialised reception centres (NGO) in the procedure providing shelter, medical, legal, administrative, and psychological assistance to victims of both trafficking and aggravated forms of migrant smuggling

illustrates concretely the human rights approach (or victim-centric) adopted in the Belgian framework.

Despite these developments and in line with the approaches singled out in the EU legal framework, the crime (and border) control approaches remain visible in the Belgian legislation and so for the following reasons. The crime control approach is particularly visible with regards to the monopoly of decision as to who can be considered as a victim reserved to the specialised prosecutor whereas other actors could have similar expertise and know-how. This role combined with the requirement for the victim to make relevant declarations to judicial authorities seem to indicate the prominence given to prosecutorial interests in the Belgian legal framework. Yet, the crime-control approach appears to be mitigated *in theory* as the granting of the status is not dependent from a criminal conviction (the choice of the human trafficking/ aggravated migrant smuggling charge is sufficient) and the 'relevant declarations' obligation is to be interpreted broadly. Considering the observations made on the securitisation of migration in the EU context, two additional observations are required. Firstly, with regards to the offence of migrant smuggling *stricto sensu* (article 77*bis*), a departure from Palermo is visible due to the broad scope of the article which reveals that the Belgian legislature might have stronger interest in protecting its national (or European) borders than the migrants themselves. Secondly, notwithstanding the non-criminalisation clause for smuggled migrants enshrined in article 5 of the UN Smuggling Protocol, article 6 (paragraph 4) allowed Member States to 'take measure against a person whose conduct constitutes an offence under its domestic law'. This possibility also shed light on the border control approach and the criminalisation of migrants that can take place in Belgium as the illegal crossing of Belgian borders and the illegal (over)staying are subject to criminal sanction and imprisonment in Belgian law (article 75 of the Law of 15 December 1980).

Whereas this overview provided a multi-scalar critical review of the 'law in the books' at the EU and the Belgian level, the functioning and implementation in practice of the Belgian legal framework is required to have a more complete understanding of the 'law in action' and will be subject to careful examination and analysis in Chapters 4 to 6.

3 How Useful is the Concept of Transit Migration in an Intra-Schengen Border Mobility Context?

Diving into the migrant smuggling and human trafficking nexus in search for answers

1 Introduction

Since the beginning of the Schengen Agreement in 1985, the right to free movement of people within the Schengen Area has been a source of both challenges and opportunities within the EU. The increased movement of people across borders has led to complex questions related to the perceived of erosion of sovereignty of nation states (see Dauvergne 2008). Then, the so-called European asylum and migration 'crisis' that drew global attention in 2015 triggered, among other things, reflections on external and internal border policing within and at the limits of the Schengen Area (Guild et al. 2015). According to the European Commission (2016), the absence of internal borders checks in the Schengen Area and its principle of free movement of people constitutes one of the most 'cherished achievements' of the EU. While this may be what the law states, this is not the case in practice, as both formal border controls (articles 24-26 Schengen Border Code) and informal border checks in border areas (article 23 Schengen Border Code) can be observed (van der Woude 2019). These (informal) border checks aim to prevent irregular migrants, including asylum seekers and refugees, from reaching their desired destination country, whether it is the United Kingdom or another EU country (see Paynter 2018).

As a result, it becomes apparent that specific zones within the Schengen Area are in fact becoming transit zones where irregular migrants are stranded for a variable period of time on their way to their desired destination country. This is, for example, the case in Calais (France), in the Maximilian Park (Belgium) and in Rome and Ventimiglia (Italy) (e.g., De Vries & Guild 2019; Tazzioli 2018; Paynter 2018). Policy documents from the Belgian national rapporteur (Myria 2020), long lasting journalist investigations (e.g., Loore 2018) and NGOs (e.g., Caritas 2019) often document the lives of irregular migrants having to stay for weeks or months in the Belgian capital, waiting for their chance to reach the United Kingdom. Going back to the story of Osman (see Introduction), who finds himself in the area of the North Station in Brussels and, together with other individuals sharing similar circumstances, plans to leave the area each night to reach motorway areas (see Loore 2018). Once there,

with or without the services of migrant smugglers, depending on the resources available to him, Osman will climb and hide in (sometimes refrigerated) trucks, hoping to reach the UK. If he is caught and stopped during his journey, he will then go back to the Maximilian Park trying his luck in the next days/weeks/months. While the national rapporteur (2020) acknowledges that someone can reside in a transit space in a legal manner, for example when such a person has lodged a demand for international protection, the focus of this chapter will be solely on individuals in irregular situations in the Schengen Area. As the NGO Caritas (2019) explained, individuals in irregular situations, such as migrants waiting in the Maximilian Park, often face two choices to survive: to depend on networks of solidarity established and acting in the territory or to work in the black economy. The latter can lead to abuses and at times human trafficking when greedy employers take advantage of the vulnerable situation of people like Osman, especially if their financial resources dried up along the way (Caritas 2019). If Osman lacks financial resources to pay a migrant smuggler, he can resort to two other options as Loore (2018) thoroughly documented. He can either work for a smuggling organization himself as a first line worker who spots and opens the trucks in exchange for a reduced fee or a free pass to the UK in the future (Hardt 2019), or he can copycat the tactics of smugglers and attempt to reach the UK on his own (Loore 2018).

The story of Osman brings to the foreground the concept of 'transit migration', which sheds light on the stranded and vulnerable conditions of individuals on the move. The concept is currently scarcely used in the context of mobility within the EU (e.g., De Vries & Guild 2019), let alone within the supposedly borderless Schengen Area (see van der Woude 2020 on the many borders that are in effect within the Schengen Area). Indeed, literature on transit migration focuses predominantly on the peripheral zones of the EU (e.g., Düvell 2012; Collyer et al. 2014; Sørensen 2006). Yet, it has been increasingly highlighted that limiting legal migration channels and increasing border checks, also Intra-Schengen checks, leads to a fragmentation of the migration journeys of irregular migrants who are inside of the EU (e.g., UNHCR 2016; Mijatovic 2019; De Vries & Guild 2019). Consequently, the vulnerability of irregular migrants can potentially rise substantially in these inter-EU transit spaces. As illustrated by Osman's story, the vulnerable position in which some migrants transiting throughout EU territories can lead them to resort to professional networks of migrant smugglers, increase their debts, and incite them to accept (temporary) work in exploitative conditions to continue their journeys etc. (e.g., Bridgen & Mainwaring 2016, Triandafyllidou 2018; O'Connell Davidson 2016). As outlined in the Introduction (see Chapter 1), the adoption of the United Nations Convention against Transnational Crime (UNTOC) and its two addi-

tional protocols (hereafter Palermo Protocols)[1] in 2000 produced a strict legal dichotomy between migrant smuggling and human trafficking (see Gallagher 2001; Hathaway 2008). As a result, the established legal categories trigger substantially distinctive protective regimes to either the 'worthy' human trafficking (ideal) victim or the undeserving 'culprit' smuggled individual (Dauvergne 2008; Kemp 2017; Baird 2016).

The main goal of this chapter is to answer the second sub-question of the dissertation, which is phrased as follow:

> *Can the contested concept of transit migration be considered useful in shedding light on the blurred area found at the nexus between migrant smuggling and human trafficking?*

Considering the geographical focus of the dissertation and the main research question which seeks to examine how an alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking affect the governance of transit migration, the (scholarly) discussions on the grey area between the two phenomena are essential to underline. By exploring the scholarship that discusses the 'grey area' located in-between prototypical cases of human trafficking and migrant smuggling, this chapter will shed light on the vulnerable positions of individuals 'stranded' (for a definition of stranded, see Section 2) or stuck in motion in transit zones. These vulnerabilities to exploitation and abuse also result from the increased fragmentation of the migration journey within the Schengen Area. The blurry lines that are generally observed by the scholarship between the two phenomena are likely to be further enhanced in transit spaces where individuals who aim to continue their migration journeys are stranded for undetermined periods of time. Hence, the concept of transit migration helps to critique the conception of migrant smuggling and human trafficking being strictly separate phenomena.

After a brief explanation of the research methods and approach underlying this chapter (Section 2), the concept of transit migration in an Intra-Schengen mobility context will be explained (Section 3). Then, after a summary on the main differences between human trafficking and migrant smuggling, their points of intersection commonly identified by the scholarship will be highlighted (Section 4). Subsequently, the representations and stereotypes generally attached to these phenomena will be deconstructed (Sub-sections 5.1 and 5.2).

---

1 The objective of the article is not to repeat the main differences between the two crimes and the debates around the adoption of the UNTOC and its additional protocols as many authors have already tackled the issue in a very insightful and thorough manner. See the articles of Gallagher (2008, 2010), Hathaway (2010) and Campana and Varese (2015), summarizing the distinct doctrinal opinions on the topic. See also the two relevant Palermo Protocols: UN the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the UN Protocol against the Smuggling of Migrants by Land, Sea and Air.

Since dealing with these two phenomena often intersects with issues of irregular migration, the potential instrumental use of the 'fight against human trafficking and migrant smuggling' by nation states to advance their agenda in preventing irregular migration will be underscored (Sub-section 5.3). In the discussion section, the concepts and findings will be connected and the usefulness and potential limitations around the use of the concept of transit migration will be discussed.

2 Approach and Methodology

The moderate social constructivist approach framed by Mertz (1994) serves as a background for this socio-legal chapter. Following this approach, it becomes apparent that laws are social constructions (*ibidem*). Therefore, as Calavita (2010) argues (see Chapter 1), care should be taken to not have an 'idealized' vision of the law as the latter is after all a 'human artefact' (3). Numerous scholars such as Giddens (1999), Bauman (2000) and Beck (1992) have shed light on the tremendous changes in modern societies and the diverse and complex issues resulting from them and the tasks left to nation states in intervening to regulate these difficult matters. Among these difficult matters, migration related issues such as migrant smuggling and to a certain extent human trafficking can be said to be complex to regulate in a globalized world (Franko 2017, see also Chapter 1). Van der Woude (2016) noted that a flexible approach is required to deal with modern complex societal issues when discussing the concept of discretion (see also Chapter 1 and Chapter 5). While discretion is neither good nor bad in the sense that it can either lead to abuse or to positive results (see Weber 2003), it is nevertheless important to acknowledge its existence. Discretion can both be found at the implementation level but also in the law-making process (Schneider 1995). Schneider (1995) explained that discretion was created by law and policy makers for diverse reasons; for example, where no consensus is reached by lawmakers who then pass on the responsibility to the decision makers, or when scenarios are too complex or messy to allow for clear rules (see also Weber 2003). The laws and regulations adopted to deal with both human trafficking and migrant smuggling and the distinction created between them can also be seen as a result of the fact that law cannot encompass an indefinite number of scenarios and is based on a construction of 'false/constructed' realities or 'truths'. Hence, regarding the grey zone found at the nexus between migrant smuggling and human trafficking (see Section 4), it is not only the implementation of the international and regional legal instruments that will be challenged. The chapter will also focus on the manner the rules themselves are constructed and the substantial room for interpretation left to decision makers when dealing with the phenomena.

This chapter builds on two distinct literature reviews, gathering critical and empirical scholarship from a diverse range of disciplines such as law, sociology, critical criminology and geography. The first review includes 58 peer-reviewed articles from 1980-2019, collected from 3 databases (Web of Science, Google Scholar, Criminal Justice Abstracts), as well as specialized journals in human trafficking/smuggling, (irregular) migration and additional referral sampling. The selection was based on articles that assess transit migration, human trafficking and migrant smuggling both critically and broadly. Particular attention was devoted to theoretical description of the phenomena, policy practices, law-making, studies tackling stereotypes and common representations attached to them, as well as the points of intersection between the phenomena. The selected articles were subsequently summarized and coded manually. The chapter is part of a broader research project, 'Dealing with human trafficking and migrant smuggling in Intra-Schengen border mobility context', which is partially financed by the National Dutch Police. Its aim is to better understand the phenomena of human trafficking and migrant smuggling (see European Border Communities website[2]). Within the project's framework, a systematic literature review was conducted between September 2017 and September 2018 and includes 181 articles and books, selected based on the following inclusion criteria: 1) published after 1997 (Treaty of Amsterdam); 2) published in English; 3) contained research related to human trafficking and/or migrant smuggling, irregular migration; facilitation of entry/movement/transit; 4) focused on the EU, its member states and/or focused on movement towards the European Union; and 5) was empirically grounded except for material which proposes a model for analysis. The initial process of data collection, methods and databases involved the same tools and techniques mentioned above. For the systematic literature review, material which met all the inclusion criteria was selected and coded using qualitative data analysis software (ATLAS.ti). In total, 86 of the 181 articles and books which were coded had material relevant to answering the research question and included excerpts which appeared in the query reports. Regarding the analytical stage, a content analysis was done by creating code groups representing the concepts outlined at the end of the introduction. The coded quotes that came from the two literature reviews were extracted and organized based on the different themes mentioned supra and analysed with specific attention given to the political discourses on migrant smuggling, human trafficking, and the links between them as presented in the analysed literature.

2 https://europeanbordercommunities.eu/research/combatting-human-trafficking-and-human-smuggling-in-intra-schengen-border-areas

3 Transit Migration in the Intra-Schengen Mobility Context

3.1 Transit migration: a difficult concept to define

The concept of transit migration is not novel and has been used in distinct contexts throughout the years. Retracing the genealogy of the term, Collyer et al. (2014) observed that since the 1990s, the term has been almost exclusively used in policy documents as a way to describe irregular migratory movements (or desired movements) towards the EU and more specifically to refer to individuals stranded in so-called 'buffer zones' at its external borders. There is no agreement on the definitions of the broad terms 'transit migration' or 'transit migrant', which can explain why they have become connoted and politicized, particularly to discursively equate them with irregular migration, organized crime and migrant smuggling (Düvell 2012). Transit migration can be seen as a blanket term devoid of legal meaning that can cover an array of migration categories and legal statuses: from mixed migration (encompassing, among other things, refugees, asylum seekers, economic migrants) to (irregular) secondary movements (Sørensen 2006). In this chapter and building on the contributions of Schapendonk (2012: 579) and Carling (2002) on the transit migration debate, 'transit migration' will be used to refer to 'a phase of experienced immobility in process of movement in a specific migratory direction'. Both scholars refer to the 'migrant's aspirations of moving in a context of involuntary immobility' (Schapendonk 2012: 579). This definition has two advantages. On the one hand, it can be used in an Intra-Schengen context as experiences of immobility can be experienced within the EU territory (see 2.2). On the other hand, the definition makes it possible to consider the multiple change of plans during the migration path and breaks the assumption that there is always a fixed settlement at the end of the journey. It is equally important to define with precision what is meant by 'stranded' to avoid further confusion. By stranded, the chapter builds on the definition of Schapendonk (2012) developed to describe migrants experiencing 'a sense of immobility in the direction of the EU' in the sense that EU borders are 'blocking their onwards movements' (580). This definition will also be used in the Intra-Schengen context where border checks (e.g., van der Woude 2019) and governmental practices policing migrants (e.g., Tazzioli 2019, Edmond-Pettitt 2018b) are experienced by migrants as obstacles to the continuation of their journey, either to other EU countries or to the UK.

Since 2014 and 2015, it has been increasingly recognized that the label 'transit migrant' has been used by the media in several Member States to

describe an individual present inside the so-called 'borderless' Schengen Area.[3] From a policy perspective, the term 'transitmigrant/transmigrant' made its appearance in 2015 in the Belgian policy, media, and governmental arenas to depict 'a migrant or illegal migrant from Africa and Asia who wishes to go to the UK and stays on the Belgian or the French Northern coast in the meantime' (see Flemish dictionary 2016; for a critical reflection see Chapter 1, Section 5 on terminology). Following Collyer et al. (2014) and Düvell's (2012; 2014) opinions, caution must be taken regarding the problematic politicization of the term 'transit migration'. The term should not be used as a way to label individuals on the move, as they can belong to distinct categories: refugees, asylum seekers, potential victims of human trafficking, etc. As it will be argued in the following sections, despite the risk of the politicization of the concept transit migration, the term as defined above, helps to shed light on the vulnerable situations faced by stranded migrants both inside and outside of the Schengen Area. Moreover, the living conditions and the particular vulnerabilities of individuals living in transit spaces can have an impact on the study of migrant smuggling, human trafficking and their intersection.

3.2 On the presence of transit zones within the Schengen Area

Papadopoulou (2004) described the transit migration phenomenon in Greece when she referred to individuals residing temporarily in a 'waiting room' in the strategic 'Schengenland' (168, 169). In 2010, Perrin specifically wrote about the Schengen Area in his study aimed at identifying key characteristics of transit countries, such as their specific geographical location and the liberal immigration policies in place. Following the ethnographic research of Paynter (2018) on 'transit migrants' (*transiti migranti*) in Rome, the transit migration concept is useful to refer to waiting zones in which individuals are located in limbo with the intention of continuing their migration journeys at a later stage. In their insightful contributions, Düvell (2012; 2014) and Sørensen (2006) explicitly link the restricted legal migration channels available to so-called transit migrants and the stranded conditions that they can experience en route. The increased securitization of the migration path to the EU also explains how migration journeys become longer and more perilous (see also Brunovskis & Surtees 2019; Bridgen & Mainwaring 2016; Triandafyllidou 2018; Sanchez 2017; Hynes 2017; Carling, Horwoord & Gallagher 2015). The 'trajectory ethnography' conducted by Schapendonk (2018) on the im-/mobility of African migrants on their way to the EU and the distinct migration regimes imposed

3 The term 'transmigration', '*migrante en transito,*' is often used in this particular context in national newspapers in some EU member states. See for example, for Spain, *El Confidencial* (2019) and the Basque Radio Television EiTB (2018); for Belgium, *le Soir* (2018) and *de Standaard* (2019).

on them puts into question the 'linearity' of migration journeys. Irregular migrants might have to stay longer than expected in some places, sometimes detained, and deported and/or work in the shadow economy to finance the rest of their journeys (Kemp 2017).

As mentioned, Collyer et al. (2014) believed that the concept of transit migration was mostly relevant to describe the situation at the outskirts of the EU borders for several reasons. The authors stated that once a migrant reached the EU, his/her status as a 'transit migrant' would not differ from any other irregular migrant present in the EU territory. According to them, once in the Schengen Area, the means of entry become legally irrelevant (see Dublin Regulation). This chapter argues the opposite and believes that the concept of transit migration, linked with or deriving from the increasingly restrictive border regime and the fragmentation of the migration journey, is crucial to describe both the situation at the external EU border as well as the situations in which migrants can find themselves while they are within the EU territory and in particular within the Schengen territory. The presumed absence of EU border checks within the Schengen Area (van der Woude 2019) makes the stranded situation of migrants even more odd.

Interestingly, despite the hesitation of the authors to use the concept of transit migration in an Intra-Schengen context, Collyer et al. (2014; 2016) acknowledge the historical tradition of several EU countries that served as transit spaces, as well as the challenging developments observed in Ventimiglia (Italy) since 2011 and more recently in the region of Calais bordering the UK. The authors described these spaces of transit as 'bottlenecks', particularly in Southern European countries and in places bordering the Schengen Area, such as Calais. Schapendonk (2012) also referred to the precarious living conditions of migrants who just made it to southern European countries, such as Greece and Italy. This, along with the instability of their administrative status as well as their living conditions, which were detrimental in their desire to continue their migration journey or to go back to their country of origin, makes it possible to situate their experiences within the concept of transit migration. The recent studies of Tazzioli (2018; 2020b) portray distinct zones inside the Schengen Area where migrants end up stranded. The stranded conditions experienced by migrants challenges the idea of 'the free internal mobility practices' that is not only the result of the recent reinstallation of national border controls (see also van der Woude 2019; Guild et al. 2015). More specifically, Tazzioli's (2018; 2020b) ethnographic work conducted at the French/Italian and Italian/Swiss borders and in Calais (France) describes somewhat more concealed governmental strategies than the reinstallation of border checks. The strategies in place aimed at disrupting migrants' journeys by constantly diverting them from sensitive border zones. What Tazzioli (2018) coined as 'governing through mobility' can be seen as a deterrent and disruptive (administrative) strategy adopted to regain control over migrants' mobility by lengthening their migration journey. These border control methods contribute to

the stranded condition of irregular migrants by forcing them to continuously be on the move throughout the territory to avoid the creation of new 'jungles of Calais'. Edmond-Pettitt (2018b) further wrote about these operations of 'dispersal' in her article on the policy of 'hostile environment' in Calais (see also Collyer 2016). The empirical research of De Vries and Guild (2019) on 'spaces of transit', which includes places inside the EU, such as railway stations and semi-permanent camps such as Calais, coined the term 'politics of exhaustion' to describe a similar migration management strategy. This type of action, therefore, enhances the fragmentation of the migration journey. Focusing on the French/Spanish and French/Italian border zones, Barbero (2018), Barbero and Donatio (2019) further observed an internal outsourcing of border control responsibilities, particularly to peripheral states of the EU, supposedly considered to be the 'guardians of the EU'.

4 Blurry Lines: Reflection on the Notions of Consent/Agency, Exploitation, and Debt

4.1 Law in the books: on the strict distinction between human trafficking and migrant smuggling

The adoption of the UNTOC and the Palermo protocols[4] produced a strict dichotomy between migrant smuggling and human trafficking. As the name of the UNTOC clearly indicates, Convention against Transnational Organized Crime, human trafficking and migrant smuggling are dealt with through the spectrum of international cooperation and border control, as they are perceived as forms of organized crime resulting from globalization (Chacon 2010; Shelley 2010; Mitsilegas 2019). Within the EU and the Council of Europe, this organized crime approach was made less severe for the case human trafficking, at least in theory, by combining it with a more protective human rights approach (Rodriguez-Lopez 2018). Nevertheless, the demarcation line between the two crimes is maintained, which triggers a reflection on what Dauvergne (2008) described as the 'all-important front in the battle for sovereignty and the nation state' (70). The (unwanted) migration flows that have arisen out of globalisation as well as the transformation of the nation states (see in that regard Sassen 2006) are important factors to understand the emergence of the Palermo Protocols (Dauvergne 2008). Dauvergne (2008) noted that as migration flows are perceived as threat to states' sovereignty, the protocols were useful to determine individuals worthy of being admitted to the polity (see also Aas 2011 on borders and sovereignty). And as controlling the mobility of indi-

4 See the two relevant Palermo Protocols: UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the UN Protocol against the Smuggling of Migrants by Land, Sea and Air.

viduals is one of the tools of expression of state sovereignty, the distinction between migrant smuggling and human trafficking, which does not necessarily reflect the blurry reality, is said will help maintain the frontier between 'us' and 'them' (Dauvergne 2008; Haynes 2009; Skilbrei & Tveit 2008; van Liempt 2011; Dandurand & Jahn 2019). This is particularly true when migration related issues are being increasingly securitized (Mountz & Hiemstra 2014).

To summarize, the presumed major differences between migrant smuggling and human trafficking are the following: presence/absence of consent, the purpose of exploitation, the length of the relationship between the trafficker/smugglers (temporality),[5] the necessary presence of a cross-border dimension for migrant smuggling and the distinct interests protected, namely the protection of the human rights of the trafficked victim and the protection of the State's interest in controlling its migration flows, respectively (Salt & Stein 1997; Gallagher 2009; Campana & Varese 2016; Hathaway 2011; see also the European Commission website 'trafficking explained'). While the majority of academic, media and governmental outputs fit exclusively within one of these two categories, a growing part of the scholarship questions the operability of the definitions and the extent to which the definitions reflect the experienced reality (e.g., Baird 2016; Dandurand & Jahn 2019; Munro 2006). According to Baird (2016), the study of human trafficking and migrant smuggling has been uncritically and problematically aligned with the strict legal categories established since 2000. The legal dichotomy and the resulting legal categories overlook the empirical evidence showing that both can be intertwined in a grey area and prevents a thorough understanding and comprehension of the phenomena and the dynamics in play between them. As Kemp (2017) explained, the blind reproduction of this fabricated distinction could reproduce the common discourses around the guilty accomplice migrants and deserving/underserving victims of human trafficking. The main controversy concerns the notions of consent/agency, exploitation and debt and the dynamics existing between these three elements. The following sub-section will shed light on the main areas of discussion that question this neat line of demarcation between the two crimes. Besides, explaining the concept of transit migration can be useful to bring more awareness to the vulnerabilities of individuals in transit spaces. This is important as the grey area identified between migrant smuggling and human trafficking is also likely to be found and bolstered in transit spaces.

5 It is assumed that the relationship between a migrant smuggler and his/her client ends at the arrival of the migrant in the country of destination or at the location previously agreed upon while, as the research shoes, the relationship between a trafficker and his/her victim is further continued in the country of destination with the exploitation dimension (see European Commission website: « Trafficking explained ».

4.2 Law in action: when exploitation, consent and debt complicate the dichotomy

Many scholars share the opinion that while human trafficking and migrant smuggling can be easily differentiated in the books and that the definitions appear logical from a legal perspective, it is not always easy to make a distinction between the two phenomena in practice. They are perceived either as being intertwined or as forming a continuum (e.g., Dimitriadi 2016; van Liempt 2011; Salt 2000; Derluyn & Broekaert 2005). Gallagher (2001) skeptically discussed the fact that the Palermo Protocols did not consider the operational links existing between both phenomena in practice. Like many other authors cited in the following sentence, Gallagher (2001) illustrated her argument through an analysis of the vast majority of cases in which migrants start their migratory journey voluntarily to end up in a situation of exploitation or abuse either en route or in the country of destination. This situation is caused by their vulnerable position, sometimes resulting from the heavy travel debt to be repaid (see also Carling, Horwood & Gallagher 2015; Munro 2006; Aronowitz 2009; van Liempt 2011). According to Dauvergne (2009),[6] Kemp (2017) and Dandurand and Jahn (2019), the 'false dichotomy' between migrant smuggling and human trafficking boils down to the complex notions of consent. According to van Liempt (2011), the dichotomy exists to facilitate the practitioner's discretionary task to decide who deserves protection and who does not. There is an assumption that an individual will either exercise full agency and have complete control over his migration path or will be forced/coerced to migrate to end up in a situation of exploitation. Yet, empirical findings show that the bulk of human trafficking and migrant smuggling cases hardly fit the prototypical categories and falls in an in-between grey area where traces of exploitation and abuse can be found and where the absence and presence of full or partial consent coexist (e.g., Kemp 2017; Munro 2006). Research has also illustrated that migrant smuggling victims can, at times, be in full control of their migration paths whereas they, at other times, choose to relinquish their agency (temporarily) to the hand of the human smugglers. This is done, it is argued, as a strategic move in their quest for a better future; it can involve high danger and possible exploitation to various degrees (Bridgen & Mainwaring 2016; Sanchez 2017; van Liempt 2011).

From a strict legal perspective, it is true that the Palermo Protocol (and the relevant European legal instruments on the matter[7]) considers that consent in human trafficking cases involving adults should be deemed irrelevant when achieved through threat, coercion, fraud, deception and abuse of power or abuse of vulnerability. The issue paper of the UN (2012) regarding the abuse

6 For concrete examples and cases falling in the 'in-between' area, *see* Dauvergne (2008, 80-90).

7 See the EU Anti-Trafficking 2011/36/EU and Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) as well as the Warsaw Convention.

of vulnerability criteria described the latter as less tangible than the other means mentioned above. The document (UN 2012) also pinpointed that the unclarity of the definition made room for ambiguities. Indeed, the abuse of a situation of vulnerability is described as 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved' (UN 2012: 3). This definition creates confusion for practitioners and allows nation states to have either a broad or as in many cases a narrow understanding of the term, which is unlikely to encompass topics such as poor socio-economic condition, family pressure or the lack of opportunity in the country of origin (UN 2012; see also Munro 2006). As an illustration, France, despite a recommendation of the Group of Experts on Trafficking on Human Beings within the Council of Europe to do otherwise, provides an exhaustive list of situations of vulnerability which does not contain social, administrative, or economic vulnerabilities (see GRETA 2017b).

Mai's (2016) study about Nigerian sex workers in France and the UK illustrates the ambiguity around the notion of consent. Contrasting with the common narrative on sexual exploitation, Mai (2016) found out that the majority of the sex workers interviewed chose to do sex work and justified it by their lack of legal status and their economic problems. The minority of sex workers who felt forced to perform sex work named the two same problems as factors underlying their situation (see also Andrijasevic 2010). Kemp (2017), who researched both labour and sexual exploitation among African irregular migrants marginalized and excluded from the legal economy in Malta, confirmed this finding. The rationales behind their choice were the need to repay a previous travelling debt, sending remittance to their home countries or collecting more money to pay human smugglers to continue their journeys towards other EU countries. Quoting a UK police officer in the research performed by Munro (2006), 'I've never found women chained up … but there are a whole series of other control factors, which mean that escape or running away isn't really an option' (328). Haynes (2009) further questioned the value of consent when the latter is likely to emanate from despair. This is particularly true when thorough discussions on power imbalance in a complex migration context were not tackled by lawmakers. It is safe to say that migrants' consent as the means to distinguish human trafficking and migrant smuggling, as highlighted in many policy documents (e.g., UNODC website "Differences and Commonalities"),[8] is under serious criticism and can at times show the futility of the 'free/forced neoliberal north-centric dichotomy' (Mai 2016: 6).

O'Connell Davidson (2006; 2013) reflected on the post-Enlightenment liberal tendency to perceive realities in a binary manner. Regarding issues around migration, this binary thinking results in building the clear demarcation lines highlighted above. The author (2013) strongly criticized this tendency and

8 See https://www.unodc.org/e4j/zh/tip-and-som/module-11/key-issues/differences-and-commonalities.html

explained how debt-financed migration muddled with the assumption of neat dual realities.[9] While contracting a debt with a human smuggler can result from an active and strategic choice to achieve a safer future, the voluntariness of it is questionable. This is due, notably, to increasingly restrictive border policies and the social exclusion that migrants can face. The debt will also place the individuals in an unbalanced power dynamic, sometimes for years, but not necessarily for an indefinite period of time. This power dynamic will enhance their vulnerability and heighten the risk of exploitation, either *en route*/transit or in the country of destination (Joniken 2016; Skilbrei & Tveit 2008). O'Connell Davidson (2013) therefore suggested to replace the liberal 'freedom versus slavery' dichotomy with 'citizenship versus slavery', as she observed that non-citizen debtors did not have their rights and freedom protected by the State and were subject to an exclusion clause in society.

Already in 2011, before the migration 'crisis' of 2015, a report from Europol (2011) identified 'a point of contact' between human trafficking and irregular immigration due the fact that 'transiting migrants were frequently exploited in illicit labor', which results from the fragmentation of the journey (22). Linking it back to the concept of transit migration and the situation of individuals stranded in transit spaces aiming to continue their journey onwards, the grey zone identified between migrant smuggling and human trafficking by scholars appears even greyer. Indeed, the blurred area found at the nexus between the two phenomena involves an interplay between facilitation, exploitation, extortion, debt bondage as well as the simultaneous presence and absence of full and partial consent (see Carling, Horwood & Gallagher 2015; Peterka-Benton 2011). When individuals get stuck in so-called transit zones, their vulnerability to exploitation and abuse is likely to be enhanced (Brunovskis and Surtees 2019). Their quests for further mobility may compel them to seek the services of (more professionalized) migrant smugglers, which can reinforce the debt and lead to potential (short-term) exploitation explained above (see Sanchez 2017; Trandafyllidou 2018; O'Connell Davidson 2017b; Andersson 2016). Moreover, as will be further developed in the following section, numerous scholars (Lucht 2013; Zangh et al. 2018; Richter 2019) also examined the involvement of migrants in smuggling operations and the social embeddedness of the smuggling process. Brunovskis and Surtees (2019) further noted that this particular involvement can be considered as human trafficking as migrants can at times be coerced or have no choice but to take part in these unlawful activities. Despite the existence of non-punishment clause in both Palermo Protocols and in the relevant European legal instruments (see Chapter 2, Section 2), they are often really difficult to use in practice (e.g., Villacampa & Torres 2019).

9 See the full article for an in-depth analysis regarding the liberal understanding of freedom versus slavery and the role of debt in the latter.

Dandurand and Jahn (2019) denounced the exclusive attribution of victimhood to human trafficking victims in the current mixed migration context. The authors (2019) pointed out the trouble in identifying signs of deception, exploitation, and abuse when distinct categories of migrants are on the move between countries. It appears clear that the dichotomy is based on a simplified and at times erroneous representation of the reality experienced by migrants. If the sharp demarcation lines designed by lawmakers facilitate the task of practitioners in sorting the guilty smuggled individual from the innocent human trafficking victim, it makes it hard to provide a legal response to the multitude of scenarios situated in the blurry area involving different types of victims and degrees of agency and victimization.

5 The Impact of Stereotypes on Policymaking and Implementation

The distinction between human trafficking and migrant smuggling is also enshrined in strong gender and sexual stereotypes as well as ideologies. Women and children have higher chances of being identified as victims of human trafficking as long as they fit the prototypical profile of a pure and innocent victim devoid of agency, while men, who are generally perceived as economic migrants fully in control of their journey, will be commonly identified as smuggled individuals (van Liempt 2011). In this section, the common stereotypes and typical representation regularly identified in the critical scholarship attached to both human trafficking (5.1) and migrant smuggling (5.2) as well as the potential issues resulting from their conflation (5.3) will be addressed. Kinney (2015) explained how stereotypical narratives on issues such as human trafficking could shape policies and affect their implementation on the ground. As Wilson and O'Brien (2016) noted, a policy never arises from an external reality and the way migrant smuggling and human trafficking are framed is also politicized, which can in turn shape the solutions introduced to deal with them, sometimes in an instrumental manner. As the phenomena and their potential intersection are often represented in an overly simplistic fashion, the consequences of victim identification and subsequent protection, as well as of the investigation and prosecution, are severe (e.g., Carling 2017; Chacon 2010). In the EU context, these framings can be damaging, as the legal frameworks in place to tackle both human trafficking and migrant smuggling share a border control approach, as they are intrinsically linked with 'the fight against irregular migration' and transnational organized crime (see Spena 2016 for migrant smuggling and Rubio-Grundell 2015 for human trafficking). In each sub-section, the common representation attached to both human trafficking (5.1) and migrant smuggling (5.2) will be identified. The aim is to shed light on the side-effects and to a certain extent the instrumental use of common narratives (5.3) and assess their potential consequences for individuals stranded in transit spaces.

5.1 The prototypical construction of human trafficking victims and villains

The troublesome assumptions about consent and agency examined above (3) already revealed one of the core stereotypes about the prototypical human trafficking victim and created a distinction between the deserving and underserving victim who consented or who is complicit in their own exploitation (Rigby 2011). The empirical research conducted by Ventrella (2017) in Italy, by Lavaud-Legendre (2017) in France, and by Constantinou (2013) in Cyprus clearly illustrate that the victimhood of an individual will become questionable once vague signs of consent appear, as well as in cases of sexual exploitation where a division between 'good' and 'bad' victims is made. There are numerous studies mentioning the problematic and predominantly gendered construction and representation of the 'ideal' victim. The latter is often imagined as a pure, innocent, passive, worthy female who is (physically) kidnapped to be sexually exploited (Brunovski & Surtees 2008; Jacobsen & Skilbrei 2010; O'Brien 2016; Hoyle et al. 2011).

The frequent emphasis on physical and crude violence that victims of human trafficking are deemed to experience can lead to the disregard of (deceived) individuals in situations of exploitation who did not endure physical and/or sexual abuse (Maroukis 2017; O'Connell Davidson 2017b). Yet, the majority of cases do not necessarily involve physical violence, as forces leading to the exploitation of an individual are often complicated to identify (Frangež & Bučar Ručman 2017; Skilbrei & Tveit 2008). The study of Leser et al. (2017) with German practitioners illustrates how these common narratives on the 'ideal victim' fail the to reflect the situation on the ground. According to the practitioners interviewed, many expressed their difficulties in finding 'a proper victim' and alluded to the blurry lines around the notion of consent and the difficult differentiation between a forced worker and a migrant worker. The authors (2017) concluded that if victims did not show themselves as 'worthy of compassion', they would likely be ignored or criminalized, as potential victims of human trafficking can quickly metamorphose into irregular migrants (see also van der Leun & van Schijndel 2016).

In her study combining the most common stereotypes on human trafficking, Rodriguez-Lopez (2018) confirmed the abovementioned issue and critically reflected on the over focus on sexual exploitation in comparison to labour exploitation. Despite the increased awareness towards labour exploitation, the lack of assistance for potential vulnerable male victims of labour exploitation was confirmed by the Group of Experts on Human Trafficking within the Council of Europe (GRETA 2018). Likewise, Heemskerk and Rijken (2011) observed that practitioners considered sexual exploitation as a more serious problem than labour exploitation. Similarly, the clear over focus on sexual exploitation in comparison to labour exploitation is also reflected in the scholarship (van Meeteren & Wiering 2019).

Rodriguez-Lopez (2018) further identified the troublesome association of human trafficking with irregular migration and the treatment of human trafficking as a pure (transnational) organized crime problem with 'ideal' deviant villains in charge, predominantly men of colour (see also Chacon 2010; Kemp 2017). The consequences of oversimplifying the reality are the following: first, the threshold to attain the victimhood understood in a narrow manner will be presumably unreachable. This is particularly troublesome for individuals stuck in transit zones in blurry (temporary) exploitative/consensual scenarios, who will be more likely to be recognized as guilty or complicit irregular smuggled individuals. Second, even if the EU adopted a more holistic approach, including human rights concerns towards human trafficking, the latter phenomenon is still treated as a transnational organized crime problem (Rubio-Grundell 2015; Rodriguez-Lopez 2018). As O'Brien (2016) and Chacon (2010) rightfully analysed, this lens will feed and legitimize policies oriented to increase border control. The predominant focus in anti-human trafficking policies on a special kind of villain preying on passive and 'blameless' victims is obscuring the responsibility of the nation states. Indeed, nation states are increasingly limiting legal migration channels and creating or reinforcing therefore the vulnerability of people on the move to smugglers and human traffickers. More generally, the recurrent silence on structural factors is considered dubious, as it can heighten the risk of exploitation, especially at the nexus between migrant smuggling and human trafficking (Kemp 2017; van Liempt 2011).

5.2 The prototypical construction of the evil ruthless human smuggler part of an organized crime group

It is certain that both human trafficking and migrant smuggling are hidden phenomena that are difficult to research. The scarcity of information also concerns secondary migration movements inside the Schengen Area where the options to cross borders are more diverse (e.g., hidden trucks, public transportation, small boats in the North Sea). A report of the International Organization for Migration highlighted this specific knowledge gap vis-à-vis the scale of the smuggling phenomenon and its interconnection with human trafficking within the EU (McAuliffe & Laczko 2016). The phenomenon also suffers from stereotypical representations painting images of ruthless, profit-driven and hyper-hierarchical organized crime structures (e.g., Triandafyllidou 2018; van Liempt & Sersli 2013).

While there are indicators that the smuggling journey can become increasingly expensive, dangerous, and violent at the outskirts of Fortress Europe, this specific representation is strongly nuanced by the empirical scholarship (van Liempt 2016; Sanchez 2017; Achilli 2015). Perkowski and Squire (2019) collected 250 narratives of smuggled individuals and explained how, from

their perspective, there was no such thing as a homogenous prototypical 'villain' smuggler. Migrants often considered smugglers as facilitators, helpers, saviours or as the necessary alternatives, who are neither good nor pure evil (e.g., Achilli & Sanchez 2017; van Liempt 2007; Mandic 2017). The sprawling organized crime narrative is also severely put into perspective as the majority of the scholarship paints a more diverse picture and agrees on the existence of loose and flexible smuggling networks constituted by interchangeable local/regional opportunists with precise and distinct tasks, but devoid of mafia-like bosses (Demir et al. 2017; Mitsilegas 2019; Staring 2004). As mentioned above (3), Richter (2019), Lucht (2013) and the insightful contributions found in the special issue edited by Zangh et al. (2018) deconstructed the image of the profit-driven migrant smuggler operating within a hierarchical and structured organized crime group by pinpointing the involvement of migrants themselves in smuggling operations. The latter can at times become more socially embedded and crossing borders can turn into a currency in certain transit spaces, where migrants see a business opportunity to help others in their migration journey. Triandafyllidou (2018) wrote about complex systems existing based on pre-existing local and regional community relationships, trust, information, interdependency, and profiteering. These findings do not deny the existence of brutality and violence during the smuggling process. Yet, as Sanchez (2017) observed, violence is unlikely to emerge out of a vacuum as vulnerability is tied to the absence of safe legal migration paths as well as social and financial capital.

The stereotypical representation of the migrant smuggling phenomenon and its intrinsic links with the 'war/fight' against irregular migration is being strongly criticized by the scholarship. Spena (2016) stressed how the EU strategy to fight migrant smuggling was commanded by the ambition to fight irregular migration. When looking at the normative foundation criminalizing migrant smuggling, Mitsilegas (2019) questioned the way in which the securitization of the phenomenon is facilitated and legitimized by the use of recurrent discourses of evil smugglers at odds with the complex reality. The discursive and simplistic correlation between the dangerous criminal and the human smuggler figure, as well as the recurrent use of real yet extreme stories of smugglers abandoning migrants in the middle of the Libyan desert, pushing migrants with the help of automatic weapons inside overcrowded boats or leaving migrants suffocating hidden in trucks, obscure the decisive role of increasingly restrictive border policies in the migrant smuggling market (Andersson 2016; van Liempt 2016; Lucht 2013).

Several scholars not only criticize the silence on structural factors, including socio-political and economic processes pushing migrants to start their migration journeys, but also shed light on the relationship between anti-smuggling policies used to crack down irregular migration and the migrant smuggling phenomenon (Perkowski & Squire 2019; Achilli & Sanchez 2017). Because issues around irregular migration often creates feelings of unease, the construction

of migrant smuggling as a security threat with identifiable culprits to be punished feeds the false belief that irregular migration can be halted (van Liempt & Sersli 2013; van Liempt 2016). Bridgen and Mainwaring (2016) described how states were legitimizing and moralizing their harsher border control policies using the humanitarian and rescue narrative of the State as a saviour of the migrant who takes irrational risks and is trapped in the hands of a cruel and ruthless smuggler. The authors (2016) also deconstructed the recurrent politicized discourse of the ceaseless linear flows of migrants starting from point A to arrive directly to point B, which can create an overwhelming feeling of invasion for the European population.

The increased border enforcement and surveillance adopted to 'fight' the evil smuggler and the fragmentation of the journey resulting from the latter has several consequences. First, the detailed overview of Sanchez (2017), combining empirical research on migrant smuggling, demonstrates that ignoring the complexity of the migrant smuggling phenomenon has an impact on the latter in varied ways. Among other things, it can boost the sophistication and professionalization of migrant smuggling groups replacing community-based enterprises due to the increased criminalization of the phenomenon; it pushes individuals to go for more clandestine and hazardous routes; and it makes the smuggling fees increase the debt-exploitation risks. Mitsilegas (2019) and Triandafyllidou (2018) further observed the vicious circle created by this hardening-borders approach, particularly vis-à-vis migrants in long and fragmented journeys, which increases their vulnerability. Carling (2017) recalled the importance of critically assessing the current strategy in place to tackle migrant smuggling, especially when evidence shows that smuggling services are indeed increasingly expensive but not automatically abusive or exploitative. If the author (2017) acknowledged that a human smuggler is not a 'good Samaritan', he nevertheless warned against the use of simplistic portrayals of the latter to legitimize harsher immigration policies as a way to go 'after the bad guys'.

5.3 The dangers of the instrumental conflation between human trafficking and migrant smuggling

As has been highlighted, the strict dichotomy between migrant smuggling and trafficking can be problematic, especially when based on the controversial notion of consent (Section 3). Nevertheless, care should be taken to not conflate the phenomena in an oversimplified manner. Making human trafficking and migrant smuggling synonymous with one another obscures the points of intersection and differences between them, which can be detrimental for the conduct of relevant research (Peterka-Benton 2011). O'Connell Davidson (2016; 2017a; 2017b) strongly criticized the fact that human trafficking is often framed by politicians, media, and NGOs as 'modern day slavery'. The author believes

that choosing this framing makes it resonate with the Transatlantic Slave Trade, which is not only deceitful from a historical perspective, but has practical consequences. First, as highlighted above (4.1), using this analogy stirs up the imagination of the public and street-level bureaucrats, who will then focus mainly on the physical suffering of victims and the 'kidnapped/captured' narrative. Second, instead of focusing on the deeper and complex structural factors, the analogy shifts the lens toward the individual modern 'slave holder'. Finally, regarding the EU migration context, O'Connell Davidson (2017b) observed that politicians sometimes used migrant smuggling and human trafficking interchangeably. O'Connell Davidson (2017b) logically deduced the consequence of using the modern slave trade narrative on the policy-making arena. Considering that human trafficking is often perceived as a modern version of the Transatlantic Slave Trade, a similar appalling image will come to mind when thinking about human trafficking, which will help nation states legitimize stricter border controls. Brunovskis and Surtees (2019) and Dandurand and Jahn (2019) described this problematic conflation as a way to curb and prevent migration flows. By mismatching migrants with modern slaves and migrant smugglers with human traffickers/modern slave holders, Carling, Horwood and Gallagher (2015) discussed the issue as a 'classic public relations move' from the EU authorities. Taking the example of the decision to intervene militarily close to the Libyan coast in targeting vessels of migrant smugglers, the document of the European Parliament on these interventions uses the following narrative: 'the overarching objective is to help save lives by disrupting criminal networks of smugglers and traffickers' (European Parliament, 2019, 1). Mandic (2017) and Carling, Horwood and Gallagher (2015) demonstrated that the conflation triggered much more political support, as it was oriented more towards dreadful traffickers than mere facilitators of irregular migration.

6 Discussion

The stereotypical representations of both phenomena are contributing to the creation of the 'false realities/truths' underlying the dichotomy between migrant smuggling and human trafficking and how they are understood and implemented (for instance when it comes to 'ideal' victim's identification) on the ground. As mentioned in the methodology section, laws can hardly encompass in an unambiguous manner the multitude of scenarios found in reality. It is also problematic that the distinction between the phenomena is legally forced. Indeed, it is hard to see why a smuggled individual should cease to be smuggled once exploited or a trafficked victim cease to be smuggled. One can also wonder how the already contested concept of transit migration can be helpful to have a better understanding of the complex grey area found at the nexus between debated notions like migrant smuggling and

human trafficking. This chapter does not aim at simplifying these concepts but to show their complexity, which reflects the messy situation on the ground empirically observed. Rather, the hope is that the findings presented will encourage and stimulate scholars and practitioners to take into account the particularly vulnerable positions of individuals stranded in transit spaces, also in an Intra-Schengen context where the absence of border checks and controls is assumed, and to question the strict categorization of individuals in one or another legal/administrative box. Indeed, if the blurry empirical reality of the grey zone highlighted above is overlooked, then it becomes easier to sort individuals into strict categories. This categorization can jeopardize the appropriate protection of migrants when looking deeper at the actual vulnerability, potential exploitation and abuse that individuals are facing in transit zones (see Brunovskis & Surtees 2019). The consequences of this legal sorting can be extremely severe: one person, if identified as a human trafficking victim and enter the protective anti-trafficking framework while another can be identified as a smuggled individual will not be offered the same protective measures. In the worst cases, the smuggled individual can be criminalized, even if a non-punishment clause exists in the UN Protocol against the Smuggling of Migrants. While the criminalization cannot take place for the mere fact of being smuggled, the criminalization can occur indirectly. This is for example the case if a migrant took part in smuggling operations and is not identified as a victim of human trafficking or if an individual in an irregular situation used a forged document (see FRA, 2014 on the criminalization of migrants in the EU).

Calling for a better understanding of the complex situation of individuals in transit within the EU is crucial, as it is a prime example of the grey area at the nexus between migrant smuggling and human trafficking. For this reason, it is argued here that the use of the concept 'transit migration', if precisely defined, can be considered useful and appropriate. Nonetheless, as Düvell (2012) advised, prudence is required when using the term 'transit migration', as the latter can easily be politicized and equated with issues of irregular migration and organized crime. This conflation is problematic, as the issue is located in a mixed migration context, meaning that individuals in transit are not only 'irregular' migrants but also refugees, asylum-seekers and potential victims of human trafficking. Besides, the use of 'transitmigrant/transmigrant' as a label can potentially dehumanize migrants and create further distance between 'us' and 'them' as the individuals are not there to settle. It would also offer governments the possibility of absolving themselves from any legal responsibility in terms of care and protection due to the temporary nature of the stay (Farcy & Deguin 2019; de Massol de Rebetz 2018). Hence, clarity is imperative when defining the term as is the specific context in which it is being used.

7 CONCLUSION

The Commissioner for Human Rights within the Council of Europe, Mijatovic (2019), recently addressed how individuals on the move are vulnerable to exploitation and human trafficking. She called into attention that this group of individuals could be located at the external borders of the EU but were also living, often irregularly, inside member states of the EU and the Council of Europe or moving from one member state to another. Mijatovic (2019) admonished the previous warning of the Group of Experts on Action against Trafficking in Human Beings regarding the lack of assistance devoted to migrants arriving or already established in Europe, making them ideal targets for human traffickers (see also Brunovskis & Surtees 2019). Furthermore, the Commissioner (2019) pointed out the conflict of interest between anti-trafficking and the recent anti-smuggling policies which, she underlined, are mostly aimed at preventing irregular migration. This recent call for the protection of vulnerable people on the move, both within Europe and at its periphery, accurately illustrates the interaction between transit migration, migrant smuggling, and human trafficking.

The goal of this chapter was to expose the grey areas created by the particular interplay of the concepts analysed, their application in practice, as well as their problematic aspects. The latter was done by collecting, combining, and analysing the critical scholarship on human trafficking and migrant smuggling and its nexus, as well as the recent empirical scholarship which sheds light on Intra-Schengen spaces of transit. Nevertheless, there is no intention to throw a stone at practitioners in charge of victim identification and protection, which is a complicated task for various reasons.[10] As cases of human trafficking and migrant smuggling are often hidden and convoluted, the investigation and collection of evidence is highly difficult, especially with individuals on the move.

Following the urgent call of Baird (2016b), it is certain that further empirically grounded and critical research on the nexus between human trafficking and migrant smuggling, also in the Intra-Schengen border mobility context, is of vital importance in order to have a better grasp of the situation on the ground. Empirical data about the 'law in action' on these hidden phenomena must be brought to the forefront in order to improve the 'law in the books'. Contrary to the pre-conceived and simplified idea of human trafficking and migrant smuggling being recognized in a strictly separate manner, the literature unveiled the existence of 'in-between' cases, which

10 Many factors prevent concrete identification. Among other things: lack of trust towards the authorities, fear of retaliation from the traffickers, the need to pay a former debt or to pay remittance to one's family, or victims who do not consider themselves as victim of human trafficking. For more information on the issues around victims' identification in a transit migratory context, see the recent work of Brunovskis and Surtees (2019).

seldom fit neatly into the prototypical legal categories due to the presence of signs of (short-term) exploitation, abuse, and the absence and presence of full or partial consent coexisting. Dauvergne (2008) adeptly described this legal predicament as 'law [which] specializes in drawing clear bright lines' (91). Based on the scarce but growing empirical findings highlighted in this chapter, it can be assumed that the aforementioned 'in-between'/grey areas are likely to become more and more troublesome within the Schengen Area.

As individuals increasingly get stranded in transit spaces, their aspiration to continue their journeys, either from one member state to another in the EU or to the United Kingdom, can bolster the demand for migrant smuggling services. Such smugglers can increase their travel fees, which can raise the (initial) debt of the migrants and can also funnel individuals towards more hazardous and hidden roads due to restrictive border regimes. The debt/facilitation dynamic explained in section 4 is likely to have an impact on subsequent (short-term) exploitation en route or in the country of destination. Nonetheless, the stereotypes around the 'ideal' victim of human trafficking creates an unreachable threshold which will prevent the individuals situated in this grey area to be considered as such. The vicious circle brought to light above, which pushes individuals on the move into vulnerable positions, is not solely the result of unscrupulous deeds of ill-intended individuals. Section 5 of the present analysis deconstructed the solutions brought forth to tackle migrant smuggling and human trafficking, which are often based on prototypical representation of extreme cases.

In their fight against migrant smuggling and human trafficking, nation states often fail to mention structural factors pressing people to migrate and elude discussing their own responsibility in these processes. Yet, as Andersson (2016), Kemp (2017) and van Liempt (2011) observed, human trafficking and migrant smuggling can also constitute side-effects of EU restrictive migration policies. What clearly emerged from the empirical and critical scholarship is the conflict of interest existing between prioritized anti-trafficking, anti-smuggling and anti-irregular migration policies. This conflict can have counterproductive consequences. In their battle for sovereignty, nation states decided to create a legal dichotomy which could, in theory, guide practitioners to sort the worthy and deserving (passive and innocent) victim from the guilty irregular migrant (Dauvergne 2008). While the international and European commitment to tackle human trafficking was generally applauded by scholars, the assumption that it was possible to fight it while preserving the full integrity of a nation's state border was questioned. As van der Leun and van Schijndel (2016) rightfully concluded, the relationship between the punitive approach adopted to fight against irregular migration and the protective approach adopted towards human trafficking should be re-examined rather than addressed as completely isolated battles. It becomes clear that rigid legal categories hardly fit the complex reality where the distinction between a 'deliberate' and 'incidental' exploited and/or abused victim can be considered

nonsensical (Carling, Gallagher & Horwoord 2015). This is the case in transit spaces where scholars brought to light the particular vulnerabilities of individuals in the move to exploitation, debt bondage, etc. The contradiction between these distinct yet linked policy agendas beg for the following reminder, also aimed at (EU) law and policymakers: one cannot keep on feeding the monsters they are pretending to fight while keeping the 'saviour' face to legitimise debatable policies.

4 Protecting Victims of Aggravated Forms of Migrant Smuggling

A Janus-Faced Response

1 Introduction

In response to the influx of migrants resulting from the so-called migration 'crisis' which began of 2015, many countries in the Schengen Area have amped up their border checks by introducing a range of bordering practices (van der Woude 2020). These formal and informal bordering practices have an impact on intra-Schengen secondary migration movements. The bordering practices within the Schengen Area and their consequences, notably on what is referred to as transit migration, have so far received limited scholarly attention (Barbero 2020, see also Introduction). Whereas the concept of transit migration and the notion of being stranded, as experienced by migrants, is mostly used in the context of describing how *external* borders are 'blocking their [migrants, MW] onwards movements' (Schapendonk 2012: 580), this chapter uses the concept to illuminate the blocking effects of *internal* border checks between Schengen states (e.g., van der Woude 2020) and governmental practices policing migrants (e.g., Tazzioli 2020a; Edmond-Pettit 2018b). The increased monitoring and management of mobility turns different zones within the Schengen Area into de facto 'transit zones' where irregular migrants, on their way to their desired destination countries, are stranded in limbo or 'stuck in motion' for a varying period during their journey. Numerous examples of these intra-Schengen transit zones can be found in the North of France, in Belgium, as mentioned above, and in border zones between France, Spain, Italy and Switzerland (Tazzioli 2020a; Schapendonk 2018; Myria 2020). The vulnerable conditions of stuck/stranded individuals on the move have been reported by scholarship focusing on transit migration which, in this chapter, is to be understood as a 'phase of experienced immobility in process of movement in a specific migratory direction' (Schapendonk 2012: 579). Scholars have linked this experienced immobility to an increase of vulnerability. Indeed, once stranded or forced to move, migrants are more likely to turn to migrant smuggling networks, to take more dangerous paths, to increase their debts to reach their destination, and to end up in exploitative situations (O'Connell Davidson 2013; Kemp 2017; Bridgen & Mainwaring 2016).

Due to its geographical position, its sea connection with the UK and its dense road network reaching out to different international borders, Belgium has historically been known to be attractive for irregular border crossings (Derluyn & Broekart 2005; Melis &Van Gelder 2017). The increase migratory

pressure on the EU since 2015 has led to a rise of secondary migration movements and gatherings of new migratory groups in the Belgian territory, particularly since the dismantling of the Jungle of Calais by the French authorities in 2016 (see Myria 2020). As a result, Brussels has been described as a 'migrant smuggling hub' (e.g., Leman & Janssens 2015). The neighbourhood of the Brussels North Station and the Maximilian Park have become gathering places for many individuals in transit who are awaiting an opportunity to reach the UK (Lafaut & Coene 2019; Myria 2020). Consequently, migrant smuggling and issues surrounding transit migration have received substantial media and governmental attention (e.g., Framework Note on Integrated Security 2016-2019). Already in 2015, a *'transit migration'* taskforce was created, and the phenomenon became a federal priority in 2018 with the establishment of a transit migration plan (Belgian House of Representatives 2018). These actions can be seen as response to growing political concerns on the emergence of new camps in Belgium and the role of the capital of Europe as a 'pit stop' or 'mini-Calais' used by migrants to reach the UK (Vandevoordt 2021).

As discussed in the Introduction, the (controversial) neologism 'transmigrant/transitmigrant' does not refer to a formal legal category and was created to make a distinction between the migrants who wish to establish themselves permanently in Belgium and those who are only passing through the territory to reach the UK. As many scholars have shown, in reality, migrant smuggling and human trafficking are not always easily distinguishable (e.g., Dandurand & Jahn 2020; Brunovskis & Surtees 2019; Baird 2016; van Liempt 2011; O'Connell Davidson 2013). While complying with the most important European Union and Council of Europe normative frameworks adopted to deal with human trafficking and migrant smuggling and the established dichotomy between the two crimes since the adoption of the United Nation Convention against Organized Crime (UNTOC) and its two additional protocols (Palermo Protocols) in 2000,[1] the Belgian legislation has gone further to protect victims of human smuggling by introducing the *'third-way approach'*.[2] When 'aggravated forms' of migrant smuggling can be proven, victims of migrant smuggling have access to the protective legal status that is usually strictly reserved for human trafficking victims. However, based on the numbers provided by the Belgian National Rapporteur for human trafficking and migrant smuggling (Myria 2018; 2019), very few victims of aggravated forms of migrant smuggling seem to end up with this protective status. In 2017 and 2018, only 19 victims were registered in the procedure while 476 and 535 migrant smuggling cases entered the public prosecution office in 2017 and

1 See Directive 2011/36/EU; Directive 2004/81/EC; Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005); Directive 2002/90/EC; Framework Decision 2002/946/JHA, see also Chapter 2.

2 The authors chose the term 'third-way' because the Belgian model proposes an alternative between two crimes that are considered completely distinct in international legislations.

2018 (Myria 2018; 2019). For the years 2019 and 2020, a drastic decrease was be reported. Among the 531 cases entering the public prosecutor office in 2019 and the 353 cases registered in 2020, 8 victims initiated the procedure in 2019 and only 5 were reported in 2020. As the National Rapporteur underlined, this was the lowest number of victims initiating the procedure since 2010 (see Myria 2021).

The observation on the low numbers of victims of aggravated forms of smuggling entering the procedure shows how the law in the books – the third-way approach – in practice does not seem to have the intended effect. Henceforth, a closer analysis is required. As Schrooten (2018) noted, with (trans)migration issues becoming more complex and covering many more places than a straightforward path from a country-of-origin A to a destination country B, it is important to get a better grasp of why and how this shortcoming in victim protection is taking place. By drawing on a combination of (legal) document analysis and semi-structured expert interviews with respondents responsible for the implementation and enforcement of the third-way approach (see section 4), this chapter aims to answer the third sub-question of the dissertation: *how does the unique legal framework developed by the Belgian legislature to deal with aggravated forms of migrant smuggling operate in practice*. In addition, the chapter also offers a critical examination of the growing presence of human rights and humanitarian ideals in border policing by addressing the challenges of policing humanitarian borderlands. The term 'humanitarian borderlands' refers to highly conflicting environments, where the objectives of protecting state security clash with the needs of vulnerable groups in precarious life situations (also see Franko & Gundhus 2015).

2 Policing Humanitarian Borderlands

Scholars working on migration and border control have increasingly been able to shed light on the complex workings of the migration control apparatus and the actors within it. In particular, the decisions of frontline agents as quintessential street-level bureaucrats have received scholarly attention demonstrating how immigration bureaucrats create de facto policies through their discretionary decision-making (Calavita 1992; Heyman 2009). Yet, as noted by Vega (2018), although this more traditional gap study approach that focuses strongly on the question of *how* state agents wield their discretionary power has led to important insights on, for instance, the growing merger of crime control and migration control, it risks obscuring the 'moral economy' of these bureaucrats' work lives. Although state agents indeed play a lead role in 'translating' immigration laws and policies into practice, it is crucial to keep sight of the fact that their 'performances occur largely behind the closed doors of guarded government bureaucracies' (Vega 2018: 2546) and that their decisions are shaped by the 'moral economy' (Fassin 2005) of their work lives. In other

words, in understanding actions and perceptions of (frontline) state agents, it is important to take into consideration the economy of the normative values and ideals of this particular group. This call to look beyond street-level agents to better understand the complex variety of factors and actors that influence their decision-making process resonates with the call for what van der Woude (2016), following Hawkins (1992), has named a more 'holistic approach' towards understanding (discretionary) decision-making practices by street-level state agents.

Focusing on the French case, Fassin (2005) uses the notion of moral economy to unpack the tension between what he calls 'discourses and practices of compassion and repression' in the policies of immigration control. This tension in policies surrounding migration matters between security and humanitarianism already highlighted by Fassin (2005), notably to discuss the 'drama of Sangatte' at the French-UK border in 2002 still resonates with more recent scholarship. This 'paradigmatic tension' (Fassin 2005: 365) is also acknowledged by Aas and Gundhus (2015), who observe two distinct developments in European security policy and practice: on the one hand, they note an intensification of migration and border control as well as a securitization of migration and on the other, they also see how human rights and humanitarianism within international and domestic governance are given more prominence (Van Zyl Smith & Snacken 2009). While researching how this tension influences the way Frontex officials perceive and implement their duties, the authors (2015) observe how – through the actions and perceptions of state agents – migrants are used as objects of a 'minimalist biopolitics' (Walters 2011), which they understand as a form of political reasoning that 'employs the language of humanity and humanitarian assistance and usually characterizes the activities of national and international humanitarian actors as well as aspects of policing and migration control' (Aas & Gundhus 2015: 12). Although not seen as subjects worthy of state's full protection, migrants are nevertheless seen as deserving compassion and humanitarianism. This language of compassion is not free of, nor outside of, politics according to Fassin (2011). He argues that the politics of compassion or humanitarianism is a salient mode of governance that concerns populations in situations of precariousness. And, when there are politics at play, there is at least reason for some healthy scepticism as to what is driving this shift towards a more humanitarian approach and who is to gain from such a shift. Bosworth (2017) speaks of the development of 'penal humanitarianism' with which she refers to the way in which human rights talk and humanitarianism can also be used, at the same time, to justify and legitimize an increase in the state's penal power. While being careful of dismissing humanitarian sensibilities as fraudulent rhetoric for a will to power, it is important to critically reflect upon it in the light of the Janus-face quality that has been attributed to various Western-European nations as self-proclaimed 'human rights champions' (see Franko, van der Woude & Barker 2018). The third-way approach is meant to offer a stronger level of protection to victims

of migrant smuggling and can therewith be seen as a more humanitarian approach. This makes it interesting to see how key actors working in the criminal justice system and the migration control apparatus (broadly understood) perceive the approach and its practical application.

3 Methodology

This research follows a single case study research design, with the Belgian third-way approach as its core. As developed in the Introduction, this chapter is primarily based on semi-structured expert interviews supplemented by various bureaucratic (legal) documents, academic literature, and investigative journalist pieces. The data was supplemented by scholarly articles, NGO reports and newspaper articles to obtain the most multi-faceted results. In line with the multidisciplinary and integrated Belgian approach (see GRETA 2013), the sample of interviewees reflects the fragmented Belgian institutional landscape as much as possible. In the Introduction, information on the amount, length, and process of the conduction of the expert interviews was provided. Nonetheless, the selection of the organizations together with the position of the respondents within these organization needs to be further elaborated upon.

3.1 Mirroring the fragmented Belgian institutional framework: respondent's selection

The usefulness of conducting expert interviews is notably due to the experts' professional, technical, institutional/organizational, and interpretive knowledge acquired during the course of their careers (Bogner, Littig and Wenz 2018, see also Introduction). These distinct criteria also refine what is to be understood by 'experts' knowledge' and they were subsequently used to select the expert respondents to be interviewed. As explained in the Introduction of the dissertation and considering the multi-disciplinary approach in place to deal with migrant smuggling and human trafficking in Belgium (see Chapter 1), the selection of respondents did not follow a haphazard process. Whereas more information on the organization of the police will be provided in the following chapter (5), notably in light of the division between judiciary and administrative police tasks and the important role of the mayor as the head of the administrative police at the local level, general information on the structure of the judiciary and the police in Belgium are required to provide the reader with an overview of the complex institutional landscape. Relevant background and technical information not available in official documents and in the scholarship obtained through an interview with one specialized prosecutor are also mobilized in this sub-section.

3.1.1 The Belgian Judiciary System and the Role of Specialized Prosecutors

The Belgian judiciary system operates a division between two types of magistrates. The 'sitting magistrature' is composed of (regular) judges and the 'standing magistrature' refers to the Public Prosecutor Office (hereinafter PPO). The main mission of the PPO is to defend the public interest and to supervise the observance of the public order. In criminal matters such as migrant smuggling and human trafficking, public prosecutors have the duty to investigate, prosecute, punish and enforce the sentences (De Leval & Georges 2019). Two types of PPOs can be found in Belgium: the ones competent for general criminal law (*Parquets du Procureur du Roi*) and the Labour Prosecution Office (*Auditorat du travail*), which is competent for social and labour criminal law. This distinction is relevant as many of the cases of human trafficking for the purpose of economic exploitation are handled by the Labour Prosecution Office.

The Belgian judiciary is organized on the basis of territoriality (Sägesser 2016). There are five main judiciary zones having each a Court of Appeal (Liège, Mons, Gent, Antwerp and Brussels). Each General PPO within the five judiciary zones are trusted with their own specific theme/topic. The human trafficking task was given to the General Prosecutor of Liège who set up an Expert Network in human trafficking and migrant smuggling that is presided by one of its General Advocates (GRETA 2013). Furthermore, a College (Bench) of General Prosecutors decides on the coherent implementation of the criminal policy determined by the Minister of Justice. The Bench of General Prosecutor (and the Minister of Justice) is assisted by the Crime Policy Department of the Federal Public Department of Justice when it comes to elaborate criminal policy on human trafficking and migrant smuggling (see GRETA 2013, 2017).

The five main judiciary zones are then sub-divided into twelve judiciary districts. The judiciary districts have been reduced from 27 to 12 since the reform of the judicial landscape that took place in 2014 and are now functioning for larger territorial zones (for more information on the judiciary reform following the infamous Dutroux case, see Hondegem & Broucker 2016). In each judiciary district, there is a PPO of the King's Prosecutor competent for general criminal law and a Labour Prosecutor Office competent for Social Criminal Law (Cartuyvels 2004; Van den Daele & Vangeebergen 2009). Within each of the 12 PPOs, there are specialized magistrates competent to *direct* and monitor the investigation for human trafficking and/or migrant smuggling cases in their respective districts (GRETA 2013). In the larger districts, two specialised prosecutors can be found: one for human trafficking, one for migrant smuggling. However, in smaller districts, the same reference magistrate can be competent for both (Interview Prosecutor 2). Considering the multi-disciplinary approach chosen, which involves numerous state and non-state actors (see Chapter 2), specialised prosecutors also act as liaison magistrates with other relevant actors such as the Foreigner's Office, other

specialized magistrates, the police, NGOs, etc. (see website of the National Rapporteur). Importantly, specialized prosecutors follow a continuous training (mandatory) that includes a specific training day organized by the Expert Network on human trafficking and migrant smuggling (GRETA 2013 and Prosecutor 2). Half of the yearly trainings are organised for the specialised prosecutors; the other half is reserved for the non-specialized magistrates from the PPO. In comparison, sitting judges do not have mandatory continuous training on these matters, which according to Prosecutor 2 can sometimes be problematic (see also Section 6 on training and sensibilisation). The respondent signalled that when sitting judges are invited to trainings, (e.g., instructive judges, juvenile judges who can deal with migrant smuggling or human trafficking cases), they are not making the effort to attend and henceforth, are not up to date on the new case law, modus operandi, etc. Nevertheless, Prosecutor 2 explained that there are also sitting judges that are generally (and personally) interested and well-informed who issue particularly well-reasoned judgments (confirmed by Prosecutor 4).

Finally, the Federal PPO is also competent for prosecuting human trafficking and migrant smuggling cases for the entire Belgian territory. Its competence is nonetheless subsidiary, meaning that federal prosecutors will only exercise it when there is 'an added-value for the administration of justice' (Clesse 2013: 89). The Federal PPO faced the criticism of not willing to be involved in cases of smuggling and trafficking. Answering this criticism, the Federal PPO stated that the presence of specialized prosecutors in the different PPOs in the country with a specific expertise to handle these cases explained this lack of involvement (see Clesse 2013). Mission wise, the Federal PPO plays an important role at the international level in coordinating international cooperation and at the national level in facilitating the circulation and exchange of information between the different PPOs, the police services and the instructive judges (Clesse, 2013; GRETA 2013).

These institutional developments are important to underline as they can help make clear the analysis presented in this Chapter. Lengthy semi-structured interviews were conducted with four specialized magistrates having substantial expertise and experience in both migrant smuggling and human trafficking. The magistrates came from distinct PPOs in the country, both French speaking and Flemish speaking. The selection also included a former specialized magistrate acting at the district level who had experience conducting international investigations (e.g., Joint Investigation Team involving Europol) and who subsequently became the federal prosecutor in charge of these matters. Moreover, the three other specialized magistrates also had additional strings to their bows considering, among other things, the role they play on the international scene (member of the GRETA), the location of their judiciary district which are particularly impacted by migrant smuggling phenomenon or their double academic/practitioner hats.

3.1.2 *Foreword on the Police Organization in Belgium*

Besides specialized prosecutors, respondents from the Belgian police (both local and federal) were also interviewed. As will be further developed in Chapter 5 (section 4.3 Actors), the Belgian police has been an integrated police service since 1998,[3] structured at two levels: the local level and the federal level (de Valkeneer 2016). Both levels work on the basis of complementarity, however, they have different missions. The federal police have specialized tasks, which include migrant smuggling and acts on the basis of the principle of subsidiarity and specialty. The federal police have both administrative and judiciary tasks in specialized areas and is competent with regard to phenomena that exceed the local level. The main missions of the local police encompass core policing missions having both an administrative and judiciary nature (e.g., local investigation, public order, road safety). The local police are considered to be the eyes and ears on the ground, responsible for first line detections (Demeester 2015). As de Valkeneer (2016) mentioned, there is in fact no strict partition when it comes to these missions. Hence, regarding migrant smuggling, both the local and the federal police can be competent, even if the latter falls *a priori* under the specialized competence of the federal police. The role and expertise of the police respondents interviewed are further specified in the following sections (e.g., head investigator of the federal police on migrant smuggling). Lastly, for the other respondents interviewed (Minister of Justice, Foreigner's Office, Director of one of the three Reception Centres for Victims, Investigative journalist), more information can be found in methodology section in the Introduction chapter.

3.2 Analysis

The interviews lasted between 105-180 minutes and were audio recorded, transcribed, and subsequently coded with the coding software *Atlas.ti*. Interviews were carried out in French, Dutch and English or a combination thereof (see Introduction). The quotes singled out in the chapter were translated to English by the authors (one is a Dutch native speaker) when they were not originally expressed in that language. As outlined in the Introduction of the dissertation, the interviews had a broad focus and were aimed at gaining understanding as to how state actors in Belgium concretely deal with and perceive migrant smuggling, human trafficking and their intersection. The data gathered was analysed and approached both deductively and inductively. The first round of the coding process involved descriptive codes and was particularly useful to have a general overview of the dataset. Subsequently,

3 For an exhaustive historical perspective on the Belgian police system, see Campion 2021; Vandenhoute 2000; De Valkeneer 2012 & 2016; Van Outrive 2005.

both grounded theory and flexible coding methodologies were used (Glaser & Strauss 1987; Deterding & Waters 2021). A list of general themes (refined from the descriptive coding), which emerged organically from the data were created during second round of the coding process. Whereas several themes were expected such as 'institutional collaboration', 'evidence gathering', 'training', 'violence', others developed unexpectedly such as 'judiciary vs. administrative missions', 'capacity shortage', 'transmigrant', 'passing the buck/hot potato'. The desk research conducted prior the coding process allowed for a list of analytical codes (e.g., 'discretion', 'compassion') to develop, which were mobilized during the third coding process. Lastly, the analytical tools available with Atlas.ti and particularly 'Query Tool', which allowed for the retrieval of quotations from the dataset with the use of the distinct codes (and combination of codes), were used to interpret the comprehensive set of data gathered.

4 Dealing with Migrant Smuggling in Belgium – A Brief Reminder

4.1 Migrant smuggling and human trafficking as distinct crimes

As explained in Chapter 1, following the adoption and subsequently the implementation of international and European legal instruments, human trafficking and migrant smuggling have been considered distinct offences in Belgian law since 2005. The offence of human trafficking is enshrined in the criminal code (art. 433*quinquies*) and the migrant smuggling offence can be found in the Law of 15 December 1980 concerning the access to the territory, stay, settlement and removal of foreigners (art. 77*bis* et seq.). Migrant smuggling can be defined as '*the act of facilitating, in some way or another, be it directly or by an intermediary, the unauthorized entry, transit, or stay of a non-EU citizen into or through an EU member state, in violation of state law, directly or indirectly, for financial gain*'. The legal dichotomy is based on the presence/absence of exploitation, the necessary crossing of a border for migrant smuggling, the legal interest protected by the offences, namely the protection of the integrity of the national borders for migrant smuggling and the protection of human dignity for human trafficking, and indirectly the presence of consent in migrant smuggling cases. Nonetheless, Belgian scholars (e.g., Derluyn & Broekaert 2005), practitioners (e.g., Algoet 2018) as well as policy makers (National Action Plan against Human Smuggling 2015-2019) report on the complex intertwinement of and 'cause and effect' relationship between the phenomena in practice. The Correctional Tribunal of Louvain (12 May 2015) considered the boundary between the phenomena '*so thin that one can turn into the other once the freedom of action of the victim* [of migrant smuggling, MW] *is put in peril*'.

4.2 Acknowledging and harmonizing aggravated circumstances

The Law of 10 August 2005 reforming the legal frameworks on both human trafficking and migrant smuggling harmonized the aggravating circumstances for both crimes. According to the legislature, consistency had to be maintained regarding the dramatic consequences of these crimes (Huberts 2006). The aggravating circumstances can allow the victim the possibility to be granted a protective status, which is usually exclusively reserved for victims of human trafficking. The status and the procedure for its allocation is thoroughly described in the Circular as putting in place multi-disciplinary cooperation regarding the victims of human trafficking and aggravated forms of migrant smuggling (COL 5/2017, see also Chapter 1). It is important to highlight that each actor (e.g., reception centres for victims, prosecutors, local and federal police, labour inspectorate, Foreigners' Office) has a specific role in the procedure. The reference magistrate in human trafficking and/or migrant smuggling (see section 3) has a monopoly on the formal decision to give the provisory status to the victim, which also explains the importance of gathering their perspective on these phenomena. Following Directive 2004/81/EC, a reflection period of 45 days and a first temporary then permanent residence permit, under several conditions, can be granted to the victim. Regarding the conditions, the provisory status can only be granted if investigation/judicial proceedings are ongoing (determined by the prosecutor). The (presumed) victims are required to a) collaborate with the authorities by making relevant declarations, b) cut ties with the presumed perpetrators, and c) be accompanied by one of the three reception centres for victims (for the full list see COL 5/2017 or GRETA 2013). If the victim's declaration leads to a conviction of the perpetrator or if the prosecutor chooses to push charges based on aggravated forms of migrant smuggling, the victim can obtain a permanent residence permit (GRETA 2013, 2017).

The complete list of aggravating circumstances can be found in article 77*quater* of the Law of 15 December 1980. Of particular relevance for this chapter are the following: 1) the smuggling offence being committed by abusing the vulnerability of an individual resulting from their irregular or precarious administrative or social situation, 2) state of pregnancy, illness or physical/mental impairment in a way that the individual has no real and acceptable alternative but to submit him/herself to the abuse; 3) the direct or indirect use of fraud, violence, threats or any form of coercion as well as abduction, deception and abuse of power; 4) the endangerment of the victim's life (deliberately or through gross negligence) and an incurable illness/work disability resulting from the offence. While many forms of violence or threats do not call for clarifications, it is important to note that debt bondage is considered to be a form of coercion (Clesse 2013). Moreover, placing individuals in refrigerated trucks or overheated ones without water is considered by the jurisprudence as gross negligence which endangers the lives of these

individuals (see the case law highlighted in Clesse (2013)). Based on these clarifications, it can be concluded that the situation of migrants in transit found in lorries or in parking areas are most likely to fall within the 'aggravated' migrant smuggling category. Nevertheless, as mentioned in the introduction, few of these victims use the protection mechanism in place (Myria 2018; 2019). While Belgium is often mentioned in scholarship for its well-integrated multi-disciplinary approach against human trafficking (GRETA 2013, 2017), the Belgian approach to deal with aggravated forms of smuggling is relatively unknown (Boels & Ponsaers 2011; Clesse 2013)

5 The Third-Way Approach Through the Eyes of State Agents

5.1 The legal reality of the third-way approach

As the third-way approach was introduced partly also to acknowledge the interwovenness of human trafficking and human smuggling, and thus to acknowledge that both phenomena in practice might not be as easily distinguishable as suggested by the seemingly clear-cut legal categories, we first asked respondents how they perceived this dichotomy. Interestingly, the majority of the respondents considered the legal dichotomy between human trafficking and migrant smuggling to be evident. In their answer, most respondents referred in a very legalistic manner to the distinctive elements highlighted in section 4.1, such as the presence of consent and the absence of the exploitation dimension in migrant smuggling cases. Prosecutor 2 was concerned about the implications of letting go of this legal distinction, even if this distinction does not reflect the messiness of reality: '*If you start mixing them, you're facing the risk to have acquittals, as you have two totally distinct criminal offences'*. They continue by explaining that this would also concern cases of migrants being exploited in the Maximilian Parc because '*the people who pick up undocumented individuals there and exploit them, for them it's solely human trafficking, it's not smuggling. And then I cannot prosecute my smuggler* [referring to the vignette presented to the respondent where the smuggler is the defendant, RM], *for human trafficking because he has no idea of what's going on site'* [in the Maximilian Parc, RM].

Nonetheless, while acknowledging and supporting the legal categorization of migrant smuggling and human trafficking, the majority of respondents also recognized the potential continuum as well as the intrinsic link existing between the two phenomena, notably when it came to debt-bondage and vulnerability (see O'Connell Davidson 2013). As two attachés of the Ministry of Justice state,

> *'For us the legal dichotomy is clear, but among the smuggled individuals, you can find elements of human trafficking that happened. (…) And there are many smuggled individuals*

> *who take on debts to come to Europe. In fact, the situation of smuggling creates a situation of vulnerability. There is already a situation of vulnerability from the start, but it is accentuated by the smuggling or by the fact that they paid dearly their journey and then have to reimburse the debt. (…) So, you have victims that once they arrived, because of the fact that they were placed in a situation of vulnerability or due to their irregular situation, can be more easily recruited by people who will exploit that vulnerability*'.

Regarding the secondary migration movements within the Schengen Area, Prosecutor 1 called specific attention to the notion of vulnerability by explaining that authorities

> '*will have to be attentive to human trafficking, because, in my opinion, there are going to be a lot of people wandering in Europe because we're seeing these secondary movements (…) and these people could be victims of human trafficking as they don't have anything and they are extremely vulnerable*'.

Prosecutor 1 also raised a pragmatic issue when tackling a case linking both phenomena in which individuals were stuck and exploited in Belgium not knowing if they had to 'wait' for weeks/days/months to reach their desired destination country. The difficulty of finding the evidence to prosecute on both accounts was signalled. The magistrate identified these situations as challenges that prosecutors will have to face in the coming years with the millions of people who moved towards Europe since 2015 and were severely exploited along the way. Due to rules of jurisdiction, even if they can be considered as human trafficking victims, when they are in Belgium, authorities can only focus on the migrant smuggling dimension as the migrants were not exploited in the Belgian territory and/or by Belgian nationals. Therefore, instead of being seen as potential victims requiring enhanced protection, they will most likely be treated as migrants in irregular stay in the territory that need to be returned.

Relating to evidence issues, the Director of one of three reception centres for victims also referred to the situation of '*transmigrants*' exploited '*temporarily*' by being picked up in the Maximilian Park. While the Director said that they 'could be' considered as victims of human trafficking, the respondent also stated that it is difficult to really call it trafficking due to the short-lasting duration of the exploitation, which is at odds with the human trafficking business model based on the long-lasting exploitation of an individual. Pragmatically, and reflecting on the possibility of securing a conviction for human trafficking with the evidence requirements, the Director explained that for cases of short-term exploitation *'you'll never get that convicted … because you need to prove that it happened for starter*'. Yet, when looking at article 433*quinquies* of the Criminal Code criminalizing human trafficking, no mention of temporality can be found. Pragmatic arguments were also raised by several respondents regarding the challenge of gathering evidence. The NGO Director explained bluntly that even if you have individuals who are completely abusing the vulnerable situation of those who want to reach the UK, the migrant exploited

in a temporary manner will never admit the fact that he was trafficked, as he received 20 euros for a day of work instead of nothing.

In answering the questions about the potential links between two phenomena, several respondents spontaneously mentioned the existence of the protection for victims of aggravated forms of migrant smuggling. They see the protective framework as a mitigator of the strict legal dichotomy established between the phenomena. When asked to reflect on the term 'aggravating circumstances' and if he could find them in the specific context of migrants in transit, a Federal Police lead Investigator in the migrant smuggling field responded: '*the aggravated circumstances, I have them immediately*'. Basing his argument on the law and the jurisprudence developed on the abuse of a situation of vulnerability, he stated, '*the fact that he is staying in the country illegally is an aggravating circumstance as far as I'm concerned*'. Regarding evidence of the abuse, the latter is '*easily proven. (…) If someone is smuggled, he is abused because he pays way too much for what he gets*'. Confirming the development of the scholarship and the jurisprudence highlighted in section 2.2, Prosecutor 4 went even further:

> *'If you illegally transport a person to England, it is automatically someone who is in a vulnerable situation. I don't know a single person in an illegal situation who isn't in a vulnerable state. So automatically you have the aggravating circumstance of vulnerability'.*

This last quote illustrates how, in theory, the legal threshold to be considered as a potential victim of aggravated forms of migrant smuggling is not unreachable. Besides, it also shows that in practice, this third-way approach could indeed be seen and used as a mitigator for the strict dichotomy in place between migrant smuggling and human trafficking. Yet, as the following sections illustrate, when asked about the application of the third-way approach in practice, in particular the extent to which victims of smuggling are better protected under this approach, the respondents seem to be less able to paint a clear picture.

5.2 The third-way approach in practice

When asked about victims' protection, all respondents pinpointed that '*the system is not working*' (Prosecutor 2). By looking at the numbers, one of the respondents noticed that the '*in-between status for victims of migrant smuggling is never used in practice*' (Federal Police Investigator 1). Different reasons were highlighted to explain this. All respondents mentioned that the victims of aggravated forms of migrant smuggling do not wish to settle in Belgium and want to reach the UK at all costs. As expressed by Prosecutor 1, '*When you already came 3000 km through the desert, it is not the last 500, 1000 or 30 km that will make you change your mind, even if we explain them that in Belgium, they will*

have rights and papers'. In her Master thesis focusing on the protective status and basing herself on 9 in-depth interviews with relevant actors coming from similar organisations (with the inclusion of the Navigation Federal Police), Bracke (2021) similarly outlines how respondents underline this clear lack of interest on behalf of migrants. The UK being seen as an El Dorado has often been mentioned as a pull factor for migrants. The common points that are often identified as attractive are the following: the presence of large migrant communities which facilitate blending in, the language, the absence of identification requirements, the presence of an important shadow economy and the rumours that the British do not apply the Dublin III Regulation (Foreigner's Office respondents 1 and 2, Prosecutor 1 and 4 – see also the report of Myria 2020 comparing Belgian and British legislations). After all, '*the English themselves say, our country is the best country to disappear*' (Prosecutor 1). It is worth mentioning that frustration was expressed about the lack of action undertaken by the UK to counter the erroneous information on the non-application of the Dublin regulation in their country to the irregular migrants staying or passing through Belgium: '*they say that's your problem, we have our problems*' (Prosecutor 4). Whereas these perceptions were gathered between 2018 and 2019, the recent and increasing perilous border crossing by boat of the English Channel leading to dramatic consequences for migrants and the reaction of French and British authorities pointing fingers at each other on who is to blame for these incidents highlight similar dynamics (The Guardian November 2021).

Furthermore, the Dublin III Regulation is identified as a major factor guiding victims' decision to not enter the protective procedure offered through the third-way approach due to the '*fear to be sent back to Italy if they start the procedure in Belgium*' (Foreigner's Office Respondent 3). The same respondent mentioned that because the goal of irregular migrants is not to stay in Belgium, he believes that '*the threshold is too high to enter the procedure*'. With this, he refers to the conditions that need to be met to start the procedure and to receive the status. All of this is too demanding in light of the needs and desires of the migrants. Indeed, several magistrates confirmed that '*the help* [the protective status, RM] *is not materially possible*' as the '*victims will have to install themselves in a reception center, they will have to collaborate* (with relevant declarations), *they will have to cut all the links with their smugglers*' (Prosecutor 2). In other words, there is much to lose, whereas it might not be clear for migrants what there is to gain. Another Prosecutor (3) explained the '*reluctance*' of victims to turn against their smuggler to enter the procedure as '*they only want one thing: to start again*', and thus they do not want to burn any bridges with their one connection to 'El Dorado'. The lack of interest to incriminate their smuggler can also be explained by two other reasons: the fear that migrants have for either their own or their family's lives and a change in the financial modus operandi of migrant smuggling in the last years. Prosecutor 1 explains that, in some cases, migrants make a deposit somewhere and it is only once they have arrived at their desired destination country that the money is libera-

ted, which explains the lack of incentive to denounce their smuggler *en route*. The attachés from the Ministry of Justice also mentioned the trust existing between the smugglers and the migrants, which explains why police officers can '*face a brick wall*' when trying to convince the migrants to start the procedure.

Regarding collaboration with the authorities, any information, however small (e.g., the place where they met their smuggler), can be considered sufficient for police officers to fulfil the 'relevant declarations' requirement (Federal Police Investigator 1) that, as explained in section 4, is necessary to show that a migrant is ready to break ties with the smuggler/smuggling organization and thus sufficient to trigger the third-way approach. However, migrants are not easily convinced to do so. According to the respondent, in comparison with victims of human trafficking, because they are staying in the territory, migrant smuggling victims are only passing through, so he '*only has one or two chances to persuade them*'. This persuasion is not easy as the person has to want it, and the respondents of the Foreigner's Office (2 and 3) mention that even when you bring interpreters into the mix, '*they're simply not open to it*'. As framed by the Director of the NGO, '*victims don't want to enter the status because then they appear on the grid, and they do not want to be on the grid*'. In short, as explained by Prosecutor 4, '*we have nothing to offer to these people*', which can be interpreted as him being conscious of the limitations of the protective status in practice. Prosecutor 4 explained that when they are asking migrants '*to leave the territory*', migrants sometimes reply in a humoristic manner: '*we would love to leave the territory, but preferably at the North Seaside*'.

Based on these insights, it is important to critically reflect on the fact that respondents, when explaining why the protective status is scarcely granted, are mostly pointing at migrants' lack of interest in entering the procedure. One can question the extent to which this is a fair depiction of the reality. While several other reasons touching upon the complexity of the institutional framework, organizational culture and capacity issues will be further developed in section 6, the lack of information or the inadequacy of information received by migrants must also be underlined as potential factors to consider to explain the ineffectiveness of the third-way approach. The information issue was signalled by the investigative journalist and further confirmed by the project manager of the citizen organization 'BXLRefugee'. In addition, the Permanent Oversight Committee of the Police Service also launched an official investigation on police control and detention of 'transmigrants' taking place during large-scale administrative arrest operations (often in parking areas along highways). The report showed that during these operations, the police forces took *little to no account* of the guidelines (of criminal policy) on human trafficking, migrant smuggling as well as the protective status reserved for victims of trafficking and aggravated forms of smuggling (Comité P 2019). The conclusion of the report of the Comité P also resonates with the findings of Bracke (2021) on the lack of information sharing on the status, notably highlighting

that the multilanguage information leaflet was not adequately distributed. Of particular interest, Bracke (2021) additionally pinpointed a lack of uniform application of the protective procedure (COL 5/2017) by frontline actors. Bracke (2021) outlined how in some events, front line actors misinterpret the procedure and apply an additional requirement which is not found in the prosecutorial circular (COL 5/2017): a debriefing/interrogation of the migrants, which involved, most notably questions about the routes taken and the suspects involved in order to identify indicators of migrant smuggling victimisation. Consequently, the status which in theory could be offered to many migrants in transit, will only be considered for a few migrants selected as a result of this debriefing/interrogation (Bracke 2021). Nonetheless, as often recalled by all the specialised magistrates interviewed (prosecutor 1 to 4), the eligibility of the victims to be offered the reflection period which leads to the protective status is not dependent on any interrogation but on the mere observation of predetermined indicators found in the confidential prosecutorial circular (see Bracke 2021 for further information on this additional step in the selection process).

6 A More Complex Answer: Institutional Forces and Dynamics at Play

The ineffectiveness in practice of the third-way approach cannot only be explained by the reasons highlighted above. Respondents drew attention to the fact that dealing with migrant smuggling and the protection of its victims intersects with other 'fights' the state is facing: the fight against irregular migration, against human trafficking and the maintenance of national security and public order, which involves a multitude of actors with distinct (political) agendas that can clash at times. Moreover, issues of police capacity and training/sensibilization, national and international institutional collaboration as well as victims' information were mentioned by the respondents as important challenges which prevent finding structural solutions to deal with the complex phenomenon. These factors will be further unpacked in this section.

6.1 Overlapping and clashing competences

The complexities caused by overlapping competences and related responsibilities of distinct actors can best be illustrated by taking a closer look at the situation of the migrants gathered in Maximilian Park and the nearby Brussels North train station, waiting to go to highway rest areas in the Belgian territory to try their luck at reaching the UK. In a nutshell, on the federal level, the government is responsible for migration and asylum policy. The Foreigner's Office is responsible for the entry and stay of foreigners whereas Fedasil is

the federal agency responsible for the applications for international protection. Lastly, the federal police (judiciary branch, the railway police, and the road police) is responsible for different tasks such as dismantling of smuggling networks, the safety and security of the station and the railway clients and road safety on the highways. At the local level, the Brussels North zone is under the authority of two local police districts of Brussels. Local police officers are responsible for maintaining security and public order on the local level, but they can also participate in migration checks coordinated by the federal police and the Foreigner's Office. Lastly, various NGOs are active in Maximilian Park to provide humanitarian assistance and care to irregular migrants (see, for instance, Plateforme Citoyenne/BXLRefugee). If migrants are moving along Belgian highways, other local police districts, judiciary federal police units and political actors such as the Governor of the Province and the mayors under his authority concerned with the issue can become competent to act.

The complexity of the Belgian institutional system and the (increased) fragmentation of the state action among a multitude of actors acting at distinct levels is not new and was already pinpointed as an important factor to consider when looking at the effectiveness of public policy. Numerous and various examples on how institutional complexities, particularly in the case of Brussels, can hinder the effectiveness of public state action can easily be found in the scholarship and range from the issue of homelessness (Malherbe et al. 2019), the integration of newly arrived immigrants in the territory (Xhardez 2016) to the general administration of primary care during the first wave of Covid 19 (Jamart et al. 2020).

The Federal Police Investigator and the respondents of the Foreigner's Office regularly mentioned the different agendas of each actor clashing with one another. For example, as they explained, whereas the judiciary federal police might find it convenient to have migrants gathered at the same place, as it is convenient for their investigation and observations of potential smugglers, this might cause a problem for the railway police, who act with the railway customer's safety in mind. Similarly, when the local police take on administrative police tasks (control and arrest of individuals in irregular situation), they are acting under the mayor's authority, who is concerned with citizens' complaints about, amongst other things, the safety and cleanliness of Maximillian Park and the surrounding area that they would like to have available for their children. For political, ideological reasons, the different mayors competent for the area can refuse to enforce migration checks to arrest irregular migrants, which then clashes with the recommendation taken at the federal level to instead engage in actions of maintenance of hygiene and safety (Foreigner's Office respondent 2). At the local level, the area of Brussels North is under the authority of two local police districts of Brussels (Brussels North Zone composed of 3 municipalities and the Brussels Capital/Ixelles Zone composed of 2 municipalities), which consequently depend on the authority of different mayors. The role of the mayors is essential (see 6.2) as the admin-

istrative police at the local level fall under their competences. As respondents explain, by prioritizing the cleanliness of the park over performing migration checks, the Maximilian Park has obtained the status of being a '*rest area*' and thereby a '*pull factor*' for migrants. They come to the park to receive basic assistance and care by NGOs before undertaking the final leg of their journey. According to several respondents, this situation upsets the mayors and the Governor in the West-Flanders region where constant judiciary and administrative actions are undertaken to dismantle migrants' smuggling networks and prevent the creation of '*mini-Calais*' in their territory (Federal Police Investigator; Investigative Journalist; Foreigner Office respondents 2 and 3, Prosecutor 4). The respondent of the Foreigner Office (2) expressed his frustration regarding the absence of '*unicity in the decision-making*', as he explains:

> '*It can't be that transit migrants in the territory of the capital of Brussels are left alone by the authorities, whereas the municipality next door pursues an active persecution policy of transmigrants. This is inefficient. It leads to an enormous, how shall I put it, misallocation of people and resources*'.

6.2 Capacity and the need for sensibilization

The former quote highlights the issue of police capacity, which plays a role at both the federal and local level. The majority of respondents signalled that in the past years, the federal police level was '*emptied of its substance to give the priority to terrorism*' (Prosecutor 3). With this, the Prosecutor refers to the fact that in response to the terrorist attacks of 2016, a large portion of federal police officers was moved to the terrorism unit.

While the respondents understand that terrorism is important, they are concerned about the fact that '*the capacity didn't return (…) and that very experienced detectives just left and by now, are almost ready to retire but they were never replaced by detectives of the same value, which is crippling* [the organization, MW] *basically*' (NGO 1). Regarding the local police districts, '*the mayors are the one deciding on the priorities and victims of migrant smuggling and human trafficking are not the priority in comparison to thefts and road safety*' (Prosecutor 1). While migrant smuggling can be a political priority where structural synergy between the federal and the local police can be observed, it is not systematic and varies from one zone to another (Federal Police Investigator, Prosecutor 4). Besides, the Federal Police Investigator explained that arresting someone without papers can lead to two distinct procedures: an administrative one on the legal status of the person and a criminal procedure that '*starts as soon as you find aggravating circumstances*'. The time-consuming nature of the procedures and the weak '*return on investment*' leading to the police's frustration was highlighted by the majority of respondents. '*There are local police districts saying 'we saw 30* [migrants, RM] *on the parking, we looked elsewhere and when we turn back, they*

were gone. I can understand, when you're only two [frontline police officers, RM] *and you have 30 migrants, you need to identify them, to take the fingerprints, to contact the Foreigner's Office. With only two of them, it can take up to 24 hours'* (Prosecutor 1). To which a policy officer from a local police district (1) replied, during the interview: '*all of that so that the Foreigner's Office can deliver an order to leave the territory*'. As the capacity of administrative detention centres to place migrants is limited, migrants receive this administrative order in most cases, which they throw in the nearby trash to then call their smugglers and start their journey again (Investigative Journalist; also see De Ridder & van der Woude 2019).

This quote by Prosecutor 1 is crucial in understanding the clash of priorities, the lack of capacity and the frustration of state agents when dealing with migrants' smuggling. For the prosecutors and the federal police, any piece of information is relevant for the investigation and ideally, all migrants' phones that are found should be searched, but for the chief of the local police zones and the mayors, it is seen as a waste of time and capacity. As phrased by a senior policy advisor of the Federal Police (3): '*If you're a first line agent, you only have two hands'* and not everything can be a priority for local police officers. Echoing strongly with these developments, the findings of Bracke (2021) outlined the crucial role of first line respondents in the process of victim detection. Bracke's (2021) empirical data shed light on the fact that *all* her respondents emphasised how the basic training of front-line agents and their interpretation of a situation was instrumental in detecting victims and henceforth initiating the procedure. Recalling a conversation with the Governor of a Belgian Province, the investigative journalist quoted the Governor as follows:

> '*There are no structural solutions, and the actions undertaken are useless vis à vis chore of the problem. We're regulating the phenomena, we're tranquilizing the population, avoiding loitering, long-lasting bivouacs and phenomenon of violence, we're showing the population that the police are there and watches*'.

Regarding the interventions of first line officers, such arrests can lead to logistic (when it comes to transportation), sanitary and security issues (when it comes to placing the migrants in small police zone offices for hours). A local police investigator (2) questioned whether there was still a place for empathy towards migrants in transit in the circumstances described above and expressed his dissatisfaction as follows: '*For us it is rare but indeed, for a small police force, it's f******g hell to be suddenly confronted with these people'*.

The 'hell' situation, on the one hand, refers to police officers being 'outnumbered' by migrants, which was not seen as optimal, and on the other hand to the conditions in which migrants themselves had to be placed in small local police offices, which are not appropriately designed to accommodate migrants. Nonetheless, on the question of whether empathy could still be found with regards to logistic issues faced by police officers and in line with the findings

of Vega (2018) on legitimation narratives of US Border Agents, we can observe, from an emotional perspective, a form of detached professionalism and strict boundary making between the respondent and the migrants in this answer (see also Aas & Gundhus 2015). The same comment of boundary-making and distance can be made about the police inaction highlighted above. Moreover, the feeling of danger of being 'outnumbered' by migrants can also prevent feelings of compassion and result in the strict application of bureaucratic procedure (Vega 2018: 2554). It is also important to question the extent to which bringing forward logistic/capacity issues and using narratives of 'care control', as the detention conditions are depicted as problematic from a care lens by the respondent, can allow bureaucrats to continue to perform their tasks in an uncritical manner (see Vega 2018; Aliverti 2020).

Lastly, the large number of migrants that police officers have to 'process', among whom many of them could, in theory, be eligible to be offered the victim status was also highlighted as a key challenge by Bracke's (2021) respondents. Her findings show how the combination of the large number of migrants with the general (presumed) lack of interest in the victim protective status had a severe impact in communicating and offering it. Indeed, Bracke (2021) shows how in some instances, first line respondents assume a lack of interest on behalf of potential victims and in turn, refrain from initiating the procedure. This is of particular interest and directly ties in with feelings of (de)motivation experienced by front line respondents which, combined with known issues of capacity (time, resources, and personnel) (see also Boels & Ponsaers for smuggling and trafficking judicial investigation 2011), can also explain the scarce use of the third-way approach in practice (see Chapter 5).

6.3 Passing the buck and shifting the blame

Both Prosecutor 1 and Prosecutor 4 emphasize the complementarity and the expertise of the local and federal police forces, which are supposed to function in an integrated manner at two levels in dealing with the migrant smuggling phenomenon. Nonetheless, despite examples where the collaboration can be efficient and structural, it is not necessarily the case everywhere. As Respondent 2 of the Foreigner's Office underlines, '*The police forces are working against each other or have different interests, especially in the Maximilian Park. Everyone tries to give the hot potatoes to someone else*'. Issues of capacity and priority were mentioned to justify the fact that police officers could turn a blind eye and look to other directions when they saw a suspicious smuggling situation. The Foreigner's Office's respondents (2 and 3) and the Federal Police Investigator explained that the local police were pointing fingers at the federal police and vice-versa when it comes to tackling the issue. Going further, Prosecutor 4 and the Federal Police Investigator both mentioned the mentality to pass the buck in the migrant smuggling field because '*the powers are scattered*

(…) and people look at each other all the time' and refuse to '*work on it anymore because the others don't work on it either*' (Prosecutor 4). The respondent explained that if people did not know who to look at anymore, '*then they put it on the English or on the country of origin'*. The Federal Police Investigator felt with a certain fear that he had to answer the following question more often: '*why put so much money in a group of 15 investigators in Brussels for an issue that is not our problem*'. Yet, both respondents considered firmly that once you have individuals dying and being abused in the Belgian territory, then it becomes '*our problem'*. Mentioning the case of the EU and the need for a structural approach, the Respondents of the Foreigner Office (1 and 2) explained that Belgium was at the end of the '*transit chain*', but that overall '*Member states are happy when people leave their territory illegally. How, when and what? As soon as possible and it's no longer our responsibility, period*'. The Federal Police Investigator pinpointed similar reasons for individuals to end up in the Maximilian Park as they were pushed away from both the British and the French authorities. Respondent 3 from the Foreigner's Office has a rather grim outlook on the future:

> '*If it's even a challenge to agree at the Belgian level. And that's Europe's big challenge, to provide an answer within ten years. What are we going to do then? We have to be ready. We have to agree because if we don't agree. (...) I think it's a disaster right now. I don't see it getting any better. I don't see any dialogue either. There's dialogue between two member states but there's no dialogue in Europe. It's far too complex and too difficult*'.

The image that the respondents paint is, unfortunately, not unique to the Belgian case. The challenges of working in multi-jurisdictional spaces with unclear lines of responsibility, particularly in the complex relationship between EU bodies, national and local authorities, are known to lead to frequent blame shifting between these different actors (e.g., van der Woude 2020; Dörrenbächer & Mastenbroek 2019). In line with Aas and Gundhus' (2015) findings on the experiences of Frontex officials, our findings reveal both a considerable level of frustration with the third-way approach, as well as the difficulty of performing policing tasks in multi-jurisdictional areas, where the lines of responsibility become blurred on the ground.

7 Conclusion

In the realm of migrant smuggling and human trafficking and considering the blurred boundaries between these phenomena, the tensions highlighted above have concrete consequences on the legal protection (or the lack thereof) given to smuggled migrants. In their work on the relation between anti-trafficking policies (protective oriented) and migration control policies (punitive oriented), van der Leun and Van Schijndel (2016) observed that treatment given to irregular migrants depended largely on the way they entered the system

and that smuggled migrants often ended up unprotected even though traces of exploitation were visible in their criminal investigation files. The authors argued that while migration control and anti-trafficking policies are interrelated, they nevertheless exist alongside each other following their own courses, which have detrimental impact on potential victim protection if these sets of policies and the relationship between them are not structurally and fundamentally re-examined. This chapter responds to that call for re-examination by looking closely at the third-way approach in Belgium, an approach aimed to provide victims of aggravated forms of migrant smuggling similar legal protection as victims of human trafficking. By listening to and critically engaging with implementers and examining their experiences and perspectives (following Loftus 2015), this chapter has provided a first understanding of why the protective third-way approach does not seem to be used as much in practice. Despite the rich insights provided through our interviews, an important limitation – and thus also recommendation for further research – is that we did not speak with migrants directly to ask about their motivations and reasoning to not make use of the protective status offered through the third-way approach. This would be important to do, as the reflections of our respondents seem to illustrate the agency that migrants can have and can take in deciding how to shape their (legal) journey, which might result in well-intended policies and procedures completely missing their aim.

Our data furthermore revealed a rather 'Janus-faced' image of how the respondents view the state of vulnerability of the potentially smuggled migrants: Whereas on the one hand this is acknowledged through their general reflections on the interwovenness of human trafficking and migrant smuggling, when urged to reflect a bit more on the practical applications of the third-way approach, respondents seem to have a hard time stepping out of the straightjacket of the legal dichotomy between the two phenomena. While our respondents predominantly seemed to 'blame' migrants for not wanting to make use of the third-way approach, this Janus-faced response indicates that those who are implementing the law and the organizational context in which they operate are also playing a crucial role in whether or not migrants get to access the third-way approach protective status. As mentioned by Vega (2018) and Fassin (2005, 2011), the role of the moral economy of government bureaucracies in which state agents operate cannot be underestimated, as it can contribute to a tension between the normative values and ideals that are dominant within the different realities in which these state agents operate and the emphasis that is placed within these different realities on either compassion or repression.

This tension is not just visible and tangible in Belgium, but throughout the EU and particularly around the topic of asylum (also see Bloch & Schuster 2002). On the one hand, European countries and societies are tooting the horn of tolerance, human rights, and solidarity, but on the other hand they are actively creating and maintaining a migration control apparatus that seems

to foster 'bureaucratic indifference to human needs and suffering' (Herzfeld 1992: 1). What also does not help in this regard is the complexity of having to operate and implement norms in a fragmented and multi-layered national and European institutional context. The interviews uncovered issues and challenges linked to institutional capacity, sensibilization of frontline implementers and a tendency to evade responsibility by passing it on to (other) actors on the local, national (federal) or at the European level. While legal frameworks on human trafficking and migrant smuggling are harmonized at the European level, the difficulties surrounding their implementation and the lack of uniformed approach, especially on migration matters from one member state to another has to be underlined (see Barbero 2020). This finding is in line with Dörrenbächer & Mastenbroek's (2019) observations regarding the implementation of the 2003 Asylum Reception Condition Directive in France, Germany, and in the Netherlands as well as van der Woude's (2020) study of the implementation and enforcement of article 23 of the Schengen Borders Code. Both studies illustrate that the attribution of discretion to practical implementers forces implementers on the ground to determine the eventual outcomes of EU law, which can, and will, result in great differences between member states.

Policing and managing the borderlands in a way that reconciles worries about national security with concerns about the vulnerability of individuals on the move remains a complex challenge, not just to the European Union, but to many countries across the globe. The Commissioner for Human Rights within the Council of Europe signalled the lack of assistance devoted to migrants within Europe as a risk factor which makes them ideal targets for exploitation (Mijatovic 2019). Considering the particular vulnerability of migrants during their fragmented migration journeys, this last concern highlights the importance of rethinking structurally and holistically the relationship between migration control policies and anti-trafficking policies and the inherent tension existing between them.

5 Passing the Buck, Discretion & Jurisdictional Games

1 INTRODUCTION

In a European context, when thinking about (irregular) migration and migrant smuggling, images of overcrowded rubber boats crossing the Mediterranean Sea at the external EU borders almost immediately come to mind. The situation at the internal borders of the Schengen Area, perhaps with the exception of Calais, where migrants often find themselves transiting to specific EU countries or towards the UK, appears to be less salient in the collective imagination. Nonetheless, in recent years, more scholarly attention has been devoted to 'bordering practices'[1] occurring at the EU internal borders and its consequences for migrants (see van der Woude 2020; Barbero 2020; Tazzioli 2020). Contributing to this body of scholarship, this chapter looks specifically at the Belgian case and at the legal governance of migrants who transit trough the territory and are involved in smuggling activities.

Since the dismantling of the infamous 'jungle' of Calais in 2016 by the French authorities, the presence of migrants transiting and settling temporarily in Belgium, mainly in the Brussels' North railway station and the nearby Maximilian Park, as well as the many parking areas on the Belgian highways in the direction of the UK, has triggered debates on a sensitive issue of migrants transiting through the territory that is now politically referred to as 'transmigration' (Vandevoordt 2021; Myria 2020; see also the Chapter 1, Section 5 on terminology). The case of Belgium as a transit and destination country for migrants is an interesting one for a couple of reasons: 1) the country's specific geographical position with its dense road network and its strategic location on the journey to the UK makes it an attractive site for migrant smuggling activities, and 2), the Belgian legislature developed a unique protective approach to deal with aggravated forms[2] of migrant smuggling, allowing its victims to, under certain conditions, access the protective status, which is otherwise strictly reserved to human trafficking victims. Individuals stranded in limbo or 'stuck in motion' in transit spaces, particularly in Brussels, thus

1 By bordering practices, I refer to the work of Côter-Boucher, Infantino and Salter (2014), who looked into the 'practices of the plurality of power-brokers involved in the securing of borders' (195).

2 Examples of aggravating circumstances can be the use of violence/coercion/fraud by the smuggler, abuse of a situation of vulnerability, life endangerment (see section 5).

find themselves at a juncture where various legislative frameworks (criminal and immigration law) intersect to govern their presence.

Dealing with complex cross-border crimes such as migrant smuggling, which is located at the crossroads of distinct 'fights' such as human trafficking, irregular immigration, and the maintenance of public order, involves a multiplicity of actors at distinct levels (local, regional, national, and international) and legal regimes. Hence, the use of 'crimmigration' as a sensitizing concept or as a conceptual framework to shed light on the intersection between criminal and administrative law could, at first glance, appear to be suitable to understand the dynamics at play in the governance of migrants in transit (Stumpf 2006; Chacon 2015). Nonetheless, Mofette (2018) and Moffette and Pratt (2020) highlight an important limitation of the crimmigration lens as it focuses solely on the merger between the two realms of law (see also Brandariz 2021). Moffette and Pratt claim that this could prevent a thorough understanding of a more 'complex and multi-layered empirical processes of legal governance' (Moffette 2018, 260). Instead of looking at points of intersection between administrative and criminal law, they suggest innovative approaches to conduct further study in legal and criminological research in a way that looks beyond the overly dominant focus on crime, criminal law, and the nation-state. Some of these approaches include interlegality and jurisdictional games. The conceptual framework of interlegality derives from legal pluralism and refers to the presence of distinct legal orders that are interpenetrated and superimposed with one another. Together with the concept of 'jurisdictional games' (see Section 2), it pays attention to the heterogeneity and distinction between legal realms intersecting with one another in the governance of object/subject. Applying this framework allows for a deeper analysis on the different treatments given to the individuals governed trough coexisting and distinct legal regimes (e.g., municipal bylaws, administrative or criminal law) (Moffette 2018, 2021; Moffette & Pratt 2020).

The chapter is based on semi-structured expert interviews conducted with 16 Belgian bureaucrats between 2018 and 2019 (see Introduction). The empirical findings illustrate the scales and jurisdictional games of various actors and touch upon bordering practices while illuminating rationales for the discretionary decision to use criminal law or immigration law. The findings also show how substantially distinctive regimes are applied to either the 'deserving victim' of aggravated forms of migrant smuggling, the asylum-seeker, and the refugee or the 'underserving crimmigrant other'. By 'crimmigrant other' I refer to the notion of a different penal subject, an unwanted subcitizen which links the logic of criminalization and insecurity with migration (Franko 2020). The distinct treatments given to migrants in transit involved in smuggling activities on the Belgian territory, who could, in theory and depending on several conditions (see below), be granted a protective status can be considered problematic. The chapter therefore aims to use the concepts of interlegality and jurisdictional games as an analytical lens to understand the messy realities

of legal governance of migrants in transit involved in smuggling activities in Belgium. This can more broadly shed light on the way Belgian authorities deal with the 'fight against irregular transmigration'. The goal is to further enrich the conceptual framework by supplementing it with the scholarship on discretionary decision-making in order to have a better grasp of the rationales at play behind decisions to mobilize one realm of law over or in combination with another in a specific context.

2 Conceptual Framework: Jurisdictional Games, Interlegality and the Role of Discretion

2.1 Jurisdictional Games & Interlegality as an Analytical Lens

The arguments developed by Moffette (2018) and Moffette and Pratt (2020) draw from the original socio-legal research of Valverde (2009, 2014) on jurisdiction and scales. Valverdes' work is inspired by de Sousa Santos' (1987) research on processes of interlegality, which refers to the continuous interactions between distinct legal orders having their own logic, scope and criteria for what and according to which rules things should be governed. Valverde (2009) indicates that researching the 'legal technicalities' that are jurisdictions can further our understanding of the multi-scalar nature of legal governance. She signals that scales (e.g., local, national, international) and jurisdictions should not be conflated as is commonly the case in legal geography and criminology because jurisdictions distinguish and divide much more than territories and authorities (Valverde 2014). In an act of categorizing, jurisdictions not only sort out the *where* of governance (territorial or scalar) but also the *who* (authorities in charge), the *what* (objects or subjects also referred to as thematic jurisdictions), the *when* (temporal jurisdiction) and most importantly the *how* of governance (Valverde 2008, 2009). Valverde (2009) observes that the process of the allocation of jurisdiction, which organizes legal governance, does so in a way that appears neutral and natural and gives the impression that different legal assemblages 'coexist without a great deal of overt conflict' (141). As a result, the scholar notices that jurisdictions are too often taken for granted. Valverde (2008, 2014) refers to the fact that if the work or the performance of jurisdictions are not hidden, they are nevertheless invisible. She describes the work of jurisdiction as a chain reaction where 'jurisdictional assemblages have a strong path of dependence' between one another (Valverde 2009). Once a decision is made on the *who* or on the *where* of governance, then, questions on the mode of governance (the *how*) end up being problematically 'black boxed' (Valverde 2014, 387). Crucial questions of the *how* of governance, which refer to the rationalities of governance as well as the governing capacities and procedures, end up being decided without explicit discussions. This prevents further scrutiny over the substance and the

'qualitative element' of governance (Valverde 2014, 388). In this chapter, specific attention will be devoted to what Valverde (2009) coined as 'games of jurisdiction', which are played when deciding on territorial and thematic jurisdiction in the governance of migrants in transit involved in smuggling activities on the Belgian territory. As will be explained below, these games have a substantial impact on the substance of the legal governance.

2.2 Enacting Jurisdictions and the Role of Discretion in the Jurisdictional Games

When theorizing on the concept of territorial jurisdictions, Ford (1999) understands them as a discourse but also as a set of social practices which could appear abstract (e.g., as lines on a map) but are constantly 'made real' because they are *practiced* in reality (843). Ford (1999) draws an analogy between jurisdiction and a tango, a dance genre comprising of a set of rules that establish the role of each dance partner, determining 'who leads and who follows as well as where one places one's feet' (855). As Moffette (2018) added, even with a set of rules, the negotiation over one's role is not absent and requires a certain level of creativity and discretion. The enactment or performance of jurisdictions involves therefore a practice through which an actor (e.g., a local police officer, prosecutor, legislator) who wishes to invoke the law, makes a claim about the when, where, what, who and the how of the law. With this claim, the actor subsequently specifies the reasons for why a subject or an object, in a certain time and place, will fall under the authority of a determined governing body and should be treated with procedure X or Y (Moffette & Pratt 2020, 19). Taking jurisdictional games and the multiplicity of actors involved in them as an analytical lens can help clarify how discretionary decisions mobilize one realm of law (e.g., administrative, municipal over criminal law) over or combined with another. As Moffette (2018) rightfully stated, this game of negotiation involves discretionary decisions and only exists because these realms of law are jurisdictionally separated, yet, because these are sites of interlegality, they coexist and interplay with one another.

Understanding why and how these decisions and negotiations are made brings to the fore the concept of discretion in decision-making (van der Woude 2016, 2020; Dörrenbächer & Mastenbroek 2019). Whereas the fluid concept of discretion is only briefly mentioned in Moffette and Pratt's (2020) article, it is argued here that, because of the decision-making involved in the games of jurisdictions, paying attention to the scholarship focusing on street-level bureaucracy and discretion is essential to foster a deeper understanding of the dynamics of governance. Whereas the concept of discretion receives many definitions, it is understood in this chapter as the 'freedom, power, authority, decision or leeway of an official, organization or individual to decide, discern or determine to make a judgment, choice or decision, about alternative courses

of action or *inaction*' (Gelsthorpe and Padfield 2004: 3). Hawkins (1992) notes that discretion, in different degrees, is present at all levels of criminal justice bureaucracies. Consequently, the decisions 'street-level bureaucrats' are making (from the local/municipal officer to the judge) have a direct impact on the distribution of justice to their (involuntary) clients (Maynard-Moody & Portillo 2010; Lipsky 2010). Lipsky (2010) highlights how street-level bureaucrats can turn into real policy makers rather than mere implementers because they adjust or adapt rules to the specific circumstances and needs (see also Zacka 2017). Formal rules can, for instance, be adapted when street-level bureaucrats are overburdened and confronted with a high volume of demands for their services while having scarce resources to handle them (Lipsky 2010; Black 1997, 2001). Even when the tasks at hand are regulated by organizational or legal rules and there is room for interpretation, or as Schneider (1995) notes, when discretion has been purposefully built into the rules by law makers, the decision making of street-level bureaucrats is determined by numerous other factors (see Black 1997, 2001). At the individual level, the attitudes, points of view, as well as the past experiences and personal relationships of the decision maker can influence their work (Musheno & Maynard-Moody 2015; Lipsky 2010). However, looking beyond the individual is imperative since street-level bureaucrats' actions and, importantly, 'indifference' or non-actions (Zacka 2017, 121) as actors operate within wider bureaucratic and organizational norms, including institutional culture and occupational ideology developed through training and socialization processes (Black 2001; Hawkins 1992; Loftus 2010). Likewise, broader economic and political pressure and social and moral norms are identified as determinant factors in the decision-making process of street-level bureaucrats (Black 1997, 2001, Dörrenbächer 2018; Trondal 2011). As discretionary decision-making processes involve a complex series of decisions and discretion is diffused among a range of distinct actors, a multi-scalar and systemic view is required (van der Woude 2016).

Recapitulating, beyond providing a descriptive illustration of jurisdictional games taking place in the Belgian context, the chapter dives deeper at a theoretical level by combining this conceptual framework with the street-level bureaucracy scholarship. The following sections will outline the usefulness and relevance of this literature combination to understand the conditions allowing these jurisdictional games to operate in the first instance, to underline the rationales at play behind these games drawing from decision-making literature in second instance and lastly, the consequences of these games for those governed. Taken together, the findings help in answering the third research sub-question which asked *how the unique legal framework developed by the Belgian legislature to deal with aggravated forms of migrant smuggling operates in practice*.

3 Methodology

This chapter uses a single case-study as a research strategy to gain a better understanding of the jurisdictional games operating when governing migrant smuggling in Belgium, which due to its multi-scalar nature involves a multiplicity of actors. Case study research provides 'an all-encompassing method' to systematically study, analyse and describe a phenomenon within its real-life context (Yin 2003, 14). As highlighted by Moffette (2018), the case study method offers an 'analytical generalizability' in the sense that the thorough description of previous cases enables the reader to deduct whether the findings to their cases could be extrapolated to other settings (262).

General information on methodology can be found in Chapter 1 (Introduction) and Chapter 4 of the dissertation. Considering the specificities of this chapter, the following brief developments are nonetheless required. Firstly, the chapter refers to respondents as 'street-level bureaucrats' which is defined by Lispky (2010) as public service workers 'who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work' (3). They are also considered as experts in light of their technical, interpretative, organizational/institutional and of course professional knowledge gained throughout their careers (Bogner, Littig & Menz 2018; see Introduction, Chapter 4). Secondly, regarding the analysis of the data, a similar deductive and inductive approach as the one developed in Chapter 4 was used. A couple of months after the data collection and the initial coding, I familiarized myself with the empirical work and analytical insights developed by Moffette (2018) and Moffette and Pratt (2020). Their findings appeared to be transferable to the Belgian case as it became apparent that the (smuggled) individuals in transit in the country found themselves at a juncture where distinct legal frameworks intersect with one another. Hence, in the secondary analysis process, 'analytical codes' (see flexible coding) were created based on the theoretical frameworks on interlegality, jurisdictional games and decision-making to analyse and interpret the data. To depict the particularities of the Belgian case, the following section will also partially draw from the semi-structured interviews conducted (see Chapter 1). This might appear unusual as the interviews are not *per se* part of the analysis, but they can be nevertheless insightful as they help shed light on the complexity of the system and the internal dynamics at play.

4 Governing Migrant Smuggling in Belgium: A Multi-Layered Issue

4.1 Belgium as a Transit Country

As explained in previous chapters (e.g., Chapter 1; Chapter 4), the country of Belgium is a well-known area for irregular border crossings (Derluyn &

Broekaert 2005). Hence, the role of Belgium as a transit country is well established and issues such as migrant smuggling involving secondary migration movements[3] of migrants transiting via Belgium to reach the UK are not novel (Leman & Janssens, 2015). However, the so-called migration 'crisis' (see Collyer & King 2016) in 2015 and the destruction of the infamous 'Jungle of Calais' by the French authorities in 2016 led to a displacement of migrants in the capital of the country and in its hinterland. The shift to Brussels can also be explained by the intensification of controls in parking areas along the highways (part of distinct plans to 'fight transmigration'[4]) as Belgian politicians started to fear semi-permanent settlements by migrants at the French/Belgian border (Vandevoordt 2021). The neighbourhood of the North railway station of the capital as well as its nearby Maximilian Park turned into a humanitarian hub where civil actors, from citizens to NGOs, supported the hundreds of (vulnerable) individuals in transit gathering in the area every day with shelter, food, medical and legal assistance. On the term 'transmigrant', see Introduction (Section 5). This gathering elicited political attention and parliamentary debates took place to address the role of Brussels as a 'Mini-Calais/pit stop' in the migrants' journey towards the UK (European Migration Networks 2017; Interview Federal Police 3).

4.2 Legislative Frameworks – A Reminder

Concentrating on the multi-scalar nature of legal governance of migrants in transit spaces on the Belgian territory involved in migrant smuggling activities requires a description of the various legal regimes and actors involved in the multi-jurisdictional games at play. To do so, it is necessary to give a (brief) overview of the complex institutional Belgian context and the distinct legislative frameworks and actors interacting with each other.

Whilst on the Belgian territory, migrants aiming to reach the UK can fall under distinct legal regimes. If migrants are intercepted during a smuggling operation and found for instance in a (refrigerated) lorry (or truck), they can be considered as *victims* (as opposed to the term 'object' used in the UN Smuggling Protocol) of aggravated forms of migrant smuggling, which falls

3 By secondary migration movements and following the official EU definition, I refer to 'the movement of migrants, including refugees and asylum seekers, who for different reasons move from the country in which they first arrived to seek protection or permanent resettlement elsewhere' (see European Commission website). However, this term can be problematic as signaled by Carrera et al. (2019), who indicate that secondary migration movements are described as a source of considerable insecurity. The puzzling narrative of equating secondary migration movements to 'voluntary/chosen movements' based on the preferences of asylum seekers, which are established on erroneous assumptions that all EU member states are equally safe, is rightfully questioned.

4 As an illustration, see the debates in the Belgian House of Representative (2018).

within the jurisdiction of the judiciary police, the scope of the reference prosecutor, and activates a specific protective procedure with rights and conditions.[5] At the same time, that fact that migrants are also staying in the country in violation of immigration law (article 7 of the Law on Foreigner of 15 December 1980) brings the administrative law dimension into the games into play. The police have to contact the Foreigners' Office which has to process the file of the migrant leading to two possible outcomes. First, the illegal stay on the territory is criminalized in Belgium with a prison sentence and a fine, or a combination of both (article 75 of the Law on Foreigners of 15 December 1980). Nevertheless, this possibility is rarely used as research showed that Belgian courts scarcely sentence migrants on the sole basis of a violation of immigration law (see De Ridder & van der Woude 2016). Second, the Foreigner's Office can decide to issue an 'Order to leave the territory' which can also be combined with an 'administrative detention in view of expulsion' under certain conditions related to the individual situation of the migrant and/or the capacity of the detention centre. According to several respondents, the most common outcome however is the sole issuing of an order to leave the territory, notably considering the scarce capacity of the administrative detention center (Interview Prosecutor 1, Local Police 1; see also the relevant statistics of the national rapporteurs, Myriatics 2021). As mentioned above, the 'transmigration' phenomenon led to many distinct large-scale administrative arrest operations (Myria 2022; European Migration Network 2017, 2019, see also the 'Plan to Fight Transmigration' (Belgian House of Representative 2018). In his research, Vandevoordt (2021) describes 'cat-and-mouse games' between the (federal and/or local) police and migrants which involved, following the former Minister of Security and Domestic Affairs Jan Jambon, police operations were aimed at dismantling smuggling networks, deporting the 'transmigrants' and discouraging migrants who could not be deported from staying illegally in Belgium (53). As will be explained below, this initiative came from the Federal government. Nonetheless, the problem is more complex and layered as other actors, namely the mayors as heads of the administrative police at the local level having distinct political agendas, are also involved in the process (Ponsaers & Devroe 2016). Besides, the illegal stay on the territory is in principle criminalized with a prison sentence and a fine, or a combination of both (article 75 of the Law on Foreigners of 15 December 1980). Nevertheless, research showed that Belgian courts scarcely sentenced migrants on the sole basis of a violation of immigration law, which was confirmed by many respondents (De Ridder & van der Woude 2016).

5 Article 77quater of the Law on Foreigners of 15 December 1980; Circular COL 5/2017 of 23 December 2016 implementing a multidisciplinary cooperation in respect of victims of human trafficking and/or certain aggravated forms of human smuggling. For further information, see section 4.

Several respondents also shed light on a common practice by migrant smugglers to recruit migrants in exchange for a free attempt to the reach UK at a later stage (as the story of Osman illustrated) and involve them in the low-level yet visible tasks of the smuggling process (e.g., conducting observations, spotting lorries and opening them) (Interviews Prosecutor 1, 2, 4; Federal Police Investigator 1). Migrants caught up in these activities run the risk of being criminalized as migrant smugglers themselves. This thorny 'smuggler/victim' scenario is complicated as migrants can fall into two distinct regimes: either by being prosecuted as smugglers themselves or by being perceived as exploited human trafficking victims (the offence includes the exploitation of forced criminality) and should therefore not be sentenced considering the principle of non-punishment of victims of human trafficking (article 433*quinquies*, para 5 Criminal Code and Section 5).

4.3 Actors

The police organization of the country has an effect on the distribution of competence and, as Valverde (2009) pointed out, jurisdiction subject can also determine how migrants are governed. Since 1998, the Belgian police force forms an integrated (or coordinated) service structured at two levels: the federal and the local level (Campion 2018). The two levels work on the basis of the principles of complementarity, subsidiarity, and specialty (De Valkeneer 2016). Since 1998, the Belgian Police force forms an integrated (or coordinated) service structured at two levels: the federal level and the local level (Campion 2018). The two levels work on the basis of the principles of complementarity, subsidiarity, and specialty (De Valkeneer 2016). The Belgian police is also based on the Napoleonian dichotomy between the judiciary police and the administrative police. This distinction exists at the local and federal level. The local police are competent to effectuate the seven basis police missions on its local territorial police zones (185 local police zones) which can have both a judiciary dimension (e.g., local investigation) or an administrative dimension (e.g., maintenance of public order, road traffic). The Federal Police also has missions of both judiciary and administrative nature and has specialized and supralocal police missions (e.g., human trafficking, migrant smuggling) and provides support and assistance to the local police for both administrative and judiciary missions (see further below and Figure 2). The judiciary police are placed under the authority of the Ministry of Justice and under the control of the magistrates (including both prosecutors and judges), whereas the administrative police are under the authority of the Ministry of Interior at the federal level and the mayors at the local level. Therefore, the important role of the mayor should not be neglected as, within the current state structure involving a Federal Government, three Regions and three communities, the policing dynamics are determined by the duality federal/local (municipality) (Ponsaers

& Devroe 2016). The distinct (political) agendas of the mayors are therefore an important element to consider as expressed by a respondent from the Foreigners' Office (Interview Foreigners' Office 2):

> *'So, each mayor decides for himself what his local police can do with regard to illegals. Then, you see political differences. For example, the mayor of Brussels does not want the police, the local police, to act too restrictively with regards to the transmigrants in the Maximilian Park because that is Brussels territory.*
>
> *Int: How does that translate into action?*
>
> *Resp2: For example, here in the Maximilian Park, once a week the police will ask people to please leave the park for a while so that the garbage service can clean it up and then they can come back. If at that time they don't want to leave, then they may be arrested, but otherwise not. Instructions from the mayor. There are other municipalities, e.g., on the coast where there is also a lot of nuisances, different political alliances. There, the mayor asks for the strictest, the most repressive possible action of their police forces.*
>
> *Int: Which would be?*
>
> *Resp 2 : 'Constant actions, constant arrests'.*

At the federal level, the federal police have specialized administrative units such as the road, railway and navigation federal police as well as decentralized judiciary entities within the 12 judicial districts of the country (see Figure 2). When it comes to dealing with smuggling and trafficking cases, while the federal police have specialized units for both phenomena, this does not exclude the competence of the local police. Considering the dual nature of the police missions at both levels, De Valkeneer (2016) indicated that no strict partition could be observed as a local police force can in theory execute a mission with federal characteristics and the federal police could come in support of the local police. When it comes to migrant smuggling, both the federal and local levels can be mobilized even if a migrant smuggling investigation falls a priori under the specialized competence of the federal police. Concretely, the detection of presumed victims of *aggravated forms* (emphasis added) of smuggling can (and often) take place amid police missions, which are administrative in nature (for instance, road safety missions carried out by the federal road police or maintenance of public order in public places in local municipalities or road traffic missions carried out by the local police on its territorial zone). Moreover, the local police are often described as 'the eyes and ears' in charge of first line detections (Demeester in Myria 2015) and should in principle be able, based

on their training, to detect potential victims and follow the procedure accordingly (see below Figure 2).

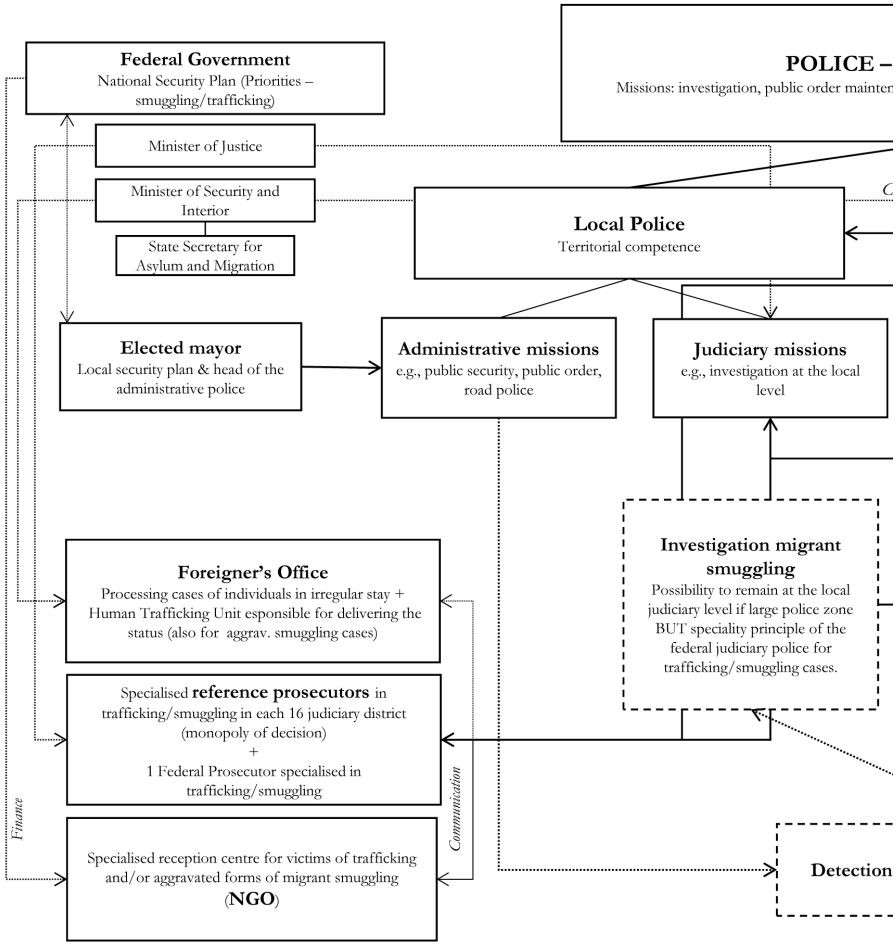
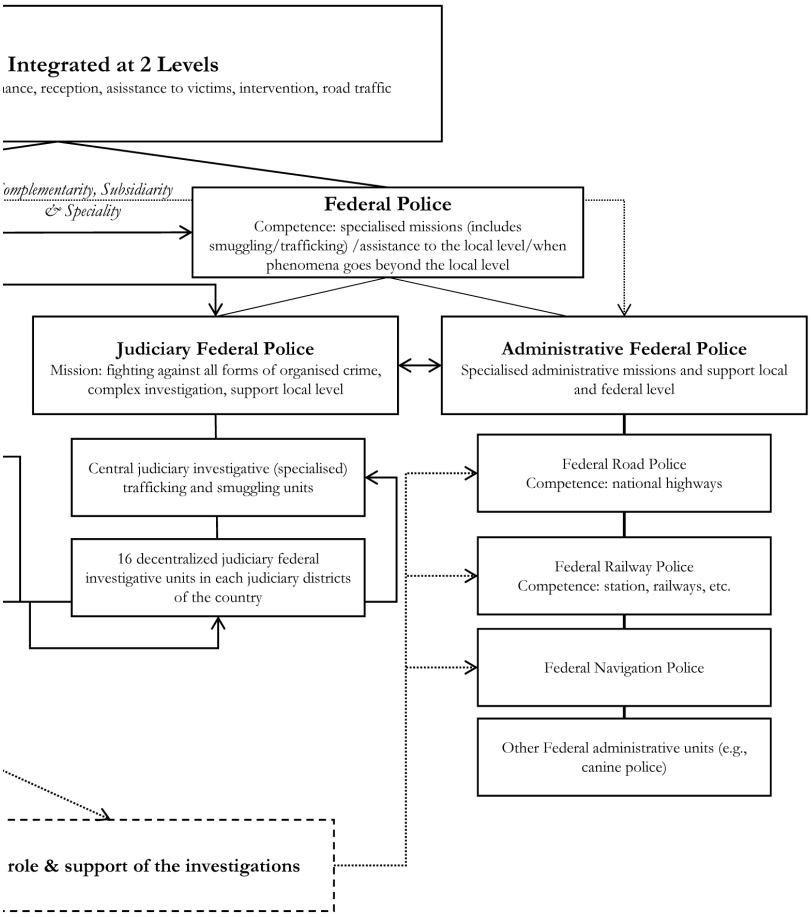


Figure 2. Simplified organigram of the Belgian police organization relevant for smuggling/ trafficking cases.

This 'mix of levels' and the importance of geographical division is best illustrated by the following quote of a senior policy advisor of the Federal Police (Interview Federal Police 3):

> *'When we look into human smuggling and human trafficking in concreto, there are two possibilities (…) whether these fluxes are coming via our borders as such* [referring to the situations at the internal Belgian borders: e.g., national roads, RM]? *But then, they're on the geographical mandate of the local police. And we have no power, no mandate within that geographical region, not one. This is purely under the mandate of the mayor. Yes? And the other part, when these fluxes* [of people, RM], *are using*



> *the highways, the trains, the planes (…)* [referring to the situations at the external Belgian borders: e.g., airports, RM]. *Then it's under the mandate of the federal police. But then we have indeed, the topic of subsidiarity. Because our organization at the federal level has these deconcentrated levels and entities. So here you come to the mix of two or three levels: you have the entity responsible, for example, for the highway* [Federal Road Police, RM], *at a certain province we have our deconcentrated capacity* [Decentralized Federal Judiciary Units, RM], *but everything then, because they don't stay at that province, they continue, we talk about transitmigration, so they go over the whole country and then it comes to the federal level* [in light of the competence to deal with supralocal cases, RM]'.

Reflecting on the multiplicity of actors involved in Maximilian Park, a Federal Police Investigator (Interview Federal Police Investigator 1) responsible for

a team of 15 federal police officers for dismantling smuggling networks, for whom the presence of migrants and smugglers at the same place is convenient from an investigative perspective, also shed light on the difficulties to coordinate the two distinct levels. According to the respondent, in addition to the municipality level, you also have to take into account the competence of the Foreigners' Office, which is a federal authority and as a consequence

> [RM: Referring to the Foreigners' Office involvement] *'falls immediately under the state secretary for asylum and migration. (…) And at Brussels North Station, where transmigrants are all going to leave en masse for the car parks across Belgium. So that's also a federal matter and falls then under the railroad police. Falls then under the Ministry of the Interior. (…) All those parties then sit together. What do you get? You won't get that resolved. The Belgian way. That will result in haggling. With a lot of compromises and in the end, you say: 'Yes guys'. But the problem, mayors say, we have our population who are angry and who say 'yes but, that park is dirty. Here there are no toilets. Here there are no facilities for showers. And my park is gone for my children. It's full of Africans. You leave the garbage. You leave the clothes. That food here attracts vermin'. They want that gone. So administratively they want that gone.* [RM: Respondent referring to mayor's statements on wanting to displace migrants and the perceived nuisance resulting from their ad hoc settlement].
>
> *Int: So, the mayor wants that too?*
>
> *Resp: Yes. And then you say ok. Then they ask us, How do we get that out? And then you say, 'I don't like having that gone'. But well, I understand that they want it gone. So, then you say: you can get rid of it by, for example, saying do massive checks. Make sure that that park is no longer attractive to people'.*

This last quote illustrates perfectly how migrants in transit spaces on the Belgian territory find themselves at the juncture of distinct legislative frameworks, which involve various actors. The subsequent analysis attempts to provide a better understanding of the way individuals finding themselves at this juncture are governed.

5 Findings: Jurisdictional Games at the National, Local and European Scales

5.1 Scaling down: jurisdictional games at the national and local scales

On the organization of legal governance, Moffette (2018) observes that jurisdiction constitutes an instrument to demarcate distinct types of laws. In this analytical section, the intersections between the abovementioned legal realms will be portrayed, to help explain how jurisdictional games are made possible in the first place, notably by considering the numerous actors deemed competent to deal with migrant smuggling and by explaining the distinct treatment

received by migrants in transit involved in smuggling activities. Regarding the competences and therefore (thematic) jurisdictions, many of the respondents acknowledge the intersections of competence in the field of migrant smuggling. According to an advisor of the Ministry of Justice, 'we will always straddle the line between issues of irregular migration and human smuggling, and therefore, the competences are shared' (Interview Ministry of Justice 1). As phrased by the Federal Police Investigator (1),

> *'When someone is in illegal stay, then de facto, systematically, we have to start up two inquiries. We have a judicial investigation (…) and we have the personal status of the person, which is in a separate investigation, or a separate case, not really an investigation. It's the administrative file of the person. (…) And, depending on the case we're building, he has other rights. That is true. But, in the* COL *5/2017 for victims of human trafficking, there are now victims of people smuggling as well.*

The respondent is referring here to the protective procedure described in a prosecutorial Directive (COL 5/2017) which has to do with the implementation of an interdisciplinary cooperation concerning the victims of human trafficking and/or certain aggravated forms of human smuggling. If aggravating circumstances are found (e.g., endangerment to the victim's life, use of fraud/violence/coercion, abuse of a situation of vulnerability), then the victim of migrant smuggling can be granted the protective status normally reserved to human trafficking victims (for the complete list of aggravating circumstances, see article 77*quater* of the Law on Foreigner of 15 December 1980). The protective status comes with rights such as a temporary and then permanent residence permit but also conditions and obligations. The status can only be granted if a judicial investigation supervised by a reference (specialized) prosecutor is ongoing. In addition, the victim has to collaborate with the authorities by making relevant declarations, has to cut all the ties with the presumed perpetrators, and has to be accompanied by one of the three reception centres for victims (NGO).[6] Despite the existence of this unique protective procedure, the vast majority of the respondents acknowledged that the procedure is in fact almost never used in practice. The statistics from the National Rapporteur (Myria) confirm this finding as between the years 2017 and 2019, only 48 victims entered the status while in the same time period 1,542 migrant smuggling cases were introduced by the Public Prosecutor's Offices (Myria 2020; see also Chapter 4).

This statistic can seem surprising as many individuals could in theory qualify to enter the status with the 'abuse of a situation of vulnerability' as an aggravating circumstance. Both Prosecutor 4 and the Federal Police Invest-

6 For the exact description of the proceedings, see the GRETA reports (endnote iii), detailing its functioning and the relevant legal basis. See also Chapter 2 (Section 5).

igator (Interview Federal Police Investigator 1) insisted on the fact that, if, for instance, during police operations a migrant is found in a truck, then

> *'The fact that he* [RM: the migrant] *is in illegal stay is an aggravating circumstance as far as I'm concerned. My legislation absolutely. If you look into the law section, the fact that he is in precarious situation, and in our jurisprudence, we see that it is considered (the illegal stay) as a precarious situation'.*

The next section will focus particularly on the jurisdictional intersections which are both thematic (distributing authority over subjects: administrative law or criminal law) and territorial (role of the mayor and local police actions), and will contribute to explain, at least partially, the lack of use of the status. However, other important reasons identified by the respondents explaining this underuse have to be summarized). Most respondents signalled that the victims themselves, who often have travelled a long way and are only a couple of kilometres away from their desired destination are not interested in the status. As the Director of one of the three NGO formulates it, '*they do not want to be on the grid, the only thing they want is to get to the UK*' (Interview NGO1). Furthermore, the status can be considered unattractive as it comes with certain conditions because it requires the victims to turn against their smuggler, which would foil their plans to continue their onward journeys (Interview Prosecutor 2, Prosecutor 3). As summarized by one of the respondents of the Foreigners' Office, due to the conditions mentioned above, '*the threshold to enter the procedure is too high*' (Interview Foreigners' Office 3).

Whereas these explanations are certainly essential to mention, other elements can contribute to understanding the situation and identifying what conditions allow for jurisdictional 'games' to take place and, with the combination of decision-making literature, how these games work in practice as well as their consequences.

5.1.1 *Thematic Jurisdictional Games: Does the Administrative Dimension Take the Lead and the Judiciary One Follows in the Tango?*

According to some of the respondents, the division of competences and tasks between the administrative and judiciary aspects appears quite clear-cut as '*the local police will do the administrative and the federal police will take over the judiciary*' (Interview Prosecutor 1 confirmed later by Prosecutor 3 and Prosecutor 4). Nonetheless, an important finding, which helps to make sense of how jurisdictional games can materialize in practice, relates to the issue the repartition of competences that is not so straightforward. As underlined by respondents from the Ministry of Justice, '*in certain circumstances, you can come across aspects of judiciary police*', which can often be the case during operations primarily having an administrative nature (for example, police operations taking place in the 'fight against transmigration') (Interview Ministry of Justice

1 & 2). Reflecting on the use of the term 'transmigration', the advisor (Interview Ministry of Justice 2) warned that:

> '*When you're facing a group of 'transmigrants', maybe there is migrant smuggling, and you shouldn't forget that there are things that you* [referring to police officers] *shouldn't forget, that there are things you should be looking at, for example indicators*[7] *and then start to investigate and that you simply tell yourself: 'oh it's a transmigrant: ok then nothing'.*

This indicates that frontline police officers forget to look for the migrant smuggling indicators (or are unaware of them), which would lead to a judicial investigation when a front-line police officer is confronted with migrants in transit. Referring to the '*tipping point between the administrative and judiciary approach*', one of the advisors called for a balance between both as the respondent acknowledged that '*in the heat of the action*' police officers can lose sight of the judiciary aspect of the law and not apply the directives of criminal policy (referring to the Directive COL 5/2017), as you have to know them, and they can be hard to read, and '*local police officers already have to think about many things*' (Interview Ministry of Justice 1). The last version of the National Action Plan against Migrant Smuggling 2021-2015 in Section 2.2.3 urges in that regard for more communication and synergy between the administrative and judiciary aspects, notably within the context of action and control of individuals in irregular situation which are directed at 'transmigration'. The Permanent Oversight Committee of the Police Service (hereafter Comité P), following a report of NGOs shedding light on the mistreatment of (trans)migrants by the police forces, investigated the police control and detention of migrants during large-scale administrative arrest operations, which often take place in parking areas along the highways. The report echoes the statement from the advisors of the Ministry of Justice as it showed that police officers were not familiar with and took little to no account of the directive issued for victims of aggravated forms of migrant smuggling and human trafficking described above (Comité P 2019). This means that in many events, potential victims are not even informed about the protective status that could be granted to them.

As the Belgian approach to deal with migrant smuggling is multi-disciplinary, the local police play a key role in the detection of victims. This role is important considering the thematic jurisdictional games that can take place between the administrative and judicial dimensions when smuggled migrants

7 Both federal and local police officers should be aware of the confidential circular (COL 1/2015) listing relevant indicators. The former circular is nonetheless accessible and mentions for instance the following 'red flags': discrepancy in terms of physical appearance (well-groomed, neat versus messy/dirty), price of the travel, presence of hidden place in vehicles, migrants having a national phone number which they don't know by heart, forged documents.

are intercepted. In this regard, Prosecutor 4 strongly disagreed with the *'common'* perception that *'human trafficking and human smuggling are by nature, phenomena that are for the federal police'*. The respondent subsequently explained that *'the big trick'* is to coordinate and make the two police forces work together. Basing his comment on his own experience, the respondent clarified how things should ideally work in practice. According to the respondent, in case of an administrative arrest, there is need of an officer with *'a bit of an eye'* and a *'checklist'* in mind of what is needed in a migrant smuggling case (e.g., collecting phone numbers, finding a small piece of paper) because the initial determinations are often done by the local police units. However, many respondents pinpointed the difficulties and frustration faced by local police officers when confronted with potential migrant smuggling situations. The procedure required them to collect key information and for that, besides specific awareness of the issue and experience, they would need two additional essential elements that are often missing: time and capacity (Interview Prosecutor 1, Prosecutor 4, Police Investigator 1, Local Police 1, Investigative Journalist). In the words of Prosecutor 1,

> *'It's like sometimes and I really understand, there are police zones that are saying 'we saw 30 of them in the parking lot, we looked away then we turned around and they were gone'. I can understand, when they are two [police officers] and that you face 30 migrants, you need to identify them, take their fingerprints, call the Foreigners' Office. The two of them should be ready to spend 24 hours'.*

To this description, a local police policy advisor added that they (the police officers) needed to do *'so that so the Foreigners' Office hands them only an order to leave the territory'* (Interview Local Police 2).

To a certain extent, this interplay between the judiciary and administrative dimensions resonates with what Valverde (2009) highlights when looking at police power at the urban scale and more specifically at the two key temporalities of governance (crime prevention versus punishment). The author signals that both temporalities can be undertaken by a similar police body and therefore one specific issue can be handled via distinct means (see also Hawkins 1992). Thus, Valverde (2009) focuses on the 'inevitable' issue of discretion determining which means would be mobilized in X or Y scenarios (147). Similarly, in the Belgian case, one could look at the issue with distinct 'hats': the judiciary hat, which could lead to initiating an investigation and the subsequent potential victim protection, and the administrative hat. As highlighted above, the administrative processing of migrants can take over the judicial approach. Following the explanation of Prosecutor 4, when you are facing 'transmigrants', '*there are different possibilities at that time as a police department that you can chose from, depending on how useful you find it, your experience and how you see that yourself*'. In practice, the police unit can either intervene or say '*yeah, well, they're just transmigrants again anyway that we then have to put back on the streets within five or six hours, or twenty-four hours. We're not going*

to turn on our lights' (Interview Prosecutor 4). This 'passing the buck' behaviour, or the decision to not act, has been highlighted by other respondents and is also consistent with the literature on decision-making of street level bureaucrats (Foreigners' Office 2 and 3; Federal Police Investigator 1; Investigative Journalist, see also Lipsky 2010). These interventions are consistently described as time- and capacity-consuming with a 'low return' on investment for a police force that is already facing a high demand for their services. The bureaucratic burden with the identification procedure and the involvement of Foreigners' Office, which often leads to releasing migrants and finding the same individuals on the same parking lot just days or weeks later, leads to frustration on the usefulness of the police's actions (see also Comité P 2019 on the feeling of demotivation experienced by the police forces; Bracke 2021 on the assumptions held by front line actors that migrants are not interested in the status anyways, leading to a lack of information). Apart from the mentioned factors, the previous experience of police officers as well as the sensibilization/training to migrant smuggling cases (or the lack thereof) are said to influence actions of police forces (Musheno and Maynard-Moody 2015; Loftus 2010).

Another important observation to expand on is the quick release of migrants once arrested and processed administratively, which strongly echoes the 'cats and mouse game' between migrants and police officers described by Vandevoordt (2021). As spelled out by the investigative journalist who conducted interviews and observations with the federal road police and many other relevant actors in the field, '*the watchword that is given is basically, if we want to summarize, 'No Calais'. So, what we are asking you is that we don't want any violence, and we don't want any permanent installations.*' This observation resonates with the empirical research conducted by Tazzioli (2020) in several Intra-Schengen border zones (French/Italy/Switzerland). Tazzioli (2020) sheds light on governmental techniques attempted at disrupting and scattering the journeys of migrants, which constitute both a deterrence strategy and most importantly, a way to evacuate sensitive border zones. By looking at how local decrees and administrative measures can impact migrants' movements, Tazzioli (2020) developed the notion of 'governing trough mobility', which is aimed at taking back control over 'unruly movements' of migrants but happens in a disorganized manner rather than based on a planned strategy by law enforcement authorities (4). These rather frantic actions concord with a statement that a governor of a Province gave to the investigative journalist. He explained that '*there are no structural solutions'* and that the actions undertaken regarding the migrant smuggling phenomenon '*didn't resolve anything'* as *'we're regulating the phenomenon, we're calming the population, avoiding loitering, camping, lasting bivouacs and phenomenon of violence and showing to the population that the police is there'* (Interview Investigative Journalist 1).

5.1.2 *Territorial Jurisdictional Games: On the Crucial Role of the Mayors in the Tango*

The previous sub-section showed the importance of not limiting an analysis to the national scale but to also scale down at the local level (Moffette 2018; Valverde 2009). As most respondents signalled, two of the critical challenges to deal with migrant smuggling are police capacity and time. While the federal police are deemed to have the specialized competence when it comes to migrant smuggling cases, in practice, a strong collaboration is required between the two (federal and local) police forces. Because of the time- and capacity-consuming nature of the actions and procedures needed for the investigations, it is acknowledged that the federal police can hardly tackle the issue on its own. The limited capacity of the federal police both at the central and the decentralized level was also mentioned by the majority of the respondents. As depicted by a prosecutor, '*they emptied the central service on human trafficking and migrant smuggling of the federal police from its substance to give the priority to terrorism*' (Interview Prosecutor 2). Another prosecutor added: '*when you're discussing with the federal judiciary police* (RM: referring to decentralized federal police units), *they regularly say that they cannot follow-up on the files*' (Interview Prosecutor 3). However, the collaboration does not always work out as the respondent from the Foreigners' Office explained '*the police forces are working against each other or have different interests, especially in the Maximilian Park. Everyone tries to give the hot potatoes to someone else (…) and a phenomenon like that can really take enormous proportions and become unmanageable*' (Interview Foreigners' Office 1). For the advisors of the Ministry of Justice, as well as Prosecutor 1 and 4, '*it is difficult for the local police to do everything*' (phrased in Interview Ministry of Justice 2). However, whereas the fight against human trafficking and migrant smuggling is listed among the 10 security priorities to be tackled in the former National Security Plan (2016-2019) and amongst the 15 priorities to be tackled in new National Security Plan (2022-2025), many local police zones are not prioritizing migrant smuggling in their zonal security plan. While the zonal security plans are not supposed to clash with the national security plan, the list of priorities can differ in practice by police zones and therefore by geographical area. Consequently, the importance of the role of the local police force depends on territorial jurisdictions, which has to be acknowledged. According to several respondents, the priorities at the local level are more oriented towards petty criminality, burglaries, drugs, or road safety and not necessarily oriented towards migrant smuggling and human trafficking (Interview Prosecutor 1, Prosecutor 4, Investigative Journalist, Federal Police Investigator 1). It can be observed how, to a certain extent, territorial jurisdictions intersect with thematic ones, depending on the exact location of migrants in transit. Reflecting on the procedure following the interception of migrants in transit, Prosecutor 1 explains the subsequent dynamics:

> *'For the mayor and the local chief of the police corps, for them it is a waste of time. Because there is no file, no follow-up. (…) They have the impression that they gave 30 orders to leave the territory, and they lost 24 hours. And in the meantime, they have not been able to be present for their own citizens. And that a mayor is a politician. And that's what matters the most'.*

In line with the impression of losing time and subsequently (deliberately) not acting, the Federal Police Investigator, alluding to the behaviour of some local police units in the parking lots, explains the following:

> *'I'm sure that they're looking left. Because sometimes we're there, because sometimes we're watching the smuggling and sometimes, we see it happening before our eyes. We see, we say well we ask, a unit, a uniformed unit to make the arrest and they will simply not come. They will say no, we don't want to, we don't have the time, power, capacity to do so. It happens. And it happens that they are just being chased away because, they're just transmigrant. They don't want to stay in Belgium and want to go towards Great Britain. Let them go to the UK. Why put two days working that if they want to go elsewhere? Why do so?'* [RM, referring to perception of demotivation experienced by local police officers].

Nevertheless, the respondent also explained that in several areas, and depending on the political actor in charge, the local police officers are well-trained and do participate accordingly. For example, in the province of West-Flanders in the Flemish part of Belgium, which is a hotspot area for migrant smuggling, the role of the Governor Carl Decaluwé taking a hard stance regarding the security issues around migrants in transit is well established. These quotes illustrate how the overlap between thematic jurisdictions as well as territorial ones can have a substantial impact on the governance of migrants in transit on the Belgian territory. The crucial role of the mayor, who, as explained above, apart from being a politician is the head of the administrative police at the local level, further influences the dance. By looking at decision-making processes and actions at the street-level and, most importantly here, non-actions of distinct actors, the influence of broader economic and political pressure becomes visible (Black 1997, 2001; Hawkins 1992; Dörrenbächer 2018). As highlighted by a respondent from the Foreigners' Office,

> '*If the Minister of the Interior says or the Minister responsible for Asylum and Migration says, 'I wish that there is a tougher action regarding transmigration'. In many areas we have to count on the cooperation of the mayor. If the mayor says no, that's it*' (Interview Foreigners' Office 2).

5.1.3 Thematic Jurisdictional Games: A Smuggler Needed to Be Punished?

While the analyses in the two last sub-sections were limited to policing, another (thematic) jurisdictional game, which is interesting to examine, concerns the dynamics happening at the prosecutorial level. The involvement of migrants

in transit in (low-level yet visible) smuggling activities can involve distinct legal responses and lead to the criminalization of migrants. To understand the complexity of the thorny 'smuggler, irregular migrant or victim' issue, it is important to discuss the legal framework as well as a recent jurisprudential case. It is also required to signal that the UN Palermo Protocol on migrant smuggling states in its article 5 that an irregular migrant should not be punished for being smuggled and that this Protocol was followed by the Belgian legislature (see Chapter 2 and see also below on the *ratio legis*). The migrant smuggling offence (art. 77*bis* of the Law on Foreigners 15 December 1980) penalizes the 'contribution, in some way or another, be it directly or by an intermediary, to the unauthorized entry, transit, or stay of a non-EU citizen into or through an EU member state, in violation of state law, directly or indirectly with a view of obtaining a patrimonial benefit'. The potential punishment is imprisonment of 1 to 5 years and a fine of 500 to 50 000 euros (fine multiplied by the number of victims). The term 'contribution' covers a vast array of behaviours such as the payment of a transportation fee of an individual to the migrant or the depiction of a country of destination as ideal to encourage individuals to go there to benefit financially from their migration journey (Clesse 2013). The concept of 'patrimonial benefit', in French *avantage patrimonial,* referring broadly to a financial or material gain, is central as it has a direct impact on the criminalization of migrants in transit. A recent case of the Correctional Tribunal of Brussels[8] stirred an important debate on the notion. Indeed, while the (European) Facilitation Directive 2002/90/EC refers to the notion of 'for profit' meaning a substantial financial/material gain, the Belgian legislature adopted the broader notion of 'direct or indirect patrimonial benefit', which leaves substantial room for interpretation and is often interpreted in light of the circumstances of a case (Hardt 2019; see also Chapter 2). The leading French dictionary Larousse defines the term 'patrimonial' as 'something having an economic value' and the court has to prove the willingness of the migrant smuggler to enrich themselves at the expense of the victim or the family of the victim (Huberts 2006).

Yet, in the abovementioned case, also commonly referred to in the media as the 'criminalization of migration trial',[9] migrants in transit were convicted by the Tribunal for migrant smuggling as they were providing assistance in the operations in exchange for a free journey or to finance their future travel

8 12 December 2018. The decision was appealed by the Public Prosecution Office. However, the decision was confirmed by the *Court of Appeal* in May 2021.

9 Defranne, T. 2021. *Ouverture du procès en appel des hébergeurs de migrants : c'est une intimidation, une criminalisation de la migration. RTBF*. https://www.rtbf.be/article/ouverture-du-proces-en-appel-des-hebergeurs-de-migrants-c-est-une-intimidation-une-criminalisation-de-la-rmigration-10725444

to the UK. The Tribunal considered that this compensation fulfilled the notion of patrimonial benefit. Hardt (2019) flagged the judicial decision as troublesome, as migrants in transit in precarious socio-economic situations are more likely to be criminalized than migrants 'simply' found in lorries who might be considered as victims (judiciary hat) or as highlighted above, simply let go in the street (administrative hat). When legislating on the issue, it appears clear that the *ratio legis* of the migrant smuggling offence is to punish highly organized criminal groups abusing or taking advantage of the miserable conditions of migrants by placing them in dangerous situations (as highlighted by excerpts of parliamentary documentation in Hardt, 2019). A teleological interpretation of the law would therefore not lead to a criminalization of migrants in transit in extreme precarious situations who are not key actors or the masterminds behind the migrant smuggling operation. As Hardt (2019) outlined, the demarcation line between perpetrator and victim becomes extremely blurred and this kind of decision therefore shows how the offence is being instrumentalized in a way that is at odds with its *ratio legis*, namely the fight against migrant smuggling.

Among the respondents, disagreement can be found regarding the problematic case in which smuggled individuals take part in the smuggling operations. Prosecutor 3 explained that during joint work meetings with the relevant actors involved in dealing with human trafficking and migrant smuggling (e.g., Federal Police, specialized Prosecutors, NGOs), no consensus could be reached on these complex cases. This observation was confirmed during the interviews as Prosecutor 4 considered that a migrant who participated in the smuggling operations (e.g., driving a van full of migrants) in exchange for a 'free ride' at a later stage had to be considered as a smuggler in any event. According to the respondent, the future 'free ride' to the UK can be considered as a 'for profit motive', which then makes the action fall under the migrant smuggling legal provision. Regarding potential cases where migrants can be '*forced or threatened to do certain things*', Prosecutor 4 admitted that this could happen but '*they* [RM: prosecutors, police officers] *don't know as they were not there and at one point. You can only work based on certain objective things that you establish*'. Prosecutor 4 expressed how 'strict' they were with this sort of cases because otherwise '*you reason with the logic of a criminal and that would certainly be a way to get away with everything*' (Interview Prosecutor 4). Interestingly, this black-letter law reasoning was nuanced by Prosecutor 1 who sees not only pure cases of migrant smuggling but pinpointed that the smuggler could also be a victim of human trafficking. According to Prosecutor 1, '*people that are on these parking lots are the most vulnerable, they are the ones that will be found by the police, that will be locked up and quickly sentenced*'. A respondent from the Foreigners' Office (Interview Foreigners' Office 3) also underlined the vulnerability and despair emanating from these situations that they see happening in Belgium. Showing empathy, the respondent explained,

> *'When a criminal organization comes and make them an offer, they basically cannot refuse. What is the alternative? Sitting in Calais for another year, not knowing what will happen every day? Ok, I need to do something dangerous but then I have two new organized attempts that could potentially succeed'.*

However, Prosecutor 1 indicated that in these circumstances, it really depends on the individual's decision. Indeed, prosecutors have attempted several times to grant the protective status to the 'transmigrant' involved in smuggling operations, without success. The respondent pointed out that *'at this stage, it's very difficult if they don't want to come to us, we will prosecute them as smugglers, as part of the smuggling network'*. Prosecutor 2 nevertheless indicated that even if you can prosecute them for migrant smuggling according to the law, you can still argue for a 'reduction of sentence or something, as the person was first a victim and then they participated [in the smuggling activities] (Interview Prosecutor 2). This lack of consensus is a prime example of how blurry cases leave room for discretionary decision-making that can have a significant impact on the situation of the individual participating in smuggling operations.

5.2 Scaling up: territorial jurisdictional games at the European scale

As mentioned in the Introduction, because migrant smuggling necessarily involves the crossing of borders, the perception of Belgian experts on the role of the EU and its member states when it comes to the phenomenon will be emphasized in the following lines. The majority of the respondents are conscious that the phenomenon should be handled in a holistic manner and shed light on the limitations on distinct actions taken solely at either the local or at the national level. Showing awareness to the interconnectedness of actions taken in distinct member states, a member of the Federal Police explains, *'The fact that you have now all these Africans here it's because they have been chased away, and I cannot use the word chased but they have been chased away by the French. It is as simple as that'*.

This issue of passing the buck to each other, either as a practice or as a discourse, both at the national and at the European level, was also identified by other respondents. In the words of Prosecutor 4,

> '*The competences are scattered. With the Flemish government, with the federal government. And I do see that in this field* (migrant smuggling)*, many people look at each other all the time. And when they really don't know anymore, they blame the English. Then it's an English problem, the English should solve it. Or they say, 'It's the country of origin, that's the problem'. That's all true, those problems are all there, but we are here now, here with those problems. And what are we going to do about it, huh?'.*

Similarly, the Federal Police Investigator was particularly frightened by the fact that he increasingly had to justify the fact that a team of 15 investigative officers in Brussels worked on '*on an issue that is not our problem*'. The respondent strongly disagreed and explained that from the moment that individuals are dying or are mistreated on the Belgian territory (e.g., being placed in refrigerated lorries), then, de facto, it becomes a Belgian problem. Reflecting upon the complex institutional framework at the national level, the respondent outlined, '*It's like Belgium, I mean you have Brussels, Flanders, you have Wallonia, you have the Brussel's regions, the Flemish regions and the French regions and you have the Federal. Cut the crap. We're a city, big. We're the size of New York*'. Subsequently, the Federal Police Investigator underlined the need for easier (international/European) collaboration, mentioning that one should have '*more Europe, less Belgium and less nations*' and that people, especially with the cross-border phenomenon where people go from A to B, should be able to work fluently with one another, for police investigations, there should be '*no borders*'. By looking at the existent mechanism available for international collaboration, mainly using a Joint Investigation Team via EU agencies, such as Eurojust and Europol, Prosecutor 2 shed light on the following challenges:

> '*In order to have a Joint Investigation Team, it is necessary to have several countries involved, these are long term investigations. So, here we come back to a question that often comes up in training sessions. Do we have to carry out this type of investigation internationally when we know that it is complicated and time-consuming?*'

The Director of the NGO describes the police perspective as follows: '*it's so much paperwork and administration and stuff. You know what, let's just solve the problem locally and don't worry about the rest*'. However, as Prosecutor 1, who has substantial experience in the domain and sees the benefit of carrying this type of investigation, made clear,

> '*in order to dismantle, it's a big word, to destabilize a network, the only way to work is to work internationally. Because it's no use cleaning up in front of your own door when you go to the next town or district where there is another part of the network. These are small cells that will immediately leave again, so you really have to try to find the right way*'.

The respondent said that when several prosecutor offices are involved on a case, either at the national or at the international level, '*one has to take responsibility*' and takes back the file, and these are '*discussions that can be difficult*'.

At the European scale, the potential problem is the involvement of multiple territorial jurisdictions and the lack of a harmonized approach to deal with migrant smuggling. As one senior policy advisor from the Federal Police explained, sometimes, when the competences are for everybody, '*then they are for nobody*'. Indeed, the respondents from the Foreigner's Office acknowledged that it is already '*a challenge to agree at the Belgian level*' and that it is '*Europe's*

big challenge to provide an answer within 10 years'. However, respondent 1 and 3 from the Foreigner's Office highlighted that if dialogues could be found at a bilateral level between two member states, having an overall dialogue in Europe and reaching a consensus is '*far too complex and too difficult*'. As summarized by respondent 3, '*Member States are happy when an illegal* (irregular migrant) *leaves their territory. How or what, when? Preferably as soon as possible and it is no longer our responsibility, period*'. Whereas this sub-section could appear to be dealing with issues of international collaboration, the 'passing the buck' discourses highlighted above, and the shifting of responsibility have important consequences in practice. Because it is 'everybody's problem', also at a European scale, it could be quickly concluded that there is no point of conducting a large-scale international investigation due to a lack of time/capacity/interest. This can also result in actions focusing at 'sweeping in front of the front door' knowing purposefully that it will not 'solve' the issue in a structural manner.

6 Conclusion

Following the suggestion of Moffette and Pratt (2020), this chapter aimed to contribute to research which is not solely centred on criminal law, and which takes the nation state as the 'default scalar setting' (Valverde 2010: 240). By so doing, specific attention was paid to the interlegal and multi-scalar jurisdictional games found in the (legal) governance of migrants in transit involved in migrant smuggling activities in Belgium. Instead of looking at sites of intersection where criminal law and administrative law can merge, which is popular in crimmigration scholarship, the interlegality and jurisdictional games analytical lens was useful to shed light on the messy realities of governing practices. The Belgian case study provided a snapshot of the multiplicity of actors and legal regimes intersecting one another, as highlighted in sections 3 and 4. The analysis focused on the intersection between distinct sets of legal technologies at the local, national, and European scales, and showed how the mobilization of one realm of law over another can have substantial consequences for the situation of migrants in transit on the territory. From a governmental perspective, because migrant smuggling is situated at the crossroads of multiple 'fights', namely the fight against irregular migration, the maintenance of public order as well as the fight against human trafficking, the competences to deal with the phenomena are scattered between distinct actors (3).

At the local and national scales, the chapter whowed the importance of both thematic and territorial jurisdictional games intersecting with each other and pointed out how the administrative processing of the migrant in the context of the 'fight' against irregular (trans)migration (administrative lens)

can take over the procedure allowing victims of aggravated forms of migrant smuggling to enter the status (judiciary lens). Whereas the reasons explaining the scarce use of the protective status in practice are manifold (5.1), the overlap between the judiciary and the administrative lens and the lack of awareness of the procedure in place to protect victims of aggravated forms of migrant smuggling by police officers is visible (5.1.2). Nonetheless, looking specifically at the local scale, the territorial jurisdictional games also play an important role as the mayors are the head of the administrative police at the local level. Consequently, and considering the capacity/time consuming nature of the procedure, when intercepting irregular migrants, the priority does not necessarily lie in starting a migrant smuggling investigation, which could potentially lead to the protection of victims (5.1.3). Indeed, because the mayors are politicians, the priorities decided at the local level, while not clashing with the priorities established at the federal level, can nonetheless be distinct. This observation can also explain why on several occasions, local police officers decide to 'look left' and not take actions as acting would have a 'low return on investment' and would be felt as a 'waste of time'. The passing the buck behaviours between the local and the federal police, who also faces capacity shortage, and the shifting of responsibility is made possible because both police forces have a role to play in the jurisdictional games.

Besides the games found at the police level, it was also important to shed light on the thematic jurisdictional games present at the prosecutorial level as the interviews conducted made clear that the complex issue of 'victim or smuggler' did not generate a unanimous consensus within reference prosecutors and other relevant actors. In some events, a migrant involved in low-level smuggling activities could be considered as a victim of human trafficking, while in other event, a same individual can be criminalized as a migrant smuggler (5.1.3). As a result of all these intersections, a migrant in transit in the territory and involved in migrant smuggling activities can 1) either be 'solely' administratively processed and sent back on the streets after receiving an order to leave the territory, 2) potentially benefit from the protective status usually reserved to victims of human trafficking or 3) be criminalized as a migrant smuggler if he or she is found to perform (low level and visible) tasks in the smuggling operation. In line with Moffette's (2020) analysis, it appears clear that it is the separateness or the heterogeneity of the jurisdictions, present at different scales, that leaves room for a multiplicity of actors to use laws as flexible sets of tactics in the everyday governance of migrants in transit in Belgium.

In their contribution, Moffette and Pratt (2020) highlighted the performative aspect of jurisdictions, by comparing them to a tango that needs to be enacted or practiced (Ford 1999). As a result, they engage necessarily some forms of negotiation and therefore a certain amount of discretion (Moffette & Pratt 2020; see also Valverde 2009). This chapter aimed to go further than only evoking the role of discretion by giving specific attention

to the performance of jurisdiction and the discretionary decision-making involved in jurisdictional games (e.g., Lipsky 2010; Black 2001; Hawkins 1992). The combination of the interlegality and jurisdictional games lens with the literature on street-level bureaucracy and decision making (1.2 and 5.1) gave insights on the rationales behind actors' decisions to use one set of legal technology, with its own logic and purpose, over another. It became apparent that the bureaucratic burden linked to the lengthy procedure, the lack of time and capacity, the presence of political pressure or incentive (or lack thereof) as well as the lack of training and/or sensibilization played a role in police officers' decision to act, to mobilize either criminal law or administrative law, or, in several events, not to act at all (5.1).

At the European scale and similar to the analysis performed at the local and national scale, the observations made by the respondents shed light on the importance of territorial jurisdictional games and underlined the necessity to adopt a holistic view to deal with the migrant smuggling phenomenon in a structural manner. If the competences are scattered between different states, it becomes easier to 'swipe in front of your own door' and pass the buck to another (member) state regarding migrants transiting within the Schengen Area (5.2). Overall, an interesting observation emerges: if the competences are too scattered, or when too many legal regimes intersect with one another, it becomes possible for relevant actors to throw the ball at each other and subsequently discharge themselves from their responsibilities. Evidently, the analysis presented in this chapter is limited as the empirical data does not shine light on the perspectives of migrants themselves and their agency and strategies in navigating these jurisdictional games. Further research taking into account these crucial insights could enrich further the theoretical lens developed in this chapter.

In her article on 'abnormal justice', Franko Aas (2014) described bordered penalty practices directed at non-citizens, which were the result of prosecutorial decisions to 'change tracks' between criminal and administrative tracks, depending on the resources available and the objectives at hand. Whereas Franko Aas (2014) looked at coercive measures, migrants' detention and the existence of a parallel penal system guided by a distinctive logic, it is also of interest to look at the latent yet potentially harmful impact of the indifference of authorities as well as the constant arrest and release of individuals in transit. The conceptual framework used in this chapter can therefore be useful to have a better grasp on the ways Belgian authorities deal with issues of 'irregular transmigration' in their territory. The jurisdictional games and the interlegal regulation of migrants in transit described in the chapter resonates with the concept of 'abnormal justice' and calls for further socio-legal research of what Moffette and Pratt (2020) described as doing 'criminology at the borderlands'.

6 Aggravated Migrant Smuggling in a Transit Migration Context

Criminal Victimization under Positive Obligations Case Law

1 INTRODUCTION

In recent years and particularly since 2015, migrant smuggling has solidified as a salient policy issue for Europe. At the EU level, in accordance with the renewed EU Action Plan against Migrant Smuggling contributing to the implementation of the New Pact on Migration and Asylum, the current position is that the phenomenon requires a 'strong European response'.[1] The current response emerged from an older one dating back from the the mid-1990s, which has primarily been conceptualised as a need to combat cross-border (organised) crime.[2] The underlying rationale is that 1)on the one hand, migrant smuggling 'puts the migrant's lives at risk, showing disrespect for human life and dignity in the pursuit of profit', and '(undermines (…) the fundamental rights of the people concerned'[3] and 2) migrant smuggling, or the 'facilitation of irregular entry, transit and stay', disrupts 'the migration management objectives of the EU'.[4] Whereas the detrimental impact of smuggling on life, dignity and rights resonates in policy narratives and smuggling is clearly circumscribed as a crime, the framing of the smuggled migrants is less clear and does not resonate with the depiction of the impact of migrant smuggling. Arguably, the second rationale, centred on migration management, predominates the legal and policy responses, rendering them perpetrator-centric in nature.[5] Policy actions are primarily oriented on breaking the 'business

1 Nina Perkowski and Vicki Squire, 'The Anti-Policy of European Anti-Smuggling as a Site of Contestation in the Mediterranean Migration 'Crisis'' (2019) 45(12) JEMS 2167; Commission (EC), 'A Renewed EU Action Plan Against Migrant Smuggling (2021-2025)' COM (2021), 1, 29 September 2021 < https://ec.europa.eu/home-affairs/renewed-eu-action-plan-against-migrant-smuggling-2021-2025-com-2021-591_fr>.

2 Ilse van Liempt, 'Human Smuggling: A Global Migration Industry', in Anna Triandafyllidou (ed), *Handbook of Migration and Globalisation,* (Edward Elgar Publishing 2018) 140. Gabriella Sanchez, Kheira Arrouche, Matteo Capasso, Angeliki Dimitriadi and Alia Fakhri. 'Beyond Networks, Militias and Tribes: Rethinking EU Counter Smuggling Policy and Response' (April 2021): <https://www.euromesco.net/publication/beyond-networks-militias-and-tribes-rethinking-eu-counter-smuggling-policy-and-response/> accessed 20 February 2022.

3 Renewed EU Action Plan (n 1).

4 Renewed EU Action Plan (n 1).

5 See Valsamis Mitsilegas, 'The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law' (2019) 10(1) New Journal of European Criminal Law 68.

model of the smugglers', and, under the primary aim of the Facilitator's package, the effective criminalization and sanctioning of perpetrators.[6] The criminal profile of the perpetrator being unequivocal,[7] the conceptualisation of the smuggled migrant is however less clear.

This approach resonates with the legal frameworks adopted at the UN level, wherein the smuggled migrant also resides in somewhat of a limbo in terms of victimization, notably in a criminal justice sense. A focal point of consideration relates to the legal distinction between migrant smuggling and human trafficking embedded in the UNTOC and its two additional protocols.[8] Sometimes referred to as a 'strange legal fiction',[9] this distinction resolves into significant differences in the legal and practical treatment of trafficked versus smuggled persons. This is underscored by the nomenclature used in the two Protocols. The Trafficking Protocol refers structurally to 'victims' (also in a criminal justice sense), while the Smuggling Protocol refers to persons who have been the 'object' of criminal conduct.[10] However, as will be further developed in this chapter, the figure of the smuggled migrant is not unambiguously framed.[11]

At the European level, the disparity plays out even more strongly. Both the Council of Europe (CoE) and the EU have established their own regulatory frameworks with respect to trafficking, securely recognizing criminal victimiza-

6 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1; Renewed EU Action Plan (n 1) 17.

7 For a critique and overview, see Federico Alagna, 'Shifting Governance: Making Policies Against Migrant Smuggling Across the EU, Italy and Sicily' (PhD Thesis, Radboud University 2020).

8 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319. On the history of these protocols and the legal dichotomy, see Yvon Dandurand and Jessica Jahn, 'The Failing International Legal Framework on Migrant Smuggling and Human Trafficking' in John Winterdyk and Jackie Jones (eds.), *The Palgrave International Handbook of Human Trafficking* (Springer International Publishing 2020) 783; James Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 Va. J. Int'l L. 1.

9 Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground – A Response to James Hathaway' (2008) 49 Va. J. Int'l L 792; Dandurand and Jahn (n 8).

10 On the notion of victims, see the notes made by the Secretariat in UNTOC 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime' (2006), < https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>, 461, 483.

11 See section 2.5. See also Alessandro Spena, 'Smuggled Migrants as Victims?: Reflecting on the UN Protocol against Migrant Smuggling and on Its Implementation' (2021) 3(4) Brill Research Perspectives in Transnational Crime 43.

tion of the trafficked person and prescribing significant duties of protection in that regard.[12] The same has not occurred for smuggled migrants, however.[13] Importantly, despite a visible ambivalence in the conceptualisation of smuggled migrants in all three legal frameworks, recent developments at the UN[14] and CoE[15] levels do demonstrate a growing awareness on the inherent risks faced by smuggled migrants to abuse and exploitation, underscoring, amongst other things, the operational links between human trafficking and migrant smuggling and acknowledging the need to take action.[16] With potential shifts in thinking on the horizon, it is a propitious time to contemplate how any momentum in this regard can be fortified through recourse to human rights law. This contribution argues that an important locale for the (re-)conceptualisation of the smuggled migrant is at the crossroads of criminal justice and human rights, with a focus not on the perpetrator but the smuggled migrant as a victim.

Holding that that a differentiated approach is critical to the development of protection within the ECHR framework, two important demarcations are maintained here. Firstly, the multiple issues and consequences surrounding the framing of the complex and multi-faceted smuggling phenomenon have increasingly captured the attention of scholarship.[17] The implications for the

12 Council Directive 2002/90/EC (n 6).

13 See for instance Joanne Van der Leun and Anet van Schijndel, 'Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat against Trafficking in Human Beings and Migration Control' (2016) 44 International Journal of Law, Crime and Justice 26.

14 New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1; Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) 5 February UN Doc A/Res/73/195.

15 European Committee on Crime Problems (CDPC). Council of Europe Roadmap on Fighting the Smuggling of Migrants (adopted 3 February 2020). The document mentions the possibility of creating a legally binding instrument on migrant smuggling considering the 'grave' legal discrepancies found in the legislations of its Member States. Despite its dominant perpetrator/crime-centric orientation, the document emphasises the necessity to adopt a multi-disciplinary approach which includes the safeguard of migrant's human rights considering the life-threatening risks and exploitation to which they are exposed (point III).

16 Whereas the Global Compact (n 14) underlines the necessity to secure the human rights of smuggled migrants, the emphasis on the dichotomy between smuggling and human trafficking remains omnipresent (see objective 9). However, the New York Declaration (n 14) concretely highlights the interconnections between migrant smuggling and human trafficking (see objectives 5-6). Besides, the text operates a terminological turn from the Smuggling Protocol in referring to 'people in vulnerable situation' and more importantly 'to *victims* [emphasis added] of exploitation and abuse in the context of the smuggling of migrants' (objective 23). See also Jean-Pierre Gauci and Vladislava Stoyanova, 'The Human Rights of Smuggled Migrants and Trafficked Persons in the UN Global Compacts on Migrants and Refugees' (2018) 4(3) International Journal of Migration and Border Studies 222.

17 Anna Triandafyllidou, 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' (2018) 676(1) The Annals of the American Academy of Political and Social Science 212; Gabriella Sanchez, 'Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research' (2017) 5(1) Journal on Migration and Human Security 9; Alagna, (n 7); Enrico Fassi, 'The EU, Migration and Global Justice. Policy

human rights needs of smuggled migrants extend well beyond the domain of criminal justice.[18] An isolated approach, focusing only on protective duties in a criminal justice sense would indeed itself be reductive, even detrimental, if that would mean a lack of regard for other types of needs.[19] While it is important to emphasize that a holistic understanding and strategy are required to address the full gamut and intersectionality thereof,[20] this chapter does focus solely on the criminal justice domain, examining if and how *certain smuggling experiences*, of *migrants with a (particular) (vulnerability) profile*, can be positioned within the *criminal related positive obligations* framework developed in the case law of the European Court of Human Rights (ECtHR), under the European Convention on Human Rights (ECHR). We argue that *categorically* approaching migrant smuggling as victimless crime or downplaying the criminal victimization of the smuggled migrants – envisaging them always as 'willing' participants, at worst as a co-perpetrators[21] – would be iniquitous. That also holds because *it is* recognized that smuggling leads to human rights abuses, potentially *also* in the form of criminal victimization. That should create a responsibility of clarity with respect to the type of criminal victimization, which can be at issue, and to provide protection in that respect.

The choice to seek recourse to the ECtHR framework lies in the prolific nature of its positive obligations case law, its unique interpretative arsenal and its responsiveness to social scientific information,[22] all making the ECtHR uniquely positioned to disrupt protective disparities in the trafficking/smuggling dichotomy. While restricting discussion to the interface between human

Narratives of Human Smuggling and their normative implications' (2020) 1 Rivista Trimestrale di Scienza dell'Amministrazione 1.

18 With respect to the right to residence, see Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in Baþak Çalý, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

19 Even within the context of criminal justice positive obligations in relation to human trafficking, the identification duties exist autonomously from criminal proceedings. See for instance Vladislava Stoyanova, 'Separating Protection from the Exigencies of the Criminal Law, Achievements and Challenges under art. 4 ECHR' in Laurents Lavrysen and Natasa Mavronicola (eds.) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Bloomsburg Publishing 2020). See also Vladislava Stoyanova, 'J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking' (Strasbourg Observers, 7 February 2017) <https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/> accessed 19 June 2022.

20 Ibid on the prescribed holistic approach required by the Court.

21 As distinct from the issue of criminalization of humanitarian aid, see Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan' (CEPS Policy Brief, December 2021) <https://www.ceps.eu/wp-content/uploads/2021/12/CEPS-PB2021-01_Between-politics-and-inconvenient-evidence.pdf> accessed 12 May 2022.

22 Besides, all EU Member States are also CoE members which *de facto* entails that ECtHR case law apply to them.

rights and criminal justice related obligations, the argument may also be made that crafting an evidence-based (vulnerability) profile under the framework of criminal justice related positive obligations, resonating better with the experience of smuggled migrants, can function as an important pivot to improve the conceptualisation of smuggled (transiting) migrants vis-à-vis other types of human rights' needs.

Secondly, considering the need for differentiation and care in the construct of a legitimate, evidence-based needs profile, this contribution focuses particularly on cases where smuggled migrants take on the feature of being *migrants in transit*. Holding that characteristic especially contributes to the (particular) vulnerability of smuggled migrants. The argument is made here that the Court, as it has been inclined to do so, among other things, in trafficking cases, can operationalize empirical evidence to enhance protection, with an emphasis on the transit element.[23] In light of the focus on the implications of a transit context, this contribution turns to the Belgian jurisdiction as a concrete illustration. Based on empirical research conducted by the first author, the functioning of the unique legal model developed in this jurisdiction to deal with aggravated forms of migrant smuggling is reviewed. Focusing on Belgium is of particular interest for two reasons. From a legal perspective, going beyond international obligations, the Belgian legislation seems to respond well to operational links, or the grey area found at the nexus between migrant smuggling and human trafficking.[24] It does so through the recognition of an unjust disparity in the treatment of trafficking and smuggling victims. Taking as a point of departure that the circumstances of such persons are similar where *aggravated forms of migrant smuggling* can be found, Belgium law accords smuggled individuals the protective status exclusively reserved for trafficking victims in other jurisdictions. From an empirical perspective, the fact that Belgium, both an EU and Schengen member, is a *transit* country and, as such, faces significant challenges arising from the presence of large numbers of irregular migrants *en route* to other destinations on its territory is of particular interest.

In order to build a realistic argument as to how the ECtHR can extend its protective umbrella through recognition of criminal victimisation, the first section provides an overview of the Belgian legal and policy framework. Section 2 also outlines, based on empirical insights, how and why that framework is not fully effectuated in practice. Drawing on the problematic as demonstrated in the Belgian case study, Section 3 discusses how the ECtHR, as it has done in other contexts, can turn robust empirical information and scholarly

23 See, with respect to the Court's margin of appreciation in its 'free evaluation of all evidence' in *Zoletic and Others v. Azerbaijan* 20116/12 (ECtHR, 7 October 2021) para 135.

24 Van der Leun and van Schijndel (n 13); Anette Brunovskis and Rebecca Surtees, 'Identifying Trafficked Migrants and Refugees along the Balkan Route. Exploring the Boundaries of Exploitation, Vulnerability and Risk' (2019) 72(1) Crime, Law and Social Change 73.

insights into human rights currency. Specific attention is devoted in this regard to the concept of vulnerability, both from a theoretical and empirical perspective. To that end, the real-life profiles and experiences of smuggled migrants as they transit throughout European jurisdictions will be developed, with an eye on stressing the need to securely recognize victimization under the intersection of human rights and criminal law in light of the evidence presented. Subsequently, Section 4 concretely outlines the potential for the development of criminal justice related positive obligations protection for smuggled migrants, utilizing the Court's human trafficking case law as a model. This section discusses *how* the ECtHR has also relied on empirical information, advancing that, with an even commitment to this methodology, it can identify similar protective needs for smuggled migrants. Section 5 concludes the chapter with some over-arching reflections.

2 The Belgian Case: Context, Legal Framework & Limitations

In examining the potential for the positioning of smuggled migrants with a particular (vulnerability) profile within the ECtHR's criminal related positive obligation framework, it is useful to explore a real-life scenario showcasing relevant legal and factual issues and illustrating needs and difficulties in this regard. Belgium provides a particularly apt case study, not only because of its unique legal framework, but particularly also because it is an important transit jurisdiction within the Schengen area. This allows to examine the under-researched situation of migrants in transit and 'secondary' or 'unauthorized' migration movements.[25] To understand the Belgian situational context, it must first be envisaged as an EU member state and as a Schengen member. Looking specifically at the distinct issues within the Schengen Area with regards to secondary migration movements and the potential links between migrant smuggling and human trafficking in a transit migration context, recent EU initiatives to tackle these phenomena and EU agency reports on the situation at the internal borders of the Schengen Area should be highlighted as part of the contextual architecture.

25 In contrast, more scholarly attention is already devoted to the situation of migrants at EU external borders. The authors are aware that the terminology 'secondary' or 'unauthorized' migration movements as used in EU policy documents can be problematic. See Sergio Carrera, Marco Stefan, Roberto Cortinovis and Ngo Chun Luk, 'When mobility is not a choice. Problematising asylum seekers' secondary movements and their criminalisation in the EU' (CEPS, December 2019): <http://aei.pitt.edu/102277/1/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf> accessed 15 May 2022. While being mindful of these important terminological concerns, the authors will still refer to the term secondary migration movements when described as such either in policy/media documents and by the respondents.

2.1 Migrant Smuggling within the Schengen Area

Taking together the adoption of the renewed Action Plan against Migrant Smuggling (2021-2025) and the incorporation of the fight against migrant smuggling as priorities in both the New Pact on Migration and Asylum[26] and the European Agenda on Security,[27] the EU message is clear: anti-smuggling efforts should be intensified in order to 'prevent the exploitation of migrants by criminal networks and reduce incentives for irregular migration'.[28] The dual rationales underpinning the fight against migrant smuggling at the EU level, outlined in the introduction, are henceforth clearly maintained. Moreover, an evolving sophistication can be identified in the understanding of smuggling *within* the Schengen Area.

Looking at counter-smuggling policies and the ways in which the phenomenon is framed, it is interesting to examine the connections created between secondary migration/unauthorized movements, migrant smuggling and human trafficking. Following EU narratives, secondary migration movements are deemed to 'feed human smuggling and trafficking networks'.[29] Also connecting these phenomena and demonstrating awareness of the victimisation risks faced by smuggled migrants, the EU agency Europol signalled in 2011 an intersection between transit migration, migrant smuggling and human trafficking by stating that 'transiting migrants are frequently exploited in illicit labour'.[30] Interestingly, while the phenomenon of migrant smuggling and human trafficking are always described in official reports as clearly distinct in light of the absence of exploitation in the migrant smuggling context, the fourth annual EMSC report uses confusing phrasing in this regard, referring to the particular vulnerability to *exploitation* of 'potential irregular migrants in remote locations and so-called bottlenecks.'[31] Distinct annual reports of the European Migrant Smuggling

26 Renewed EU Action Plan (n 1); Commission (EC), 'New Pact on Migration and Asylum', COM (2020) 609 final, 23 September 2020 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0609&from=EN.

27 Commission (EC), 'EU Security Union Strategy', COM (2020) 605 final, 24 July 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0605&from=EN>

28 Commission (EC) website <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en> accessed 10 June 2022.

29 European Parliament, 'EU Parliament Briefing on EU Secondary Movements of Asylum Seekers in the EU Asylum System (October 2017), https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf accessed 10 June 2022; see also New Pact on Migration and Asylum (n 26).

30 European Police Office (Europol), 'OCTA 2011 EU Organized Crime Threat Assessment', <https://www.europol.europa.eu/publications-events/main-reports/octa-2011-eu-organised-crime-threat-assessment> accessed 3 May 2022; Dunja Mijatovic, 'Time to Deliver on Commitments to Protect People on the move from Human Trafficking and Exploitation' (12 September 2019), <https://www.coe.int/en/web/commissioner/-/time-to-deliver-on-commitments-to-protect-people-on-the-move-from-human-trafficking-and-exploitation> accessed 25 June 2022.

31 European Migrant Smuggling Centre, 4th Annual Activity Report 2019 12.

Centre (EMSC) recently established within Europol contain references to 'bottleneck' areas or 'migrant hubs', also within the Schengen Area, where a high concentration of migrants gather in order to circumvent obstacles (whether physical barriers or permanent/temporary border controls), to continue their journeys onwards.[32] These areas, where the presence of organized crime groups are particularly visible, are 'increasingly targeted by law enforcement authorities' which in turn drives migrant smugglers to further displace their activities, such as around the English Channel, where facilitation activities increasingly take place inland (such as in Belgium and the Netherlands). In the same report, specific attention is paid to secondary migration movements, with respect to which an increase in migrant smuggling services has been observed.[33] Looking at the impact of Covid-19 measures on the phenomenon, notably vis-à-vis the stranding conditions faced by migrants, Europol has signalled a general shift in facilitation activities. The agency describes the crossings as becoming riskier and dangerous, also for migrants already present in European territories. This shift is explained by restrictive border controls and travel restrictions leading, among other things, to an increase in the use of small rubber boats to cross the English Channel and a boost in the practice of hiding migrants in (refrigerated) concealed compartment of trucks.[34] Regarding sea crossings, this dangerous technique often involves migrant smugglers overcharging their fees and making migrants steer the boats, who in turn end up being arrested as co-perpetrators of smuggling.[35]

The ambiguous position of the EU and its agencies on the migrant smuggling phenomenon and its intersection with human trafficking, exploitation and abuse is visible and becomes even more complex. Whereas the necessity to distinguish migrant smuggling and human trafficking is reiterated, the simultaneous recognition of fluidity between the phenomena and the (increased) intersectional hazards faced by smuggled (transiting) migrants is crucial to underline. Moreover, developing narratives outlining the difficulties faced by migrants in transit zones display how vulnerability can be exacerbated by these policies and actions. This is, for instance, the case for narratives pointing to the relationship between restrictive border policies and the presence of organised crime groups.

These developments were important to emphasise because onwards unauthorised movements within the Schengen Area and actions undertaken in other EU Member States and in the United Kingdom (UK) have bearing on both the legal and factual situation in Belgium. From a legal standpoint, the

32 European Migrant Smuggling Centre, 3rd Annual Activity Report 2018 (2019) 12; European Migrant Smuggling Centre, 4th Annual Activity Report 2019 (n 31); European Migrant Smuggling Centre, 5th Annual Activity Report 2020 (2021).

33 Ibid.

34 European Migrant Smuggling Centre, 4th and 5th Annual Activity Reports (n 31 and n 32).

35 Maël Galisson, 'Deadly Crossing and the Militarisation of Britain's Borders' (2020) < https://irr.org.uk/wp-content/uploads/2020/11/Deadly-Crossings-Final.pdf> accessed 3 May 2022.

EU legal instruments related to migration, asylum, migrant smuggling, and human trafficking influence the Belgian legal framework, even with some room for manoeuvre in the implementation process.[36] Without discussing extensively relevant EU legal instruments for the governance of smuggled migrants, it is important to highlight that ambiguity vis-à-vis the framing of the figure of the smuggled migrant (see also Chapter 2). Notable in that regard is the adoption of the EU Directive on Short-Term Residence Permits in 2004, which assured that the blurry area between smuggling and trafficking is formally acknowledged at the EU level.[37] Whilst the approach in this Directive remains perpetrator-centric, as the assistance and protection is dependent on the collaboration of the victim with the authorities, it represents a step in the direction of the reconceptualization of smuggled migrants in terms of victimization. Indeed, besides trafficking victims, the Directive leaves the option to the Member States to extend the scope of protection to smuggled individuals (see also Chapter 2). Belgium is one of the nine Member States who have made use of the facultative option, even going further in that regard (see below 1.3).[38]

2.2 Fight against 'Transmigration' and Migrant Smuggling in Belgium

Focusing now on the Belgian factual situation, the historical role of the country as a jurisdiction of transit has been extensively documented in scholarship and underlined in Chapter 2, Chapter 4 and Chapter 5.[39] Since 2015, in response to rising numbers of migrants transiting through the country, and on the initiative of the then Secretary of State and Asylum and Migration, a

36 We can *inter alia* refer to the Facilitator's Package (n 6), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 ; Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/10; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

37 Directive 2004/81/EC (n 36).

38 Conny Rijken, 'Inaugural Address: Victimisation through Migration' (2016) <https://research.tilburguniversity.edu/en/publications/victimisation-through-migration> accessed 5 January 2022.

39 See Ilse Derluyn and Eric Broekaert, 'On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors' (2005) 43(4) International Migration 31. See also Chapter 2, Chapter 4 and Chapter 5.

'transmigration' task force has been put in place to combat illegal migration.[40] This was followed in 2018, the issue now seen as a federal priority, with the creation of a special Action Plan on Transmigration whose primary objective was preventing the creation of a 'minis-Calais' or other forms of migrant settlements on Belgian soil.[41] The plan included the evacuation of Maximilian Park, considered to represent a pull-factor for so-called 'transmigrants',[42] the intensification of police controls, the creation of an administrative detention centre for transmigrants (subsequently closed in December 2019) and the high securitization of parking areas along the highways. Due to the Covid 19 pandemic, Maximilian Park was evacuated by the authorities in 2020. Since then, migrants in transit are more dispersed but many remain in the North Station neighbourhood. The humanitarian hub established in that region moved to another building and currently shelters hundreds of migrants in transit providing direct humanitarian assistance such as through the provision of food, clothes, and medical care.[43]

As highlighted in the former National Action Plan against Migrant Smuggling (2015-2019) and reiterated in the new plan (2021-2015),[44] actions undertaken on Belgian territory to push back transmigration often focus exclusively on that objective, without necessarily considering the human rights position of the migrants from a (criminal) victimization perspective. Thus, legally prescribed protection, which is available not only for potential victims of human trafficking, but also for 'victims' of aggravated forms of migrant smuggling, remains under administered.[45]

In 2020, the National Rapporteur on human trafficking and migrant smuggling (Myria), clearly underlined the links between migrant smuggling

40 European Migration Network, 'Belgian Annual Report on Asylum and Migration Policy in 2015' (2016) < https://emnbelgium.be/publication/annual-report-asylum-and-migration-policy-belgium-and-eu-2015-emn> accessed 24 January 2021.

41 Belgian House of Representatives, 'Note de Politique Générale. Asile et Migration' (26 October 2018), (Doc 54 3296/021).

42 The neologism 'transmigrant/transitmigrant', which appeared in 2015, refers to a migrant who only passes through or resides temporarily in the territory and aims to reach the United Kingdom. This term, which does not refer to any formal legal category, creates a distinction between migrants who are applying for asylum in the country and those who are not. See Robin Vandevoordt, 'Resisting Bare Life: Civil Solidarity and the Hunt for Illegalized Migrants' (2021) 59(3) International Migration 47?

43 See Elsa Mescoli and Antoine Roblain, 'The ambivalent relations behind civil society's engagement in the 'grey zones' of migration and integration governance: Case studies from Belgium' (2021) 91 Political Geography 102477.

44 Service de Politique Criminelle, 'Plan d'Action Trafic des Etres Humains 2015-2019' (2019) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 May 2022; Service de Politique Criminelle, 'Plan d'Action Trafic des Etres Humains 2021-2025' (2021) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 January 2021.

45 Ibid.

and transit migration in a report specifically dedicated to the matter.[46] The National Action Plan (2015-2019) invited relevant actors (e.g. federal and local police) to approach both phenomena in a holistic manner and emphasizes the need to check, during control operations, not only for potential signs of human trafficking, but also aggravated forms of migrant smuggling, so that protective mechanisms available by law can be operationalized. In this regard, calls are made for a continuation of training efforts for police officers.[47] Moreover, there is an observable growing awareness of various actors, including some regional Governments (in this case in Wallonia)[48] on the vulnerable situation of migrants in transit. The Circular Letter indeed highlights the potential for exploitation and human rights abuses faced by migrants whilst transiting through Belgium and subsequently informed relevant actors on their human rights' protective duties at the local and regional level.

In recent years, attention has also been devoted to the treatment of migrants in transit by the police. In 2018, the NGOs 'Médecins du Monde' and 'Humain' issued a report based on quantitative and qualitative research establishing the existence of physical and psychological police violence towards migrants stranded in Maximilian Park and its surrounding area.[49] The Permanent Oversight Committee of the Police Service (Comité P) also launched an investigation on police control and detention of migrants taking place during large-scale administrative arrest operations (often in parking areas along the highways).[50] Whereas the focus of these two reports is not completely aligned, the Myria underlined important commonalities. It was emphasised that in briefings, police forces took little to no account of the guidelines on human trafficking, migrant smuggling or the protective status reserved for victims of trafficking and aggravated forms of smuggling,[51] indicating a discrepancy

46 Myria, 'Myriadoc 10: Belgium, on the Road to the United Kingdom' (2020) <https://www.myria.be/en/publications/myriadoc-10-belgium-on-the-road-to-the-united-kingdom> accessed 24 January 2021.

47 Ibid.

48 Ibid; see the Circular Letter on the Situation of Migrants in Transit in Wallonia (20 September 2020) < https://interieur.wallonie.be/sites/default/files/2020-10/20201001164241354.pdf> accessed 5 January 202; see also the collaborative report created by 5 NGOs on the topic of migrants in transit in Belgium by Caritas International, 'Migrant en Transit en Belgique' (February 2019) < https ://www.caritasinternational.be/wp-content/uploads/2019/02/Migrants-en-transit-en-belgique.pdf> accessed 5 January 2021.

49 Médecins du Monde, 'Violence Policières envers les Migrants et les Réfugiés en Transit en Belgique' (October 2018) < https://medecinsdumonde.be/actualites-publications/publications/violences-policieres-envers-les-migrants-et-les-refugies-en> accessed 5 January 2021; see also Mescoli and Roblain (n 100) on the securitization approach adopted at the Federal level to organise frequent police raids to disperse and at times arrest irregular migrants.

50 Comité P, 'Le Contrôle et la Détention de Transmigrants par la Police à l'Occasion d'Arrestations Administratives Massives' (2019) <https://comitep.be/document/onderzoeksrapporten/2019-02-06%20transmigrants.pdf> accessed 5 January 2021.

51 Ibid; Myria, 'Police et Migrants de Transit' (2019) <https://www.myria.be/files/Note_Police_et_migrants_de_transit.pdf> accessed 27 January 2021.

between law and practice as far as (vulnerable) migrants in transit spaces using smuggling services are concerned.

2.3 Legal Framework: A Protective Approach Towards Victims of Aggravated Forms of Migrant Smuggling …

As explained in further details in Chapter 2, the criminal offences of migrant smuggling and human trafficking are also considered distinct in Belgium since the legislative reform of 2005. Nonetheless, the aggravating circumstances for trafficking and smuggling were harmonized. Recognizing the 'dramatic consequences' of both offences, with an eye on maintaining coherence and consistency,[52] article *77quater* of the Law on Foreigners of 15 December 1980 was amended to provide that, if aggravated circumstances are found in migrant smuggling cases, the smuggled person should be able to access the protective status normally reserved for human trafficking victims.

On the basis of the insights gathered through interviews with Belgian experts,[53] the following aggravating circumstances[54] can often be found in smuggling situations: abuse of a situation of vulnerability of an individual (which includes his/her irregular or precarious administrative situation) in a way that the individual has no real and acceptable alternative to submit her/himself to the abuse; the endangerment of the victim's life either deliberately or through gross negligence; the (direct or indirect) use of fraud, violence, the use of threats or other form of coercion (e.g., debt bondage), abduction, deception and abuse of power.

The design of the Belgian approach to both migrant smuggling and human trafficking is multi-disciplinary in nature,[55] all actors, in accordance with their own expertise, have a specific role within established procedures. Particularly important are the prosecutors specialised in human trafficking and migrant smuggling, the reception centres for victims present in each of the three regions of the country, the federal police, the local police, the Foreigner's Office and

52 Belgian House of Representative, 'Explanatory Statement' (10 August 2005) 11.

53 See Chapter 1.

54 For the complete list of aggravating circumstances, see article 77q*uater* of the Law on Foreigner of 15 December 1980. See Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

55 Circular COL 5/2017 of 23 December 2016 Implementing a Multidisciplinary Cooperation with regard to Victims of Human Trafficking and/or Certain Aggravated Forms of Human Smuggling available on the website of the Public Prosecutor's Office < https://www.om-mp.be/fr/savoir-plus/circulaires> accessed 22 January 2021. For detailed information on the procedure, see also the two English reports of the Group of Experts on Action against Trafficking in Human Beings (GRETA) on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium issued respectively in 2013 and 2018 available on the website of the GRETA <https://www.coe.int/en/web/anti-human-trafficking/belgium> accessed 10 July 2021.

the Labour Inspectorate. On the rights and conditions attached to the protective status, the reader is referred to Chapter 2.

To an extent, this system has an impact on the situation of the smuggled migrant. Belgian case law provides at least two indications in which national courts regard smuggled migrants as victims from a criminal law perspective. Firstly, they are referred to as such in verdicts against perpetrators. In a 2017 judgment, the Brussels Court of Appeal,[56] finding that the offence had been committed through abuse of the vulnerable situation of the migrant victims, leaving them with no other choice than to be smuggled. The Court added that the fact that they had perhaps in part contributed to their own vulnerability did not take away from the abuse of a situation of vulnerability. The Court of Appeal explicitly held that the offences were serious and especially morally objectionable, not only because of the impact on public order and security, but also because of the effect on the individuals, being vulnerable persons from whom money had been obtained.[57] Secondly, Belgian Courts allow third parties, notably the Myria, to join criminal proceedings against smugglers as civil parties on behalf of smuggled migrants, a procedural position reserved for criminal victims or those acting on their behalf.[58]

The recognition of victimization is weaker however where aggravating circumstances are not under discussion. In 2015, the Correctional Court of Louvain[59] also dealt with the claim of an individual smuggled migrant who was a victim of both trafficking and aggravated smuggling. Not finding trafficking or the *aggravated form* of smuggling to have been proven in that case, the Court rejected the claim, because it had not been proven that the suspect had abused the particularly vulnerable position of the 'foreigners', or had directly or indirectly made use of trickery, violence, or any other form of coercion. Nonetheless, Belgian courts seem to have developed a sensitivity to the trafficking/smuggling nexus, particularly induced to do so via the special legislation creating a bridge between the phenomena in the event of aggravated circumstances.[60] Where cases involving those do come to criminal courts, the special system does therewith seem to have important effect.

---

56 Bruxelles (13e ch. Corr.), 17 May 2017.

57 See also the judgment Corr. Anvers (8e ch.), 8 December 2016 in which the Court sheds light on the abuse of the precarious administrative, social, and financial situation of the smuggled victim. For an overview of the jurisprudence, see the website of the National Rapporteur Myria gathering key court cases on migrant smuggling <https://www.myria.be/fr/jurisprudence/eyJyZXN1bHRfcGFnZSI6ImZyXC9qdXJpc3BydWRlbmNlIiwiY2F0ZWdvcnkiOiIzMzEiLCJyZXF1aXJlX2FsbCI6ImNhdGVnb3J5In0> accessed 12 January 2022.

58 Ibid.

59 Corr. Louvain (17e ch.), 12 May 2015.

60 Ibid. The Correctional Court of Louvain held that the line between human trafficking and human smuggling is thin and that human smuggling can evolve into human trafficking when free will is brought under pressure.

2.4 … Scarcely Used in Practice

The protective status for aggravated smuggling is scarcely used in practice, however (see Chapter 4 on the statistics provided by National Rapporteur). In line with national jurisprudence,[61] and to underscore that migrants intercepted in lorries in parking areas qualify as victims of aggravated forms of migrant smuggling, expert respondents explained that they can establish the aggravated circumstances automatically in the case of irregular migrants being transported to the UK and that it would be inconceivable for them to not be considered as vulnerable. The fact that migrants often significantly overpay for their journeys was also considered by respondents as sufficient proof of abuse.[62] These views emphasize the discrepancy between the law and reality,[63] showing, as summarized by one specialised Prosecutor, that '*the system is not working*'.[64]

The semi-structured interviews with Belgian experts provide insights as to the distinct causes of the shortcomings. Firstly, many respondents explained that smuggled migrants have no interest in entering the protective status, as their goal is to stay 'off the grid'[65] and reach the UK at all costs. The threshold to enter the status was also considered 'too high',[66] particularly because of the condition of turning against one's smuggler.[67] A further impediment identified was the fear of being sent back to another EU country via the Dublin III regulation.[68] Secondly, several respondents acknowledged various issues concerning: informational deficiencies with respect to the option of the special status became apparent,[69] the lack of authorities' awareness of legal procedures, due to insufficient training and/or sensibilization of first line officers.[70] Thirdly, time and operational capacity issues were pointed out in relation to the administrative and judicial formalities involved.[71] Shortages, in this sense, were identified as important concerns by the majority of respondents at all levels, from police officers to prosecutors. Fourthly, dealing with migrant smuggling is located at the crossroads of distinct fights, namely the fight against illegal migration, the fight against human trafficking and the maintenance of safety and public order. This entails a problematic scattering of powers between different actors, whose respective agendas and priorities do not necessarily

61 Charles-Eric Clesse, *La Traite des Êtres Humains. Droit Belge Eclairé des Législations Française, Luxembourgeoise et Suisse* (Larcier 2013).
62 Interview, Federal Police Investigator in Migrant Smuggling.
63 Interview, Specialised Prosecutor 1.
64 Interview, Specialised Prosecutor 2.
65 Interview, Director NGO.
66 Interview, Respondent 3 Foreigner's Office.
67 Interview, Specialised Prosecutor 2 and 3.
68 Interview, Respondents 1, 2 and 3 Foreigner's Office.
69 Interview, Investigative Journalist; Interview, Volunteer Citizen's Platform.
70 Interview, Respondents 1 and 2 Ministry of Justice.
71 Also emphasised in the recent National Action Plan 2021-2025 (n 101) section 2.2.3.

align. Finally, the absence of unicity, structural and harmonized solutions, also at the European level, were recognized by most respondents as key challenges.

3 Turning empirical evidence into human rights currency

3.1 Deference practices in the migration field

Taking into consideration empirical realities in aid of legal revision is always useful but becomes critical where advocated change is likely to conflict with policy goals. The Belgian case clearly reveals an under addressed problem with respect to transiting smuggled migrants. The fact remains, that even if the position of smuggled migrants is fortified in the Belgian legal framework, the general position of the smuggled migrant remained weaker than the position of the trafficking victims. This can notably be explained by the endurance of the legal trafficking/smuggling dichotomy which follows from a conscious choice. Ultimately, this can be related to the strong juncture between migrant smuggling and robustly guarded (national and regional) (im)migration and asylum policies. Challenges presented therewith extend to any room the ECtHR may see to manoeuvre in bringing about paradigm shifts in the conceptualisation of the transiting smuggled migrant.

As highlighted by Baumgärtel, 'the politicized question of migration has been a persistent headache for the ECtHR', with criticism of the Court's handling of the theme generally coming from 'diametrically opposed perspectives.'[72] The ECtHR is being charged simultaneously with judicial activism and under-intervention in this terrain.[73] Where human trafficking is concerned, the Court has been able to enhance protection, among other things, by relying on the broad and strong legal recognition that criminal victimization associated with that phenomenon requires rigorous protection. While trafficking victims are not always irregular migrants (although, in ECtHR trafficking case law, they often are),[74] all smuggled migrants always are (barring those attaining asylum or refugee status). This potentially lands the plight of the smuggled migrant in the centre of a difficult deference problematic, within the forcefields of what

72 Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2021) 38(1) Netherlands Quarterly of Human Rights 12.

73 Baumgärtel (n 72) 12-13.

74 See *Siliadin v. France* 73316/01 (ECtHR, 26 October 2005); *C.N. v. United Kingdom* 4239/08 (ECtHR, 13 February 2013); *Chowdury and Others v. Greece* 21884/15 (ECtHR, 30 March 2017); *Rantsev v. Cyprus and Russia*, 25965/04 (EctHR, 7 January 2010); *J. and Others v. Austria* 58216/12 (ECtHR, 17 January 2017); *S.M. v. Croatia* [GC] 60561/14 (ECtHR, 25 June 2020); *V.C. L and A.N. v. United Kingdom* 77587/12 and 74603/12 (ECtHR, 5 July 2021); *Zoletic and Others v. Azerbaijan* 20116/12 (ECtHR, 7 October 2021). In *C.N. and V. v. France*, the applicants were French nationals who were born in Burundi. However, facing threats to be sent back to Burundi by their aunt, the victims believed that her residence in France was irregular. See *C.N. and V. v. France* 67724/09 (ECtHR January 2013).

Dembour has dubbed the 'Strasbourg reversal.' In this approach, notwithstanding important successes which have been achieved by the Court,[75] the ECtHR 'generally privileges state sovereignty over migrants' rights', meaning that in the totality of case law, it 'rarely' finds for migrant applicants.[76]

Dembour's 'reversal' refers to a particular formula used by the Court, in which it declares Member States to be 'entitled, as a matter of international law and subject to (…) treaty obligations, to control the entry of aliens into its territory and their residence there [...]'.[77] This principle has more than abstract or symbolic impact. Rather, it is 'just one particularly striking pointer that indicates that the Strasbourg case law is not resolutely on the side of migrants' human rights.'[78] Concrete strategies give the principle actual effect. These include 'an interpretation of substantive rights that makes it difficult for violations to be declared and processual choices that tend to leave states off the hook'[79] in which the Court declines to recognize the existence of particular rights. Over time, the principle has gained importance. While when it first 'appeared in case law', it 'was simply presented as one important consideration to bear in mind amongst others',[80] the Court subsequently opted to prelude its assessments with it as an opening consideration, '(reaffirming) at the outset the 'entitlement'.[81]

In the European context, the prerogative becomes stronger still through consideration of the joint interests of Member States in this respect. The Court namely not only holds that 'Contracting States have the right to control the entry, residence and removal of aliens' and to 'establish their own immigration policies' as a self-standing national entitlement, but also '*potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union* [emphasis added]'.[82] Underlining 'the importance of managing and protecting borders for distinct purposes such as preventing threat to internal security, public policy and public health',[83] the Court also has regard for the joint 'challenges facing *European States* [emphasis added] in terms of immigration control as a result of the economic crisis and recent social and political changes (…)'.[84] Deference to policy in this respect thus plays out in two manners, not only with respect to *national* immigration policies, but also with respect to the right of States to fulfil international

75 Dembour (n 18) 19; with respect to the protection provided for asylum seekers, see also Juan Ruiz Ramos, 'The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis' (2019) 39 REEI 45.
76 Dembour (n 18) 29.
77 Ibid 32.
78 Ibid.
79 Ibid 23.
80 Ibid 30.
81 Ibid 29.
82 *N.D. and N.T. v. Spain* [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 167.
83 Ibid para 168.
84 Ibid para 169.

obligations and in that light implement common policies and mindfulness of the disparate (burdens) which may rest on different States.

The 'reversal' takes effect, in some shape or form, even for (irregular) migrants who, under various international law sources as well as in the basis of standing ECtHR case law, qualify for greater protection because of a special status (e.g., asylum seekers).[85] Nevertheless, even if criticized for not intervening more because international law sources prescribe further protection for them, the Court is able to feed off international law sources to significantly restrict discretion where such rights bearers are concerned.[86] For the smuggled migrant, the absence of such a springboard means that the prerogative enjoyed by Member States in the determination and effectuation of their (national and common European) asylum and migration policies may be conceived as presenting greater challenges for the Court in prescribing the same or similar positive criminal justice protective duties with respect to smuggled migrants as it does for trafficking victims.

3.2 (Non-)deference in the Context of Criminal Justice Related Positive Obligations

Nevertheless, impediments may exist in the general development of rights of 'particular benefit'[87] to migrants, but there is 'nothing in international human rights law [which] would inherently prevent the ECtHR from adopting more progressive interpretations of the ECHR.'[88] Dembour rejects the ECtHR's claim that in the domain of migration 'the principle of state control' – absent in the text of the Convention[89] – is 'well-established in international law', holding rather that it is 'spurious, both on historical and on legal grounds',[90] as well as '(fiercely opposed)', also by Judges of the Court.[91] As such, she maintains that '[t]he ECtHR should find the courage to veer in a direction that is more protective of the migrant applicant'[92] in an over-all sense.

Taking as a point of departure that deference in migration is a reality – and to an extent is legitimate – there are, however, ways to manage it. The Strasbourg reversal easily connects to the principle of subsidiarity and the margin

85 See Ruiz Ramos (n 75) in the context of administrative detention of asylum seekers under articles 5 and 3 ECHR.
86 Trafficking victims need not be migrants, the ECtHR recognizing internal trafficking as typology requiring position obligations protection (see section 4).
87 Dembour (n 18) 21.
88 Ibid 19.
89 Ibid 30.
90 Ibid 31.
91 Ibid.
92 Ibid 19; see also Ruiz Ramos (n 75) 45.

of appreciation doctrine.[93] Recently fortified by the entry into force of the 15th Protocol to the Convention (through which, among other things, a new recital has been added to the Preamble, with an explicit reference to them),[94] these foundational interpretative principles are used to generally navigate the role of the ECtHR vis-à-vis national discretion.[95]

Importantly, they are not applied in a set manner. Firstly, ECtHR adjudicative technologies include an array of devices, which intrinsically direct *towards* ECtHR engagement. The principle of autonomous interpretation, the maxim that the Convention is a living instrument, which must be interpreted 'evolutively and dynamically', in accordance with 'object and purpose' of the Convention and that protection cannot be 'theoretical and illusory' but must be 'practical and effective',[96] all present powerful tools which can reduce national discretion. Notably, these devices have played an important role in the development of criminal justice related positive obligations case law relating to trafficking.[97] Again, the interpretative principle that the ECHR must, as an instrument of international law itself, be read in harmony with other such sources[98] does not currently push towards enhanced protection in the context of smuggling. The same holds with respect to the consensus method[99] in as far as the Court cannot gauge common ground amongst Member States in that respect. Nevertheless, harmony and consensus considerations can also work in favour of the smuggled migrant. Even if they are only slight, any shifts in (softer) international law sources, or emerging standards at national levels[100] can be picked up through early signalling and be operationalized by the ECtHR.[101]

93 See, amongst others, the recent case *M.A. v. Denmark* 6697/1 (ECtHR, 9 July 2021) para 162.

94 Council of Europe, Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, No.: 213 (31 October 2021). See also Ruiz (n 132).

95 See also in that light the 16th Protocol, which has a similar objective. Council of Europe, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 November 2013 (CETS, No. 214).

96 See amongst many others the recent case *M.A. v. Denmark* (n 93) para 162.

97 See among others *Rantsev* (n 74) para 273-277 and the Grand Chamber confirming, *S.M.* (n 74) para 286-292.

98 See amongst others *Correia de Matos v. Portugal* 56402/12 (ECtHR, 4 April 2018) para 134. See also Separate Opinion of Judge Pinto de Albuquerque in *Söderman v. Sweden* [GC] 5786/08 (ECtHR, 12 November 2013).

99 Jens Theilen, *European Consensus Between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*. (Nomos Verlagsgesellschaft 2021).

100 See for an illustration, *M.H. and Others v. Croatia*, 15670/18 and 43115/18 (ECtHR, 18 November 2021), paras 200 and 236, the Court, in the context of complaints of unlawful deprivation of liberty and detention conditions, responding to 'increasing' calls of 'various international bodies' to 'expeditiously and completely cease or eradicate the immigration detention of children'.

101 See also Baumgärtel (n 72).

Secondly, deference determination also occurs through a complex algorithm in which different variables and interests are weighed against each other. The nature of a (policy) domain is certainly amongst those. There are clearly identifiable terrains with respect to which the Court by default adopts a position of more than standard deference because it finds the subject matter to fall under a hard-core public law prerogative. Thematically, the domain of (im)migration and asylum indeed squarely falls under those (although it is certainly not the only one).[102] However, in case law at large, but *also* in such 'deference by default' areas, whether or not the Court will opt to intervene, is also determined on the basis of the facts and circumstances of the case, the (vulnerability) profile of the rights bearer and the nature and aspect of the rights at stake, which are more or less susceptible to deference considerations.

As for the nature of rights at stake and the contexts in which they are invoked, Dembour analyses deference in relation to particular types of issues, attaching to different (aspects and types of) rights. These are issues relating to residence, family reunification, access to social services, deportation and removal in the context of rights guaranteed mainly under art. 8 and 6 (although sometimes also art. 3 ECHR).[103]

National prerogative has (or should have) greater competition however where other issues and rights are concerned. It is from this perspective that Ruiz Ramos examines the ECtHR's management of margins in the context of administrative detention of asylum-seekers, under art. 5 par. 1 (f) and 3 ECHR.[104] Analysing what the impact of the 2015 refugee crisis has been on the ECtHR's approach, he signals that while deference was already strong, rather than the crisis leading to amplified protection, it has 'in some cases' become both 'clearer' and 'expanded'.[105] Associating the proclivity of deference with 'political tensions', he concludes 'that European States' renewed preoccupation with strengthening their borders after 2015 has led the Court to widen the scope of the margin of appreciation',[106] *inter alia* on the basis of its 'consideration (…) of States' difficulties in managing a migration crisis'.[107]

It is argued that this would hold *a fortiori* in the context of the rights issues of concern here being positive obligations in relation to (i) critical rights, invoked in (ii) a criminal justice context. Positive obligations case law with respect to trafficking confirms that logic. Not only is the 'Strasbourg reversal formula' never invoked by the ECtHR but mention of the margin of appreciation doctrine (or related devices) is scarce. Deference is thus not part of the mainframe of principles and standards governing positive obligations. The Court

102 For an overview of such domains, see separate opinion of Judge Pinto de Albuquerque in *Correia de Matos* (n 98).
103 Dembour (n 18).
104 Ruiz Ramos (n 75).
105 Ibid 43.
106 Ibid.
107 Ibid 38.

does cap positive obligations, but endeavouring to not impose 'impossible or disproportionate burdens',[108] does so via testing against proportionality(-type) considerations. In this context, the testing does not focus on national prerogatives with respect to policy choices, but rather constitutes mindfulness of the limits of the ability of states to positively protect against crime.

In criminal justice related positive obligations case law, there is only one set role for margin of appreciation considerations, albeit, as will be discussed further below, it is an important one. Attached to the nature of (the aspect of) the right at stake, margins are recognized where 'lesser' horizontal abuses (falling under the scope of art. 8 ECHR) are concerned. The Court holds that a criminal justice response is not necessarily required, leaving that decision to the State, as long as other appropriate remedies are available.[109] However, where the Court itself determines with respect to more serious abuse that it can only be dealt with as criminal victimization, a threshold is crossed. All criminal justice related obligations then come into effect, with no room for national preferences for a different approach.

The smaller role for deference in this context makes sense. Dembour argues that the Court's restrictive approach to the development of migrant rights plays out poorly from an equality perspective. She argues that it would be absurd if fair trial rights in a criminal process would be diminished on the basis that the suspect/defendant is a migrant and furthermore that States must be granted leeway in managing migration.[110] That is entirely true, but more so because a *criminal process* – as opposed to an administrative procedure relating to denial of residence rights – would be under discussion. If there is (serious) criminal victimization on European soil, the fact that the victim is a migrant, and that full effectuation of protection would undermine migration policy cannot be a concern.

In criminal justice related positive obligations case law, there is one (important) context where the Court leaves room for national (policy) choices. As will be discussed below, that is where (horizontal) rights abuses are not per se grave and therefore do not necessarily warrant State intervention through criminal justice means. In such cases, other remedies, such as civil ones, may be sufficient.[111] However, where the Court itself determines with respect to more serious abuse that it can only be dealt with as criminal victimization, a threshold is crossed. All criminal justice related obligations then come into effect, with no room for national preferences for a different approach. If the Court were to determine, as it has done with respect to trafficking, that particular types of migrant smuggling with a particular profile entails grave abuse,

108 See among others, *Rantsev* (n 74) and para 287, *Zoletic* (n 23), para 188.
109 See further, section 4.
110 Dembour (n 18).
111 See further, section 4.

the fact that the victim is a migrant and that stringent protective standards would undermine European or national migration policies cannot be a concern.

3.3 Evidence-based adjudication and recognition of (particular) vulnerability

Nevertheless, taking the step to underscore deficiencies in the framing of the smuggled migrant as a victim in a criminal law sense would still require a forceful stand on the part of the Court and a legitimizing basis to counter deference considerations. It is held here that the ECtHR can justifiably expand protection for transiting smuggled migrants by doing so in a *differentiated and evidence-based manner*, bolstering enhanced protection through reliance on empirical evidence pointing to particular needs. Differentiation is key because the rights needs and profiles of the migrant – 'anybody outside their country of origin'[112] – are highly variable, meaning that the 'smuggled migrant' also does not constitute a homogenous category. Not all smuggled migrants or smuggling experiences should therewith qualify for this type of protection. As for evidence-based appraisal, while the empirical information is used in a myriad of different types of decisions by the ECtHR, notably also in trafficking case law, discussion here will focus on the concept of (particular) vulnerability. In framing the needs of the transiting smuggled migrant, this notion holds great potential as an ordering device and can function as a channel to convert real life issues into protection. Used as a heuristic device in scholarship, the vulnerability concept also has important practical application as a sorting mechanism in ECtHR case law.[113] Reviewing the Court's application of the concept, vulnerability theorists explore its capabilities to reduce protective deficiencies, including through sounder theoretical grounding, enabling its ordered deployment in litigation, with an eye on better approximation of the lived realities of (distinct types of) rights bearers.[114]

Two main queries of vulnerability scholarship are of importance here: how (particular) vulnerability can be identified and once recognized, what legal effect that should have.[115] While the first question will be dealt with here,

112 Ibid 19.

113 For an overview on the potential and pitfalls of the vulnerability concept for human rights, see Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133; Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056; So Yeon Kim, 'Les Vulnérables: Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights' (2021) 41(4) Legal Studies 617; Baumgärtel (n 72).

114 Other scholars however argue for an alternative approach to group vulnerability, although in the specific context of art. 14 ECHR and the manner in which vulnerability interacts with discrimination grounds. See Kim (n 113).

115 Baumgärtel (n 72).

second will be discussed in the next section, as it can more appropriately be embedded in arguments relating to the scope and locale of protection under the ECHR. Briefly discussing the vulnerability concept at a theoretical level (3.4), some remarks need to be made with respect to the Court's ability to register new forms of (particular) vulnerability (3.5). Building thereupon, utilizing insights to be extracted from recent scholarly and NGO research and enriching those with concrete empirical markers gathered through research, a basis is laid for a particular (legal) vulnerability construct for the smuggled transiting migrant, based on its own traits (3.6) as well as constructed situational and contextual factors (3.7). What is critical to signal is that (empirical and scholarly insights) increasingly point to strong conceptual similarities in smuggling and trafficking phenomena. While it may not be necessary to fully equate smuggling and trafficking experiences, on the basis of empirical evidence, the Court can break through protective disparities in the trafficking/smuggling dichotomy, or at least provide some form of similar protection for the smuggled migrant, where necessary.

3.4 Theoretical Reflections on the Vulnerability Concept

Building on the work of Fineman, vulnerability theorists have reviewed the manner in which the notion is and should be enacted in human rights law, including in ECtHR litigation. A critical question in this regard is who the primary subject of human rights is.[116] Fineman holds that 'much of legal theory has been centred around an illusory 'universal human subject' defined by 'autonomy, self-sufficiency, and personal responsibility.'[117] This boils down to the particular ideal profile of a 'male, heterosexual, white, able-bodied Christian' to whom applicants are mostly compared.[118] From the viewpoint of the transiting smuggling victim, an added characteristic would be that that the rights bearer is a person regularly and stably residing in Europe, living with a level of socio-economic welfare associated with that status. Where human rights are 'calculated' departing from this archetype, vulnerability is circumscribed through a 'sameness/difference' algorithm.[119]

Summarily stated, Fineman's argument is that the archetypical profile should be discarded as a measuring device[120] and vulnerability should be conceptualised as universal, as the potential for 'harm, injury and misfortune'

116 Peroni and Timmer (n 113).
117 Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism, 10.
118 Kim (n 113) 623 referring to Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211.
119 Kim (n 113) 624.
120 For a complete criticism on the group vulnerability model, see Fineman (n 113 and n 117) and Kim (n 113).

is innately ever-present inherent in the human condition, while persons can be impacted differently by them.[121] Thus, vulnerability is formed through *social processes and institutional interactions*, meaning that it is *situational, context-sensitive and produced*. Using (set) 'identity categories' creates a hazard that individual vulnerabilities not aligning therewith will be excluded, or, conversely, that categories will be drawn too broadly.[122] Discarding them allows for a more fine-tuned approach, with a focus on the 'socially embedded processes that will affect persons differently'.[123] This creates the opportunity to 1) recognise sources and states of vulnerability arising as 'a socially induced condition' and 2) expose 'the institutional practices that produce the identities and inequalities in the first place'.[124] Crucially, this 'promotes' the concept of the 'responsive state'. The concept conceives the State as an important part of the apparatus creating vulnerability and resolves into state responsibility to redeem and build (back) resilience.[125]

Scholars point out that the hazard to such an individualized universal approach (in which everyone is vulnerable),[126] is that vulnerability becomes too broad, in a manner which can cloud the needs of particular individuals or groups.[127] In litigation, where the use of taxonomies is required, the universal notion moreover does not provide a workable legal concept.[128] Peroni and Timmer point out however that the ECtHR's use of 'group vulnerability' is not irreconcilable with the universal notion.[129] Referring to an ECtHR judge's depiction that the Court sees all applicants as vulnerable, but some as 'more vulnerable than others',[130] Peroni and Timer see a merger between the two approaches[131] while further alignment is to be found in the fact that the Court's group vulnerability notion itself is 'relational.' Thus, 'the Court links the individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of.'[132] The focus on social context is consistent with recent analysis using vulnerability as a 'critical tool' as it encourages scrutiny of the role of institu-

121 Baumgärtel (n 72) 14.
122 Ibid 15.
123 Ibid citing Fineman.
124 Ibid. For further discussion of the disadvantages of the group vulnerability approach in Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé, and Lieneke Slingenberg, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (2021) 39(3) Netherlands Quarterly of Human Rights 190, 195.
125 Baumgärtel (n 72) 15.
126 Kim (n 113).
127 Alyson Cole, 'All of Us Are Vulnerable, But Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 Critical Horizons 260.
128 Baumgärtel (n 72).
129 Peroni and Timmer (n 113).
130 Fineman (n 117) 13.
131 Peroni and Timmer (n 113).
132 Ibid 1064.

tional or societal environments which create and maintain vulnerability.[133] The context-based and situational construct of universal vulnerability theory therewith does not necessarily exclude the use of group vulnerability.[134] Thus, vulnerability can be 'existential'[135] but also accommodate broader group or individual recognition through a context sensitive approach.[136] For Baumgärtel, vulnerability theory provides 'several potentially important insights for developing a notion of *migratory vulnerability* within the context of the ECHR'.[137] According to the author, migratory vulnerability 'describes a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and forms. It therefore should be conceptualized neither as group membership nor as a purely individual characteristic, but rather determined on a case-by-case basis and in reference to identifiable social processes'.[138] Important in that regard is '(t)he fact that both State and societal institutions are critical to enhancing resilience in the face of vulnerability comes as an important reminder when we look at the situation of vulnerable migrants', in that '(e)ven where migration control is the priority, it mostly falls upon those same institutions to respond to the most detrimental difficulties that policies may create'.[139]

3.5 The ECtHR's Ability to Deploy (New) Vulnerability Markers

As underscored in scholarship, theoretical and empirical grounding of vulnerability clearly offers critical opportunities and could aid in the resolution of gaps and inconsistencies which exist in the ECtHR's vulnerability catalogue.[140] Even with such an open approach to vulnerability, its practical deployment can be difficult and requires identifying markers. The ECtHR's approach therein leads to differing appraisals. Baumgärtel as well as Peroni and Timmer commend the fact that the ECtHR, in *M.S.S. v. Belgium and Greece,*[141] worked from a 'textured and complex evaluation' basing itself on various reports issued by international organizations on the situation of asylum seekers in Greece to evaluate the applicant's vulnerability.[142] As will be discussed further below, (particular) vulnerability is also vividly present as a pivot to expansion protection in trafficking case law. At the same time, the Court is not always as

133 Ibid 1057.
134 Kim (n 113).
135 Baumgärtel (n 72) 15.
136 Peroni and Timmer (n 113).
137 Baumgärtel (n 72) 16.
138 Ibid 13.
139 Ibid 16.
140 For an overview, see ibid and Peroni and Timmer (n 113).
141 *M.S.S. v. Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011).
142 Peroni and Timmer (n 113) 1070.

mindful as it could be. Militating against overbroad deference in the context of administrative detention of asylum-seekers, Ruiz Ramos points out that 'significance of the vulnerability' of this group has become 'blurred' by the Court. Not recognizing or giving appropriate effect to vulnerability profiles therewith becomes another 'form of granting more power to States as it weakens their responsibility to adapt detention conditions to their needs'.[143] It is therefore fundamental that the ECtHR is aided in vulnerability identification and appraisal through the availability of empirical information and that the Court commits itself to this methodology.

3.6 The (Particular) Vulnerability of the Transiting Smuggling Victim

Proceeding through the lens of this theoretical approach, the position adopted in this contribution is that an error needs to be corrected if the actual vulnerability profiles of trafficking and (some) smuggling victims is considered. Under hard positive law, trafficking victims are (rightly), as a group, recognized as so (particularly, inherently) vulnerable that they require a certain type of protection, while smuggled migrants, by default, are not. Looking more deeply at the contextual, situational factors and the role played by the policies and actions of state authorities in constructing vulnerabilities experienced by smuggled migrants, a better understanding can be achieved.

Again, given that 'smuggled migrants' constitute a group that is way too large (in that not all will qualify as (sufficiently) vulnerable), differentiation is necessary. To narrow down the scope, the particular harm or endangerment which can associate with that status, smuggled migrants who already fall under another group already designated a particularly vulnerable status (such as trafficking victims, asylum seekers and minors), for whom heightened protective duties arise on that basis, particularly if such features are present in aggregate form, are excluded from the following discussion.

This section will explore a vulnerability profile arising out of the intersectional aggregation of the two features at the focus of this analysis, arguing that both qualify for at least presumptive identification under (group) vulnerability and that this is particularly the case when they are both at issue. These are the following: the individual is an *irregular migrant in transit* within Council of Europe territories and, inspired by the distinction incorporated in Belgian legislation, is also a migrant who has been *smuggled (or stands to be smuggled further) under aggravated circumstances.*

143 Ruiz Ramos (n 75) 43.

3.6.1 The Profile of the Transiting Migrant

Deconstructing both profiles, the ECtHR's stance with respect to *irregularity* seems to be that this does not give rise to particular vulnerability. In *Khlaifia and Others. v. Italy*,[144] reversing the violation established by the chamber of art. 3 ECHR due to the detention conditions of the applicants, the Grand Chamber, while holding that the chamber had been right to point out the migrants weakened state following a sea-crossing,[145] found however that they 'were not asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin'.[146]

Such a categorical rejection points to a too broad strokes approach where transiting migrants living in situations such as depicted above with respect to Belgium are concerned. Diverse vulnerability markers flagged in scholarship already provide useful anchoring-points in this regard, such as power differentials and dependency on (State) institutional and social structures, social disadvantages, and absence of resources.[147] Baumgärtel specifically argues for the recognition of the notion for 'migratory vulnerability',[148] in a manner accommodating differentiation. Because migratory vulnerabilities affect migrants differently depending on distinct factors (age, socioeconomic status, gender, race, etc.), Baumgärtel et al. state that with a 'context-sensitive approach', a better alignment with lived realities is possible 'to analyse what specific disadvantages are being created, whether these are indeed conducive to immigration control (or merely based on an unproven assumption based on deterrence), and what the State and courts can and should do to offset them'.[149] Both systematic reviews of reports from NGOs and international organizations attesting to such vulnerabilities and growing (empirically grounded) sociolegal and migration scholarship could be utilized by the Court to investigate the relationship between vulnerability and migration.[150]

Departing from the perspective that migratory vulnerability is underrecognized,[151] overreach in group vulnerability designation can thus be avoided through evidence-based (group) distinctions, such as between the situation of an irregular migrant while attempting entry via external borders,

144 *Khlaifia and Others. v. Italy* [GC] 16483/12 (ECtHR, 15 December 2016) para 194.
145 Ibid.
146 Ibid para 194; see also Ruiz Ramos (n 75) 33 et suivant.
147 Peroni and Timmer (n 113) 1078. See for typologies of vulnerability Kim (n 113) 3-5.
148 Baumgärtel (n 129).
149 Timmer, Baumgärtel, Kotzé, and Slingenberg (n 124) 196.
150 See for instance Theodore Baird and Ilse Van Liempt, 'Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling' (2016) 42(3) JEMS 400; Martina Tazzioli, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) 38(1) Environment and Planning C: Politics and Space 3.
151 See also categories of citizenship referred to by Kim (n 113).

as opposed to that of the transiting irregular migrant who has entered and continues to irregularly move about European soil. The ECtHR's recent judgment in *M.H. and Others. v. Croatia* is indicative of a move towards such recognition.[152]

In a nutshell, the case relates to topic of pushbacks of migrants and asylum-seekers taking place in Croatia. More specifically, at the Serbian-Croatian border, an Afghan family was denied access to asylum in Croatia and was prescribed by the authorities to follow the tracks of the train in the direction of Serbia. In the course of event, a six-years old child was struck by a train and subsequently lost her life. Moreover, this push-back from Croatia took place without an examination of the individual circumstances of the individuals involved.[153] Not going into the details of the case, it is important to underline the Court's conceptualization of vulnerability.

Following the incident, and due to the lack of identification document, the applicants were detained in Croatia. With respect to the detention conditions, the Court, establishing, on the basis of *their* particular vulnerability, a violation as far as the minor applicants were concerned,[154] declined to do so in relation to the adult applicants, however not categorically. The Court, finding 'it useful to emphasise that the adult applicants were not persons suspected or convicted of a criminal offence', depicting them as 'migrants detained pending the verification of their identity and application for international protection',[155] some of its considerations militated for recognition of (particular, group) vulnerability. Firstly, the Court noted that 'asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they are likely to have endured previously and that the applicants had been in a state of migration starting from 2016.[156] This observation underscores a situational feature associated with the difficulties of a long and fragmented journey,[157] while given the profile of the applicants, the lines between asylum seekers and irregular migrants seems to be blurred. Secondly, the Court recognized that the applicants 'must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied', underscoring the complexity of their legal status. At an individual

152 *M.H. and Others* (n 100).

153 Hanaa Hakiki and Delphine Rodrik, 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (VerfBlog, 29 November 2021) <https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot> accessed 10 July 2022.

154 For the examination of the art. 3 ECHR with respect to the minor applicants, see ibid paras 191-204.

155 Ibid para 205.

156 Ibid para 207.

157 See also in that regard *M.S.S.* (n 141) para 232 and *Z.A. and Others v. Russia* [GC] 61411/15; 61420/15 and 61427/15 (ECtHR, 21 November 2019) para 193.

level, the Court was 'mindful' of the fact that the applicants were mourning the death of their daughter, referred in the case as MAD. H.

Building a vulnerability profile in this manner, the Court found no violation of art. 3 ECHR, however not because the applicants were not found to be sufficiently vulnerable, but because of the way issues were offset.[158] The negative effects of legal uncertainty must according to the Court have been allayed through the support of their legal aid lawyer and visits paid to them by the Croatian Ombudswoman and the Croatian Children's Ombudswoman.[159] With respect to the death of MAD. H., the Court found that they had been provided with appropriate psychological support.[160] Importantly however, in the absence of such ameliorating circumstances, the aggregated situational vulnerability of the applicants, importantly determined by their experiences preceding their detention as well the situational unclarity of their status, could have swayed the balance, even though their detention conditions were found not be to materially unsatisfactory.[161]

This judgment importantly demonstrates a *general* sensitivity to the special circumstances of *transiting* migrants. Emphasized in the Court's considerations with respect to the public interest involved in the case[162] and the ample sources cited in the judgment with respect to pushbacks of asylum seekers and migrants at the Croatian border (including that provided by the five third party interveners), awareness of transiting vulnerability was strongly emphasized in Judge Turković's attached concurring opinion.[163] Therein, she proclaims irregular migration to be 'one of the biggest challenges of today's society' and underlines that 'Croatia, together with several other countries, is at the front line' thereof, given its 'geographical position in the European Union'.[164] Referring to research indicating that 'Croatia is a transit State', this 'meaning that most migrants do not wish to stay there, but clandestinely cross through that country in order to reach western Europe', Judge Turković pointed out that '[t]his leads to a situation where numerous attempts are made to irregularly enter and cross Croatia, which understandably creates a range of difficulties for its authorities'.[165] Nevertheless, 'duly taking into account Croatia's difficult position', she holds that 'it is possible to meet these chal-

158 The negative effects were alleviated, among other things, by the legal aid lawyer, the visits of the Croatian Ombudswoman, the provision of psychological support etc. See *M.H. and Others* (n 100) paras 211-212; 208-209.
159 *M.H. and Others* (100) paras 211-212.
160 Ibid paras 208-209.
161 Ibid para 193.
162 Ibid para 123.
163 See also Hakiki and Rodrik (n 153).
164 *M.H. and Others* (100), concurring Opinion of Judge Turković, para 1.
165 Ibid.

lenges while at the same time complying with the Convention requirements'.[166]

Moreover, while the vulnerability designated by the Court to the adult applicants did not resolve into a violation of art. 3 ECHR on the basis of their detention conditions, arguably, it did play out in the context of the applicants' other complaints. This is notably the case with respect to the established violations of the positive procedural obligation to effectively investigate the death of MAD. H. These obligations were importantly linked to the particular contextual, situational vulnerability, extracted from evidence depicting the general situation of migration border management in Croatia, provided in various reports as well as through the submissions of the five third party interveners.

3.6.2 The Profile of the Aggravated Smuggling Victim

(i) Object vs. Victim of Migrant Smuggling?

Reviewing what add-on effect aggravated smuggling victimization could potentially have in a vulnerability profile, as underscored in the introduction, an important feature of the smuggled migrant is his ambiguous conceptualisation in international and national frameworks (see Introduction of the dissertation). On the one hand, a sharp divide exists between the rights bearer who has been trafficked and smuggled. Moreover, tendencies to criminalise the smuggled individuals are also visible (see Chapter 2 and Chapter 3). On the other hand, there is also an inescapable – and growing – recognition of harm or endangerment in the context of smuggling, although this does not transpose into disruption of the strongly perpetrator-centric approach. As discussed in the introduction of this chapter but also in the Introduction of the dissertation, the smuggled migrant resides in somewhat of a limbo as far as framing in terms of victimization is concerned, notably in a criminal justice sense. Besides differences in concrete obligations arising with respect to both categories, the legal dichotomy between trafficked and smuggled persons is strongly underscored through the nomenclature used in the UN trafficking and smuggling protocols, the former referring structurally to 'victims' (as follows from the content of the protocol otherwise, also in a criminal justice sense), the latter, in contrast, to persons who have been the 'object' of criminal conduct as set forth in art. 6 of that Protocol.[167] As underlined in the Introduction and in section 1, this conceptual ambiguity drips down to European and national frameworks.

---

166 Ibid.

167 For an exhaustive overview, see François Crépeau, 'The Fight Against Migrant Smuggling: Migration Containment over Refugee Protection' in Joanne van Selm, Khoti Kamanga, John Morrison, Aninia Nadig, Sanja Spoljar-Vrzina and Loes van Willigen (eds), *The Refugee Convention at Fifty. A View from Forced Migration Studies* (Lexington Books 2003); Spena (n 11).

The manner and locale of regulation of smuggling offences is of great import at the national levels. The regulation of the phenomenon under titles relating subsuming offences against collective interests as public order or the public purse (as opposed to personal integrity or dignity of individuals) will direct towards exclusion of the smuggled migrants as victims. Going back to the Belgian illustration, an important ambivalence arises in that regard. On the one hand, human trafficking is regulated as an offence in the Criminal Code under Title VIII regulating offences against persons whereas migrant smuggling is regulated outside the Criminal Code, in the hybrid Foreigners Act, in a section designated for criminal offenses. On the other hand, Chapter IV of that Foreigners Act, containing provisions with respect to the special status contains multiple references to 'foreigners who are *victims*' (of aggravated forms of smuggling). During an interview with a Belgian specialised prosecutor, the project to place the human smuggling offence in the Criminal Code was mentioned. The project was subsequently dropped as no government coalition could be formed at the time and the interim government lacked legitimacy to undertake substantial reform of the Criminal Code. Interestingly, the specialised prosecutor firmly expressed the preference to keep both offences separated as human trafficking is 'an offence against the dignity of a person' whereas 'smuggling is an offence against public order and the State as it's about migration law'.[168] Yet, the respondent also pointed out that both phenomena can 'converge' because, even if migrant smuggling is not at first glance an infringement on human dignity, it can also become so. Adding to the confusion, and reiterating the necessity to keep the offences apart, the specialised magistrate further argued on the distinct 'aim' of the offences: 'exploitation for human trafficking' and 'making money' for human smuggling whilst still acknowledging the difficult circumstances that migrants can face during their journey.[169]

This lack of conceptual clarity may be one of the drivers behind the discrepancies between the law in the books and the effective implementation of the protective Belgian model developed in section 2. The scarce use of the special status could be also explained because it is not *clear enough* to important stakeholders that criminal victimization is at issue. As discussed further below, empirically supported deficiencies in the mode of criminalization can give rise to positive obligations violations, notably to have an effective legal framework, appropriate to the victimization and vulnerability needs in question.[170] ECtHR recognition of a strong vulnerability profile, akin to that of trafficking victims, thus (also) based on individual harm and endangerment of the smuggled migrant therewith could lead to prescription of a more robust

168 Interview, Specialised Prosecutor 1

169 Ibid.

170 See, with respect to deficiencies in criminalization, the Concurring opinion of Judge Pinto de Albuquerque, attached to *Söderman* (n 98).

criminal victimization profile, this in turn holding strong potential to incentivize resolution of more concrete issues established above.

(ii) Aggravated Smuggling Victims – A Profile Resembling Human Trafficking Victims?

Beyond legal delineation, empirically supported opinion increasingly points out the resemblance between the profiles of smuggled migrants and victims of human trafficking, notably where transit conditions and fragmentation of the migration journey can bolster the migrant's vulnerability to abuse and/or exploitation.[171] The fieldwork depicted in Section 2 of the Belgian scenario confirms the similarities. The dichotomy between the two phenomena is considered particularly problematic because of the complex notions of consent,[172] debt bondage[173] as well as the increased vulnerability to exploitation in a mixed migration context.[174] The framing used in EU policy documents on these issues also indicates the growing recognition of a nexus, such as where the New Pact on Migration and Asylum underscores that '[s]muggling involves the organised *exploitation* of migrants, showing scant respect for human life in the pursuit of profit'.[175]

The (empirical) findings of two recent reports, also focusing on transit zones within the EU and mapping the vulnerabilities of individuals on the move, verify the impact of both the cumulation of different types of vulnerabilities as well as the problematic attaching to the trafficking/smuggling dichotomy.[176] The ECPAT report, gathering research conducted by NGOs and co-funded by the UK Home Office, focuses with precision on precarious transit journeys undertaken by Vietnamese nationals designated therein as human trafficking victims. Likewise, the France Terre d'Asile report reveals identification and protection issues in a transit migration context, particularly in the north of France. A crucial observation in both reports is that migrant smuggling and human trafficking can rarely be differentiated in a transit migration

171 See Brunovskis and Surtees (n 24); Dandurand and Jahn (n 8).

172 See for example, Christian Kemp, 'In Search of Solace and Finding Servitude: Human Trafficking and the Human Trafficking Vulnerability of African Asylum Seekers in Malta' (2017) 18(2) Global Crime 140.

173 Julia O'Connell Davidson, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1(2) Migration studies 176.

174 See in particular the argument and the hazy scenarios depicted in Chapter 6 of Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2009); Brunovskis and Surtees (n 24); Dandurand and Jahn (n 8) for an overview of the criticism.

175 New Pact on Migration and Asylum (n 26) 15.

176 ECPAT, 'Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking From Vietnam to Europe' (March 2019): < https://www.ecpat.org.uk/precarious-journeys> accessed 12 May 2022; France Terre d'Asile, 'Identification et Protection des Victimes de la Traite dans un Contexte de Migration de Transit' (April 2017): <https://www.france-terre-asile.org/toutes-nos-publications/details/1/212-identification-et-protection-des-victimes-de-la-traite-dans-un-contexte-de-migration-de-transit> accessed 12 May 2022.

context because being 'on the move' enhances the vulnerability of migrants. Both reports indicate that migrants in transit are, also within the EU, in or outside transit camps, subjected to labour and/or sexual exploitation.[177] The France Terre d'Asile report underlines the superficiality of the legal dichotomy, pointing out that smuggling also entails advantage being taken of vulnerable individuals because of their desire to migrate, which creates a vulnerability to exploitation and/or abuse through diverse non-static factors. Amongst these are the precarious legal status of transiting migrants (de facto limiting their access to protection) and strict border control policies which push migrants to higher-risk border-crossing alternatives (also on their own when they lack financial resources and resort to acts of 'self-facilitation'[178]) or towards more 'professionalized' smuggling networks demanding higher fees.[179] Smuggling fees and debt bondage are cited in the scholarship as a key element placing migrants in transit at risk of (future) exploitation.[180] Facing long and perilous migration journeys, migrants often face no alternative but to work in exploitative conditions to finance their journeys. Abuse and/or exploitation of migrants in transit susceptible to smuggling is *not* automatic, but the *risk* thereof is systemically present to such an extent as to warrant presumptive flagging as a particularly vulnerable group.[181]

Two important general vulnerability markers may be further adduced, namely the interrelated (i) fluidity of factual profiles and (ii) the complexity of legal position. The transit migrant has a kaleidoscopic profile, making factual and legal sorting difficult, including through normative distinction which may arise considering movements between jurisdictions. Factual inability to do so becomes aggravated by a conscious policy to remove ambivalence. Taken together, access to and effectuation of rights is impeded by unclear legal standing. This issue becomes practically evident through the challenges with respect to *victim identification and protection* as well as provision of *information* as depicted in section 1 (see also Chapter 5). The presence of migrants in

177 Also confirmed in Interview, Volunteer Citizen's Platform.

178 On the complexity of the migrant smuggling phenomenon and the deconstruction of taken for granted concepts, see Sanchez, Arrouche, Capasso, Dimitriadi and Fakhri (n 2). On the operational definition of migrant smuggling as 'the smuggling spectrum' in line with the multifaceted nature of the phenomenon, see Alagna (n 7). The recourse to self-facilitation or migrants 'copycatting' on their own professional smugglers when lacking alternatives was also observed in the Belgian context (Interview, Prosecutor 1; Interview, Federal Police Investigator).

179 Ibid. See also Jørgen Carling, 'Batman in Vienna: Choosing How to Confront Migrant Smuggling' (*PrioBlog*, 12 September 2017): <https://blogs.prio.org/2017/09/batman-in-vienna-choosing-how-to-confront-migrant-smuggling/> accessed 16 January 2022. On the lack of information given to migrants in transit zones, see Giacomo Donadio, 'The Irregular Border: Theory and Praxis at the Border of Ventimiglia in the Schengen Age' In Livio Amigoni, Silvia Aru, Ivan Bonnin, Gabriele Proglio, Cecilia Vergnano (eds), *Debordering Europe: Migration and Control Across the Ventimiglia Region* (Springer Nature 2020).

180 Carling (n 179); Triandafyllidou (n 17).

181 See France Terre d'Asile (n 176).

different jurisdictions can vary between days, weeks and months, exacerbating difficulties in this respect, including in necessary follow-up, both by governmental and non-governmental entities.[182] Moreover, the ambiguity of factual and legal profiles fosters opportunities to look away, driven, as observed in Belgium, by a 'not our problem' mentality in transit countries, relegating responsibility to destination countries.[183] Thus, '*[m]ember states are happy when an illegal leaves the territory. How or what, when? Preferably as soon as possible and it's not our responsibility anymore, period*'.[184]

This idea has registered in ECtHR case law, in the specific context of distinct rights. As discussed above, in *M.H. and Others v. Croatia*, the legal uncertainty about the applicant's status was marked by the ECtHR as a vulnerability indicator. In *Khlaifia and Others v. Italy*, in the context of the applicants' complaint of violation of art. 5 ECHR, because of the unlawfulness of their deprivation of liberty following a sea-crossing, as a third-party intervener, the Centre for Human Rights and Legal Pluralism of McGill University put forward that an inherent vulnerability should be recognized in the context of this provision for the applicants. Arguing that 'the law and legal theory were lacking when it came to the status and protection applicable to irregular migrants who did not apply for asylum' and that 'this legal void made them particularly vulnerable',[185] this intervener argued for the transposition of that consideration into proportionality requirements. The Grand Chamber established a violation of art. 5 ECHR in that case,[186] holding that 'the provisions applying to the detention of irregular migrants were lacking in precision' and that there was thus a 'legislative ambiguity'. Although it did not explicitly incorporate the (legal) vulnerability aspect argued for by the intervener in its judgment, the idea that irregular migrants not applying for asylum are notably confronted with a precarious legal position, remains upright in the outcome.

What emerges then is that different types of harm or endangerment risks exist for the smuggled migrant. Following the empirical narratives discussed above, with respect to operational links between smuggling, trafficking, and the circumstances of being in migratory transit, a first type of abuse is at smuggled migrants are susceptible to becoming trafficking victims. Beyond that, further types of *sui generis* abuse can also be linked to the experience of being smuggled (multiple times). While that abuse is not identical to that associated with trafficking, there are strong similarities, particularly in terms of exploitation and the assault on human dignity incurred therewith. Exploitation can take many forms. The commodification of desperation and vulnerability as a business model should certainly be considered as an egregious variant

182 See France Terre d'Asile (n 176).
183 ECPAT (n 176); Interview, Respondent 1, Federal Belgian Police.
184 Interview, Respondent 3 Foreigner's Office.
185 *Khlaifia and Others* (n 144) para 86.
186 Ibid paras 93-108.

thereof. The problem is exacerbated because the abuse attached to smuggling is not adequately conceptualised, let alone legally defined *in abstracto*, while the fluidity and changeability of smuggled migrants factual and legal profiles renders it challenging to capture a full (vulnerability) conceptualisation *in concreto*.

3.7 Constructed vulnerability

Going back to Fineman's vulnerability concept (see 3.1), the *constructed* nature of vulnerability and the role of and responsibility of institutional or societal environments and actors in its construction needs to be reflected upon. Indeed, factual and legal vulnerability can also be considered as being aggravated because of the intentional stratagems underlying it. Discussing migration governance in the EU, observing that the migrant can be 'trapped in legal ambiguity', Stel charts how migrants experience continuous dispersal and displacement between distinct national jurisdictions, underlining deficiencies in the provision of information in that process.[187] Along with other scholars, Stel links the 'constructed' uncertainty to the policies managing migration.[188] The production of continuous uncertainty and ambiguity, arising from the lack of regulatory precision is even described as a key governance strategy within the EU, its aim being to deter and generate disillusionment, a sense of abandonment and exhaustion.[189] Accounts of Davies et al. with respect to Calais also depict a strategic approach, concentrating rather on non-governance rather than governance, made visible by the 'violent inaction' of authorities as well as by the 'turning a blind eye' behaviours to the living conditions in the camps.[190]

With regards to the legal governance of the mobility of 'illegalized migrants' stranded in transit spaces within the Schengen Area, scholars have also highlighted distinct governance strategies other than the abovementioned inaction. Based on ethnographic work conducted at the EU internal borders, Tazzioli coined the term 'governing through mobility' to describe techniques

187 Nora Stel, 'Uncertainty, Exhaustion, and Abandonment Beyond South/North Divides: Governing Forced Migration Through Strategic Ambiguity' (2021) 88 Political Geography 102391.

188 Ibid. See also Leonie Ansems de Vries and Marta Welander, 'Politics of Exhaustion: Reflecting on an Emerging Concept in the Study of Human Mobility and Control. (*Border Criminologies*, 15 January 2021) :<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/politics> accessed 12 May 2022; Alessandra Sciurba, 'Categorizing Migrants by Undermining the Right to Asylum. The Implementation of the 'Hotspot Approach' in Sicily' (2017) 10(1) Etnografia e Ricerca Qualitativa 97; Thom Davies, Arshad Isakjee, and Surindar Dhesi, 'Violent Inaction: The Necropolitical Experience of Refugees in Europe' (2017) 49(5) Antipode 1263.

189 Scurbia (n 188).

190 Davies, Isakjee and Dhesi (n 188).

going beyond detention, surveillance and forced immobility.[191] Examining administrative measures and local decrees, she observes techniques aimed at disrupting migrants' journeys by dividing, scattering, and forcing migrants to be continuously on the move. These techniques are depicted as instruments to evacuate sensitive border zones, as a strategy of deterrence, and as a 'frantic attempt rather than a planned strategy' to take back control over so-called 'unruly movements'.[192] Fontana's findings echo Tazzioli's arguments, with her research focusing on vulnerabilities and insecurities faced by migrants at the external *and* internal EU borders. Fontana outlines how bordering practices of EU Member States 'cast migrants into spaces of containment and vulnerability'.[193] Touching upon both smuggling practices and the constructed nature of vulnerability, Fontana provides an overview of the causes of death in secondary onwards movements across the EU between 2014 and 2020. The author reached the conclusion that when migrants find themselves contained in transit spaces without legal channels available to move onwards, they have no other possibilities but to resort to dangerous alternatives to cross borders which enhances significantly the risk of injuries and death.[194] Importantly, the cause of these dynamics is located, among other things, in the (mis)management of migrants and asylum seekers by the Member States and their bureaucratic barriers, which lead individuals on the move to end up into a 'bureaucratic limbo'.[195] Similarly, Menghi, focusing on the Roya Camp, describes an 'economy of containment beyond detention'.[196] Ansems de Vries and Welander use the concept of the 'politics of exhaustion' to refer to a technology of governance used in places of transit which is aimed at 'pushing people to the edge, directly or indirectly'.[197] The authors depict a feeling of exhaustion experienced by migrants in settlements in Calais, Brussels and the nearby UK border regions, due to 'repeated evictions, detention, push-backs, deportations, sub-standard living conditions, fundamental uncertainty, the continuous threat and reality of violence, etc.'.[198] These practices are regarded by these scholars as a deterrent strategy, the objective being to exhaust and discourage migrants'

191 Martina Tazzioli, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) 38(1) Environment and Planning C: Politics and Space 3.

192 Ibid 11.

193 Iole Fontana, 'The Human (In) security Trap: How European Border(ing) Practices Condemn Migrants to Vulnerability' (2022) 59(3) International Politics 480.

194 Ibid.

195 Ibid.

196 Marta Menghi, 'The Moral Economy of a Transit Camp: Life and Control on the Italian-French Border', in Amigoni, Aru, Bonnin, Proglio and Vergnano (n 182) 94.

197 Ansems de Vries and Welander (n 188). See also Leonie Ansem De Vries and Elspeth Guild, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2018) 45(12) JEMS 2156; Anja Edmond-Pettitt, 'Territorial Policing and the 'Hostile Environment' in Calais: From Policy to Practice' (2018) 2(2) Justice, Power and Resistance 31.

198 Ansem de Vries and Welander (n 188).

attempts to access the UK or another EU country to lodge asylum requests. In his recent empirical research focusing on migrants in Brussels, Vandevoordt describes policing practices framed as games of 'cat and mouse' where migrants are 'hunted down', arrested and subsequently released.[199]Also using the concept of the politics of exhaustion, Vandevoordt signals that these police actions are aimed at deterring migrants who do not wish to apply for asylum from staying in Belgium.[200]

4 Legal Effects: Application of Criminal Justice Related Positive Obligations Framework

Empirical insights such as those discussed above can be used in different ways by the ECtHR. As will be discussed further below, the ECtHR has deployed such information in different types of decisions in the context of trafficking. The Court could also utilise information reviewed in Sub-Section 3.6.2 with respect to different types of concrete decisions in relation to aggravated smuggling in a transit context. It is argued here that the operationalization by the Court of such information, through the construction of a specially calibrated (particular) vulnerability profile, would represent a fundamental step forwards, also in terms of facilitating evidence-based determinations with respect to more concrete issues. Vulnerability recognition is, namely not 'mere rhetorical flourish', but actually '*does* something' in ECtHR case law.[201] The strongest legal impact of vulnerability arises where vulnerability becomes so crystallized that it transposes into the right to not be kept in that situation. This engenders obligations on the part of the State to prevent such vulnerability from occurring, cease its continuation and provide redress for it.[202] With the Court structurally referring to particular vulnerability in that context, this route is arguably also the one taken in the recognition of positive obligations in art. 4 ECHR, with respect to forms of victimization not referred to in the text of the provision, namely human trafficking and other forms of exploitation not (clearly) qualifying as slavery, servitude or forced labour.[203]

199 Vandevoordt (n 42) 53. See also Mescoli and Robain (n 43) reporting the frequent police raids in transit spaces in Brussels.

200 Ibid.

201 Peroni and Timmer (n 113) 1057.

202 In the intimate relationship between vulnerability and discrimination grounds in the sense of art. 14 ECHR, the former can solidify to such an extent that it becomes a distinct, new ground of discrimination. See ibid. Something similar has occurred in the context of statelessness and art. 8 ECHR in *Hoti v. Croatia* 63311/14 (ECtHR, 26 July 2018).

203 Likewise, this provision makes no mention of positive obligations ensuing from it, while the Court holds that it is in this format that obligations particularly arise under art. 4 ECHR. See *S.M.* [GC] (n 74).

Via an overview of human trafficking case law in relation to criminal justice related positive obligations, this section first explores the feasibility of expansive interpretation of art. 4 ECHR to include aggravated smuggling in a transit context under its protective umbrella (4.1). Subsequently, the second sub-section develops a fluid and flexible approach including other protective bases existing outside of art. 4 ECHR, which can apply in conjunction with the latter or independently to forms of ill-treatment faced by smuggled transiting migrants (4.2). The final sub-section discusses how the Court has relied consistently on empirical information to develop its human trafficking case law (4.3) and how the same approach can be taken to circumscribe and operationalize vulnerability of aggravated smuggling of transit migrants.

4.1 Applicability of the Convention to Transiting Migrant? Trafficking Case Law as a *Model*

Given the nexus between trafficking and smuggling vulnerability and victimization, the optimal location for protection within the ECHR arguably would be art. 4 ECHR. Firstly, protection against trafficking victimization requires specific types of measures – built by the Court into art. 4 ECHR – which, given the resemblance between the phenomena, would also be appropriate in the context of (transiting) smuggling victimization. In its 13 judgments regarding criminal justice related positive obligations with respect to trafficking,[204] the ECtHR has addressed and established violations with respect to precisely these types of issues, as they have arisen in *that context*. Mainly (and through an explicit preference therefore),[205] positioning that protection in art. 4 ECHR, the Court has demonstrated a willingness to expansively interpret the 'restrictive wording'[206] of this provision 'in such a way as to allow it to cover rights unthought of when it was conceived',[207] modernizing it in line with contemporary protective needs in 'modern European democracies'.[208] Relying on its own 'general principles' applicable in this context,[209] the Court has responded to the protective needs in two important manners.

Firstly, not only taking a broad approach to its understanding of the forms of abuse explicitly prohibited in this provision (slavery, servitude and forced

204 The result of 13 judgments is obtained through a search of HUDOC using art. 4 ECHR, English language, and the exact term 'human trafficking' as filters. Adjudicated both at the chamber and Grand Chamber level, *S.M.* (n 74) counts twice.

205 *S.M.* [GC] (n 74) paras 242-243.

206 Kirsty Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85(4) *The Modern Law Review* 1045 referring to Helen Fenwick, *Civil Liberties and Human Rights* (Routledge, 2007).

207 Ibid.

208 Hughes (n 206) 1045 referring to Fenwick.

209 *J. and Others* (n 74) para 103.

or compulsory labour), the Court has critically added to its scope by adding human trafficking as a further autonomous category of prohibited horizontal abuse.[210] The Court's open approach is moreover facilitated by the fact that it does not see the need for exact classification, holding that pertinent typologies of harm or endangerment often overlap, not only within the categories in art. 4 ECHR,[211] but can also be covered by other Convention provisions, notably articles 2, 3, and 8 ECHR.[212] Protection in one instance has also been innovatively extended to art. 6 ECHR.[213] The Court has been lenient with not clearly formulated applications (either with respect to the Convention provision(s) on which complaints were based, or the format of alleged positive failings on the part of the State).[214] Where necessary, it has characterized complaints in the most suitable construct itself, demonstrating therewith awareness difficulties involved in capturing the complex phenomena in terms of human rights' deficiencies.[215] As such, diverse (sub-)categories of abuse have been drawn under Convention protection (trafficking (of minors) in association with domestic servitude, labour or sexual exploitation and forced prostitution).[216]

With one – perhaps two- exception(s),[217] in none of the judgments has the Court ever determined that the scenarios presented therein, legally or factually, could not fall within the scope of Convention protection, even though

210 The Court did so first in *Rantsev* (n 74).

211 See the discussion and clarification also in relation to exploitation for the purpose of prostitution in *S.M* (n 74).

212 *S.M.* [GC] (n 74) para 297; see also *M. and Others. v. Italy and Bulgaria* 40020/03 (ECtHR, 31 July 2012), Factsheet art. 4 ECHR.

213 That occurred in *V.C.L. and A.N.* (n 74) in which the minor applicants complained of their criminal prosecutions despite their (recognized) status as trafficking victims. The Court established a violation of art. 6 ECHR, *inter alia* because the national court had not 'consider(ed) their cases through the prism of the State's positive obligations under (art. 4 ECHR)' para. 208.

214 *S.M.* [GC] (n 74) para. 240. See with respect to *S.M* (n 74) in Hughes (n 206) 1049-1051; see also *Zoletic* (n 23) paras 121-133.

215 *S.M.* [GC] (n 74) para. 240.

216 In *V.C.L and A.N.* (n 74) the second applicant put forward a further typology of trafficking abuse, holding that 'as a victim of trafficking exploited for the purposes of producing illegal drugs he was treated differently from victims of trafficking exploited for other criminal purposes'. This complaint was found to be inadmissible by the Court, but only did so because of non-exhaustion of domestic remedies. See paras 211-213.

217 See the case of the second applicant in *C.N. and V* (n 74) para 94. In the case of *M. and Others* (n 212), it is difficult to say whether or not the Court found that the first applicant could potentially have been trafficked. The case is an an outlier in that the Court, establishing a violation of the procedural obligation under art. 3 ECHR to investigate the treatment to which the first applicant had been subjected, considered in that regard that she was potentially also a trafficking victim. In its examination of the art. 4 ECHR complaint relating specifically to trafficking in that case, the Court seems however to have backtracked to a certain extent, in the context of other obligations than the procedural one. See in this judgement, with respect to the art. 3 ECHR complaint, para. 106 and, in contrast, in relation to the art. 4 ECHR complaint, paras 154-155.

all cases arguably presented hazy narratives.[218] The Court's open approach is made visible between its first judgment (*Siliadin v. France* in 2005), up to the most recent judgment (*Zoletic and Others v. Azerbaijan* in 2021) in the catalogue of pertinent case law. The Court has indeed consistently broadened its scope. Even where the Court has itself not been able to establish that treatment alleged by applicants amounted to treatment prohibited under art. 4 ECHR, it has found procedural violations in the sense that *national authorities* did not do enough to determine (or exclude) prohibited behaviour under art. 4 ECHR in domestic investigations and proceedings.[219] Generally, the Court established, in its assessments of compliance, at least one (type of) violation in nearly all cases.[220] Inclusion of the transiting smuggling victim under the scope of art. 4 ECHR would mean that such specific obligations would also apply. This inclusion would moreover have important symbolic and norm-transferring impact, emphasizing the conceptual proximity between trafficking and smuggling and underscoring the victimizing aspects of the latter.

Secondly, while the concrete criminal justice positive obligations in art. 4 ECHR, in their base form, follow the same format as those which apply in relation to other types of horizontal abuse,[221] in trafficking case law, the Court reads these in line with specific protective needs associated with this type of abuse, in some instances prescribing specific further obligations in that regard.[222] As such, the Court established obligations to (*inter alia*) ensure: (i) *effective* criminalizations, interpretations and classifications[223] which adequately capture the full gamut of abuse; (ii) that the overall legal and practical apparatus is effectuated in practice, in this context emphasizing the importance of victim identification and the training of officials;[224] (iii) that impediments

218 The same holds for the 9 decisions, in which inadmissibility was established for other reasons.

219 *Zoletic* (n 23), paras 193-210; *S.M.* [GC] (n 74) paras 336-347.

220 *J. and Others* (n 74) and with respect to the second applicant in that case, *C.N. and V.* (n 74) paras 93-94 form the exceptions.

221 From a criminal justice perspective, these are: (i) the (first) substantive obligation to have in place an adequate protective legal and administrative framework and the means to effectively operate it; (ii) the (second) substantive obligation) to prevent or stop harm from occurring and (iii) the procedural obligation to provide effective (criminal law) redress, including via adequate investigation, adjudication and sanctioning. See, among others, *S.M.*[GC] (n 74) para 306; *Zoletic* (n 23) para 182.

222 In that 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking', the Court also prescribes non-criminal measures specifically important in the trafficking context, such as 'adequate measures regulating businesses often used as a cover for human trafficking', while 'a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'. *Rantsev* (n 74) para 284.

223 See *Siliadin* (n 74), paras 147-148; *C.N. and V.* (n 74) paras 107-108; *C.N.* (n 74), para 80; *Chowdury* (n 74) para 123.

224 *J. and Others* (n 74) para 110-113 and, distinctly in terms of criminal victimization, para 115.

thereto do not arise through the existence of conflicting criminal justice and (immigration) policies, the latter undermining the former;[225] and (iv) shortcomings in investigations in association with the features of the crime phenomenon,[226] *inter alia* by emphasizing that the often cross-border aspect of trafficking gives rise to robust duties of international cooperation.[227] In so doing, the ECtHR has incorporated special features of trafficking victimization in its appraisals to the advantage of applicants. These include, strongly relying in this regard on empirical evidence extracted from diverse sources, the problems related to the (over) reliance on victims' statements, which may be problematic in light of (i) psychological pressure and burdens felt by them before and in the course of proceedings, (ii) prejudice and insensitivity to victims' problems on the part of officials taking testimony, (iii) credibility of statements, in light of changes therein over time and (iv) fear and reluctance on the part of victims because of threats of reprisals or a lack of trust in 'the effectiveness of the criminal justice system'.[228] The Court has alleviated the burdens of victims by lowering thresholds in terms of (*prima facie*) evidence which they must show to trigger (the applicability of) positive obligations (to protect and provide criminal procedural remedies) at the national level.[229] Critical for the context of aggravated smuggling is that the Court also recognizes the complexities of the notion of consent by being sensible to the possibility that this can dissolve or be diluted.[230] Overarchingly, the ECtHR emphasizes the particular vulnerability arising from this type of victimization. Importantly, with most applicants falling under that category, the vulnerability of trafficking victims is often (in part) related to the fact that they are also *irregular migrants*.[231]

That is not to say that the Court can or should equate aggravated smuggling victimization (notably in a transit context) with trafficking. As discussed below, the current position of the ECtHR is that abuse can only qualify as trafficking if it meets the constituent aspects of that phenomenon as it is circumscribed in pertinent international law definitions.[232] While there may be strong similarities between smuggling and trafficking experiences and there

225 *Rantsev* (n 74) paras 291-293.

226 See *S.M.* [GC] (n 74), para 337, where the Court emphasized the importance of investigating contacts on social media, in that 'such contacts represent one of the recognized ways used by traffickers to recruit their victims'.

227 *Zoletic* (n 23) para 191; *Rantsev* (n 74) para 289; see also *J. and Others* (n 74) para 105.

228 *S.M.* (n 74), para 344, referring to empirical evidence cited in paras 138, 171, 206 and 260. See also in *Chowdury* (n 74) para 121, the reference to the recovery and reflection period in art. 13 of the Council of Europe Convention on Action against Trafficking in Human Beings, with the aim allowing a potential victim time to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.

229 *S.M.* [GC] (n 74), 324-332. See also Hughes (n 206) 1053-1054 on *S.M.* (n 74).

230 *Chowdury* (n 74) paras 96-97; *Zoletic* (n 23) para 167.

231 See footnote 74.

232 *S.M.* [GC] (n 74) para 303.

may be concrete instances in which the Court could interpret horizontal abuse as falling under those definitions, it is unlikely that the Court would create full identity between the two groups. That would not be necessary, however, in that the Court, on the basis of evidence recognizing *sui generis* harm and endangerment and vulnerability associated with certain types of smuggling, could understand these specific (aggravated) forms of smuggling as falling under the scope of art. 4 ECHR, under their own category.[233]

4.2 A Consolidated and Fluid Approach Under Articles 2, 3, 4 and 8 ECHR

The fact remains, however, that the range of smuggling experiences and the profiles of smuggled migrants is highly varied, also in the sense that the similarity to trafficking may be more or less strong. It is further important, in this regard, that art. 4 ECHR is not the only locale in which the Court can establish protective duties. The question then becomes which provisions can be considered as alternative for which types of smuggling situations.

Again, taking Belgian law as an illustration, when implementing the EU Facilitator's Package, article 77*bis* of the Foreigners Act criminalizes preparing, facilitating, or effectuating (attempted) of the irregular entry, residence, and transit by a non-EU subject, for direct or indirect financial gain. A reading of the legislative proposal makes it clear that the legal provision, which is purposefully placed in the Foreigner's Act as opposed to the Criminal Code, protects the interests of the State. Indeed, when modifying former article 77*bis*, which did not differentiate migrant smuggling from human trafficking, the positioning of the trafficking offence in the Criminal Code under the title 'Crimes and Offences against Persons' allowed to 'make a stark distinction between migrant smuggling and human trafficking' in line with international instruments.[234] Prescribed as such, difficulties may arise in the qualification of this act as a horizontal human rights abuse under any Convention provision. Moreover, articles 75 and 76 of the Foreigner's Act criminalize the illegal entry, residence and non-compliance with removal orders by an alien himself, with the provisions taken together rather framing this migrant as a consensual participant within the smuggling narrative.

The dynamics change, however, where aggravated circumstances mentioned in articles 77*quater* and 77*quinquies* are at issue. Some of those may (even without a smuggling context), trigger articles 2 and 3 ECHR. Thus, positive obligations under art. 2 ECHR could become engaged under aggravated circum-

233 See in that regard, *S.M.* (n 74) para 307, where the Court considered that 'the relevant principles relating to trafficking' are also applicable to cases of forced prostitution, 'given the conceptual proximity of human trafficking and forced prostitution under Article 4 (…)'. Also referring in that regard to *C.N.* (n 74), paras 65-69, with respect to domestic servitude.

234 Belgian House of Representative, Legislative Proposal (10 August 2005), 9-10.

stance (iv) of art. 77*quater*, where the life of the victim is endangered, intentionally or through gross negligence, or art. 77*quinquies* (i), if the crime causes the (unintentional) death of the victim.[235] Aggravated circumstance (v) under art. 77*quater*, where the crime causes a seemingly incurable disease, an inability to perform personal labour for more than four months, full loss of an organ or the use thereof or serious mutilation, could correspond with the requisite level of severity of ill-treatment in art. 3 ECHR.[236] The same may hold true, although less categorically, for the aggravated circumstances of art. 77*quater* under (iii), where smuggling is committed through direct or indirect use of cunning trickery, violence, threat or any form of coercion, or by kidnapping, abuse of power or deceit, particularly if violence is involved. Where art. 3 ECHR would not apply (because the requisite level of severity is not attained), an alternate basis may be found in art. 8 ECHR which is broad enough to cover a great variety of horizontal abuse. That would also be an option for the aggravated circumstances meant under art. 77*quater*, where the crime is committed (i) in relation to a minor; (ii) through abuse of the vulnerable situation of a person as a result of his irregular or precarious administrative situation, his age, pregnancy, illness or physical or mental deficiency, to such an extent that that person in fact has no other real and acceptable choice than to allow themselves to be abused or (iii) by offering or accepting payments or other advantages from a person holding authority over them.

Diverse issues arise however with these locales. Horizontal abuses falling under articles 2 and 3 ECHR may be grave enough to trigger criminal justice positive obligations, but there is no guarantee of that. It would moreover be problematic if appraisal were to focus in isolation on the impact on life or physical or psychological integrity, thus only the aggravated circumstances themselves without consideration of the smuggling backdrop. In such a an approach, aspects of abuse associated with aggravated *smuggling* would not (necessarily) come to the fore, meaning that any protection provided would be disengaged therefrom. While the same issues could arise with art. 8 ECHR, a further problematic attaching to this provision is that this is the location where the Court does administer a margin of appreciation in that national authorities can be left a choice of means of redress for lesser abused criminal remedies (and therewith criminalization) not necessarily being required.[237]

235 Art. 2 ECHR would also apply in loss of life under such circumstances, regardless of Belgian law.

236 See also art. 6 par. 3 of Palermo Smuggling Protocol, 3 on the necessity to establish aggravating circumstances in life endangerment situations, inhuman or degrading treatment which include the exploitation of migrants.

237 In the framework of art. 8 ECHR, the 'nature of the State's obligation' depends on 'the particular aspect of private life that is in issue', the margin becoming 'correspondingly narrower' if 'a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life.' That will be the case where 'physical and psychological integrity' are involved. Particular vulnerability

The hazard is then that in the blurry environment of art. 8 ECHR, where 'lesser' aggravated circumstances are involved, that the Court will not recognize a deficiency in recognition of criminal victimization.

Such concerns again render the option of art. 4 ECHR an important locale to consider. While the ECtHR has on numerous occasions made clear that prohibited forms of treatment under this provision, including trafficking, can overlap with abuse in the sense of articles 2, 3 and 8 ECHR, it is critical that it *prefers* to examine trafficking complaints under art. 4 ECHR. This is precisely the case in order to capture all aspects of the complex phenomenon. Underscoring that 'in its case-law it has tended to apply Article 4 to issues related to human trafficking',[238] the Court explains 'that this approach allows it to put the possible issues of ill-treatment (under Article 3) and abuse of the applicant's physical and psychological integrity (under Article 8) into their general context, namely that of trafficking in human beings (…)' holding further that 'allegations of ill-treatment and abuse are inherently linked to trafficking and exploitation, whenever that is the alleged purpose for which the ill-treatment or abuse was inflicted'.[239]

(Aggravated) smuggling can be as complex – and in terms of ill-treatment and abuse – as aggregated a phenomenon as trafficking. It is paramount then that harm associated with it are adequately addressed. It is also only in this manner that concrete obligations, which may arise specifically in relation to this phenomenon, can be developed, as they have been for trafficking. Understanding however that not all smuggling experiences will be the same, a resolution would lie in envisaging articles 4, 2, 3 and 8 ECHR as points on a variable scale of ill-treatment, the (greater) relevance of one or the other provision depending on the type and gravity of abuse. Taking all bases together, a broad matrix of potential protection would then be established, allowing for optimal approximation of the concrete situation of the smuggled migrant. Art. 4 ECHR could then be reserved for cases in which the abuse undergone by the smuggled migrant is found to have such close conceptual proximity to the types of treatment prohibited in that provision, with the other provisions serving as fallback bases. Using them as alternates would not be problematic as long as specific types of obligations associated with the type

---

can also reduce margins, such as is the case for minors, notably where 'serious acts such as rape and sexual abuse' – which also engage 'fundamental values' – are concerned.' See *Söderman* (n 155) paras 78-82.

238 *S.M.* [GC] (n 74) para 241 referring to *Rantsev* (n 74) paras 252 and 336; *C.N. and V.* (n 74) para 55; *C.N.* (n 74) para 84; and *J. and Others* (n 74) para 123.

239 *S.M.* [GC] (n 74) para 242.

of abuse (corresponding to the needs and problematic arising from the crime phenomenon) are also read into those provisions.[240]

4.3 Sorting through reliance on empirical information and insights

In positioning the transiting migrant smuggled under aggravating circumstances within such a protective matrix (see sub-sections 3.6.1 and 3.6.2), the Court can importantly rely on empirical evidence and the insights of expert bodies and scholars to interpret such information. Again, this is an approach also taken in trafficking case law in which the Court has utilized empirical evidence in different manners. As will be addressed more specifically directly below, the Court arguably and critically operationalized such evidence in its fundamental decision to recognize trafficking as creating a state of vulnerability, which qualifies as a separate category of prohibited treatment under art. 4 ECHR.[241] This prohibited treatment which henceforth cannot be protected against and remedied through any other means than through criminal law enforcement.

The Court has also used empirical information in assessing applicability and whether or not a *prima facie* case of victimization was at issue,[242] in support of its findings with respect to specific types of obligations[243] and in assessing applicability and whether manners in which they can be triggered, in the

240 See in this respect, *M. e.a. v. Italy and Bulgaria* (n 212) paras 156 and 157, where the Court determined in its assessment of the art. 4 ECHR complaint that 'irrespective of whether or not there existed a credible suspicion that there was a real or immediate risk that the first applicant was being trafficked or exploited', the complaint of violation of the procedural obligation to effectively investigate established under art. 3 ECHR (see para 103), also covered any problematic which may have existed in that regard in the context of art. 4 ECHR.

241 In *Siladin* (n 74) in which the Court did not establish trafficking, but servitude and forced or compulsory labour, the Court relied in part on empirical information with respect to its findings that positive obligations are to be read into art. 4 ECHR and that the type of abuse at issue can only be addressed via criminal justice protection. In *Rantsev* (n 74), as will be discussed further below, the Court relied in part on empirical information in finding that trafficking is to be considered an autonomous form of abuse within art. 4 ECHR.

242 See with respect to the use of empirical evidence in aid of rights bearers' burden of presenting *prima facie* evidence of victimization, *Zoletic* (n 23), paras 156-170 and 193-200. See also in this regard John Tajer, 'Hidden in Plain Sight: Failure to Investigate Allegation of Abuse on Public Construction Projects in Zoletic v. Azerbaijan. (Strasbourg Observer, 18 November 2021). <https://strasbourgobservers.com/2021/11/18/hidden-in-plain-sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/>.

243 See with respect to the identification duty in *J. and Others* (n 74), paras 110-113 and 115 and in that light, Stoyanova (n 19). See also *S.M.* (n 74) paras 295-296, where the Grand Chamber found that internal trafficking of nationals also falls under the concept of trafficking in art. 4 ECHR, *inter alia*, relying on the information provided by one of the third-party interveners 'that internal trafficking is currently the most common form of trafficking'.

assessment of compliance in concrete cases[244] and, as discussed below, in recognition of specific implications of the (particular) vulnerability of trafficking victims.[245] A broad capital of information in the form of opinions, reports, studies, and statistical information emanating from public and private (monitoring) entities, often provided through third party interventions, has provided a wealth of opportunities for the Court in this regard.[246]

This type of information has been used alongside support the Court has found for its positions in international law sources, but the Court has also this type of information where international sources provided no clear answers on certain issues (or conflicted). In *S.M. v. Croatia*, the Grand Chamber, finding that the evidence suggests [emphasis added] that 'internal trafficking is currently the most common form of trafficking',[247] it declined to exclude from its trafficking concept cases without a cross-border element, in order to '(ensure) the wider relevance of Article 4'. The Grand Chamber emphasized in this regard that 'addressing human trafficking as a phenomenon that does not necessarily entail crossing a border may assist *in centring analysis upon victims' experiences, as opposed to immigration control* [emphasis added]'.[248] Finding that a more restrictive approach would 'would run counter to the object and purpose of the Convention as an instrument for the protection of individual human beings, which requires that its provisions be interpreted and applied so as to make its safeguards practical and effective', the Grand Chamber also relied expressly on information provided by one of the third party interveners to that effect.[249] In *S.M.*, the Grand Chamber also established that 'human trafficking may take place outside the parameters of 'organised crime'.[250] While it found basis to do so in international law sources, in doing so it again underscored the importance of approximating the real life experiences of witnesses, expressing the 'hope' that 'a conception of human trafficking that is not tied to border control and organised crime may assist in developing Article 4 *beyond*

244 *Rantsev* (n 74). In *S.M.* (n 74), as underlined by Hughes (n 206) 1049: 'Both (judgements) found that Croatia had violated the procedural obligation to investigate by neglecting to pursue various lines of enquiry, all of which was contrary to expert guidance as to how to investigate human trafficking.'

245 In *S.M.* [GC] (n 74) para 344, the Court relied on the expertise of specific bodies such as the GRETA, notably regarding the advice to not rely primarily on the victim's testimony which is impacted by psychological trauma..

246 In this regard, GRETA is identified as playing an important role as a contributor. See, among others, Vladislava Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece' (2018) European Human Rights Law Review 67.

247 *S.M.* [GC] (n 74) para 295.

248 Hughes (n 206) 1051.

249 *S.M.* [GC] (n 74) paras 269-270 where the Research Centre *L'altro diritto onlus* (University of Florence) referred to the UNODC *Global reports on trafficking in persons*, which 'pointed out that victims who had been detected within their own borders represented the largest part of the victims detected worldwide'.

250 *S.M.* [GC] (n 74) paras 294-296 referring to sources mentioned in paras 11 and 120.

punishing 'perpetrators' of human trafficking (…) towards understanding the experiences of victims and addressing their substantive needs [emphasis added]'.[251]

The ECtHR can likewise source the real-life experiences and vulnerabilities of smuggled migrants as well as challenges in the effectuation of protection, using empirical insights to bolster its approach. Again, a fundamental first step which must be taken in that regard – which would trigger the whole chain of distinct positive obligations – is the recognition that there is a *sui generis* form of abuse associated with aggravated smuggling, notably in a transit context, which gives rise to an inherent vulnerability against which criminal justice protection must be available.

Returning then to the important use made by the Court of empirical information in the incorporation of trafficking as a distinct category in art. 4 ECHR, it is important to underscore that while lauded, the ECtHR's open approach to art. 4 ECHR has also been criticized.[252] The criticism touches upon the lack of clarity with respect to abuse categories it (legally and factually)[253] sorts under the scope of the provision and the manner in which they relate to each other.[254] Commentary has been that the Court has created a 'definitional quagmire' within the provision[255] and has particularly been ambiguous in its description of trafficking, creating 'doubt over the broader parameters of the right'.[256] Perhaps influenced by the diverging views, including those within the Court itself,[257] in *S.M. v. Croatia*, (the only Grand Chamber judgment with respect to trafficking), the ECtHR brought more clarity to the notion of trafficking under the Convention by binding itself to international law definition(s) of the phenomenon.[258] In keeping with the idea of deference, this may point to a strategy to check an overly progressive approach. Marking that the Grand Chamber did so in *S.M. v. Croatia*, Stoyanova argues that the chamber's judgment in that case was importantly corrected, in that an implication lay therein that 'the definitional scope of Article 4 was enlarged to such an extent as to cover 'exploitation', whatever 'exploitation' might mean'.[259]

---

251 See Hughes (n 206) 1051.

252 Ibid 1046.

253 See Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) *Netherlands Quarterly of Human Rights* 163.

254 Hughes (n 206). See also Stoyanova (n 310). Vladislava Stoyanova, 'The Grand Chamber Judgment in SM v. Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (*Strasbourg Observers*, 3 July 2020) <https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/> accessed 10 June 2022.

255 Stoyanova (n 254).

256 Hughes (n 206) 1046-1048. See also the conclusion of Stoyanova, (n 253).

257 Hughes (n 206) 1046.

258 Hughes (n 206).

259 See Stoyanova (n 253) on the interpretative openness of the term prostitution; Hughes (n 206) 1053 on the ambit of art. 4 ECHR.

Nevertheless, at the same time, Hughes argues that, even after this Grand Chamber judgment, there are also indications that 'different future directions remain both possible and contested'.[260] She argues that there is a basis to hold that in *S.M. v. Croatia*, the Court has added, beyond trafficking, forced prostitution as a further category of distinct abuse.[261] Hughes offers an interesting analysis as to how the door may remain open. She identifies as a main cause for the definitional uncertainty, with respect to the definition of trafficking under art. 4 ECHR, the fact that the Court used two different approaches in framing the concept in *Rantsev v. Russia*.

Hughes coins these two approaches as follows: the 'ECtHR characteristics approach' and the 'international law definition'.[262] The international law definition approach relates to Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, both of which unpack the three core elements of trafficking, being the 'act, means and purpose' (see also Chapter 2). The 'characteristics approach', on the other hand, 'describes the nature of human trafficking, the intentions of traffickers, and the impact of human trafficking upon the victim'.[263] The two approaches give rise to ambiguity because, while overlapping to an extent, they are also significantly different. Particularly important is that the 'characteristics definition' does not require that the core elements in the international law elements are established, making it broader.[264] The Court exacerbated the lack of clarity according to Hughes, by, in case law following *Rantsev*, 'vacillating' between the two approaches, alternately relying on one over the other.[265]

One of two explanations Hughes provides for the persistence of ambiguity in case law is of particular importance here. She argues 'the Court did not pin down the concept earlier, due to 'difficulties (…) in explaining the relationship between human trafficking and Article 4, and thus in justifying reading the concept into the right', making it understandable that 'when implying a new concept (…) the Court would wish to explain how and why there was a role for it within Article 4 and would wish to resist being seen to be simply lifting concepts from other international frameworks'.

Therefore, the 'characteristics account' can be considered as having functioned to legitimize the inclusion of trafficking under art. 4 ECHR, by supporting the position that there is a real need to do so. It remains relevant however, in that in *S.M. v. Croatia*, the Grand Chamber did not remove it as a tool but gave it an alternate function, namely as a means to determine '*how* [emphasis added] the phenomenon of human trafficking falls within the scope of Ar-

260 Hughes (n 206) 1046.
261 Hughes (n 206).
262 Hughes (n 206) 1048.
263 Ibid.
264 Ibid.
265 Ibid.

ticle 4'.[266] Thus, the characteristics account 'is now presented as an attempt at explaining the nature of Article 4 and the rights that it encompasses by examining the ways in which an individual experiences a loss of those rights'.[267] As such, this approach can remain relevant in the ECtHR jurisprudence as the Court may '(return) to this account',[268] also where ambiguity may again arise with respect to particular types of treatment.[269]

Of great significance is that Hughes' characteristics approach paraphrases a description of trafficking first laid down by the Court in *Ranstev v. Cyprus and Russia*, which reads fully as follows:

> *'[t]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…) It implies close surveillance of the activities of victims, whose movements are often circumscribed (…) It involves the use of violence and threats against victims, who live and work under poor conditions (…) It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (…) The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place 'under a regime of modern slavery' (…)'.*[270]

The elements of this definition of characteristics is fully extracted from empirical information provided in reports, third party submissions in that case.[271] Reasoning why trafficking should be included within the scope of art. 4 ECHR, the Court, moreover, pointed to the increase in trafficking as a 'global phenomenon', referring in that regard to the *Ex Officio* report of the Cypriot Ombudsman on the regime regarding entry and employment of alien women as artistes in entertainment places in Cyprus, two follow-up reports made by the Council of Europe Commissioner for Human Rights and the third party submission of The AIRE Centre.[272] The Court's conclusion that '(t)here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention', is (as well as being mentioned in the preamble of the Anti-Trafficking Convention)[273] also sup-

266 Hughes (n 206) 1057.
267 Ibid.
268 Ibid.
269 See Hughes (n 206) with respect to forces prostitution.
270 Hughes (n 206) 1048.
271 Ibid para 281.
272 *Rantsev* (n 74) paras 278-279.
273 Ibid para 162.

ported in the included citations from the reports of the Cypriot Ombudsman.[274]

As such, the 'characteristics account' is in fact a summation of empirical evidence, which, having being utilized first to recognize that trafficking creates a type of vulnerability which brings it under the scope of art. 4 ECHR, now functions to sort and analyse concrete narratives, to determine not only whether they constitute trafficking (within the parameters of the international law definition), but also other forms of abusive exploitation rightly to be brought under the scope of art. 4 ECHR. The strong empirical evidence forming an own characteristics account of the real-life experiences and vulnerabilities of transiting smuggled migrants can likewise be used by the Court to draw this type of abuse under the scope of Convention, in accordance with the specific type and gravity at issue, positioning concrete cases within the matrix of protection arising from the combined bases of articles 2, 3, 4, and 8 ECHR as envisaged above.

5 Conclusion

Even in Belgium, where the legal protection of the smuggled migrant is stronger and better aligned with the empirically observed vulnerabilities of smuggled migrants, the implementation and effectuation of intended protection is impeded. In jurisdictions where the strict dichotomy between trafficking and smuggling is even more forcefully in place, given the blurred boundaries between human trafficking and migrant smuggling and the type of victimization and vulnerability associated with migrant smuggling, the persistence thereof is untenable. Differential treatment is particularly problematic given increasing empirical evidence of traces of abuse and exploitation in smuggling situations, *particularly* in a transit migration context.

Departing from a human rights perspective, we explored the extent to which, and if so how, the ECtHR, with its interpretative arsenal, could break through the protective disparities. We argued that diverse approaches can be reconciled if the Court takes into consideration the real-life experiences of smuggled migrants, viewing these from the lens of the context and *constructed nature* of their vulnerability and the role of institutional or societal environments in its deliberate creation. Unpacking growing theoretical and empirical insights, we built on the emerging awareness of the trafficking/smuggling nexus and the concept of 'migratory vulnerability', particularly in a transit context. We argued that *some* transiting smuggled migrants can and must be recognized as particularly vulnerable and as victims in the sense of the criminal law by the ECtHR. It is critical that the Court continues to use theoretical and

274 Ibid para 89.

empirical information and does so *systematically* and *structurally* in order to operate vulnerability paradigms (and transposition to criminal victimization) in clear and effective manners. The Court's management of such information (which sources it uses, when and how it will do so) could benefit from ordering, while the operationalization of theoretical and empirical insights is contingent on the availability of information,[275] meaning that there is also a responsibility of stakeholders to ensure that the Court is provided with appropriate information.

Being conscious of the ambitious nature of the argument put forward, one important limitation should be underlined. Even if the steps suggested above were to be taken by the Court, further issues would likely appear at the level of testing whether positive obligations were actually violated in concrete cases, given the specific criteria and thresholds which apply for each type. The Court may recognize that strong protective duties exist for transit jurisdictions such as Belgium, also considering the obligations to manage and implement migration in a particular manner as Schengen-participants and EU Member States. Internal transit jurisdictions present their own problematic, notably in relation to the clarity their own legal obligations with respect to both victims of migrant smuggling and human trafficking.[276] However, the fact that Belgium is a transit country and is therewith burdened with this particular problem linked to transit, may also provide grounds for the Court to reject the idea that it can be held to stringent account. As observed by Golini, 'transit countries feel exploited as a springboard towards 'El Dorado' and do not regard themselves as able to deal with the growing numbers of irregular migrants'.[277] With regards to the Schengen Area and the vulnerability and unsustainability of EU migration policy, Scipioni highlights that the conditions for the migration 'crisis' of 2015 are to be found in weak monitoring, low solidarity between Member States, the absence of central institution and the lack of policy harmonization, situational contexts *created by and driven by (conscious) incomplete agreements within the EU* [emphasis added].[278]

It is important to be mindful of the possibility that the Court might be reticent in establishing violation against transit jurisdictions, on the basis that it may be unfair to impose 'impossible or disproportionate burdens'.[279] A viable idea worth exploring in this regard is the notion of *shared* or *collective*

275 See Baumgärtel (n 72).

276 Benjamin Perrin, 'Just passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons' (2010) 7(1) European Journal of Criminology 11.

277 Antonio Golini, 'Facts and Problems of Migratory Policies' in Jospeh Chamie and Luca Dall'Oglio (eds) *International Migration and Development – Continuing the Dialogue: Legal and Policy Perspectives* (IOM, 2008) 96.

278 Marco Scipioni, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25(9) Journal of European Public Policy 1357.

279 Rantsev (n 74) para 219.

responsibility of multiple European jurisdictions already recognized in case law and scholarship.[280] Taking the necessary protection of vulnerable individuals within the European legal space at heart, such an approach would resonate with the 'not our problem' mentality and the blaming games between European jurisdictions which are salient and visible in light of dramatic incidents of migrants' fatal journeys.[281] Judge Turković's recent concurring opinion attached to *M.H. and Others. v. Croatia* underscores the need to examine shared responsibility. Opining that the judgment 'offers good guidance for the domestic authorities as to their future conduct', she marks out that the challenges involved in irregular transit migration 'concern the entire society', so that 'a common solution to the situation should be found within the European family'.[282] As underlined by Dembour, the Court has the ability to opt for a progressive approach when interpreting the Convention. Joining Dembour, to conclude, we argue that the ECtHR should deploy its historically well-displayed courage to ensure that smuggled migrants are protected against abuse as they move about in European legal spaces.[283]

280 See in particular the insightful work of Maarten Den Heijer, 'Shared Responsibility Before The European Court of Human Rights' (2013) 60(3) Netherlands International Law Review 411; Maarten Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4(2) Journal of International Dispute Settlement 361; Raquel Regueiro, 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar (2021) 25(1) Tilburg Law Review 27.

281 John Lichfield, 'The Channel Blame Game' *Politico* (27 November 2021): <https://www.politico.eu/article/migrants-english-channel-france-uk-refugees-drowned/> accessed 12 May 2021.

282 *M.H. and Others* (n 157), Concurring Opinion Judge Turković, para 1.

283 Dembour (n 75).

7 Conclusion

Connecting the Dots, Avenues for Further Research and Plausible Solutions

1 Introduction

Similarly to migration processes which, as underlined throughout the dissertation, are far from being linear, the research journey also followed a path filled with shifts and detours. Nonetheless, unlike migration journeys which are often mistakenly imagined as departing from a point A with an actual end in sight to point B, the time has finally come to draw general conclusions. To reach point B, it is necessary to connect concretely the distinct findings by retracing the dynamic path followed throughout the research to provide an answer to the main research question and to arrive, so to say, at the destination of this dissertation.

The central research question of this doctoral research asked how the alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking developed in Belgium affects the governance of transit migration. The dissertation scrutinized the unique Belgian legal framework allowing *victims* (as opposed to objects) of *aggravated forms* of migrant smuggling to have access to the protective legal status usually strictly reserved for victims of human trafficking. The Belgian 'third way' or alternative approach can be said, at least on paper, to provide an interesting correction to the recurrent criticism surrounding the legal dichotomy between the two phenomena. In this regard, the title of the dissertation, 'Beyond the Dichotomy Between Migrant Smuggling and Human Trafficking?' ends with a question mark. The question can be answered in the affirmative in the Belgian case. This unique approach, which recognizes an unjust disparity in terms of protection, is also in line with recent agreements reached internationally, such as the UN Global Compact for Safe, Orderly and Regular Migration, which seems to acknowledge the particular vulnerability and risk of victimization faced by migrants in the midst of their migration journeys as well as the organic links existing between migrant smuggling and human trafficking.

Whereas the research presents a combination of independent sub-studies, each having their own distinct conceptual and theoretical approach, logic, methodology and conclusions, they nevertheless complement one another and contribute to answering the central research question. The main goal of this conclusion is to bring together the findings of each chapter and to locate them within the context of scholarly literature focusing on migrant smuggling, but more broadly on mobility and (frontline) implementation and decision-making

research. This final chapter starts by answering the central research question and subsequently unpacks the main findings. This first section emphasises the implications of the research, notably by highlighting the crucial relevance of the transit element. The second section further contextualise the research findings and engage with a growing body of scholarship aiming to disentangle migration-related research from methodological nationalism. The third section outlines avenues for further scientific inquiry connected with the research limitations. The final section ends by bringing forward and discussing solutions designed to enhance the protection of vulnerable individuals transiting within the Schengen Area.

2 Answering the Central Research Question and Unpacking the Main Findings

2.1 Answer to the central research question

An essential aspect of the central research question highlighted above is the focus on the situation of migrants *in transit*, specifically within the Schengen Area. Because migrants transiting through or stranded in the Belgian territory can be or become victims of human trafficking and/or (aggravated forms of) migrant smuggling, the dissertation scrutinized the ways in which this alternative approach concretely affected their (legal) governance. Taking a socio-legal approach to answer the main research question, the dissertation demonstrated how and why this unique and promising framework is not effectively used in practice (Chapters 4-6). Whereas the answer to this overarching question will be further unpacked in the following sub-sections, the key elements can be summarized as follows.

First, the research considered the complex operationalisation and implementation of norms enshrined in a fragmented and multi-layered national and European institutional context. This context implicates that migrants transiting in Belgium or more generally within the Schengen Area find themselves at a crossroads where multiple actors and legal regimes intersect, and consequently, where the competencies to govern migrants in transit are inevitably scattered between these distinct actors. Therefore, oversimplistic explanations which solely underline the fact that even in the case where migrants could, from a strictly legal perspective, 'qualify' to be granted the protective status, only to end up unprotected due to their lack of interest in the status, need to be discarded. Describing the migrants as only wanting to reach the UK at all costs or emphasising the fact that the situation of migrants transiting in the territory is 'only a UK problem' would be reductive. The dissertation reveals the fact that the governance of onward mobility movements within the Schengen Area is situated at the juncture of multiple sensitive and politicized 'fights' having intrinsic links and tensions with one another, and which are not under

the sole competence of the Belgian authorities, namely the fight against migrant smuggling, the fight against human trafficking, the fight against irregular migration and the maintenance of security and public order. The findings underline how, by taking a jurisdictional lens, for instance, it can be observed that some policies are prioritized over others. This is notably the case when the administrative 'processing' of migrants in transit in the context of the fight against irregular migration and the maintenance of security and public order takes precedence over the protective dimension, which would require authorities to identify, inform and subsequently protect individuals who could be considered as potential victims of human trafficking and/or aggravated forms of migrant smuggling.

Second, the research identified six causes or elements than can shape the dynamic described above. To summarize, the findings pinpoint critical issues of institutional capacity (1) that are further complexified considering the intricate Belgian institutional framework (2), issues of sensibilization and training of frontline implementers or the lack thereof (3), a lack of harmonized application of the procedure by frontline implementers (4), as well as a visible tendency of relevant actors to evade their responsibility by passing it on to other actors at the local, national or European level (5) which is stimulated by the scattering of competences between numerous actors operating at these distinct levels (6). Notwithstanding the contrasting and at times clashing 'fights' mentioned above, the findings unveil the presence of human rights concerns, notably by outlining languages of care or humanitarian narratives displayed by respondents. Taken together, the findings allow to draw a 'Janus-faced' picture displaying both practices and policies of control and securitization, on the one hand, and discourse of empathy and care considering the recognized vulnerability of migrants to abuse and exploitation on the other. These findings also confirms that the role of the moral economy of government bureaucracies in which state agents operate should not be underestimated. Yet, and despite the knowledge of this human-rights and protective-oriented alternative approach, which is described by most respondents as a mitigator to the strict legal dichotomy, the findings also demonstrate that stepping out of the straight-jacked legal dichotomy can be a challenging task in practice.

A third and crucial component that the dissertation brought forward, which is essential to answer the research question, is the transit element which was examined both conceptually and empirically. The transit element is key to unpack as it plays an important role in the decision-making of respondents, which thenceforth affects the ways in which migrants in transit are governed (see in that regard sub-section 2.3). In the specific socio-political Belgian context, the transit element became apparent with the deployment of the politicized label of 'transmigration' which carries the assumption that migrants in transit are only passing through the Belgian territory. Consequently, the research highlights how this conceptualisation of the migrant's journey and more generally onwards mobility in the EU can lead to a shifting or responsibil-

ities on behalf of state authorities. Whereas the fact that migrants do not display the desire to establish themselves on the Belgian territory might hold true in some cases, the fact that migrants in transit intercepted by the authorities are not necessarily granted adequate information should not be underestimated. In direct connection to transit, the constant mobility of migrants is crucial to emphasise as it has consequences when state authorities make the first step in informing migrants about the procedure.

Lastly, by broadening the geographical lens, the dissertation demonstrates that there are many factors contributing to the constant mobility of migrants. In the Belgian case, the need to avoid temporary *ad hoc* settlements of migrants appeared to be central to the governance of onwards mobility in the Intra-Schengen context. In doing so, Belgium is not unique within Europe. If migrants only stay temporarily in Belgium to reach the North of France first or directly attempt to reach the UK, the shifting of responsibility dynamic is somewhat encouraged as the situation appears to not be a problem that concerns Belgium. The question as to 'why' a procedure that is known to be time and capacity-consuming in nature should be deployed considering the scarcity of both time and capacity takes on its full meaning and can be seen to create a potential unfair burden. This reveals how despite the fact that the dissertation focuses solely on Belgium, the case of Belgium lies at the core of the complex challenge of managing and policing borderlands at the EU level (see also section 4). Legal instruments and policies related to irregular migration, human trafficking and migrant smuggling are decided at the EU scale, yet, despite some degree of harmonization, they are nevertheless subject to substantially distinct outcomes when implemented at the national level. This observation not only holds true from a legal perspective where legal variation 'in the books' can be found but also considers the discretion left to practical implementers in their course of action. The fact that migration control, migrant smuggling and anti-trafficking policies are not thought through holistically and structurally despite the inherent linkage and tensions existing between them, impacts therefore the governance of potentially vulnerable migrants on the move towards and *within* the EU.

This condensed answer to the central research question is useful to bear in mind when looking at the fictional scenario of Osman introduced at the beginning of the dissertation. During his stay on the Belgian territory, Osman finds himself at the crossroads of a complex web of overlapping legislation adopted at distinct scales and legal regimes, which together involve various actors. As a result, and depending on the concrete scenario, the governance of Osman can take different turns. Osman can be treated and governed as an irregular migrant, as a potential victim of human trafficking, as a victim of aggravated forms of migrant smuggling, as an 'object' of 'simple' migrant smuggling, or as a presumed migrant smuggler.

2.2 A dichotomy under scrutiny: a multi-scalar overview of the legal and policy instruments to deal with migrant smuggling and human trafficking

The dichotomy between migrant smuggling and human trafficking and its implications lies at the core of this dissertation and, evidently, is central to its overarching research question. The dissertation henceforth started out by looking critically into the genesis of the creation of the 'legal fiction' between migrant smuggling and human trafficking at the UN level. The introduction placed the construction of the dichotomy within its socio-political context, where concerns of perceived erosion of sovereignty felt by nation-states are omnipresent in the current globalized era. The construction of migrant smuggling and to a lesser extent human trafficking, as border security issues relating to broader securitization of migration processes, was helpful in order to understand the demarcation between the two crimes as drawing bright lines between the two phenomena was deemed instrumental for member states to reach a consensus on the UNTOC and its additional protocols and, most importantly, to uphold the current state of affairs of migration law in place. By outlining past and current criticism of the dichotomy and the erroneous or approximative assumptions on which it is based, as well as highlighting the empirical research shedding light on the existence of a grey area between the two phenomena (see Introduction and Chapter 3), the findings underline the relevance of placing the Belgian legal framework under the scope of inquiry.

As legal and policy instruments dealing with both migrant smuggling and human trafficking were adopted at distinct scales, Chapter 2 elaborated on the legal and policy backbone adopted at the EU and national (Belgian) level. To grasp the alternative approach adopted by the Belgian legislature, the research sub-question aimed to identify the common approaches and narratives present in EU counter-smuggling and anti-trafficking legislation and policies and explored how they concretely translated within the Belgian legal framework. By so doing, Chapter 2 first outlined how the EU Facilitator's Package deviated from the UN Smuggling Protocol and not only from a terminological standpoint. In essence, the broad application of the facilitation offence and the general lack of provisions protecting migrants' individual rights illuminated how the EU response needs to be understood within the broader securitization of the migration process. Considering the intersections between migrant smuggling and human trafficking underlined in the dissertation as well as the widely recognized difficulties surrounding trafficking victims' identification, the findings make visible the coexistence of a dual approach in the EU anti-trafficking frameworks. Whilst the human rights or victim-centric approach is clearly visible in the EU legal instruments, the analysis reveals the dominance of the crime-control approach, which is combined at times with a focus on cross-border elements due to the linkage made with transnational organised crime.

Subsequently, the analysis of the narratives found in the EU 'policy package' adopted since 2015 indicate salient inconsistencies and incoherence between them and the EU legal instruments, notably with regard to the broad scope of the facilitation offence. The coexistence of multiple narratives describing the migrant smuggling phenomenon mirrors its multi-faceted nature. Whereas the policy documents demonstrated a growing awareness of victimisation risks to abuse, and exploitation faced by smuggled migrants during their migration journeys, the analysis nevertheless reveals the predominance of the crime-security-centric narrative. These findings need to be contextualised with the reflections brought forward in Chapter 3 on the prevailing stereotypes of human trafficking and migrant smuggling. This is important as dominant narratives are essential elements in the construction of reality and contribute to, among other things, having a better understanding of (frontline) actors' decision-making to the extent that decisions about who is to be considered as a 'real victim' and therefore is deemed worthy of protection are shaped by these dominant representations (e.g., Gregoriou & Ras 2018; O'Brien 2018). Henceforth, the prototypical narrow construction of the 'ideal' human trafficking victim highlighted in Chapter 3, based on gendered and troublesome assumptions about consent and agency, can be problematic as the threshold to reach the status of victim can easily become unreachable. The scenario of Osman developed in the Introduction (Chapter 1), who, to pay the next stretch of his journey might end up working (temporarily) in exploitative conditions, illustrates how fixed ideas about consent, agency, and gender might play against him to be perceived by relevant actors as a potential victim of human trafficking, while fulfilling *de facto*, at least in the Belgian legislation, all the legal conditions to be considered as such. Furthermore, as underlined in the Introduction and in Chapter 3, the omnipresence of the archetype of the 'evil migrant smuggler' figure closely connected to hyper-hierarchical organised-crime structures in policy narratives at odds with a more nuanced and complex empirical reality, keeps out of sight the role played by structural factors in these processes and conveniently legitimizes increasingly restrictive border policies which impact the migrant smuggling 'market'. This is important to underline in light of the recent and dangerous small boat crossings taking place in the English Channel (see section 4).

2.3 Transit migration and onward migration movements within the Schengen Area

As outlined in the answer to the central research question, the transit element is essential to the dissertation and, arguably, constitutes the most important theoretical and empirical contribution that the research can offer to the scholarship focusing on migrant smuggling, human trafficking but more broadly for scholarship looking at mobility and borders. As recently underlined by Barbero

and Blanco (2022), the field suffers from a paucity of research focusing on the specific case of transit migration or 'migration in transit', particularly when scrutinizing the mobility of individuals taking place within the Schengen Area, which is itself relatively scarce in comparison to the research focusing on the situation at the external EU borders.

From a *conceptual standpoint,* the dissertation reflected critically on the convoluted concept of 'transit migration' and demonstrated its inherent value, if the term is defined carefully. If prudently defined, this thesis asserts that the concept of transit is useful in four regards. First, the concept allows for a deconstruction of the common and problematic linear understanding of the migration journey as a straightforward path from a fixed point of departure to a fixed point of settlement. Paying attention to the transit dimension allows taking into consideration the multiple changes of plans and breaks that can take place during the migration journey. Second, by expanding its definition and by building on a scarce strand of scholarship focusing on the governance of Intra-Schengen mobility (e.g., Tazzioli 2020; Menghi 2021; Barbero 2021), the concept of transit migration helps to shine a light on the experience of (involuntary) immobility and, importantly, forced mobility lived by migrants, *not only* at the EU external borders but also, importantly, once migrants achieve to enter the Schengen space, which is often imagined as a space without internal borders (e.g., Van der Woude 2020; Klajn 2021). Third, and in direct relation to the critical examination of the legal dichotomy between migrant smuggling and human trafficking, particularly with regards to the grey area found between the two phenomena, the concept of transit migration is highly valuable to have in mind with regards to the enhanced vulnerability to abuse and exploitation which can be enhanced by the fragmentation of the migration journeys. As often underlined, when individuals end up stranded in transit zones, their quest for onward mobility may lead to an increase in the demand for (more professionalised, potentially dangerous, and henceforth expensive) smuggling services, which then reinforces their debt and can lead to (short-term) exploitation. In that regard, the role of increasingly restrictive border policies and bordering practices at times legitimized by the 'fight against migrant smugglers', also within the Schengen Area, should not be obscured. Therefore, the concept 1) gives the opportunity to not overlook the blurry empirical reality of the grey area between migrant smuggling and trafficking and 2) stimulates the questioning of the categorization and sorting of individuals within strict and seemingly straightforward legal and administrative boxes. 3) Finally, adopting a nuanced and careful definition of the concept of transit migration allows to problematize the usage of the term in political, policy and mediatic spheres which often equate 'transit' with the idea that individuals are only passing through and are therefore not to be treated with specific care. As written above, the concept then becomes helpful by underlining the consequences that transit can have in bolstering vulnerability.

Furthermore, and from an *empirical standpoint,* the transit element revealed itself to be equally central to the findings presented in the dissertation and needs therefore to be further expanded upon as it contributes to the development of empirical research focusing on migration in transit and its governance within the Schengen Area. The recurrent usage since 2015 of the term 'transit-migration' or 'transmigration' in the Belgian context (see Introduction/Chapter 1, sub-section 1.5) needs to be replaced in the context of the broader ongoing securitization of migration in the EU, which intensified since the start of the so-called migration 'crisis'. Beyond political and mediatic discourses, the fact that this term is employed in various policy documents, such as the National Security Plan, can be deemed particularly problematic as (policy) discourses impact the actions of frontline implementers. It needs to be taken into consideration that term is not a legal one as, from a legal stance, the word encompasses a vast array of migratory categories and should not absolve state authorities from their responsibility to protect vulnerable individuals on their territory. Yet, in its current usage, the word introduces a stark and potentially dehumanizing distinction between individuals aiming to stay on the Belgian territory by applying for asylum and those who are only passing through. The securitization approach deployed by the Belgian federal authorities towards migrants who did not aim to apply for international protection and gathered in the Maximilian Park and its surrounding area between 2015 and 2019 became visible with the organization of frequent police raids to disperse and at times arrest migrants with the overall aim to prevent long-lasting settlements (e.g., Mescoli & Roblain 2021).

These developments are critical when looking into the functioning in practice of the alternative approach and how the latter affects the governance of migrants in transit. Many respondents acknowledged that the protective system for victims of aggravated forms of migrant smuggling was insufficiently made use of in practice and, in their reflections, pointed toward the transitory nature of migrants stay on the territory. Respondents described the alternative approach as unattractive for migrants in transit in their quest for further mobility, notably in light of the obligations imposed by the latter such as turning against their smuggler by making relevant declarations. However, as succinctly explained in the central answer above (see 2.1), the reasons for migrants to not start the protective procedure are more complex and shine light on dynamics that are also inherently connected to the transit element. A *first factor* to emphasise is the lack or the inadequacy of information received by migrants on the alternative approach and its advantages. The absence of communication about the protective legal status from law enforcement officers in the context of large-scale administrative arrests was revealed in the Comité P report and, more generally, the absence or inadequacy of information was subsequently confirmed by respondents from the Citizen Platform (see also the empirical findings of Bracke 2021). The findings of the analysis underscore the lack of awareness and sensibilisation towards the specificities of the proced-

ure by frontline police officers. In direct connection to the temporary nature of the stay and sustained mobility of migrants in an Intra-Schengen mobility context, a distinction between victims of human trafficking versus victims of aggravated forms of migrant smuggling was signalled. The opportunity for relevant trained actors to 'convince' a presumed victim to start the procedure was described as more challenging with migrants in transit as there are only a few opportunities to do so in contrast with presumed victims of human trafficking who can be in a situation of exploitation for a longer period in the territory. The temporality element can further weigh in the balance with regard to the necessary trust-building between actors, especially law enforcement officers and the presumed victim, which is essential to the procedure.

A *second factor* which in fact precedes the sharing of information with the presumed victim is the ability of state authorities to identify migrants transiting through Belgium. This ability calls for a more general reflection on the common stereotyped representation of victimhood (see Chapter 3; Gregoriou & Ras 2018 for an overview). The preconceived idea of who can be considered a victim often boils down to notions of gender, agency, and consent. Put simply, the 'ideal' victim is often imagined as a pure, passive, and innocent female physically coerced to be in a situation of exploitation. One can then wonder if a male showing agency in shaping his migratory journey (as described by the respondents) and 'consenting' to work for a flexible period of time in exploitative conditions to finance the next stretch of the route fit the common representation and conceptualisation of a victim. Whereas this does not appear to be an issue for the expert respondents who are specialised and trained in the field, the specific profile of migrants in transit can be more problematic for frontline police officers unaware of the complex dynamics involved in human trafficking/aggravated forms of migrant smuggling.

Because migrants in transit can find themselves in short-term situations of (labour and/or sexual) exploitation, which was also confirmed by members of the Citizen Platform, a *third factor* related to prosecutorial pragmatism needs to be underlined. The gathering of evidence for short-term exploitation situations resulting from the abuse of a situation of vulnerability can be particularly challenging. Yet, in 'the books', the human trafficking offence does not refer to any temporality element and henceforth this legal qualification could and arguably should be chosen by the public prosecutor's office. Considering the crime/prosecutorial-centric nature of the procedure in place making the protection dimension also dependent on the opening of an investigation and/or the ongoing running of a judiciary procedure, the transit element can also explain why many migrants in transit who can *de facto* be considered potential victims of human trafficking are left unidentified and consequently unprotected.

Lastly, the transit element is particularly relevant when placed in the context of the governance of so-called 'secondary migration movements'. The perception of many of the expert respondents points to a clear lack of consensus

both at the national and European levels on the management of onwards migration movements within the Schengen Area. The striking lack of harmonised and structural solutions brought forward to deal with vulnerable individuals on the move within the EU is an important empirical finding to highlight. As the following sub-section will touch upon in further detail, the scattering of powers and competencies lead to a dynamic where blame and responsibilities are constantly and problematically shifted amongst relevant actors who then develop practices of 'looking the other way or 'sweeping in front of their own doors'. In that regard, it should be underlined that vulnerability seldom comes out of a vacuum and the (bordering) practice of making migrants in transit constantly move in order to prevent *ad hoc* settlements at all costs only reinforces and bolsters vulnerability to abuse and/or exploitation.

2.4 On decisions and jurisdictions

With its focus on the decision-making of actors within the Belgian criminal justice system and more broadly within the migration control apparatus, the dissertation contributes to the sub-field of border criminology and particularly to scholarship looking into intersections between criminal law and administrative law. In line with recent scholarly invitations to critically evaluate the use of the 'crimmigration lens' as the most adapted conceptual and analytical tool, the chosen socio-legal conceptual frameworks question whether the examination of the intersections and points of merger between these two legal regimes, is the most adapted concept to, among other things, have a comprehensive understanding of the (coercive) socio-legal regulations of immigrants (for an overview and a critique, see Brandariz 2021; Moffette 2021). Following the stream of scholars who have expanded the scope of understanding of the crimmigration concept, the dissertation examines the differentiation and separation of administrative and criminal law in terms of scope, procedure, guarantees, objects, etc., and its consequences for the governance of migrants in transit instead of focusing on points of convergence (e.g., Aas 2014, Chacon 2015). As argued by Moffette (2021), the legal pluralist approach, which examines *inter alia* jurisdictional games, insists on the differentiation of the legal regimes in order to discern how they are strategically utilised which enables the production of more robust empirical analysis (see also section 3). As the dissertation demonstrates, the ability to mobilize one set of laws over or in combination to another in concrete scenarios exists because such laws are separated in the first place. This divide between the realms of criminal and administrative law calls for a careful scrutiny on the decision-making processes of implementers. Combining decision-making scholarship with the socio-legal concept of jurisdictional games provides an original empirical contribution to the scholarship. The empirical findings show that decisions to act or, equally important, *not to act* and to approach an issue from a criminal justice lens or

from an immigration management (administrative) lens has crucial implications for the governance of migrants transiting through the territory. The specific example of local police officers effectuating their police missions within the context of the 'fight' against 'transmigration', who are processing migrants in an administrative manner and end up losing sight of, being unaware of or simply purposefully not considering the possibility to approach the issue from a judiciary perspective entailing guarantees and protection for migrants was striking in that regard (see Chapter 4 and 5). Describing this police practice as a form of '*ad hoc* instrumentalism', where frontline implementers perceive laws and procedures interchangeably and are henceforth able to 'cherry pick' the most efficient tool to deal with the issue at hand, will be misleading in this case (e.g., Slansky 2012; Van der Woude & Van der Leun 2017). The added value of examining these practices through the rich literature on street-level bureaucracy and decision-making, which underline the influence of complex and broader institutional, economic, and political factors on these decisions, is clear in that regard. Integrating this strand of scholarship contributed to the construction of a more nuanced understanding of the overlap between thematic and territorial jurisdictional games and its consequences for migrants in transit.

In spite of the recent debates surrounding the usefulness of the crimmigration lens as a tool for analysis, it can be argued that when conceptualised to include broader public discourses linking migration and crime and placing them in their social, political and cultural context in which they emerge has substantial interest (van der Woude, van der Leun & Nijland 2014; Brandariz 2021). Following this scholarship, the dissertation pays attention to the underlying discourses and narratives framing migrant smuggling and human trafficking as (border) security issues. These discourses and narratives construct migrant smugglers as a special kind of devil and generally depict migrants in transit as disruptive elements to public order (see Introduction to Chapter 3). In Chapter 5, the disagreement found at the prosecutorial level as to whether a migrant involved in low-level tasks of smuggling operations should be criminalized and punished as a smuggler or protected as a presumed victim of human trafficking illustrates the impact of these complex dynamics. From a general standpoint, taken together and against the background of increased securitization of migration in the EU, the findings presented in the dissertation demonstrate how the (political) pressure to develop swift solutions to manage the presence of irregular migrants can affect concretely institutional actors at the expense of criminal justice considerations (see also Brandariz 2021).

Finally, the combination of the literature on (discretionary) decision-making with the legal pluralist approach shedding light on the complex web of legal regimes intersecting with one another and the scattered competences shared between various actors involved in the governance of migrants in transit helped to reveal problematic 'passing the buck' dynamics at the national and European level. These findings firmly echo the conclusive remarks made by

Weissensteiner (2021) in her dissertation focusing on cross-border cooperation within the Schengen Area. More specifically, 'unauthorised secondary movements' were described by her respondents as a 'hot potato' that needs to be passed on and with which you are playing 'ping pong'. Interestingly, when the situation in Maximilian Park and the presence of migrants in transit were discussed in Chapter 4 (section 6), the findings show the use of the exact same metaphor of 'throwing the hot potato to someone else' (FO 1). The findings, moreover, indicate how some actors use their discretionary power to look the other way with a 'not our problem mentality', which is also only possible when competencies are so scattered between distinct actors. Tackling the larger, prominent issue of the governance of onwards mobility within the Schengen Area and observing that EU member states are keen on discharging themselves from the responsibility of care to 'unauthorized' migrants on their territory who are then going (or are pushed) to neighbouring EU countries, the call for a harmonised response decided at the EU level was voiced by respondents. The findings underline the problematic lack of consensus on the governance of individuals transiting within the EU felt by the respondents, who at the same time displayed pessimistic views on the ability to reach such agreement in light of the sensitive, political, and complex nature of the phenomenon. The findings also strongly resonate with the 'passing the buck' and 'blaming Brussels' dynamics presented in the study of Alagna (2020), focusing on policy-making in the counter-smuggling field which, as described by the author, are made possible by the complexity of the governance system.

3 Taking the Nation-State as the Default Scalar Setting?

The choice to narrow down the scope of the research underlying this thesis to only the Belgian case might, at first glance, indicate to the reader that the national state, as a frame of understanding, was uncritically privileged. In recent years, a growing strand of scholarship warned against the pitfalls of taking the methodological nationalism stance in the social sciences and particularly in migration-related research (e.g., Wimmer & Glick Schiller 2003; Glick Schiller 2012; Sager 2016; Franko 2017; Moffette 2021; Scheel & Tazzioli 2022). In essence, taking the methodological nationalism viewpoint obscures the fact that nation-states are situated, formed, and moulded by transnational, global and local forces (Glick Schiller 2012). While not contesting the continued significance and relevance of nation-states and their sovereign right to manage their borders, on the contrary, critics of methodological nationalism nevertheless invite us to move away from conceiving society and nations as 'nationally bounded containers' (Scheel & Tazzioli 2022: 6; Wimmer & Glick Shiller 2003; Franko 2017). The role and the nature of the state should therefore be carefully thought through by going beyond the 'Westphalian, sovereignty-based, pluralism of states' (Franko 2017: 368). Phrased differently, it would benefit

researchers to shy away from the presupposition that the world is constituted by disconnected sovereign nation-states and instead pay attention to trans and cross-border connections when examining contemporary issues of crime and migration governance (Sager 2016; Wimmer & Glick Shiller 2003). Because the dissertation touches upon issues that are transnational in nature and, as highlighted from the beginning, are intrinsically linked with matters of globalization and sovereignty, the developments on methodological nationalism are important to bear in mind. As Franko (2017) outlined, the choice to examine a single site, in this instance the case of Belgium, remains valuable and needed provided that, in line with the methodological stance outlined above, attention is paid to motion, global structures and the plurality of sovereignties. More concretely, the dissertation engages with this strand of scholarship in three specific ways.

The first way to avoid falling in the pitfall of methodological nationalism was to go back to the creation of the legal dichotomy between migrant smuggling and human trafficking and situating the latter within its global context and focusing on its implication and relation to sovereignty issues. The dissertation shows how the debate on migrant smuggling and human trafficking framed as transnational and at times cross-border crimes[1] is located within the broad nexus of securitization of migration and globalization (Miller & Baumeister 2012). The governance of the two crimes is substantially shaped by global forces as legislations and policies constructed to deal with the phenomena were adopted at the international (UN) level, the transnational (EU/ Council of Europe) level, implemented at the national level and finally enforced at the national, regional, and local level. By paying attention to these distinct scales and subsequently the multiplicity of actors involved, this research highlights how state power and particularly the power to first criminalise, investigate, prosecute, punish and, importantly, the duty to protect, is not solely entrusted to national state governing bodies (Franko 2017; Côter-Boucher, Infantino & Salter 2015). Besides, migrant smuggling is itself a phenomenon linked to illicit globalization, which is perceived as a source of insecurity and contributes to states' perception of 'losing control' and therefore the erosion of sovereignty (e.g., Andreas 2011; Shelley 2014). This observation links back to the creation of the legal dichotomy between migrant smuggling and human trafficking, which was problematized and critically examined throughout the dissertation (see in particular Introduction and Chapter 3). More broadly, this examination responds to the call made by Dauvergne (2008) and Franko (2017: 363) to investigate 'global processes of production of illegality' which, in this context, not only focus on how services or individuals are made illegal but how and why some people are deemed worthy of protection whereas others are not. This ability to sort between the deserving and underserving and to

1 As stated in the dissertation, whereas migrant smuggling always has a cross-border dimension, this is not necessarily the case nor a pre-condition for human trafficking.

decide on life and death, which Franko (2017) argues entails both protection and killing, lies at the cornerstone of sovereignty. Because the dissertation underlies the complexity of multi-scalar governance, the analysis shows that sovereignty is not only vested in the nation state. Beyond examining the adoption and diffusion of crime definitions and legislations (often drafted by wealthy countries located in the 'global North'), the research importantly focuses on predominant narratives and framing surrounding the phenomena at distinct levels, which have substantial impact on how the phenomena are subsequently understood and implemented. To that extent, the dissertation questions the recurrent and archetypical depiction of the 'evil smuggler' as the bad actor to blame, which obscures the need to address root causes that are fuelling the demands for smuggling services (see Franko 2017). Moreover, globalization processes are also significant when focusing on rights and legal protection and require the inclusion under the scope of scientific inquiry the burgeoning expansion of international and transnational human rights norms. Once more, this is required in order to conduct an examination going beyond boundaries of the nation state (Franko 2017). To that end, the argumentation provided in Chapter 6 explores how in a careful balancing act between respecting state sovereignty, on the one hand, and enhancing protection of vulnerable individuals on the move on the other hand, the ECtHR and its unique interpretative arsenal can (and arguably should) break through, in specific cases, the uneven protection granted to 'objects' of migrant smuggling versus victim of human trafficking (see also section 5).

A second way in which methodological nationalism was prevented, as recommended first by Valverde (2010: 240) and further developed in a migration governance context by Moffette and Pratt (2020) and Moffette (2021), was to adopt a legal pluralist approach. The aim is not to fully restate or enter the complex and contested debate on what exactly counts as legal pluralism but to briefly situate the dissertation within that strand of scholarship (see Merry 1988 or more recently Sani 2020 for a comprehensive overview). To summarize, at its origin, early or 'classic' legal pluralism studies examined the coexistence and relationship between formal 'state law' introduced in a colonial context and 'customary law'. Following a turn in the 1970s, 'new' legal pluralism scholarship scrutinized the relationship between official or formal and less official or informal forms of ordering (e.g., religious law) in 'advanced' post-colonial industrial societies (Merry 1988). Nonetheless, as indicated by von Benda-Beckmann and von Benda-Beckmann (2014), Benda-Beckmann & Turner (2018; 2020), these two noteworthy forms of legal pluralism study do not account for other pertinent constellations, particularly in a global context. For instance, the existence of transnational laws (which also includes human rights norms) *de facto* go beyond national confines and research needs to also take into consideration the ever-increasing complex webs of normative legal orders coexisting and overlapping with one another (von Benda-Beckmann and von Benda-Beckmann 2014). In a call to produce more vigorous theory of legal

pluralism, Sani (2020) discussed the necessity of including cases of pluralism within state law. Sani (2020) supports this claim in light of the thriving interest for legal pluralism which can be attributed to pragmatic requirements when focusing on areas of research such as migration, trafficking or smuggling, which involve 'legal issues whose jurisdictions challenge national state boundaries' (82). Taking this sociolegal perspective and 'thinking jurisdictionally' on the Belgian third-way approach requires that one looks at the constant interactions between distinct legal regimes operating at distinct scales yet coexisting in the same social space. This legal pluralist and jurisdictional approach is particularly emphasised in Chapter 5 (see also 2.3).

A third and final way to disentangle the research from the methodological nationalism stance was by drawing on the recent alternative conception of migration developed by Scheel and Tazzioli (2022). Without going into detail, their innovative conceptualisation of migration engages with and underlines the mobility perspective while paying attention to the concept of 'border struggles', which refrains from obscuring the prominent role of bordering practices enacted by nation-states and sheds light on how people are constituted as migrants. Among other things, Scheel and Tazzioli (2022) invited researchers to move away from conceiving migratory movements in a linear fashion going from nation A to nation B. This resonates with Kalir's developments (2013), who outlined that taking the national state as a frame of understanding or as a point of departure inevitably accentuates the conceptualisation of migration journeys as 'points of departure and arrival', which conceals the complexity of human mobility (312). This dissertation concretely answers these calls, considering the consistent attention given to 'transit migration' related to the fragmentation/non-linearity of the migration journey and the strategies of migration governance through both mobility and immobility within the Schengen Area. Scheel and Tazzioli (2022) urged migration scholars to ask the following question as a prerequisite: 'who is (not) enacted as a migrant in the situation under study and how and through what kind of practices of border and boundary-making is this migrantisation done?' (10). To do so, Scheel and Tazzioli (2022) encouraged scholars to question, among other things, situations in which the presence of individuals are constructed as problematic and by focusing on encounters between the 'mobile subjects and actors charged with controlling their mobility', to be able to critically scrutinize 'discourses, categorizations, taxonomies and knowledge regimes they rely on (…)' (11). Asking the first overarching question would go beyond the scope of the inquiry presented here, but in line with the sub-questions outlined, the present research engages in a critical manner with the discourses, narratives, knowledge, (legal) categorization and taxonomies used by law and policymakers as well as by (frontline) implementers in sorting the deserving from the undeserving.

4 Avenues for Further Research and Limitations

The choice to deliberately focus on state authorities, also considering the source of the research funding, concretely answers the call made by Côter-Boucher, Infantino and Salter (2015) on the pressing need to conduct empirical research paying attention to 'practices, beliefs and actions' of practitioners and particularly street-level decision-makers considered as 'policy translators' (197).

A consequence of the choice to focus exclusively on state actors entails that other and equally important perspectives are left unexplored. Following Kalir's (2013) invitation to examine regimes of mobility from the eyes of migrants themselves, follow-up studies could and arguably would benefit from gathering the accounts of those subjected to these regimes. As the findings seemed to indicate that state actors give weight to migrants' agency in the choice to not make use of the protection made available to them, their reasoning and motivations to do so would be important to examine. Expanding the scope of inquiry, future research should pay attention to migrants' perceptions on how they experience, navigate, survive, and potentially escape and resist acts of control over their (im)mobility within the Schengen Area. In direct connection to the migrant smuggling field and considering the monolithic and unnuanced representation of the migrant smuggler and the consequences of such representation, further empirical research looking into smuggler self-representation and motives for engaging in smuggling operations would be crucial for both researchers and law and policy makers (e.g., Sanchez 2017). These follow-up studies could shine light on the diverse profiles of the smuggler within the EU, by paying attention notably to the figures of the 'opportunity smuggler' and 'copycat smuggler' engaging in action of self-facilitation. Indeed, the findings outlined the frequent involvement of migrants themselves in the smuggling operations, or the fact that they themselves attempt to cross borders on their own by copying smugglers. Taken together, these accounts could be helpful to further deconstruct dominant policy narratives at odd with a more nuanced and complex reality.

Considering that migrant smuggling is a fast-changing and a highly topical field, the reader should keep in mind that the time period between the data collection that took place between 2018 and 2019 and the final writing phase which ended in June 2022 is significant to consider in light of the relevant events that took place which directly impact the field. Among other things, the Covid 19 pandemic and the restrictive measures adopted by EU members to contain it had a crucial impact on migrant smuggling and human trafficking, and more broadly on the mobility and governance of migrants in transit within the Schengen Area (see Sanchez & Achilli 2020). Ideally, the impact of the Covid 19 pandemic would have been interesting to include under the scope of inquiry. However, realistically, this would have required an endless process of data collection and updates, which makes the conduction of any scientific research unfeasible. Similarly, the recent and drastic increase of the English

Channel's crossings with the use of small boats departing from the French Northern coast to the UK has received significant attention, notably due to the increased use of this border crossing strategy (e.g., BBC 2022) and the tragic drowning taking place in the last two years (see Maggs 2020; Parker et al. 2022). Whilst going slightly beyond the geographic scope of the dissertation, it is important to signal to the reader that the French Minister of Interior Gerald Darmanin underlined that more than half of the individuals making these crossings came from Belgium (Le Vif 2021). Although not examined in the dissertation, these events provide new illustrations of dynamics that emerged from the analysis conducted in the research. In particular, the blaming games and shifting of responsibilities that occurred between French and British authorities echo strongly the findings presented in the dissertation (see Parker et al. 2022; Lichfield 2021). Resonating also with the analysis conducted at the policy-making level, the discourses rationalising and legitimizing the militarized responses of state authorities to these perilous crossings are interesting to allude to. The discursive construction of the smuggler as the main figure to blame for the situation obscuring both the role of restrictive border policies and more generally structural factors for these dangerous crossings resonates with the dynamics outlined in the dissertation. Coinciding with the research findings, the simultaneous presence of humanitarian narratives, which emphasise the need to protect vulnerable individuals engaging in these crossings, is also clear. Interestingly, vulnerable migrants are concurrently depicted as desperate and reckless, and henceforth also to blame for their risky and irresponsible endeavours (see Parker et al. 2022). Moreover, the current deployment of a plane patrolling the French and Belgian coastline by the agency Frontex, to assist authorities in 'dismantl[ing] criminal activities such as migrant smuggling and [to] prevent people from putting their lives at risk', offers unprecedented developments to further explore in this geographic area of importance (Frontex 2022).

Further research in the field could examine the increased presence of state and non-state humanitarian actors and its consequences in the socio-legal governance of individuals engaging in onwards mobility within the EU. In particular, the rise in participation of NGOs in the provision of service within criminal justice systems and borderwork, often referred to as 'penal humanitarianism', has remained underexplored (e.g., Pallister-Wilkins 2015, 2022; Tomczak & Thompson 2017; Bosworth 2017; Gerard & Weber 2019; Franko 2021). In the Belgian context, several authors have researched the involvement of civil society organisations and grassroots citizen initiatives in the governance of migration and integration policies. These recent studies analysed how this increased involvement, which can become institutionalised, emerged as a pragmatic response to problematic States' delegation of responsibility in migration-related matters which has notably been described as resulting from an intentional adoption by the Belgian State of the 'indifference-as-policy' approach (e.g., Depraetere & Oosterlynck 2017; Mescoli & Robain 2021; Lafaut

& Coen 2019; Vandevoordt 2019). Focusing specifically on the Belgian alternative or 'third-way' approach and the multi-disciplinary nature of the procedure, the interviews conducted revealed the constant exchange taking place between traditional criminal justice actors and the workers of the specialised reception centres. The well-functioning of the national referral mechanism was described as dependent on the unique expertise and mutual trust existing between each actor. Based on the interviews, this trust appeared particularly prominent between the reference prosecutors, the workers of the specialised reception centre as well as the trained federal police investigators. Yet, the fact that the director of the specialised reception centre seemed to be aware of what could constitute sufficient evidence for the judicial authorities requires to inquire further about the possibility or the need for workers specialised reception centre to engage in some sort of pragmatic 'sorting' between presumed victims to maintain trust and credibility for the working relationships. The empirical data collected was too limited to draw such conclusions, but was sufficient to identify a research gap to further explore which would contribute to the limited research on the involvement of NGOs in the delivery of criminal justice services (see Gerard & Weber 2019).

Lastly, and from an external validity standpoint, it is important to delve into the question as to whether the findings presented in the dissertation can be generalised, or more specifically to determine if some general inferences can be drawn from the data collected in the Belgian case (see Mayring 2007). When conducting qualitative research and particularly in this case, the overarching aim of the inquiry is not necessarily to engender general conclusions which can be applied in distinct contexts but to delve in-depth into a case study, which can be viewed as an important limitation. Nonetheless, despite the unique nature of the Belgian third-way approach and the distinctive specificities of the Belgian context highlighted throughout the thesis, some of the findings might be of a value in other settings and cases which share some legal and social attributes. In light of the arguments produced in this final chapter, the findings connected to the (legal) governance of onwards migration movements within the EU and the challenges faced by state authorities related to victims' identification might not be 'exceptional' to the Belgian case and could prove themselves valuable in other (European) settings. Further empirical studies focusing on similar issues and on state actors which look into other countries (also from a comparative perspective) can build on the dynamics and findings presented in the dissertation and expand the understanding of the governance of migrants in transit as well as the blurry area found between migrant smuggling and human trafficking.

5 Looking into the Future: Finding Solutions to Enhance Protection?

The findings presented in the dissertation makes it crystal clear that the legal dichotomy established between migrant smuggling and human trafficking has a concrete impact on the protection of individuals on the move who often find themselves in vulnerable situations and who *can* experience abuse and exploitation during their journeys, also within the EU. Because migrant smuggling finds itself at the juncture between equally complex phenomena, namely irregular migration and human trafficking and as other scholars have argued before, the relationship between policies tackling migrant smuggling, irregular migration and human trafficking needs to be thoroughly re-examined (e.g., van der Leun & van Schijndel 2016). Henceforth, these matters need to be rethought in a holistic and structural manner and preferably at the EU level in light of the 'passing the buck' behaviours observed regarding onwards mobility within the Schengen Area. Considering the findings presented above, and more generally the visible disagreements between EU member states on politically sensitive topics such as asylum and solidarity, the task of reaching a consensus appears to be Dantean (see for instance Scipioni 2018; de Bruycker 2021; Carrera 2021). Whilst these accounts might appear pessimistic, this research is also intended for current or future national and European politicians and policymakers who may not be aware of these complex dynamics and the inherent links existing between the phenomena.

On a distinct scale and focusing on practitioners, three concrete solutions need to be developed in this section. The two first solutions concentrate on sensibilisation and training regarding victims' identification and are based on the discussions with the respondents. Both solutions touching upon human trafficking and (aggravated) forms of migrant smuggling draw attention to less conventional methods used for sensitising (frontline) authorities. Respondents frequently emphasised the need to have frontline implementers sensitised with regard to their crucial role in instigating investigations and contacting directly specialised actors when facing presumed victims. Whereas concrete and relatively frequent specialised training of one to two days on these topics and their evolution can always be beneficial, this solution is not always realistically feasible considering the specialisation and competences of local police and federal units, financial and capacity issues, and the distinct priorities established at each level. A specialised prosecutor shed light on an informal solution previously developed which entails the organisation of monthly lunches with local police officers during which one concrete case or a recent case law was discussed in detail. This practice could be considered as a useful 'best practice'. The discussions held during these informal lunches allowed police officers to be sensitised to the phenomena by having a concrete example of indicators or 'red flags' to have in mind as well as the important reflexes to adopt, which were described as less abstract than information

received during a training, or a list of indicators written on a newsletter on the police intranet. The informal lunches were also recounted as beneficial to 'break the barrier' which can exist between the police and the prosecutorial level. Because the chosen approach involves a multiplicity of actors, local police officers would not be afraid to pick up the phone to directly reach out to other levels to discuss a specific situation. Still focusing on practitioners, the second solution focuses on the interaction between practitioners. Because criminal justice actors are working in a chain (see van der Woude 2016), the effectiveness of judicial proceedings depends de facto on the interactions taking place between the police and the prosecution levels as public prosecutors rely on both prior notifications made, among others, by police officers and the evidence collected by them under their supervision (see Callens, Bouckaert & Parmentier 2016 in the Belgian context). These necessary interactions taking place between relevant actors shed light on the potential need to organise organic follow-ups on investigations and case-law instigated at the local level which moved to other levels. This automatic feedback was indeed deemed crucial by another specialised prosecutor. As mentioned in the dissertation, police officers can experience the feeling of 'time waste' or 'discouragement' when initiating distinct procedures, which can only be reinforced if they are not made aware of the concrete impact of their actions and henceforth can be detrimental to their motivation to keep (or start) such procedures in the future.

The third solution addresses the topic of cooperation in the investigation and prosecution of transnational organised crime as many respondents stressed the need for and the importance of raising awareness and making more use of the mechanisms existing at the European level, notably via Europol and Eurojust agencies. This call is in line with the recent diagnosis drawn by Dandurand and Jahn (2022) on international criminal justice cooperation remaining to this day 'disjointed, insufficient and reactive' as challenges triggered by (increasing) global and cross-border crimes tend to call for solutions which are developed at the national level (210). The necessity to collaborate at the EU level does not stop at the police level as respondents mentioned that particularly prosecutors are not necessarily informed about the possibility and added value that comes with cooperation mechanisms. The lack of awareness is however not the sole hindrance to conduct more complex and long-lasting investigation at both the national and international levels. The research of Boels and Ponsaers (2011) on Belgian smuggling and trafficking judicial cases already revealed that in some events prosecutors deliberately decided to not further investigate links with other existing cases and potential suspects. This reluctancy to dig deeper was explained by the inclination of prosecutors to avoid 'mammoth' cases. On the one hand, avoiding big cases is a pragmatic decision related to the length of the investigation which could lead to a lifting of a pre-trial detention and ultimately result in impunity for the perpetrator. On the other hand, Boels and Ponsaers (2011) also explained that this reluctance was linked to the managerial style of prosecutors and their willingness

to choose 'speed' instead of 'thoroughness'. In a recent press interview, Le Cocq, who is the expert of Myria on smuggling and trafficking, confirmed this tendency when signalling that large criminal files became scarcer in the last years, which she explained as being due to a cruel lack of investigation capacity and a reshuffling of priorities (Guillaume 2022). Considering the severe capacity and financial issues faced by the Belgian federal (judiciary) police in the last years, the urge to conduct large-scale and complex investigations, also at the international levels, appears unlikely (see for instance the interview of the general commissioner of the federal police De Mesmaecker in Eeckhaut & Vanhecke 2022; and for the specific case of the judiciary federal police, see the intervention of the president of the college of public prosecutors de la Serna in Benayad 2022). In spite of what preceded, and even though European joint investigation teams can be time consuming and- and require a lot of capacity, the importance of conducting more large-scale investigations to 'go after' the 'masterminds' as opposed to targeting low-level perpetrators was described as crucial. Considering the developments highlighted throughout the dissertation, this strategy also seems more aligned with the *rationes legis* found in the Palermo Protocols and the Belgian legislation. Hence, as prosecutors find themselves in a position where they need to manage scarce criminal justice resources (see Wade 2008), incentives for using the existing cooperation mechanisms in place at the European level instead of rewarding a drop in the numbers of files on one's desk might be a plausible (short-term) solution to envision at the national or European level.

Taking now a broader approach considering that many individuals can transit throughout national jurisdictions that are not only part of the EU but also the Council of Europe and attempting to find some silver lining, the creative and original argumentation built in Chapter 6 requires some developments. By addressing the argument *inter alia* to strategic litigators, the chapter offers concrete plausible solutions to enhance, in the criminal justice sense, the protection for (aggravated) smuggling experiences involving migrants with a specific vulnerability profile. At odds with common pre-conceptions that migrant smuggling is a victimless crime and underlying the possibility that smuggling may lead to human rights abuses, Chapter 6 engages in a thought-experiment which reconceptualises the position of the smuggled migrant and places the latter at the nexus between criminal justice and human rights. Building on the empirical findings presented in the research and more generally, valuing the tendency of the ECtHR to provide evidence-based adjudication, the chapter brings forward the argument that the ECtHR has the potential to identify similar protective needs for smuggled migrants as for victims of human trafficking and therefore can trigger obligations on behalf of member states to address them. Nonetheless, and realistically avoiding the deployment of overbroad group vulnerability categories which can be detrimental, the claim that the ECtHR should use case-specific and exact reasoning was made, which can only happen if the Court remains committed to its methodology to rely

upon rigorous scientific and empirical information presented by researchers, civil society organisations as well as international organisations.

Reaching the end of this research journey, it appears important to emphasise once again the real and concrete consequences that fixed legal categories and taxonomies can have on the lives of migrants engaged in mobility processes. Whereas these categories can seem to be pragmatic and necessary evils to provide rights and protection for individuals who need them, they can nevertheless lag behind or be at odds with the lived, current mobility practices. Considering that legal categories are not only intended to give rights but also to deny them and have the ability to create an artificial distinction between 'object' and 'victim' of crimes, they should be carefully and critically questioned and regularly re-examined if the necessary protection of vulnerable individuals in transit within the European legal space is taken to heart.

Summary

More than twenty years ago, the United Nations Convention against Transnational Organised Crime and its two additional protocols were adopted in Palermo resulting in the creation of the legal dichotomy between migrant smuggling and human trafficking. Amongst other things, the distinction created between these two crimes entails stark differentiation in terms of protection granted to either 'object' of smuggling and 'victims' of human trafficking. In the current day and age, the regulation of migrant smuggling remains a politically salient issue on the agendas of the European Union, for its institutions, agencies as well as for its Member States. This dissertation takes this contested dichotomy as its point of departure and answers the following central research question:

> *How does the alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking developed in Belgium affect the governance of transit migration?*

This question is answered by taking Belgium, a member of the Schengen Area, as a case study. The recurrent (scholarly) criticism surrounding the strict legal dichotomy and the operational links or, what is often referred to as 'the grey area' between the two complex crimes of migrant smuggling and human trafficking grossly boils down to three elements: the presence/absence of exploitation, the presence/absence of (partial or full) consent, and the debt bondage dimension making smuggled migrants potentially more vulnerable to exploitation. The dissertation places the genesis of the legal dichotomy in its historic-socio-political context where concerns of perceived erosion of sovereignty felt by Nation States in the current globalized era are omnipresent. The thesis further underlines how the inception of the legal dichotomy and the conceptualization of the migrant smuggling phenomenon as a border security issue relates to broader processes of securitization of migration. Indeed, the sheer differentiation in terms of protection granted to (undeserving) smuggled migrants versus (worthy) trafficked victims can be explained by the inclination of Nation States to maintain the status quo of migrant law in place. In that regard, the Belgian legislature seems to have recognized an unjust disparity in the treatment and the protection of smuggling victims versus trafficking victims by developing an alternative protective approach (referred to in the dissertation as the 'third-way' approach). By introducing

the category of aggravated forms of migrant smuggling, the Belgian legislature allows, under several conditions, victims of *aggravated forms* of migrant smuggling to have access to the protective legal status usually strictly reserved to victims of human trafficking.

This sociolegal dissertation specifically focuses on two central elements of the Belgian case which are involved in the implementation of migrant smuggling and human trafficking policies and regulations. The first element is the functioning in practice of the unique Belgian legal framework which, when looking purely at the law 'in the books' goes beyond the strict legal dichotomy established between migrant smuggling and human trafficking. The second element is the concept of transit understood within the context of Intra-Schengen border mobility context in light of Belgium's position as a jurisdiction of both destination and transit for migrants. The concept of transit which is scarcely used when describing migration movements taking place within the often-imagined borderless Schengen Area is both examined from a conceptual and an empirical perspective. The dissertation presents findings based on a mixed-method research design combining legal, policy and document analysis as well semi-structured qualitative expert's interviews with key actors in charge of dealing with both migrant smuggling and human trafficking in Belgium.

To provide an answer to the central research question, *Chapter 2* underlines the multi-scalar nature of the applicable Belgian legal framework and starts by examining the approaches and narratives commonly identified in European Union (EU) counter-smuggling and anti-trafficking legislations and policies and identify how they concretely translate in the domestic legal framework. The analysis of the normative foundations underlying the criminal offence of migrant smuggling first show a clear demarcation of the EU Facilitator's package from the United Nation (UN) Smuggling Protocol which boils down to the broad scope of the facilitation offence as well as a general lack of safeguards of migrant's individual rights found in EU legal instruments. Notably considering the broad scope of the facilitation offence, the narrative analysis of the EU policy instruments adopted to deal with migrant smuggling since 2015 moreover show visible incoherence and inconsistencies between the multiple policy narratives deployed to describe migrant smuggling. This mirror the multi-faceted nature of the phenomenon adopted within EU legal instruments adopted. The analysis furthermore illustrates the continued dominance of the crime-security-centric narratives deployed by EU policy makers to describe the phenomenon despite, at the same time, an also seemingly growing realization from EU policymakers to risks of victimization faced by smuggled migrants during their migration journeys. Taken together, the findings underline that the response to migrant smuggling necessitates to be understood within broader securitization of migration processes taking place in the EU. Considering the intersections between human trafficking and migrant smuggling, and in view of the widely recognized challenges to adequately identify

victims of human trafficking, the results of the analysis of EU anti-trafficking legal framework reveal the coexistence of a dual approach to deal with human trafficking: the human rights/victim centric approach and the crime-control approach. The analysis highlights the dominance of the latter over the former and sheds light on the combination of the crime-control approach with a focus on cross-border elements which arise from the recurrent linkage made between human trafficking and transnational organised crime.

Besides an analysis focused on the commonly identified approaches and narratives at both the UN and EU level, *Chapter 2* also looks at how they translate concretely into the Belgian legal framework. The findings reveal that at first glance, the Belgian legal framework appears to be more in line with the UN Smuggling Protocol than with the EU facilitators Package. The results show that the Belgian legislation aligns itself with the UN Smuggling Protocol considering *inter alia* the general scope and rational behind the migrant smuggling offence, the terminological choice made by the Belgian legislature (*trafic des êtres humains* and not facilitation) and the creation of a distinct facilitation offence which specifically exclude humanitarian assistance from the scope of the offence. Besides, the creation of the unique legal framework allowing victims of aggravated forms of migrant smuggling to benefit from the protective status underlines the acknowledgement of risks of victimization faced by smuggling victims in the domestic legal framework which goes beyond regional and international instruments in terms of protection. Nonetheless, the analysis also indicates that the crime (and border) control approaches prevalent in the EU legal framework also translate at the Belgian level, notably with regards to the predominance given to prosecutorial interests in the procedure, the creation of a facilitation offence *stricto sensu* and the fact that the illegal crossing of Belgian borders as well as the illegal (over)stay in the territory as subject to criminal sanction and imprisonment. The thorough and critical examination of the 'law in the books' at the UN, EU and domestic scales presented in this chapter reveal a complex picture where both human rights-victim centric approach coexists with a crime-border control approach to deal with the multi-faceted phenomenon of migrant smuggling.

As Belgium can be seen as being *inter alia* a jurisdiction of transit for migrants, *Chapter 3* raises the question whether the contested concept of transit migration can be considered useful in untangling and better understanding the blurred/grey area found at the nexus between migrant smuggling and human trafficking. The inspection of the current use of the concept of transit migration in contemporary scholarly literature and policy documents highlights how transit migration typically refers to situations located outside or at the outskirts of the EU. *Chapter 3* provides an analysis of the critical and empirical scholarship which uncovers the grey or in-between area where it becomes hard to make clear-cut distinctions that can be found at the nexus between migrant smuggling and human trafficking. The findings highlight the real-life vulnerabilities faced by smuggled migrants and dynamics that do not fit constructed

legal categories/taxonomies of either human trafficking or migrant smuggling. In doing so, the analysis also identifies and deconstructs prevailing stereotypical representations of both migrant smuggling and human trafficking, *inter alia* with regards to 'ideal' victimhood and villainhood, as well as assumptions about gender, agency, and consent contributing to the creation of approximative or at times false realities/truths underlying the dichotomy between both phenomena. The chapter also underscores the dangers of the instrumental conflation by media, law/ policymakers between the two phenomena. The results further show how migrants' vulnerabilities to abuse and/or exploitation uncovered in the legal and empirical scholarship are likely to be further enhanced in transit zones where stranded individuals within the EU aim to continue their (increasingly) fragmented/non-linear migration journeys. Therefore, *Chapter 3* which relies on two thorough literature reviews including growing yet relatively scarce empirical scholarship focusing on intra-Schengen border mobility, proposes to consider the scholarly/policy usage of the notion of transit migration in the Intra-Schengen context and not just when discussing border mobility at the external borders of the EU but also when referring to similar processes within the Schengen Area. However, the use of the term is only desirable if the latter is carefully defined and understood from the migrant's subjective perspective as a phase of experienced involuntary (im)-mobility in the 'process of movement in a specific migratory direction' (Schapendonk 2012: 579). From a conceptual standpoint, this specific definition to which brackets were added within the word (im)mobility is argued to be useful for three main reasons. First, the definition is broad enough to encompass processes of mobility within the EU. Second, by using the word 'involuntary', the definition does not obscure the active role of governmental bordering practices which have consequences on the experience of (im)mobility faced by migrants amidst their journey and can reinforce their vulnerability. Third and finally, far from simplifying the complex concepts of both migrant smuggling and human trafficking, the term transit migration can stimulate both scholars and practitioners to take into consideration the particularly vulnerable position of individuals stranded or force to move in transit spaces. Henceforth, based on the findings that shed light on the blurry empirical reality of the grey zone at the nexus of both phenomena, it is argued that the term transit migration can serve as a helpful lens that can prevent falling into the trap of conceiving migrant smuggling and human trafficking as strictly separate phenomena and to question the strict categorisation of individuals in one or another legal/administrative box.

Chapter 2 and *Chapter 3* focus on the normative foundations, the dominant narratives/approach as well as the preconceptions underlying both migrant smuggling and human trafficking. Taken together, these elements are essential in the construction of reality of individuals in charge with dealing with both phenomena 'in action'. In *Chapter 4* and *Chapter 5*, the dissertation examines, from an empirical perspective, how the unique Belgian legal framework dealing

with aggravated forms of migrant smuggling operate in practice. The chapters consider the complex operationalisation and implementation of norms enshrined in a fragmented and multi-layered national and European institutional context. Migrants in transit in Belgium (but also generally within the Schengen Area) find themselves at a crossroads where multiple actors and legal regimes intersect and therefore, where the competencies or jurisdictions to govern migrants in transit are inevitably scattered between distinct actors. The findings in both chapters show that the scattering of competences is notably due to the fact that the governance of onwards mobility movements within the Schengen Area is situated at the juncture of multiple and politized 'fights' having intrinsic links and tensions with one another, namely the fight against migrant smuggling and human trafficking, the fight against irregular migration (including 'transmigration' in the Belgian context) and the maintenance of security and public order. This specific *locus* is therefore at the intersection of distinct realms of law, in particular criminal law with the judiciary dimension necessarily involved when the protective dimension is initiated and administrative law when smuggled migrants find themselves administratively 'processed' by authorities either in the context of the fight against 'transmigration' or amid tasks aimed at the maintenance of security and public order.

Adopting distinct conceptual lenses, both chapters shed light on the fact that the promising unique and alternative Belgian approach allowing victims of aggravated forms of migrant smuggling to access the protective status is in fact scarcely used in practice. Whereas at first glance the underuse of the protective approach could be explained by a lack of interest on behalf of migrants transiting through Belgium to reach the United Kingdom to start the procedure, the results of both chapters paint a more complex picture and identify six main causes helping to understand the limited use of the 'third-way' approach which can be summarized as follow. The findings underline critical issues of institutional capacity which are complexified by the intricate Belgian institutional framework in which the various responsible actors have to find their way. The findings further show a lack of sensibilization and training of frontline implementers and furthermore how frontline implementers fail to apply the procedure in a harmonized manner, notably with regards to the crucial information on the procedure needed to be delivered to migrants smuggled in aggravated circumstances. Moreover, a key finding element in both chapters is a visible tendency of actors to evade their responsibility (referred to as 'passing the buck') by passing it on to other actors at the local, national or at the European level. This tendency is stimulated or bolstered by the scattering of competences between numerous actors operating at distinct levels.

Chapter 4 critically examines the (discretionary) decision-making of key actors responsible for the enforcement of the protective framework. In doing so, the findings also underline the growing presence of human rights concerns,

notably considering visible narratives of care voiced by the respondents. The concept of 'humanitarian borderlands' describing conflicting environments where objectives of protecting the needs of vulnerable individuals in precarious life situations such as migrants smuggled in aggravating circumstances clash with objectives of protecting state security is helpful to show these contradictions. The findings confirm the crucial role of moral economy in shaping bureaucrats' decision unpacking the tension between coexisting languages of repression and compassion. Nonetheless, the scarcity of use of the procedure and the findings show that on the ground, stepping out of the straight-jacked legal distinction between migrant smuggling and human trafficking is a challenging task for relevant actors. This is the case despite the awareness displayed by numerous respondents on the protective-oriented approach which is based on human-rights concerns, and which is often described by the respondents as a 'mitigator' to the strict legal dichotomy.

Still focusing on decision-making and combining this strand of scholarship with a legal pluralist approach, and more specifically, on games of jurisdictions, *Chapter 5* examines the functioning of the third-way approach in Belgium by focusing on the complex web of legal regimes (mainly administrative and criminal law) intersecting with one another and the scattered competences shared between various actors involved in the (socio-legal) governance of migrants in transit in Belgium. *Chapter 5* shows the value of expanding the scope of the 'crimmigration lens' by not only looking for points of convergence between these two legal regimes but by highlighting and insisting *instead* on their differentiation and separation to discern how the jurisdictional separation allow relevant actors to (strategically) mobilised and/or combined one set of law over or in combination to another. The empirical findings show that in practice, the administrative 'processing' of migrants in transit in the context of the fight against irregular (transit)migration and the maintenance of security and public order often takes precedence over the protective third-way approach which has a judiciary nature. By combining both strands of scholarship, the analysis of the findings presented in *Chapter 5* reveal that decisions to act or, importantly, not to act, and to approach an issue with a criminal justice (judiciary) lens or with an immigration management lens has critical consequences for the governance of migrants in transit, who can end up being either unnoticed, ignored, protected, or in worse case scenarios criminalized and punished.

From an empirical standpoint, both *Chapter 4* and *Chapter* 5 address the centrality of the transit element to make sense of the scarcity of the use in practice of the alternative approach. Focusing on the national scale, the transitory nature of the stay of the smuggled migrants on the territory and the prioritization at times of the fight against irregular migration is helpful to make sense of the lack or inadequacy of information received by smuggled migrants in aggravating circumstances about the procedure, its advantages, and its conditions. The transitory nature of migrant's stay can furthermore hinder

the ability of state authorities to adequately identify migrants as presumed trafficking and/or aggravated smuggling victims. The stereotyped and common representation of 'ideal' victimhood (notably with regards to notions of consent, agency, and exploitation) can indeed be at odds with the specific profile of migrants in transit and play a role in this lack of identification, especially when frontline police officers are not sensitized to the complex dynamics involved in both phenomena. Moreover, as migrants transiting through Belgium can find themselves in conditions of short-term exploitation to finance the next stretch of their journey, prosecutorial pragmatism notably with regards to evidence gathering can help to explain why potential victims of human trafficking are left unidentified and unprotected. Focusing on the European scale, the transit element is also essential to consider with regards to the governance of unauthorised onwards mobility or 'secondary migration movements' within the Schengen Area. Due to the lack of consensus and hence, structural, and harmonised solutions on this matter at the EU level, the findings reveal a tendency to shift the blame and to discharge oneself of their responsibility to other actors, and in this case, to other member states.

The findings presented throughout the dissertation demonstrate in a clear manner that the strict legal dichotomy established between migrant smuggling and human trafficking rests upon approximative and at times erroneous assumptions that do not match with the empirical reality. Moreover, the results of the Belgian case study show that the artificial distinction between both phenomena has a concrete impact on the protection or the lack thereof of (smuggled) individuals on the move who often find themselves in vulnerable situations and who can experience abuse and exploitation during their migratory journey, also within the Schengen Area. Taking the necessary protection of vulnerable individuals to heart, *Chapter 6* approaches the issue from a human rights perspective and broadens the geographical scope to the jurisdiction of the Council of Europe. The chapter offers a thought-experiment which explores how human rights can concretely be mobilized to mitigate the vulnerabilities experienced by smuggled migrants in transit within Europe. The argument is *inter alia* addressed to strategic litigators and argues that a differentiated protection can be crafted for particular smuggling experiences involving migrants with a specific vulnerability profile. *Chapter 6* builds on the previous chapters and deconstructs the pre-conception of migrant smuggling as a victimless crime by emphasising that smuggling can give rise to human rights abuses which need to be addressed. The chapter reconceptualises the position of the smuggled migrant and replaces it at the nexus between criminal justice and human rights and suggests therefore that a differentiated protection can be crafted for this profile within criminal justice related positive obligations ensuing from the European Convention of Human Rights. In so doing, *Chapter 6* recourses on the European Court of Human Rights (ECtHR) framework in light of the prolific nature of its positive obligations case law, its interpretative arsenal, its responsiveness to social scientific information that

fosters evidence-based adjudication which places the Court in a unique position to disrupt protective disparities in the trafficking/smuggling dichotomy. Even though (inter)national law sources do not compel towards similar protective duties towards (aggravated) smuggling victims, the chapter brings forward the argument that the ECtHR, in a similar manner to what has been developed in the trafficking context, has the potential to identify similar protective needs and can trigger obligations on behalf of member states to address them. Building notably on vulnerability theory and promoting the concept of the 'responsive state' which, alike to the transit definition, insists on the role and responsibility of the State in creating or contributing to vulnerability, *Chapter 6* argues that the ECtHR can legitimately find an alternate basis for protection by basing itself on empirical evidence pointing to similar human rights needs than for trafficking victims. The argument nonetheless aims to be realistic and avoids the pitfall of deploying overboard vulnerability categories which can be detrimental and claims that the Court should use case-specific and exact reasoning by committing to its methodology to relying more upon meticulous empirical and scientific information.

The final chapter of the dissertation connects the dots between the distinct chapters and, to summarise, brings forward the argument that the Belgian 'third way' approach does provide an interesting corrective to the well-founded criticism surrounding the legal dichotomy between migrant smuggling and human trafficking. In this regard, the unique Belgian alternative approach goes beyond the dichotomy by recognizing the unjust disparity in terms of protection between the two phenomena. Nonetheless, the case study makes clear that the protective approach is currently underused and unpacks the complex dynamics at play behind the scarce deployment of the procedure and the consequences for smuggled migrants transiting through the Belgian jurisdiction. The last chapter addresses the importance of considering the element of transit which arguably, constitutes the most crucial theoretical (developed in Chapter 3) and empirical (developed in Chapters 4 to 6) contribution that the dissertations can offer to scholarship focusing on migrant smuggling, human trafficking and more broadly to scholarship looking at borders and mobility. Besides highlighting the limitations of the dissertation, the areas for further research as well as practical solutions to enhance protection, the conclusion emphasises the concrete consequences of fixed legal taxonomies on migrant's lives and experiences amid their journeys. Legal categories are indeed considered as necessary evils to provide rights and protection for individuals in need, yet, the research stresses that legal categories should be carefully questioned and thoroughly re-examined in light of lived mobility practices. On a similar vein and considering the *locus* of migrant smuggling which finds itself at a juncture between irregular migration and human trafficking, policies on these three complex phenomena should be thought through in a holistic and structural manner instead of following their own and relatively independent course of action.

Samenvatting
(Dutch summary)

VOORBIJ DE DICHOTOMIE TUSSEN MENSENSMOKKEL EN MENSENHANDEL
Een Belgische casestudy over het bestuur omtrent migranten in transit.

Meer dan twintig jaar geleden werd in Palermo het Verdrag van de Verenigde Naties (VN) tegen grensoverschrijdende georganiseerde misdaad en twee aanvullende protocollen aangenomen, wat resulteerde in de constructie van een juridische dichotomie tussen de smokkel van migranten en mensenhandel. De gecreëerde juridische afbakening van deze misdrijven behelst onder meer een aanzienlijk verschil wat betreft de bescherming die wordt toegekend aan enerzijds het 'object' van mensensmokkel en anderzijds het 'slachtoffer' van mensenhandel. Deze dissertatie neemt de omstreden dichotomie als vertrekpunt en beantwoordt daarbij de volgende onderzoeksvraag:

> *Hoe beïnvloedt de in België ontwikkelde alternatieve benadering van de strikte juridische dichotomie tussen mensensmokkel en mensenhandel de aanpak van het fenomeen transitmigratie?*

Deze vraag wordt beantwoord door België, lid van het Schengengebied, als casestudy te nemen. Wanneer men kijkt naar de (wetenschappelijke) kritiek op de strikte juridische tweedeling tussen de twee complexe misdrijven en de operationele verbanden tussen de twee – welk gebied vaak wordt aangeduid als een 'grijze zone' – lijkt de discussie zich te centreren rondom grofweg drie elementen: (1) de aan-/afwezigheid van uitbuiting, (2) de aan-/afwezigheid van (gedeeltelijke of volledige) instemming, en (3) de schuldhorigheidsdimensie die gesmokkelde migranten potentieel kwetsbaarder maakt voor uitbuiting. Dit onderzoek positioneert de ontstaansgeschiedenis van de juridische dichotomie in haar historisch-socio-politieke context, waarbinnen de zorg omtrent de door natiestaten ervaren erosie van de soevereiniteit in het huidige geglobaliseerde tijdperk alomtegenwoordig is. Daarnaast benadrukt dit onderzoek hoe het ontstaan van de juridische dichotomie en de conceptualisering van het mensensmokkelfenomeen als een probleem van grensbewaking verband houdt met meer algemene processen waarbij migratiekwesties worden geduid in termen van veiligheid; zo kan het enorme verschil in de beveiliging die wordt geboden aan (onwaardig) gesmokkelde migranten en (waardige) slachtoffers van mensenhandel verklaard worden door de neiging van staten

om de status quo van hun reeds bestaande migratiewetten te handhaven. Door het ontwikkelen van een alternatieve beschermende aanpak (hierna, conform de Engelstalige terminologie, aangeduid als 'de derde-wegbenadering') lijkt de Belgische wetgever het bestaan van een onrechtvaardige ongelijkheid in de behandeling en bescherming van slachtoffers van smokkel enerzijds en van mensenhandel anderzijds te erkennen. Door het invoeren van een nieuwe categorie van slachtofferschap gekoppeld aan de juridische categorie van het bestaan van 'ernstige vormen van mensensmokkel' kent de Belgische wetgever onder een aantal omstandigheden een beschermde juridische status toe aan slachtoffers die binnen deze categorie worden geacht te vallen. Het bijzondere is dat een dergelijke status doorgaans strikt is voorbehouden aan slachtoffers van mensenhandel.

Deze rechtssociologische dissertatie richt zich specifiek op twee centrale elementen in de implementatie van beleid omtrent mensensmokkel en mensenhandel binnen de Belgische context. Het eerste element is het functioneren van het unieke rechtskader *in de praktijk*. Binnen dit kader lijkt, bezien vanuit een louter juridisch perspectief, meer ruimte voor nuance te bestaan tussen de doorgaans strikte juridische dichotomie tussen mensensmokkel en mensenhandel. Het tweede element is het concept *transit*, begrepen binnen de context van intra-Schengen grensmobiliteit en in het bijzonder het gegeven de positie die België binnen Europa inneemt als zowel eind- als doorreisbestemming voor migranten. Het concept *transit*, dat doorgaans nauwelijks wordt gebruikt bij het beschrijven van migratiestromen binnen het vaak als grenzeloos beschouwde Schengengebied, wordt in deze studie onderzocht vanuit een zowel conceptueel als empirisch perspectief. Dit onderzoek presenteert bevindingen op basis van een *mixed-method* onderzoeksdesign waarbinnen een juridische, beleids- en documentenanalyse is gecombineerd met semigestructureerde kwalitatieve expertinterviews met sleutelactoren in het veld van zowel mensensmokkel als mensenhandel in België.

Om een antwoord te formuleren op de centrale onderzoeksvraag benadrukt *hoofdstuk 2* het gelaagde karakter van het toepasbare rechtskader in België. Het onderzoek brengt in eerste instantie de prevalente benaderingen en narratieven binnen beleid en wetgeving van de Europese Unie (EU) gericht op het tegengaan van mensensmokkel en mensenhandel in kaart, en beschrijft hoe deze zich concreet laten vertalen in wetgeving op nationaal niveau. Uit een analyse van de normatieve beginselen die ten grondslag liggen aan het misdrijf mensensmokkel blijkt allereerst dat de faciliteringsrichtlijn van de EU duidelijk afwijkt van het Smokkel Protocol opgesteld door de VN; vooral voor wat betreft de reikwijdte van de strafbaarstelling en de individuele rechtsbescherming van migranten lijkt er een groot verschil tussen de twee benaderingen. De analyse van de narratieven zoals die binnen het EU-beleid omtrent mensensmokkel sinds 2015 kunnen worden waargenomen, illustreert dat er, met name wat betreft de reikwijdte van het faciliteringsmisdrijf, zichtbare incoherenties en inconsistenties bestaan tussen de verschillende beleidsnarratieven die

worden gebruikt in de beschrijving van mensensmokkel. Dit reflecteert het veelzijdige en dynamische karakter van het fenomeen binnen EU-wetgeving en beleid. De analyse illustreert voorts dat de EU-beleidsmakers het fenomeen nog steeds in de eerste plaats vanuit het oogpunt van criminaliteit en veiligheid beschrijven, ondanks het feit dat ze zich tegelijkertijd steeds meer bewust lijken te worden van de risico's die gesmokkelde migranten lopen tijdens hun migratietrajecten. Alles bij elkaar onderstrepen de bevindingen dat de reactie op mensensmokkel moet worden begrepen tegen de achtergrond van een bredere securitisering van migratieprocessen in de EU. Gezien de raakvlakken tussen mensenhandel en mensensmokkel, en gezien de algemeen erkende problemen om slachtoffers van mensenhandel adequaat te identificeren, blijkt uit de resultaten van de analyse van het rechtskader ter bestrijding van mensenhandel gehanteerd door de EU dat er sprake is van een tweeledige aanpak van mensenhandel: een op mensenrechten en slachtoffers gerichte aanpak en een aanpak die misdaadbestrijding centraal stelt.

In *hoofdstuk 2* wordt voorts ook ingegaan op het vraagstuk hoe de verschillende narratieven rondom de fenomenen mensenshandel en mensensmokkel zich concreet laten vertalen in het Belgische wettelijke kader. Uit de bevindingen blijkt dat het Belgische rechtskader op het eerste gezicht meer in overeenstemming lijkt te zijn met het smokkelprotocol van de VN dan met de EU-faciliteringsrichtlijn. Zo blijkt onder meer uit de rationale achter en de omvang van het toepassingsgebied, de gemaakte terminologische keuzes (*trafic des êtres humains)* en de invoering van een afzonderlijk faciliteringsmisdrijf waarmee humanitaire hulp specifiek uitgesloten wordt van het toepassingsgebied van het smokkelmisdrijf, dat de Belgische wetgeving meer in overeenstemming is met het Protocol tegen smokkel van migranten van de VN. Daarbij geeft de invoering van het unieke rechtskader waarbinnen slachtoffers van ernstige vormen van mensensmokkel aanspraak kunnen maken op een beschermde status, blijk van erkenning van de risico's op slachtofferschap die gesmokkelde migranten lopen. In dat opzicht biedt het nationale rechtskader aanzienlijk meer mogelijkheden tot bescherming dan beschikbaar binnen het regionale en internationale rechtskader. Desalniettemin laat de analyse eveneens een doorwerking zien van de op EU-niveau prevalerende aanpak van criminaliteitsbestrijding en grensbewaking op het nationale Belgische niveau, met name wat betreft het overwicht van de belangen van het Openbaar Ministerie binnen de procedure, de strictu sensu-invoering van het faciliteringsmisdrijf en het feit dat het illegaal overschrijden van de Belgische grenzen evenals illegaal verblijf op het grondgebied worden bestraft met strafrechtelijke sancties en vrijheidsstraffen. Het grondige en kritische onderzoek van de 'law in the books' op supranationaal, Europees en nationaal niveau dat binnen dit hoofdstuk wordt gepresenteerd toont een complex beeld waarin een op mensenrechten gerichte aanpak en een aanpak gericht op misdaadbestrijding aan de grens naast elkaar bestaan en samen worden gebruikt ter duiding en bestrijding van het fenomeen mensensmokkel.

Aangezien België onder meer kan worden beschouwd als een land dat door migranten wordt gebruikt als een doorreisland of 'transitland', richt *hoofdstuk 3* zich op de vraag of het omstreden begrip van *transitmigratie* nuttig kan zijn in het beter begrijpen en ontwarren van het vage/grijze gebied op het raakvlak tussen mensensmokkel en mensenhandel. Uit onderzoek naar het huidige gebruik van het begrip in hedendaagse literatuur en beleidsdocumenten blijkt dat *transit* doorgaans verwijst naar situaties buiten of aan de grens van EU-gebied. *Hoofdstuk 3* bevat een analyse van de kritische en empirische literatuur die zich richt op het in kaart brengen en bediscussiëren van het grijze gebied (ook wel 'tussengebied') tussen mensensmokkel en mensenhandel. Uit deze literatuur komt naar voren dat het maken van een duidelijk onderscheid tussen beide begrippen ingewikkeld blijkt. De bevindingen onderstrepen de reële kwetsbaarheid van de gesmokkelde migranten en wijzen op een dynamiek die niet overeenkomt met de geconstrueerde juridische taxonomieën van mensensmokkel als mensenhandel. Daarbij identificeert en deconstrueert de analyse eveneens de prevalerende stereotype voorstellingen van beide misdrijven, onder meer wat betreft de ideaaltypische veronderstelling van slachtoffer- en daderschap bij zowel mensensmokkel als mensenhandel en de aannames rondom gender, agency en instemming die bijdragen aan het creëren van realiteiten/waarheden waarop de dichotomie tussen beide fenomenen is gestoeld. Het hoofdstuk benadrukt eveneens de gevaren van instrumentele verbondenheid tussen de fenomenen veroorzaakt door de media, wetgeving en beleid. Uit de resultaten blijkt verder hoe de kwetsbaarheid van migranten voor misbruik en/of uitbuiting waarschijnlijk toeneemt in doorreis- of *transit*-zones waar gestrande individuen binnen de EU trachten hun (in toenemende mate) gefragmenteerde migratietrajecten voort te zetten. Om die reden pleit *hoofdstuk 3,* dat zich baseert op twee grondige literatuurstudies waarin onder andere gekeken is naar intra-Schengen grensmobiliteit, voor het gebruik van de definitie van *transitmigratie* zoals gehanteerd binnen de academische literatuur en beleid, niet alleen wanneer het gaat om de grensmobiliteit aan de buitengrenzen van de EU, maar ook wanneer het soortgelijke processen binnen het Schengengebied (intra-Schengen) betreft. Het gebruik van de term is echter alleen wenselijk indien deze zorgvuldig wordt gedefinieerd en begrepen wordt vanuit het subjectieve perspectief van de migrant als een fase van ervaren onvrijwillige (im)mobiliteit in een 'proces van beweging in een specifieke migratierichting' (Schapendonk 2012: 579). Vanuit een conceptueel standpunt is deze definitie om drie belangrijke redenen nuttig. Ten eerste is de definitie ruim genoeg om mobiliteitsprocessen binnen de EU te omvatten. Ten tweede verhult de definitie, door het woord 'onvrijwillig' te gebruiken, niet de actieve rol van de door de overheid ingegeven grenspraktijken die consequenties hebben voor de (im)mobiliteit ervaren door migranten tijdens hun reis en die hun al kwetsbare positie verder kan versterken. Ten slotte kan de term *transitmigratie,* zonder de complexe concepten mensensmokkel en mensenhandel te bagatelliseren, zowel wetenschappers als mensen

binnen de praktijk ertoe aanzetten om oog te houden voor de bijzonder kwetsbare positie van personen die gestrand zijn of gedwongen worden zich te bewegen binnen doorreisruimten. Op basis van de wazige empirische realiteit van de grijze zone op het raakvlak van de twee fenomenen wordt betoogd dat de term *transitmigratie* kan dienen als een nuttige lens, waarmee kan worden voorkomen dat men mensensmokkel en mensenhandel valselijk beschouwt als twee strikt gescheiden verschijnselen en waarmee de strenge categorisering van individuen in een van de twee juridische/administratieve hokjes ter discussie kan worden gesteld.

Hoofdstuk 2 en *hoofdstuk 3* richten zich op de normatieve funderingen, de dominante narratieven, benaderingen en aannames die ten grondslag liggen aan zowel mensensmokkel en mensenhandel. Tezamen zijn deze elementen essentieel in de constructie van de werkelijkheid waarmee personen die met beide fenomenen werken geconfronteerd worden in de praktijk. In *hoofdstuk 4* en *hoofdstuk 5* worddt vanuit een empirisch perspectief onderzocht hoe het Belgische rechtskader in de praktijk opereert in reactie op ernstige vormen van mensensmokkel. Deze hoofdstukken behandelen de complexe operationalisering en implementatie van normen die zijn vastgelegd in een gefragmenteerde en gelaagde nationale en Europese institutionele context. Migranten op doorreis in België, maar ook meer algemeen binnen het Schengengebied, bevinden zich op een kruispunt van verschillende rechtsstelsels, waardoor de bevoegdheden en jurisdicties wat betreft het besturen van migranten onvermijdelijk verspreid zijn over meerdere actoren. De bevindingen in beide hoofdstukken illustreren dat deze versnippering van bevoegdheden met name te wijten is aan het feit dat het bestuur van de mobiliteitsstromen binnen het Schengengebied zich afspeelt binnen de intersectie van meerdere, gepolitiseerde 'gevechten' die onderling aan elkaar gelieerd en met elkaar in spanning zijn; hier kruisen discussies rondom de strijd tegen irreguliere migratie (waaronder doorreismigratie) en discussies omtrent de handhaving van veiligheid en publieke orde elkaar, waardoor deze specifieke *locus* zich bevindt op het snijvlak van verschillende rechtsgebieden. Deze specifieke *locus* bevindt zich met name op het snijvlak van het strafrecht met de justitiële dimensie die noodzakelijkerwijs betrokken is wanneer de beschermingsdimensie in gang wordt gezet, en het bestuursrecht wanneer gesmokkelde migranten administratief worden 'aangepakt' door de autoriteiten, ofwel in het kader van de bestrijding van 'transmigratie', ofwel in het kader van handhaving van de veiligheid en de openbare orde.

Door het gebruik van verschillende conceptuele uitgangspunten brengen beide hoofdstukken in beeld dat de veelbelovende unieke en alternatieve Belgische aanpak die het mogelijk maakt voor slachtoffers van ernstige vormen van mensensmokkel om een beschermde status toegekend te krijgen in de praktijk maar zelden daadwerkelijk gebruikt wordt. Hoewel het wellicht op het eerste gezicht aannemelijk lijkt dat het minimale gebruik van deze beschermende aanpak verklaard kan worden door een gebrek aan kennis danwel

interesse vanuit de migranten die via België doorreizen naar het Verenigd Koninkrijk om de procedure te starten, schetsen de resultaten van beide hoofdstukken een meer complex beeld, waarbij zes hoofdzaken geïdentificeerd kunnen worden die het beperkte gebruik van deze bijzonder beschermingsprocedure helpen begrijpen. Zo benadrukken de bevindingen cruciale problemen omtrent de institutionele capaciteit, die verder bemoeilijkt wordt door het ingewikkelde Belgische institutionele kader waarbinnen verschillende verantwoordelijke actoren moeten navigeren. Daarnaast blijkt sprake van een gebrek aan sensibilisering en training op het niveau van eerstelijnsmedewerkers waardoor zij de procedures niet op een geharmoniseerde manier (kunnen) uitvoeren, dit geldt in het bijzonder voor de cruciale informatie over de procedure die moet worden verstrekt aan migranten die onder verzwarende omstandigheden worden gesmokkeld. Een belangrijke bevinding in beide hoofdstukken is bovendien de zichtbare neiging van actoren om hun verantwoordelijkheid te ontlopen door deze af te schuiven op andere actoren op lokaal, nationaal of Europees niveau; een tendens die verder gestimuleerd of versterkt wordt door de versnippering van bevoegdheden over de talrijke actoren die in verschillende hoedanigheden en op uiteenlopende niveaus betrokken zijn bij de uitvoering van het beleid.

Hoofdstuk 4 onderzoekt op kritische wijze de (discretionaire) besluitvorming van de actoren verantwoordelijk voor de handhaving van het beschermende rechtskader. Tijdens de gesprekken met respondenten werd veelal gebruik gemaakt van een *care narrative,* woordkeuzes en omschrijvingen die verwijzen naar de zorg rondom de veiligheid van migranten. Dit duidt op een toenemende zorg omtrent mensenrechten. Het concept *humanitarian borderlands* beschrijft een spanningsveld waarbinnen de doelstellingen wat betreft de veiligheid van kwetsbare individuen in precaire leefomstandigheden kunnen botsen met de doelstelling omtrent nationale veiligheid. De bevindingen laten eveneens een spanningsveld zien; deze bevestigen de cruciale rol van de morele economie bij de besluitvorming van bureaucraten en benadrukken het naast elkaar bestaan van narratieven van repressie en mededogen. Hoewel veel respondenten zich bewust toonden van de beschermingsgerichte aanpak en deze beschreven als tegenwicht tegen de strenge juridische dichotomie, blijkt uit de schaarse toepassing van de procedure en de bevindingen dat het in de praktijk een uitdaging blijft om het strikte onderscheid tussen mensensmokkel en mensenhandel te doorbreken.

In *Hoofdstuk 5* wordt het functioneren van de Belgische derde-wegbenadering verder onderzocht door de lens van literatuur omtrent besluitvorming in combinatie met een rechtspluralistische benadering, waarbij specifiek ingegaan wordt op het complexe web van elkaar kruisende rechtsstelsels (voornamelijk bestuurs- en strafrecht) en de versnipperde bevoegdheden van de verschillende actoren die betrokken zijn bij het (sociaal-juridische) besturen van migranten op doorreis. Het hoofdstuk toont de waarde van een uitgebreidere 'crimmigratie'-lens, waarbij niet enkel gezocht wordt naar de overlap

tussen de twee hierboven genoemde rechtsgebieden, maar waarbij juist ook aandacht is voor de punten waarop ze van elkaar verschillen en gescheiden zijn. Zo kan in kaart gebracht worden hoe de betrokken actoren de individuele rechtsgebieden op strategische wijze mobiliseren en eventueel combineren. De empirische resultaten tonen dat, in de praktijk, de bestuurlijke aanpak van migranten in transit begrepen moet worden in de context van de strijd tegen irreguliere (trans)migratie en de handhaving van openbare orde en veiligheid. Deze benadering lijkt ook te prevaleren boven de strafrechtelijke aanpak. *Hoofdstuk 5* laat zien dat het besluit om wel of niet op te treden, evenals de keuze voor de 'bril' waarmee de migrant in kwestie wordt gezien (een strafrechtelijke bril of een immigratiebeheer bril) cruciale gevolgen heeft voor het bestuur van migranten op doorreis, die onopgemerkt, genegeerd of beschermd kunnen worden, of in het ergste geval gecriminaliseerd en gestraft.

Zowel *hoofdstuk 4* als *hoofdstuk 5* behandelen op een empirische wijze het transit-element als cruciaal element in het verklaren van het minimale gebruik van de alternatieve benadering in de praktijk. Op nationaal niveau bezien, blijkt het tijdelijke karakter van het verblijf van de gesmokkelde migranten op het grondgebied en het feit dat de bestrijding van illegale migratie op bepaalde momenten prioriteit krijgt, belangrijk om het gebrek aan of de ontoereikendheid van de informatie die gesmokkelde migranten in verzwarende omstandigheden ontvangen over de procedure, de voordelen en de voorwaarden ervan, te begrijpen. Dit element van tijdelijkheid kan bovendien het vermogen van de overheidsinstanties belemmeren om migranten adequaat te identificeren als vermoedelijke slachtoffers van mensenhandel en/of mensensmokkel met verzwarende omstandigheden. De stereotype en gangbare voorstelling van het 'ideale' slachtoffer (met name wat betreft begrippen als instemming, agency en uitbuiting) kan in de praktijk haaks staan op het specifieke profiel van migranten op doorreis en een rol spelen bij dit gebrek aan identificatie, vooral wanneer eerstelijnspolitieagenten zich niet bewust zijn van de complexe dynamiek van beide verschijnselen. Daarnaast kunnen migranten op doorreis in België relatief korte periodes terechtkomen in omstandigheden van uitbuiting om het volgende deel van hun reis te financieren, maar kunnen pragmatische overwegingen, met name wat betreft het verzamelen van bewijsmateriaal, helpen verklaren waarom potentiële slachtoffers van mensenhandel niet worden geïdentificeerd en niet worden beschermd. Ook op Europees niveau bezien is het belangrijk om het transit-element in beschouwing te nemen met betrekking tot het bestuur van ongeoorloofde doorreismobiliteit of 'secundaire migratiebewegingen' binnen het Schengengebied. Door een gebrek aan consensus en derhalve aan structurele en geharmoniseerde oplossingen voor kwesties rondom secundaire migratiebewegingen, ontstaat een tendens waarbij de verantwoordelijkheid wordt afgeschoven op andere actoren en, in dit geval, op andere lidstaten.

De gepresenteerde bevindingen demonstreren op inzichtelijke wijze dat de strikte juridische dichotomie tussen mensensmokkel en mensenhandel is

gebaseerd op primitieve en soms foutieve aannames die niet overeenstemmen met de empirische realiteit. Daarbij tonen de resultaten van de Belgische case-study dat het kunstmatige onderscheid tussen beide verschijnselen concrete gevolgen heeft voor bescherming, of het gebrek daaraan, van (gesmokkelde) individuen in beweging. Deze individuen bevinden zich regelmatig in kwetsbare situaties waardoor ze geconfronteerd kunnen worden met misbruik en uitbuiting gedurende hun migratietocht, zowel binnen als aan de grenzen van het Schengengebied. Met het oog op de noodzakelijke bescherming van kwetsbare individuen, benadert *hoofdstuk 6* de kwestie vanuit een mensenrechtenperspectief, waarmee het geografische toepassingsgebied wordt uitgebreid tot de jurisdictie van de Raad van Europa. Het hoofdstuk kan gelezen worden als een gedachte-experiment, waarin wordt onderzocht hoe mensenrechten concreet gemobiliseerd kunnen worden om de kwetsbare positie van gesmokkelde doorreismigranten te verminderen. Het argument dat volgt uit het gedachte-experiment richt zich op strategische advocaten (*litigators)* en pleit voor een gedifferentieerde bescherming voor specifieke smokkelervaringen voor migranten met een uitzonderlijk kwetsbaarheidsprofiel.

Hoofdstuk 6 bouwt voort op de voorgaande hoofdstukken en deconstrueert de vooroordelen en het beeld omtrent mensensmokkel als een slachtofferloos misdrijf door te benadrukken dat smokkel kan leiden tot de schending van mensenrechten, die als zodanig beschouwd moet worden. Het hoofdstuk herdefinieert de positie van de gesmokkelde migrant en positioneert deze op het snijvlak van strafrecht en mensenrechten, waarmee het suggereert dat een gedifferentieerde bescherming kan worden vervaardigd met het oog op een specifiek profiel binnen de strafrechtelijke positieve verplichtingen die voortvloeien uit het Europese Verdrag voor de Rechten van de Mens. Daarbij baseert het hoofdstuk zich op het kader van het Europees Hof voor de Rechten van de Mens (EHRM) en de jurisprudentie inzake de zogenoemde *positive obligations* waarin blijk wordt gegeven van de ontvankelijkheid voor sociaalwetenschappelijke informatie en dus empirisch onderbouwde berechting. Dit biedt het Hof de unieke positie om de ongelijke bescherming binnen de strikte juridische dichotomie open te breken. Hoewel de (inter)nationale rechtsbronnen niet tot soortgelijke beschermende verplichtingen dwingen in het geval van slachtoffers van (ernstige) smokkel, beargumenteert het hoofdstuk dat het EHRM, vergelijkbaar met wat binnen de context van mensenhandel is ontwikkeld, de potentie heeft om soortgelijke beschermingsbehoeften vast te stellen en kan het voor de lidstaten verplichtingen in het leven roepen om daarin te voorzien. *Hoofdstuk 6* bouwt met name voort op theorie rondom kwetsbaarheid en promoot het concept van de 'responsieve staat' waarin, vergelijkbaar met de definitie van *transitmigratie,* de rol en verantwoordelijkheid van de staat bij het creëren van of bijdragen tot kwetsbaarheid wordt benadrukt. Het hoofdstuk beargumenteert dat het EHRM een legitieme alternatieve basis kan vinden voor bescherming van slachtoffers van mensensmokkel door zich te baseren op empirisch bewijs dat aantoont dat slachtoffers van mensenhandel ook mensen-

rechtelijke bescherming verdienen. Het gebruik van empirisch en wetenschappelijke informatie ter onderbouwing van deze casuïstiek is noodzakelijk om te voorkomen dat er wordt gehandeld op basis van oversimplificaties ten aanzien van kwetsbaarheid.

Het laatste hoofdstuk van het proefschrift verbindt de afzonderlijke hoofdstukken met elkaar en beargumenteert, kort samengevat, dat de Belgische 'derde-weg'-aanpak een interessante oplossing biedt voor de gegronde kritiek op de juridische tweedeling tussen mensensmokkel en mensenhandel. De unieke Belgische benadering gaat immers voorbij aan de dichotomie door de onrechtvaardige ongelijkheid in termen van bescherming tussen beide verschijnselen te onderkennen. Desalniettemin maakt de case study duidelijk dat de beschermde aanpak momenteel niet veel wordt gebruikt en benadrukt de complexe dynamiek achter de schaarse toepassing van de aanpak en de consequenties hiervan voor de gesmokkelde migranten die door de Belgische jurisdictie reizen. Het laatste hoofdstuk behandelt het belang van het *transit* element dat aantoonbaar de meest cruciale theoretische en empirische bijdrage van het proefschrift aan de literatuur omtrent mensensmokkel, mensenhandel en meer in het algemeen aan de studie over grenzen en mobiliteit vormt. Naast het benoemen van de beperkingen van deze studie, de aanbevelingen voor verder onderzoek en praktische oplossingen om de bescherming te verbeteren, benadrukt de conclusie de concrete gevolgen van vaste juridische categorieën voor het leven en de ervaringen van migranten tijdens hun reis. Ondanks de erkenning van juridische categorieën als noodzakelijk kwaad om individuen noodrechten en bescherming te bieden, benadrukt het onderzoek dat juridische categorieën kritisch moeten worden benaderd en grondig moeten worden geanalyseerd – en dus ook mogelijk moeten worden bijgesteld – in het licht van de mobiliteitspraktijk zoals ervaren door betrokken actoren. Gezien de complexe positie van mensensmokkel op het snijvlak van irreguliere migratie en mensenhandel, moet beleid omtrent deze drie ingewikkelde fenomenen, in plaats van een onafhankelijke en op zichzelfstaande koers te volgen, op holistische en structurele wijze doordacht en benaderd worden.

General Bibliography

Aas, K. (2011). 'Crimmigrant'bodies and bona fide travelers: Surveillance, citizenship and global governance. *Theoretical criminology*, *15*(3), 331-346.

Aas, K. (2014). Bordered penality: Precarious membership and abnormal justice. *Punishment & Society*, *16*(5), 520-541.

Aas, K., & Gundhus, H. (2015). Policing humanitarian borderlands: Frontex, human rights and the precariousness of life. *British journal of criminology*, *55*(1), 1-18.

Abel, R. L. (1973). Law books and books about law. *Stanford Law Review* 26, 175-228.

Abels, G., & Behrens, M. (2009). Interviewing experts in political science: A reflection on gender and policy effects based on secondary analysis. In A. Bogner, B. Littig, & W. Menz (Eds.), *Interviewing experts* (pp. 138-156). Palgrave Macmillan.

Aberbach, J. & Rockman, B. (2002) Conducting and coding elite Interviews, *Political Science and Politics, 35*(4), 673-676.

Achilli, L. (2016). Irregular migration to the EU and human smuggling in the Mediterranean: the nexus between organized crime and irregular migration. In IEMed (ed.), *IEMed Mediterranean yearbook 2016 : mobility and refugee crisis in the Mediterranean* (pp. 98-103), Migration Policy Centre.

Achilli, L., and Sanchez, G. (2017). What does it mean to disrupt the business models of people smugglers? Policy Briefs, 09, Migration Policy Centre. http://hdl.handle.net/1814/46165.

Achilli, L. (2018). *The human smuggling industry : nuances and complexities*, BTI Institute DHS Symposium Series, Migration Policy Centre, *14*, http://hdl.handle.net/1814/60087.

Achilli, L., & Tinti, A. (2022). Debunking the smuggler-terrorist nexus: human smuggling and the Islamic State in the Middle East. *Studies in Conflict & Terrorism*, *45*(5-6), 463-478.

Adamson, F. (2006). Crossing borders: International migration and national security. *International security*, *31*(1), 165-199.

Alagna, F. (2020). *Shifting governance making policies against migrant smuggling across the EU, Italy and Sicily* [Doctoral dissertation, Radboud University Nijmegen] Radboud Repository.

Alagna, F. (2022). So much promise, so little delivery: evidence-based policy-making in the EU approach to migrant smuggling. *Journal of European Integration*, 1-17.

Albahari, M. (2018). From right to permission: Asylum, Mediterranean migrations, and Europe's war on smuggling. *Journal on Migration and Human Security*, *6*(2), 121-130.

Algoet, I. (2018). La traite des êtres humains : une nouvelle Hydre de Lerne ? Discours de rentrée prononcé à l'occasion de la rentrée de la cour du travail de Mons, le 4 septembre 2017. *Droit Pénal de l'Entreprise 1,* 3-17.

Aliverti, A. (2020). Benevolent policing? Vulnerability and the moral pains of border controls. *The British Journal of Criminology*, *60*(5), 1117-1135.

Allsopp, J. (2016). The European Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: measuring the impact on the whole community. In E. Guild, S. Carrera, J. Allsopp, R. Andrijasevic, M. Collyer, A. Dimitriadi, A. Jokinen, A. Leerkes, M. Manieri, J. Muraszkiewicz, M. Ruete, A. Spena & S. Spencer, S. (Eds). Irregular migration, trafficking and smuggling of human beings: Policy Dilemmas in the EU (pp. 47-57). CEPS Paperback. *http://aei.pitt.edu/72834/.*

Alshenqeeti, H. (2014). Interviewing as a data collection method: A critical review. *English Linguistics Research*, *3*(1), 39-45.

Amigoni, L., Molinero, C., & Vergnano, C. (2021). Smugglers and smuggled migrants: Amid Sudanese passeurs in the border regime of Ventimiglia. In In L. Amigoni, S. Aru, S., I. Bonnin, G. Proglio, G., C. Vergnano (Eds.), *Debordering Europe* (pp. 137-158). Palgrave Macmillan, Cham.

Andersson, R. (2014). *Illegality, Inc.: Clandestine migration and the business of bordering Europe*. University of California Press.

Andersson, R. (2016). Europe's failed 'fight'against irregular migration: ethnographic notes on a counterproductive industry. *Journal of Ethnic and Migration Studies*, *42*(7), 1055-1075.

Andreas, P., & Price, R. (2001). From war fighting to crime fighting: Transforming the American national security state. *International Studies Review*, *3*(3), 31-52.

Andreas, P. (2021). The illicit trade and conflict connection: Insight from US history. In M. Gallien, & F. Weigand (Eds), *The Routledge Handbook of Smuggling* (pp. 355-368). Routledge.

Andrijasevic, R. (2010). *Migration, agency and citizenship in sex trafficking*. Springer.

Angeli, D., & A. Triandafyllidou. (2016). Migrant smuggling in Europe. In M. McAuliffe, & F. Laczko (Eds), *Migrant smuggling data and research: A global review of the emerging evidence base* (pp. 105-136). International Organisation for Migration.

Aradau, C., & Van Munster, R. (2007). Governing terrorism through risk: Taking precautions,(un) knowing the future. *European journal of international relations*, *13*(1), 89-115.

Aronowitz, A. (2009). *Human trafficking, human misery: The global trade in human beings*. Greenwood Publishing Group.

Ansems de Vries, L., Carrera, S., & Guild, E. (2016). Documenting the migration crisis in the Mediterranean: Spaces of transit, migration management and migrant agency. *CEPS Paper in Liberty and Security in Europe*, *94*.

Ansems De Vries, L. & Guild, E. (2019). Seeking refuge in Europe: spaces of transit and the violence of migration management. *Journal of ethnic and migration studies*, *45*(12), 2156-2166.

Arrouche, K. Fallone, A., & Vosyliūtė, L. (2021, December). Between politics and inconvenient evidence: Assessing the renewed EU action plan. *CEPS Policy Brief.* https://www.ceps.eu/wp-content/uploads/2021/12/CEPS-PB2021-01_Between-politics-and-inconvenient-evidence.pdf.

Aziani, A. (2021). The heterogeneity of human smugglers: a reflection on the use of concepts in studies on the smuggling of migrants. *Trends in Organized Crime*, 1-27.

Bacchi, C. (2009). *Analysing policy*. Pearson Higher Education.

Baird, T. (2013). *Theoretical approaches to human smuggling*, DIIS Working Paper 10.

Baird, T. (2014). Human smuggling and violence in the east Mediterranean. *International Journal of Migration, Health and Social Care, 10*(3), 121-133.

Baird, T. (2016a). *Human smuggling in the Eastern Mediterranean*. Routledge.
Baird, T. (2016b). Defining human smuggling in migration research: An appraisal and critique. *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS*, *30*.
Baird, T., & Van Liempt, I. (2016). Scrutinising the double disadvantage: Knowledge production in the messy field of migrant smuggling. *Journal of Ethnic and Migration Studies*, *42*(3), 400-417.
Barbero, I. (2018). The European Union never got rid of its internal controls: a case study of detention and readmission in the French-Spanish border. *European Journal of Migration and Law*, *20*(1), 1-27.
Barbero, I., and Donadio, G. (2019). La externalización interna de las fronteras en el control migratorio en la UE. *Revista CIDOB d'Afers Internacionals, 122,* 137-162.
Barbero, I. (2020). A ubiquitous border for migrants in transit and their rights: analysis and consequences of the reintroduction of internal borders in France. *European Journal of Migration and Law*, *22*(3), 366-385.
Barbero, I. (2021). When return orders are more than just a deportation receipt: Transit migration and socio-legal meanings of administrative documents. *Journal of Immigrant & Refugee Studies*, 1-14.
Barbero, I., & Blanco, C. (2022). Migration in transit: A challenging concept for public and social policy. *Calitatea Vietii*, *33*(2), 1-16.
Basilien-Gainche, M. L. (2015). The EU external edges. *The Journal of Territorial and Maritime Studies*, *2*(1), 97-117.
Bastenier, A. (2021). La solidarité n'est pas un crime. *La Revue Nouvelle*, *5,* 9-12.
Bauman, Z. (2000). *Liquid modernity*. Cambridge: Polity Press.
Baumgärtel, M. (2020). Facing the challenge of migratory vulnerability in the European Court of Human Rights. *Netherlands Quarterly of Human Rights*, *38*(1), 12-29.
BBC. (2022, August 23). Channel migrants : Almost 1,300 migrants cross Channel in new record. *BBC News*. https://www.bbc.com/news/uk-england-kent-62644946.
Beck, U. (1992). From industrial society to the risk society: Questions of survival, social structure and ecological enlightenment. *Theory, Culture & Society*, *9*(1), 97-123.
Belloni, M. (2019). The big gamble: The migration of Eritreans to Europe. *Ethnic and Racial Studies*, *44*(3), 467-469.
Ben-Arieh, G., & Heins, V. M. (2021). Criminalisation of kindness: narratives of legality in the European politics of migration containment. *Third World Quarterly*, *42*(1), 200-217.
Benayad, M. (2022, April 29). Trafic de drogue à Bruxelles: "Avec les effectifs actuels, il faudra huit ans pour traiter ces dossiers'. *La Libre Belgique.* https://www.lalibre.be/belgique/societe/2022/04/29/trafic-de-drogue-a-bruxelles-avec-les-effectifs-actuels-il-faudra-huit-ans-pour-traiter-ces-dossiers-PHLEJ7G7DRCFVNSFAFBPOOSAPE/.
Bigo, D. (2002). Security and immigration: Toward a critique of the governmentality of unease. *Alternatives*, *27*, 63-92.
Bigo, D. (2005). La mondialisation de l'(in) sécurité? Réflexions sur le champ des professionnels de la gestion des inquiétudes et analytique de la transnationalisation des processus d'(in) sécurisation. *Cultures & Conflits, 58,* 53-101.
Black, J. (1997). New institutionalism and naturalism in socio-legal analysis: Institutionalist approaches to regulatory decision making, *Law & Policy, 19*(1), 51-93.
Black, J. (2001). Managing discretion. Penalties: Policy, principles and practice in government regulation. An ARLC Conference Papers, Law Department and Centre for

the Analysis of Risk and Regulation, London School of Economics. https://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black21.pdf.

Bloch, A., & Schuster, L. (2002). Asylum and welfare: contemporary debates. *Critical Social Policy*, *22*(3), 393-414.

Blocq, D., & van der Woude, M. (2018). Making sense of the Law and Society movement. *Erasmus Law Review*, *11*(2), 134-141.

Blommaert, J. (2011). The long language-ideological debate in Belgium. *Journal of Multicultural Discourses*, *6*(3), 241-256.

Boels, D., Ponsaers, P. (2011). Knelpunten in de opsporing en vervolging van mensenhandel en mensensmokkel. Casestudie binnen een gerechtelijk arrondissement. *Panopticon*, *32*(5), 33-49.

Bogner, A., Littig, B., & Menz, W. (Eds.). (2009). *Interviewing experts*. Springer.

Bogner, A., Littig, B., & Menz, W. (2018). Generating qualitative data with experts and elites. In U. Flick (Ed.), *The SAGE handbook of qualitative data collection* (pp. 652-657). SAGE Publications.

Boswell, C. (2003). The 'external dimension'of EU immigration and asylum policy. *International affairs*, *79*(3), 619-638.

Boswell, C. (2011). Migration control and narratives of steering. *The British Journal of Politics and International Relations*, *13*(1), 12-25.

Boswell, C., Geddes, A., & Scholten, P. (2011). The role of narratives in migration policymaking: A research framework. *The British Journal of Politics and International Relations*, *13*(1), 1-11.

Bosworth, M. (2008). Border control and the limits of the sovereign state. *Social & Legal Studies*, *17*(2), 199-215.

Bosworth, M., & Guild, M. (2008). Governing through migration control: Security and citizenship in Britain. *The British journal of criminology*, *48*(6), 703-719.

Bosworth, M. (2017). Penal humanitarianism? Sovereign power in an era of mass migration. *New Criminal Law Review*, *20*(1), 39-65.

Bouagga, Y. (2021). Tactiques du franchissement des frontières: contournements et résistances face aux contrôles à Calais. *Champ pénal/Penal field*, 23. https://halshs.archives-ouvertes.fr/halshs-03255265.

Bourbeau, P. (2011). *The securitization of migration: A study of movement and order*. Taylor & Francis.

Bowen, G. (2009). Document analysis as a qualitative research method. *Qualitative Research Journal*, *9*(2), 27-40.

Brandariz, J. A. (2021). An expanded analytical gaze on penal power: Border criminology and punitiveness. *International Journal for Crime, Justice and Social Democracy*, *10*(2), 99-112.

Brandariz, J. A. (2022). Criminalization or instrumentalism? New trends in the field of border criminology. *Theoretical Criminology*, *26*(2), 285-303.

Brekke, J. P., & Brochmann, G. (2015). Stuck in transit: secondary migration of asylum seekers in Europe, national differences, and the Dublin regulation. *Journal of Refugee Studies*, *28*(2), 145-162.

Brière, C., & Weyembergh, A. (2014). The EU and the fight against trafficking in human beings. In B. de Sousa Santos, M. Duarte, K. Grot, L. Pop, E. Savona, A. Weyembergh, & C. Pérez (Eds). *The fight against THB in the EU: Promoting legal cooperation and victims' protection* (pp. 63-102). https://www.transcrime.it/wp-content/uploads/2016/01/THB_CoopToFight.pdf.

Brière, C., & de Ghellinck, I. (2014). Belgium national case. In B. de Sousa Santos, M. Duarte, K. Grot, L. Pop, E. Savona, A. Weyembergh, & C. Pérez (Eds). *The fight against THB in the EU: promoting legal cooperation and victims' protection* (pp. 149-220). https://www.transcrime.it/wp-content/uploads/2016/01/THB_CoopToFight.pdf.

Brigden, N. and Mainwaring, C. (2016). Matryoshka journeys: im/mobility during migration. *Geopolitics*, *21*(2), 407-434.

Broad, R., & Muraszkiewicz, J. (2020). The investigation and prosecution of traffickers: Challenges and opportunities (pp. 707-723). In J. Winterdyk & J. Jones (Eds.), *The Palgrave international handbook of human trafficking* (pp. 707-723). Springer International Publishing.

Brouwer, J. (2020). *Detection, detention, deportation: criminal justice and migration control through the lens of crimmigration*. [Doctoral dissertation, Leiden University]. Leiden University Repository.

Brown, W. (2010). *Walled states, waning sovereignty*. Princeton University Press.

Brunovskis, A., and Surtees, R. (2008). Agency or illness—The conceptualization of trafficking: victims' choices and behaviors in the assistance system. *Gender, Technology and Development*, *12*(1), 53-76.

Brunovskis, A., & Skilbrei, M. L. (2016). Two birds with one stone? Implications of conditional assistance in victim protection and prosecution of traffickers. *Anti-Trafficking Review*, (6), 13-30.

Brunovskis, A., & Surtees, R. (2019). Identifying trafficked migrants and refugees along the Balkan route. Exploring the boundaries of exploitation, vulnerability and risk. *Crime, Law and Social Change*, *72*(1), 73-86.

Buzan, B., Wæver, O., Wæver, O., & De Wilde, J. (1998). *Security: A new framework for analysis*. Lynne Rienner Publishers.

Calavita, K. (1992). *Inside the state: The Bracero Program, immigration, and the INS*. Routledge.

Calavita, K. (2010). *Invitation to law and society: An introduction to the study of real law*. University of Chicago Press.

Callens, M., Bouckaert, G., & Parmentier, S. (2016). Intra-and Interorganisational trust in a judicial context: an exploratory case study. In A. Hondeghem, X. Rousseaux, & E. Schoenaers (Eds), *Modernisation of the criminal Justice chain and the judicial system* (pp. 115-130). Springer, Cham.

Campana, P., & Varese, F. (2016). Exploitation in human trafficking and smuggling. *European Journal on Criminal Policy and Research*, *22*(1), 89-105.

Campana, P. (2020). Human smuggling: Structure and mechanisms. *Crime and Justice*, *49*(1), 471-519.

Campana, P., & Gelsthorpe, L. (2021). Choosing a smuggler: Decision-making amongst migrants smuggled to Europe. *European Journal on Criminal Policy and Research*, *27*(1), 5-21.

Campion, J. (2018). Les logiques de la police locale depuis l'indépendance de la Belgique. *Journal de la Police, 3*, 22-26.

Carling, J. (2002). Migration in the age of involuntary immobility: Theoretical reflections and Cape Verdean experiences. *Journal of Ethnic and Migration Studies*, *28*(1), 5-42.

Carling, J., Gallagher, A., & Horwood, C. (2015). Beyond definitions: global migration and the smuggling-trafficking nexus. *Regional Mixed Migration Secretariat*. Danish Refugee Council.

Carrera, S., Sanchez, G., Vosyliute, L., Smialowski, S., & Allsopp, J. (2018). *Fit for purpose?: the Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update*. European Parliament, Policy Department of Citizens' Rights and Constitutional Affairs, Study for the PETI committee. Migration Policy Centre. http://hdl.handle.net/1814/60998.

Carrera, S., Vosyliute, L., Mitsilegas, V., & Allsopp, J. (2019). *Policing humanitarianism: EU policies against human smuggling and their impact on civil society*. Hart Publishing.

Carrera, S., Stefan, M., Cortinovis, R., & Luk, NC. (2019, December). When mobility is not a choice. Problematising asylum seekers' secondary movements and their criminalisation in the EU. CEPS paper.

Carrera, S., & Geddes, A. (2021). The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees. Migration Policy Centre, https://hdl.handle.net/1814/70600.

Cartuyvels, Y. (2004). Police et parquet en Belgique: vers une reconfiguration des pouvoirs?. *Droit et Société*, (3), 523-542.

Carson, L., & Edwards, K. (2011). Prostitution and sex trafficking: What are the problems represented to be? A discursive analysis of law and policy in Sweden and Victoria, Australia. *Australian Feminist Law Journal*, *34*(1), 63-87.

Casella Colombeau, S. (2020). Crisis of Schengen? The effect of two 'migrant crises'(2011 and 2015) on the free movement of people at an internal Schengen border. *Journal of Ethnic and Migration Studies*, *46*(11), 2258-2274.

Castagnone, E. (2011). Transit migration : a piece of the complex mobility puzzle. The case of Senegalese migration. Cahiers de l'Urmis, 13, http://journals.openedition.org/urmis/927.

Ceccorulli, M., & Lucarelli, S. (2017). Migration and the EU Global strategy: narratives and dilemmas. *The International Spectator*, *52*(3), 83-102.

Ceccorulli, M. (2018). On Protection and Justice: The Proposals for Reform of the Common European Asylum System. *GLOBUS Research Paper*, *4*.

Chacón, J. (2010). Tensions and trade-offs: Protecting trafficking victims in the era of immigration enforcement. *University of Pennsylvania Law Review*, *158*(6), 1609-1653.

Chacón, J. M. (2014). Producing liminal legality. *Denver University Law Review, 92(4), 709-767*.

Chapkis, W. (2003). Trafficking, migration, and the law: Protecting innocents, punishing immigrants. *Gender & Society*, *17*(6), 923-937.

Charnysh, V., Lloyd, P., & Simmons, B. (2015). Frames and consensus formation in international relations: The case of trafficking in persons. *European Journal of International Relations*, *21*(2), 323-351.

Chuang, J. A. (2014). Exploitation creep and the unmaking of human trafficking law. *American Journal of International Law*, *108*(4), 609-649.

Ciré. (2019, February). Migrants en transit en Belgique. Recommandations pour une approche plus humaine. https://www.cire.be/publication/migrants-en-transit-en-belgique/#:~:text=Qui%20sont%20ces%20personnes%3F,d'Irak%2C%20de%20Syrie%E2%80%A6.

Claes, T. (2018, March 1). Van mensen en (transit)migranten. *MO Magazine*. https://www.mo.be/wereldblog/van-mensen-en-transitmigranten.

Clesse, C. E. (2013). *La traite des êtres humains. Droit belge éclairé des législations française, luxembourgeoise et suisse*. Larcier.

Cole, A. (2016). All of us are vulnerable, but some are more vulnerable than others: The political ambiguity of vulnerability studies, an ambivalent critique. *Critical Horizons, (17)2*, 260-277.

Collyer, M., Düvell, F., de Haas, H., and Molodikova, I., (2014). Introduction Transit Migration and European Spaces. In F. Düvell, I. Molodikova & M. Collyer (Eds), *Transit migration in Europe* (pp. 13-33). Amsterdam University Press.

Collyer, M., & King, R. (2016). Narrating Europe's migration and refugee 'crisis'. *Human Geography*, *9*(2), 1-12.

Commission Justice et Paix. (2010). Aider les sans-papiers, délit ou solidarité ? https://www.justicepaix.be/aider-les-sans-papiers-delit-ou-solidarite/.

Comité P. (2019). Le Contrôle et la Détention de Transmigrants par la Police à l'Occasion d'Arrestations Administratives Massives. https://comitep.be/document/onderzoeksrapporten/2019-02-06%20transmigrants.pdf.

Constantinou, A. (2013). Human trafficking on trial: Dissecting the adjudication of sex trafficking cases in Cyprus. *Feminist Legal Studies*, *21*(2), 163-183.

Cornelisse, G., & Campesi, G. (2021). The European Commission's New Pact on Migration and Asylum: Horizontal substitute impact assessment. European Parliament Research Service.

Côté-Boucher, K., Infantino, F., & Salter, M. (2014). Border security as practice: An agenda for research. *Security Dialogue*, *45*(3), 195-208.

Crépeau, F. (2003). The fight against migrant smuggling: Migration containment over refugee protection. In J. van Selm, K Kamanga, J. Morrison, A. Nadig, S. Spoljar-Vrzina & L. van Willigen, *The Refugee Convention at Fifty. A View from Forced Migration Studies.* (pp. 173-185). Lexington Books.

Cusumano, E. (2021). United to rescue? Humanitarian role conceptions and NGO-NGO interactions in the Mediterranean Sea. *European Security*, *30*(4), 547-568.

D'Amato, S., & Lucarelli, S. (2019). Talking migration: Narratives of migration and justice claims in the European migration system of governance. *The International Spectator*, *54*(3), 1-17.

Dandurand, Y., & Jahn, J. (2020). The failing international legal framework on migrant smuggling and human trafficking. In J. Winterdyk & J. Jones (Eds.), *The Palgrave international handbook of human trafficking* (pp.783-800). Springer International Publishing.

Darian-Smith, E. (2013). *Laws and societies in global contexts: Contemporary approaches*. Cambridge University Press.

Dauvergne, C. (2004). Sovereignty, migration and the rule of law in global times. *The Modern Law Review*, *67*(4), 588-615.

Dauvergne, C. (2008). *Making people illegal: What globalization means for migration and law*. Cambridge University Press.

Davies, T., Isakjee, A., & Dhesi, S. (2017). Violent inaction: The necropolitical experience of refugees in Europe. *Antipode*, *49*(5), 1263-1284.

de Coninck, J. (2022, January 14). M.H and Others v. Croatia: Resolving the jurisdictional and evidentiary black hole for expulsion cases? *Strasbourg Observer Blog*. https://strasbourgobservers.com/2022/01/14/mh-and-others-v-croatia-resolving-the-jurisdictional-and-evidentiary-black-hole-for-expulsion-cases.

De Genova, N. (2017). *The borders of "Europe": Autonomy of migration, tactics of bordering*. Duke University Press.

Delgrange, P., & Stein, O. (2019). L'incrimination du trafic des êtres humains et de l'aide à l'entrée et au séjour : protection des victimes ou lutte contre l'immigration irrégulière ? Le point sur le cadre légal, *Revue du Droit des Etrangers, 200*, 485-500.

Dembour, M-B. (2021). The migrant case law of the European Court of Human Rights. Critique and way forward. In B. Çalý, L. Biancu, I. Motoc (Eds) *Migration and the European Convention on Human Rights* (pp. 19-40). Oxford University Press.

Demir, O., Sever, M., and Kahya, Y. (2017). The social organisation of migrant smugglers in Turkey: Roles and functions. *European Journal on Criminal Policy and Research*, *23*(3), 371-391.

de Massol de Rebetz, R. (2018). Transmigrant: One word to hide them all. Oxford. *Border Criminologies*. https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/12/transmigrant-one.

Den Heijer, M. (2013). Shared responsibility before the European Court of Human Rights. *Netherlands International Law Review*, *60*(3), 411-440.

Den Heijer, M. (2013). Procedural aspects of shared responsibility in the European Court of Human Rights. *Journal of International Dispute Settlement*, *4*(2), 361-383.

Depraetere, A., & Oosterlynck, S. (2017). 'I finally found my place': a political ethnography of the Maximiliaan refugee camp in Brussels. *Citizenship Studies*, *21*(6), 693-709.

Derluyn, I., Watters, C., Mels, C., & Broekaert, E. (2014). 'We are all the same, coz exist only one earth, why the border exist': Messages of migrants on their way. *Journal of Refugee Studies*, *27*(1), 1-20.

Derluyn, I., & Broekaert, E. (2005). On the way to a better future: Belgium as transit country for trafficking and smuggling of unaccompanied minors1. *International Migration*, *43*(4), 31-56.

De Ridder, S., & van der Woude, M. (2016). Changing practices regarding the implementation of entry bans in Belgian migration policy since 1980. In M.J. Guia, R. Koulish, & V. Mitsilegas (Eds), *Immigration Detention, Risk and Human Rights* (pp. 171-183). Springer.

De Stoop, C. (1994). *They Are So Sweet, Sir: The cruel world of traffickers in Filipinas and other women*. Limitless Asia.

De Sousa Santos, B. (1987). Law: A map of misreading. Toward a postmodern conception of law. *Journal of Law and Society*, 279-302.

Deterding, N. M., & Waters, M. C. (2021). Flexible coding of in-depth interviews: A twenty-first-century approach. *Sociological Methods & Research*, *50*(2), 708-739.

De Valkeneer, C. (2016). *Manuel de l'organisation policière*. Éditions Larcier.

Doezema, J. (2002). Who gets to choose? Coercion, consent, and the UN Trafficking Protocol. *Gender & Development*, *10*(1), 20-27.

Donadio, G. (2021). The irregular border: theory and praxis at the border of Ventimiglia in the Schengen Age. In L. Amigoni, S. Aru, I. Bonnin, G. Proglio, & C. Vergnano (Eds), *Debordering Europe* (pp. 109-133). Palgrave Macmillan, Cham.

Döringer, S. (2021). 'The problem-centred expert interview'. Combining qualitative interviewing approaches for investigating implicit expert knowledge. *International Journal of Social Research Methodology*, *24*(3), 265-278.

Dörrenbächer, N. (2018). Frontline uses of European Union (EU) law: a parallel legal order? How structural discretion conditions uses of EU law in Dutch and German migration offices. *Journal of Public Policy*, *38*(4), 455-479.

Dörrenbächer, N., & Mastenbroek, E. (2019). Passing the buck? Analyzing the delegation of discretion after transposition of European Union law. *Regulation and Governance*, *13*(1), 70-85.

Dimitriadi, A. (2016). The interrelationship between trafficking and irregular migration. In E. Guild, S. Carrera, J. Allsopp, R. Andrijasevic, M. Collyer, A. Dimitriadi, A. Jokinen, A. Leerkes, M. Manieri, J. Muraszkiewicz, M. Ruete, A. Spena & S. Spencer, S. (Eds). Irregular migration, trafficking and smuggling of human beings: Policy dilemmas in the EU (pp. 64-69). CEPS Paperback. *http://aei.pitt.edu/72834/.*

Düvell, F. (2012). Transit migration: A blurred and politicised concept. *Population, Space and place*, *18*(4), 415-427.

Düvell, F. (2014). Transit Migration in the European Migration Spaces Politics. Determinants and dynamics. In F. Düvell, I. Molodikova & M. Collyer (Eds), *Transit migration in Europe* (pp. 209-236). Amsterdam University Press.

Dworkin, R. (1977). *Taking rights seriously*. Harvard University Press.

ECPAT. (2019, March). Precarious journeys: Mapping vulnerabilities of victims of trafficking from Vietnam to Europe. https://www.ecpat.org.uk/precarious-journeys.

Edmond-Pettitt, A. (2018a). Voices from the 'Jungle': stories from the Calais refugee camp. *Race & Class*, *60*(2), 129-131.

Edmond-Pettitt, A. (2018b). Territorial policing and the 'hostile environment'in Calais: from policy to practice. *Justice, Power and Resistance*, *2*(2), 314-334.

Edwards, R., & Holland, J. (2013). *What is qualitative interviewing?* Bloomsbury Publishing.

Eeckhaut, M., & Vanhecke, N. Het geld is op. Er is te veel gesneden': Noodkreet van de baas van de federale politie. *De Standaard*. https://www.standaard.be/cnt/dmf20220410_97735316.

European Commission. (2016, September 14). Enhancing security in a world of mobility: Improved information exchange in the fight against terrorism and stronger external borders. COM(2016) 602 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A602%3AFIN.

European Commission. (2017, March 22). Commission staff working document. Refit evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD (2017) 117 final.

European Commission. (2021, June 2). Towards a stronger and more resilient Schengen Area: questions and answers. European Commission.https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_2707.

European Migrant Smuggling Centre. (2019). 3rd annual activity report 2018. Europol. https://www.europol.europa.eu/publications-events/publications/emsc-3rd-annual-activity-report-%E2%80%93-2018.

European Migrant Smuggling Centre. (2020). 4th annual activity report 2019. Europol. https://www.europol.europa.eu/publications-events/publications/emsc-4th-annual-activity-report-%E2%80%93-2020.

European Migrant Smuggling Centre. (2021). 5th annual activity report 2020. Europol. https://www.europol.europa.eu/publications-events/publications/european-migrant-smuggling-centre-5th-annual-report-%E2%80%93-2021.

European Migration Network. (2016). *Annual report on asylum and migration policy in Belgium 2015*. https://emnbelgium.be/publication/annual-report-asylum-and-migration-policy-belgium-and-eu-2015-emn.

European Migration Network. (2017). *Annual report on asylum and migration policy in Belgium 2016*. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a_belgium_annual_policy_report_2016_en.pdf.

European Migration Network. 2020. *Annual report on asylum and migration policy in Belgium 2019*. https://emnbelgium.be/sites/default/files/publications/Belgian%20annual%20report%20on%20asylum%20and%20migration%202019_1.pdf.

European Parliament. (2017, October). Briefing. Secondary movements of asylum-seekers in the EU asylum system. European Parliament. https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf.

European Parliament. (2019, December). Legislative train. 8 Towards a new policy on migration. https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/towards-a-new-policy-on-migration/file/eunavfor-med-operation-sophia.

European Parliament. (2022). Factsheet. An Area of Freedom, Security and Justice : general aspects. https://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.1.pdf.

Europol. (2011). OCTA 2011. EU organized crime threat assessment. https://www.europol.europa.eu/activities-services/main-reports/octa-2011-eu-organised-crime-threat-assessment.

Europol. (2016). *Migrant Smuggling in the EU*. https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu.

Evrard, E., Nienaber, B., & Sommaribas, A. (2020). The temporary reintroduction of border controls inside the Schengen Area: Towards a spatial perspective. *Journal of Borderlands Studies*, *35*(3), 369-383.

Faist, T. (2006). International migration and security before and after 11 September 2001. *The Immigration Reader*, 609-617.

Farcy, J. B., & Desguin, N. (2019). Transmigrant: un vocable réducteur pour des réalités juridiques multiples. *Revue du Droit des Etrangers*, *196*, 685-700.

Fargues, P., & Bonfanti, S. (2014). When the best option is a leaky boat: why migrants risk their lives crossing the Mediterranean and what Europe is doing about it. *Migration Policy Centre, Policy Briefs* 5. http://hdl.handle.net/1814/33271.

Fassi, E. (2020). The EU, migration and global justice. Policy narratives of human smuggling and their normative implications. *Rivista Trimestrale di Scienza dell'Amministrazione*, *1*, 1-30.

Fassin, D. (2005). Compassion and repression: The moral economy of immigration policies in France. *Cultural anthropology*, *20*(3), 362-387.

Fassin, D. (2011). Policing borders, producing boundaries. The governmentality of immigration in dark times. *Annual Review of Anthropology*, *40*(1), 213-226.

Fekete, L. (2018). Migrants, borders and the criminalisation of solidarity in the EU. *Race & Class*, *59*(4), 65-83.

Fineman, M. (2008). The vulnerable subject: Anchoring equality in the human condition. *Yale Journal of Law & Feminism (20)*1, 1-23.

Fineman, M. (2017). Vulnerability and inevitable inequality. *Oslo Law Review*, *4*(3), 133-149.

Fontana, I. (2022). The human (in) security trap: how European border (ing) practices condemn migrants to vulnerability. *International Politics*, *59*(3), 465-484.

Ford, R. T. (1999). Law's territory (a history of jurisdiction). *Michigan Law Review*, *97*(4), 843-930.

Fouladvand, S. (2018). Decentering the prosecution-oriented approach: Tackling both supply and demand in the struggle against human trafficking. *International journal of Law, Crime and Justice*, *52*, 129-143.

Flyvbjerg, B. (2006). Five misunderstandings about case-study research. *Qualitative Inquiry, 12*(2), 219-245.

FRA. (2014, March 26). Criminalisation of migrants in an irregular situation and of persons engaging with them. https://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them.

France Terre d'Asile (2017, April). Identification et protection des victimes de la traite dans un contexte de migration de transit. https://www.france-terre-asile.org/toutes-nos-publications/details/1/212-identification-et-protection-des-victimes-de-la-traite-dans-un-contexte-de-migration-de-transit.

Frangež, D., and Bučar Ručman, A. (2017). Specific forms of human trafficking in Slovenia: Overview and preventive measures. *Police Practice and Research*, *18*(3), 230-244.

Franko, K. (2017). Criminology, punishment, and the state in a globalized society. In A. Liebling; S. Maruna & L. McAra (Eds), *The Oxford handbook of criminology* (pp. 353-372). Oxford University Press.

Franko, K. (2019). *Globalization and crime*. Sage.

Franko, K., van der Woude, M., and Barker, V. (2019). Beacons of tolerance dimmed?: Migration, criminalization, and inhospitality in welfare states. In S. Bendixsen, & T. Wyller (Eds.) *Contested hospitalities in a time of migration* (pp. 55-75). Routledge.

Franko, K. (2020). *The crimmigrant other: Migration and penal power*. Routledge.

Franko, K. (2021). The two-sided spectacle at the border: Frontex, NGOs and the theatres of sovereignty. *Theoretical Criminology*, *25*(3), 379-399.

Frontex. (2020, May 27). Consolidated annual activity report 2019. Reg. no. 5139. https://frontex.europa.eu/assets/Key_Documents/Annual_report/2019/General_Report_2019.pdf.

Frontex (2022, March 23). Frontex deploys its own plane in the Channel. *Frontex Press Release*. https://frontex.europa.eu/media-centre/news/news-release/frontex-deploys-its-own-plane-in-the-channel-cHkg9q.

Gabrielli, L. (2014). Securitization of migration and human rights: frictions at the Southern EU borders and beyond. *Lidé mìsta*, *16*(2), 311-322.

Gallagher, A. (2001). Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis. *Human Rights Quarterly*, *23*, 975-1004.

Gallagher, A. (2006). Recent legal developments in the field of human trafficking: A critical review of the 2005 European Convention and related instruments. *European Journal of Migration and Law*, *8*(2), 163-189.

Gallagher, A. (2008). Human rights and human trafficking: Quagmire or firm ground – A response to James Hathaway. *Virginia Journal of International Law*, *49*, 789-848.

Gallagher, A. (2010). *The international law of human trafficking*. Cambridge University Press.

Gallagher, A., & David, F. (2014). *The international law of migrant smuggling*. Cambridge University Press.

Gallagher, A. (2015). Two cheers for the trafficking protocol. *Anti-Trafficking Review* 4, 14-32.

Gallagher, A. (2017). Trafficking in transnational criminal law. In R. Piotrowicz, C. Rijken, & B. Uhl (Eds.). *Routledge handbook of human trafficking* (pp. 21-40). Routledge.

Galligan, D. (1986) *Discretionary powers. A legal study of official discretion*. Clarendon Press.

Galisson, M. (2020). Deadly crossing and the militarisation of Britain's borders. The Institute of Race Relations. https://irr.org.uk/article/deadly-crossings/.

Gauci, J.P., & Stoyanova, V. (2018). The human rights of smuggled migrants and trafficked persons in the UN Global Compacts on Migrants and Refugees. *International Journal of Migration and Border Studies*, *4*(3), 222-235.

Geddes, A. (2001). International migration and state sovereignty in an integrating Europe. *International Migration*, *39*(6), 21-42.

Gerard, A., & Weber, L. (2019). 'Humanitarian borderwork': Identifying tensions between humanitarianism and securitization for government contracted NGOs working with adult and unaccompanied minor asylum seekers in Australia. *Theoretical Criminology*, *23*(2), 266-285.

Giddens, A. (1999). Risk and responsibility. *Modern Law Review.*, *62*(1), 1-10.

Glaser, B., & Strauss, A. (1967). The Discovery of grounded theory: Strategies for qualitative research. Aldline.

Gläser, J., & Laudel, G. (2009). On interviewing 'good' and 'bad' experts. In A. Bogner, B. Littig, & W. Menz (Eds.), *Interviewing experts* (pp. 117-137). Palgrave Macmillan UK.

Glick Schiller, N., Basch, L., & Blanc-Szanton, C. (1992). Transnationalism: A new analytic framework for understanding migration. *Annals of the New York academy of sciences*, *645*(1), 1-24.

Glick Schiller, N. (2012). Unravelling the migration and development web: Research and policy implications. *International Migration*, *50*(3), 92-97.

De Leval, G. & F. Georges. (2019). *Droit judiciaire. Institutions judiciaires. Tome 1*. Larcier.

Golini, A. (2008). Facts and problems of migratory policies. In J. Chamie, & L. Dall'Oglio (Eds), *International migration and development – Continuing the dialogue: Legal and policy perspectives* (pp. 89-102). International Organisation for Migration.

Gould, J. B., & Barclay, S. (2012). Mind the gap: The place of gap studies in sociolegal scholarship. *Annual Review of Law and Social Science*, *8*, 323-335.

GoŸdziak, E. M., & Vogel, K. M. (2020). Palermo at 20: A retrospective and prospective. *Journal of Human Trafficking*, *6*(2), 109-118.

Gready, P. (2004). Conceptualising globalisation and human rights: boomerangs and borders. *The International Journal of Human Rights*, *8*(3), 345-354.

Gregoriou, C., & Ras, I. A. (2018). Representations of transnational human trafficking: A critical review. In C. Gregoriou (Ed), *Representations of transnational human trafficking* (pp. 1-24). Palgrave Macmillan.

Group of Experts on Action against Trafficking in Human Being – GRETA. (2013). Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium. First evaluation round. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680630d0f.

Group of Experts on Action against Trafficking in Human Being – GRETA. (2017a). Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium. Second evaluation round. https://rm.coe.int/greta-2017-26-frg-bel-en/1680782ae0.

Group of Experts on Action against Trafficking in Human Being – GRETA. (2017b). Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France. Second evaluation round. https://rm.coe.int/greta-2017-17-fgr-fra-en/16807454bf.

Group of Experts on Action against Trafficking in Human Being – GRETA. (2018). 8th General report on GRETA's activities. Retrieved from https://rm.coe.int/8th-/168094b073.

Guild, E., & Minderhoud, P. (2006). *Immigration and criminal law in the European Union*. Brill Nijhoff.

Guild, E. (2010). *Criminalisation of migration in Europe: Human rights implications*. Commissioner for Human Rights, Council of Europe.

Guild, E., Brouwer, E., Groenendijk, K., and Carrera, S. (2015). What is happening to the Schengen borders? *CEPS Paper in Liberty and Security in Europe*, *86*, 1-23.

Guild, E., Carrera, S., Allsopp, J., Andrijasevic, R., Collyer, M., Dimitriadi, A., Jokinen, A., Leerkes, A., Manieri, M., J. Muraszkiewicz, Ruete, M., Spena, A., & and Spencer, S. (2016, February 22). *Irregular migration, trafficking and smuggling of human beings: Policy dilemmas in the EU.* CEPS Paperback, *http://aei.pitt.edu/72834/.*

Guillaume, T. (2021, February 1). Immersion dans un centre de la Croix-Rouge. *La Libre Belgique*. https://www.lalibre.be/belgique/societe/2021/02/01/ici-cest-le-confort-mais-a-20-heures-je-retourne-a-la-rue-immersion-dans-un-centre-de-la-croix-rouge-V4S7S4VQ4BAW3FJBBC25JZXBOQ/.

Guillaume, T. (2022, August 16). Certaines enquêtes pour traite d'êtres humains passent à la trappe, faute de moyens. *La Libre Belgique*. https://www.lalibre.be/belgique/societe/2022/08/16/certaines-enquetes-pour-traite-detres-humains-passent-a-la-trappe-faute-de-moyens-372IVWOQKNCALDH5LGJK3KHL6U/.

Guiraudon, V. (2008). Lutte contre les passeurs: une politique qui ne protège pas les victimes de l'immigration illégale. *Recueil Alexandries* 19. http://www.reseau-terra.eu/article860.html.

Guiraudon, V. (2010). *Les effets de l'européanisation des politiques d'immigration*. L'Harmattan.

Guiraudon, V. (2018). The 2015 refugee crisis was not a turning point: Explaining policy inertia in EU border control. *European Political Science*, *17*(1), 151-160.

Gülzau, F. (2021). A 'new normal' for the Schengen Area. When, where and why Member States reintroduce temporary border controls? *Journal of Borderlands Studies*, 1-19.

Hakiki, H., & Rodrik, D. (2021, November 29). M.H. v. Croatia: Shedding light on the pushback blind spot. VerfBlog. https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot.

Halliday, S., & Schmidt, P. (2004). *Human rights brough home : Socio-legal perspectives on human rights in the national context.* Bloomsbury Publishing.

Hardt, M. (2018). Les difficultés d'appréhension et espaces d'instrumentalisation de la lutte contre l'immigration irrégulière. Procès des douze: qui incrimine-t-on? *Annales de Droit de Louvain*, 78(3), 487-541.

Hardt, M. (2019). Le procès dit 'de la solidarité 'comme révélateur des faiblesses du cadre légal en matière de lutte contre l'aide à l'immigration irrégulière. *Cahiers de l'EDEM*.

Harvey, W. (2011) Strategies for conducting elite interviews, in *Qualitative Research*, 11(4), 431-441.

Hathaway, J. C. (2008). The human rights quagmire of human trafficking. *Virginia Journal of International Law*, *49*, 1-59.

Haynes, D. F. (2009). Exploitation nation: The thin and grey legal lines between trafficked persons and abused migrant laborers. *Notre Dame Journal of Law Ethics and Public Policy*, *23*, 1-72.

Hawkins, K. (1995). The use of legal discretion: Perspectives from law and social science. In K. Hawkins (Ed), *The uses of discretion* (pp. 11-46). Clarendon Press.

Heemskerk, M., and Rijken, C. (2011). Combating trafficking in human beings in the Netherlands. In C. Rijken (Ed), *Combating trafficking in human beigns for labour exploitation* (pp.73-158). Tilburg University.

Hendrickx, R. (2018, January 30). Waarom VRT NWS het over transmigranten heeft en niet over transitmigranten. VRT. https://www.vrt.be/vrtnws/nl/2018/01/30/waarom-vrt-nws-het-over-transmigranten-heeft-en-niet-over-transi/.

Herzfeld, M. (1992). *The social production of indifference: exploring the symbolic roots of Western bureaucracy*. Routledge.

Heyman, J. M. (2009). Trust, privilege, and discretion in the governance of the US borderlands with Mexico. *Canadian Journal of Law and Society*, *24*(3), 367-390.

Hondeghem, A., & Broucker, B. (2016). From Octopus to the reorganisation of the judicial landscape in Belgium. In A. Hondeghem, X. Rousseaux, & E. Schoenaers (Eds), *Modernisation of the criminal justice chain and the judicial system* (pp. 3-18). Springer, Cham.

Hoyle, C., Bosworth, M., and Dempsey, M. (2011). Labelling the victims of sex trafficking: Exploring the borderland between rhetoric and reality. *Social and Legal Studies*, *20*(3), 313-329.

Huberts, C. (2006). Les innovations de la loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil. *Jeunesse & Droit 251*, 6-20.

Huberts, C., & Minet, J. F. (2014). La loi du 29 avril 2013 visant à modifier l'article 433quinquies du Code pénal en vue de clarifier et d'étendre la définition de la traite des êtres humains:: analyse et mise en perspective. *Revue de Droit Penal et de Criminologie*, *94*(1), 6-48.

Hughes, K. (2022). Human trafficking, SM v Croatia and the conceptual evolution of article 4 ECHR. *The Modern Law Review*, *85*(4), 1044-1061.

Huysmans, J. (2000). The European Union and the securitization of migration. *Journal of Common Market Studies*, *38*(5), 751-777.

Huysmans, J. (2006). *The politics of insecurity: Fear, migration and asylum in the EU*. Routledge.

Hynes, P. (2017). Trust and mistrust in the lives of forcibly displaced women and children. *Families, Relationships and Societies*, *6*(2), 219-237.

Intérieur Wallonie. (2020, Septembre 21). Lettre Circulaire : La situation des migrants en transit en Wallonie. http://actionsociale.wallonie.be/sites/default/files/20201001164241354.pdf.

Jabko, N., & Luhman, M. (2019). Reconfiguring sovereignty: Crisis, politicization, and European integration. *Journal of European Public Policy*, *26*(7), 1037-1055.

Jacobsen, C. M., and Skilbrei, M. L. (2010). 'Reproachable victims'? Representations and self-representations of Russian women involved in transnational prostitution. *Ethnos*, *75*(2), 190-212.

Jacobson, D., & Mustafa, N. (2019). Social identity map: A reflexivity tool for practicing explicit positionality in critical qualitative research. *International Journal of Qualitative Methods*, *18*, 1-12.

Jacobus, R. (2020, November 25). Procureur: "Al meer dan twintig keer transmigranten in koeltransport". *Flows*. https://www.flows.be/shipping/procureur-al-meer-dan-twintig-keer-transmigranten-koeltransport.

Jamart, H., van Maele, L., Ferguson, M., Drielsma, P., Macq, J. and Van Durme, T. (2020). La première vague de Covid-19 en Belgique et les soins primaires. *Revue Medicale Suisse*, *16*, 2119-2122.

Jeandesboz, J., & Pallister-Wilkins, P. (2016). Crisis, routine, consolidation: The politics of the Mediterranean migration crisis. *Mediterranean politics*, *21*(2), 316-320.

Jones, J. (2020). Is tt time to open a conversation about a new United Nations treaty to fight human trafficking that focuses on victim protection and human rights? In J. Winterdyk & J. Jones (Eds.),*The Palgrave international handbook of human trafficking* (pp. 1803-1818). Springer International Publishing.

Jokinen, A. (2016). Irregular migration, trafficking in persons and prevention of exploitation. In S, Carrera & E. Guild (Eds), *Trafficking and smuggling of human beings: policy dilemmas in the EU*. (pp.70-73). Centre for European Policy Studies.

Jovanovic, M. (2017). The principle of non-punishment of victims of trafficking in human beings: a quest for rationale and practical guidance. *Journal of Trafficking and Human Exploitation*, *1*(1), 41-76.

Jovanovic, M. (2020). International law and regional norm smuggling: How the EU and ASEAN redefined the global regime on human trafficking. *The American Journal of Comparative Law*, *68*(4), 801-835.

Kalir, B. (2013). Moving subjects, stagnant paradigms: can the 'mobilities paradigm' transcend methodological nationalism? *Journal of Ethnic and Migration Studies*, *39*(2), 311-327.

Karamanidou, L., & Kasparek, B. (2018). *Border management and migration control in the European Union*. Global migration: Consequences and responses – Respond working Papers Series 14. Available at: https://www.diva-portal.org/smash/record.jsf?dswid=7219&pid=diva2%3A1248445.

Kemp, C. (2017). In search of solace and finding servitude: human trafficking and the human trafficking vulnerability of African asylum seekers in Malta. *Global Crime*, *18*(2), 140-157.

Kezar, A (2002) Reconstructing static images of leadership: an application of positionality theory. *Journal of Leadership Studies 8*(3): 94-109.

Kim, S. Y. (2021). Les vulnérables: evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights. *Legal Studies*, *41*(4), 617-632.

Kinney, E. (2015). Victims, villains, and valiant rescuers: Unpacking sociolegal constructions of human trafficking and crimmigration in popular culture. In M. J. Guia (Ed), *The illegal business of human trafficking* (pp. 87-108). Springer.

Klajn, M. (2021). The forced returns of Polish citizens: Cross-border transfers on the Polish–German border in the context of the discretionary powers of the border guards. *Central and Eastern European Migration Review*, *10*(1), 119-142.

Krieg, S. (2009). Trafficking in human beings: The EU approach between border control, law enforcement and human rights. *European Law Journal*, *15*(6), 775-790.

Kurz, F.(2002). L'application du principe du respect de la dignité humaine: un défi pour les juridictions du travail. *Journal des Tribunaux du Travail 17,* 273-278.

Kurz, F. (2014). La clause de non- sanction. In C-E. Clesse, F. Kurz, P Le Cocq, & V. Truillet (Eds), *La traite des êtres humains et le travail forcé* (pp. 67-80). Éditions Larcier.

Lafaut, D., & Coene, G. (2019). 'Let them in!' Humanitarian work as political activism? The case of the Maximiliaan refugee camp in Brussels. *Journal of Immigrant & Refugee Studies*, *17*(2), 185-203.

Lavaud-Legendre, B. (2017). De l'identification à la qualification de la traite: l'aveuglement des acteurs face à l'exploitation. *Archives de politique criminelle*, *1*, 195-214.

Lavenex, S., & Schimmelfennig, F. (2009). EU rules beyond EU borders: theorizing external governance in European politics. *Journal of European Public Policy*, *16*(6), 791-812.

Leman, J., & Janssens, S. (2007). The various 'safe'-house profiles in East-European human smuggling and trafficking. *Journal of Ethnic and Migration Studies*, *33*(8), 1377-1388.

Leman, J., & Janssens, S. (2012). Albanian entrepreneurial practices in human smuggling and trafficking: On the road to the United Kingdom via Brussels, 1995-2005. *International Migration*, *50*(6), 166-179.

Leman, J., & Janssens, S. (2015). *Human trafficking and migrant smuggling in southeast Europe and Russia: Learning criminal entrepreneurship and Traditional culture*. Springer.

Leser, J., Pates, R., and Dölemeyer, A. (2017). The emotional Leviathan – How street-level bureaucrats govern human trafficking victims. *Digithum, 19*, 19-36.

Le Vif. (2021, October 10). Trafic migratoire sur les côtes françaises : Mahdi plaide en faveur d'une approche commune. *Le Vif.* https://www.levif.be/belgique/trafic-migratoire-sur-les-cotes-francaises-mahdi-plaide-en-faveur-dune-approche-commune/ .

Loftus, B. (2010). Police occupational culture: classic themes, altered times. *Policing and society*, *20*(1), 1-20.

Loftus, B. (2015). Border regimes and the sociology of policing. *Policing and society*, *25*(1), 115-125.

Loore, F., & Tistaert, J. Y. (2007). *Belgique en sous-sol: immigration, traite et crime organisé*. Lannoo Uitgeverij.

Loore, F. (2018). Migrants : l'autoroute du trafic. *Paris Match Belgique*. https://dossiers.parismatch.be/migrants/.

Lofland, J., & L. Lofland. (1984). *Analyzing social settings: A guide to qualitative observation and analysis*. Wadsworth.

Lichfield, J. (2021, November 27). The Channel blame game. *Politico.* https://www.politico.eu/article/migrants-english-channel-france-uk-refugees-drowned/.

Lipsky, M. (1980). *Street-level bureaucracy: Dilemmas of the individual in public service*. Russell Sage Foundation.

Lipsky, M. (2010). *Street-level bureaucracy: Dilemmas of the individual in public service*. Russell Sage Foundation.

Maas, W. (2005). Citizenship, free movement, and EU enlargement. *Jean Monnet/Robert Schuman Paper Series 5*(34).

Macq, C. (2019, February 23). Procès des hébergeurs : hébergeurs acquittés, migrants condamnés. Justice en Ligne. https://www.justice-en-ligne.be/Proces-des-hebergeurs-hebergeurs.

Maiani, F. (2017). The reform of the Dublin system and the dystopia of 'sharing people'. *Maastricht Journal of European and Comparative Law*, *24*(5), 622-645.

Macaulay, S. (1984). Law and the behavioral sciences: Is there any there there? *Law & Policy*, *6*(2), 149-187.

Malherbe, A., Moriau, J., Rosa, E., & Wagener, M. (2019). La problématique du sans-abrisme à Bruxelles-limite de la gouvernance multiniveau dans l'application du principe de justice spatiale. *Justice spatiale-Spatial justice, 13,* 1-25.

Maggs, J. (2020). The 'Channel Crossings' and the borders of Britain. *Race & Class*, *61*(3), 78-86.

Mai, N. (2016). 'Too much suffering': Understanding the interplay between migration, bounded exploitation and trafficking through Nigerian sex workers' experiences. *Sociological Research Online*, *21*(4), 1-14.

Maier, C. (2016). *Once within borders*. Harvard University Press.

Mainwaring, C., and Brigden, N. (2016). Beyond the border: Clandestine migration journeys. *Geopolitics, 21*(2), 243-262.

Mandic, D. (2017). Trafficking and Syrian refugee smuggling: Evidence from the Balkan route. *Social Inclusion 5*(2), 28-38.

Maroukis, T. (2017). Keeping up appearances: The British public policy response to the trafficking of domestic workers in a changing regime of social protection. *Journal of Immigrant and Refugee Studies*, *15*(2), 155-170.

Mason-Bish, H. (2019). The elite delusion: reflexivity, identity and positionality in qualitative research. *Qualitative Research*, *19*(3), 263-276.

Maynard-Moody, S., & Portillo, S. (2010). Street-level bureaucracy theory.In S. Maynard-Moody, S. Portillo, R. Durant, & G. Edwards (Eds), *The Oxford handbook of American bureaucracy* (pp. 252-277). Oxford University Press.

Mayring, P. (2007, September). On generalization in qualitatively oriented research. In *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research, 8*(3).

McAuliffe, M., and Laczko, F. (2016). *Migrant smuggling data and research: A global review of the emerging evidence base*. International Organization for Migration.

McAuliffe, M., & Laczko, F. (2016). Report Overview. In M. McAuliffe & F. Laczko (Eds), *Migrant Smuggling Data and Research: A global review of the emerging evidence base*. (pp. 1-25).International Organization for Migration.

Médecins du Monde. (2018, October). Violence policières envers les migrants et les réfugiés en transit en Belgique. https://medecinsdumonde.be/actualites-publications/publications/violences-policieres-envers-les-migrants-et-les-refugies-en.

Melis, F., & Van Gelder, J. (2017). De impact van onregelmatige migratie en mensensmokkel op de wegvervoerder. *Tijdschrift voor Internationale Handel en Transportrecht*, 17(1), 3-29.

Menghi, M. (2021). The moral economy of a transit camp: Life and control on the Italian-French border. In L. Amigoni, S. Aru, S., I. Bonnin, G. Proglio, G., C. Vergnano (Eds.), *Debordering Europe* (pp. 93-107). Palgrave Macmillan, Cham.

Mescoli, E., & Roblain, A. (2021). The ambivalent relations behind civil society's engagement in the 'grey zones' of migration and integration governance: Case studies from Belgium. *Political Geography*, *91*, 102477.

Merry, S. E. (1988). Legal pluralism. *Law & Society Review*, *22*, 869-896.

Mertz, E. (1994). Conclusion: A new social constructionism for sociolegal studies. *Law & Society Review*, *28*(5), 1243-1265.

Meuser, M., & Nagel, U. (2009). The expert interview and changes in knowledge production. In A. Bogner, B. Littig, & W. Wolfgang Menz (Eds.), *Interviewing experts* (pp. 17-42). Palgrave Macmillan.

Migliaccio, F. (2021). At the border between Italy and France: When policemen appear in the landscape. In L. Amigoni, S. Aru, S., I. Bonnin, G. Proglio, G., C. Vergnano (Eds.), *Debordering Europe* (pp. 221-229). Palgrave Macmillan, Cham.

Miller, R., & Baumeister, S. (2013). Managing migration: Is border control fundamental to anti-trafficking and anti-smuggling interventions? *Anti-Trafficking Review*, *2*, 15-32.

Minetti, M. (2020). The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy. *New Journal of European Criminal Law*, *11*(3), 335-350.

Mijatovic, D. (2019, September 12). Time to deliver on commitments to protect people on the move from human trafficking and exploitation. Council of Europe. https://www.coe.int/en/web/commissioner/-/time-to-deliver-on-commitments-to-protect-people-on-the-move-from-human-trafficking-and-exploitation.

Mitsilegas, V. (2009). The third wave of third pillar law: which direction for EU criminal justice? *European Law Review*, *34*(4).

Mitsilegas, V. (2015). *The criminalisation of migration in Europe: challenges for human rights and the rule of law*. Springer/.

Mitsilegas, V. (2016). *EU criminal law after Lisbon: rights, trust and the transformation of justice in Europe*. Bloomsbury Publishing.

Mitsilegas, V. (2019). The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law. *New Journal of European Criminal Law*, *10*(1), 68-85.

Moffette, D. (2018). The jurisdictional games of immigration policing: Barcelona's fight against unauthorized street vending. *Theoretical Criminology*, *24*(2), 258-275.

Moffette, D., & Pratt, A. (2020). Beyond criminal law and methodological nationalism: Borderlands, jurisdictional games, and legal intersections. In C. Côté-Lussier, D. Moffette, & J. Piché (Eds), *Contemporary criminological issues: Moving beyond insecurity and exclusion* (pp. 15-39). University of Ottawa Press.

Moffette, D. (2021). Governing migration by other means: criminalization, crimmigration, or legal pluralism? In E. Carmel, K. Lenner, & R. Paul (Eds), *Handbook on the Governance and Politics of Migration* (pp. 341-353). Edward Elgar Publishing.

Moreno-Lax, V. (2017). The EU humanitarian border and the securitization of human rights: The 'rescue-through-interdiction/rescue-without-protection'paradigm. *Journal of Common Market Studies*, *56*(1), 119-140.

Mountz, A., and Hiemstra, N. (2014). Chaos and crisis: Dissecting the spatiotemporal logics of contemporary migrations and state practices. *Annals of the Association of American Geographers*, *104*(2), 382-390.

Musheno, M., & Maynard-Moody, S. (2015). 'Playing the rules': discretion in social and policy context. In P. Hupe, M. Hill, & A. Buffat (Eds), *Understanding street-level bureaucracy* (pp. 169-186). Policy Press.

Myria. (2015). *Rapport annuel traite et trafic des êtres humains 2015 : Resserrer les maillons.* http://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2015-resserrer-les-maillons.

Myria. (2016). *Rapport annuel traite et trafic des êtres humains 2016 : Des mendiants aux mains de trafiquants.* http://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2016-des-mendiants-aux-mains-de-trafiquants.

Myria. (2017). *Rapport annuel 2017: traite et trafic des êtres humains en ligne.* http://www.myria.be/fr/publications/rapport-annuel-2017-traite-et-trafic-des-etres-humains-en-ligne.

Myria. (2018). Rapport annuel traite et trafic des êtres humains 2018: Mineurs en danger majeur. https://www.myria.be/fr/publications/rapport-annuel-traite-et-trafic-des-etres-humains-2018-mineurs-en-danger-majeur.

Myria (2019). Police et migrants de transit. https://www.myria.be/files/Note_Police_et_migrants_de_transit.pdf.

Myria. (2019). Annual evaluation report 2019. Trafficking and smuggling of human beings. Empowering victims. https://www.myria.be/en/publications/2019-annual-report-trafficking-and-smuggling-of-human-beings.

Myria. (2020a). Myriadoc 10: Belgium, on the road to the United Kingdom. https://www.myria.be/en/publications/myriadoc-10-belgium-on-the-road-to-the-united-kingdom.

Myria. (2020b). Annual evaluation Report 2020. Trafficking and smuggling of human beings. Behind closed coors'. https://www.myria.be/en/publications/2020-annual-report-trafficking-and-smuggling-of-human-beings/.

Myria (2021). Annual evaluation Report 2021. Trafficking and smuggling of human beings. Visbily Invisible. https://www.myria.be/en/publications/2021-annual-report-trafficking-and-smuggling-of-human-beings

O'Brien, E. (2016). Human trafficking heroes and villains: Representing the problem in anti-trafficking awareness campaigns. *Social & Legal Studies*, *25*(2), 205-224.

O'Brien, E. (2018). *Challenging the human trafficking narrative: Victims, villains and heroes*. Routledge.

Obokata, T. (2015). Human trafficking. In: Boister N, Currie R. (Eds), *Routledge handbook of transnational criminal law* (pp. 171-186). Routledge.

Obokata, T. (2016). Evolution of the EU action against trafficking of human beings. In *Research handbook on EU criminal law* (pp. 422-438). Edward Elgar Publishing.

O'Connell, R. Cinderella comes to the ball: Article 14 and the right to non-discrimination in the ECHR (2009). *Legal Studies*, *29*, 211.

O'Connell Davidson, J. (2013). Troubling freedom: Migration, debt, and modern slavery. *Migration Studies*, *1*(2), 176-195.

O'Connell Davidson, J. (2016). De-canting 'trafficking in human beings', re-centring the State. *The International Spectator*, *51*(1), 58-73.

O' Connell Davidson, J. (2017a). The presence of the past: Lessons of history for anti-trafficking work. *Anti-Trafficking Review*, (9), 1-12.

O' Connell Davidson, J. (2017b). The right to locomotion? Trafficking, slavery and the State. In P. Kotiswaran (Ed.), *Revisiting the law and governance of trafficking, forced labor and modern slavery* (pp. 157-178). Cambridge University Press.

Pallister-Wilkins, P. (2015). The humanitarian politics of European border policing: Frontex and border police in Evros. *International Political Sociology*, *9*(1), 53-69.

Pallister-Wilkins, P. (2022). *Humanitarian borders: Unequal mobility and saving lives*. Verso Books.

Palidda, S. (2009), The criminalization and victimization of immigrants: a critical perspective in W.F. Mcdonald (Ed.), *Immigration, crime and justice* (pp. 313-326). Emerald Group Publishing Limited.

Papadopoulou, A. (2004). Smuggling into Europe: transit migrants in Greece. *Journal of Refugee Studies*, *17*(2), 167-184.

Parker, S., Bennett, S., Cobden, C. M., & Earnshaw, D. (2022). 'It's time we invested in stronger borders': media representations of refugees crossing the English Channel by boat. *Critical Discourse Studies*, *19*(4), 348-363.

Paynter, E. (2018). The liminal lives of Europe's transit migrants. *Contexts*, *17*(2), 40-45.

Perkowski, N., & Squire, V. (2019). The anti-policy of European anti-smuggling as a site of contestation in the Mediterranean migration 'crisis'. *Journal of Ethnic and Migration Studies*, *45*(12), 2167-2184.

Peroni, L., & Timmer, A. (2013). Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law. *International Journal of Constitutional Law*, *11*(4), 1056-1085.

Perrin, B. (2010). Just passing through? International legal obligations and policies of transit countries in combating trafficking in persons. *European Journal of Criminology*, *7*(1), 11-27.

Peterka-Benton, D. (2011). Human smuggling in Austria: A comparative analysis of data on smuggled migrants from former Yugoslavia and the Russian Federation. *International migration review*, *45*(2), 215-242.

Petintseva, O., Faria, R. & Eski, Y. (2020). *Interviewing elites, experts and the powerful in criminology*. Palgrave Macmillan.

Petrillo, E. R. (2016). The securitization of the EU external borders and the rise of human smuggling along the Eastern Mediterranean route. In E. Ambrosetti, D. Strangio, & C.W. de Wenden (Eds), *Migration in the Mediterranean: Socio-economic perspectives* (pp. 105-126). Routledge.

Picum. Why 'undocumented' or 'irregular'? Terminology leaflet. https://picum.org/words-matter/.

Picum. (2020, May). Insecure justice? Residence permits for victims of crime in Europe. https://picum.org/wp-content/uploads/2020/06/Residence-permits-victims-of-Crime-FULL-REPORT.pdf.

Picum. (2021). The EU Migration Pact: Questions and answers. https://picum.org/eu-migration-pact-questions-answers/.

Pijnenburg, A., & Rijken, C. (2021). Moving beyond refugees and migrants: reconceptualising the rights of people on the move. *Interventions*, *23*(2), 273-293.

Planitzer, J., & Sax, H. (2020). *A commentary on the Council of Europe Convention on action against trafficking in human beings*. Edward Elgar Publishing.

Ponsaers, P., & Devroe, E. (2016). Une nouvelle structure pour la police de Bruxelles? *Vigiles, 2*, 51-56.

Pound, R. (1910). Law in books and law in action. *American Law Review*, *44*, 12-36.
Picozza, F. (2017). Dublin on the move. *Movements Journal for Critical Migration and Border Regime Studies*, *3*(1), 71-88.
Pratt, A., & Sossin, L. (2009). A brief introduction of the puzzle of discretion. *Canadian Journal of Law and Society*, *24*(3), 301-312.
Provera, M. (2015). *The criminalisation of irregular migration in the European Union*. CEPS Paper in Liberty and Security in Europe 80. https://www.ceps.eu/wp-content/uploads/2015/03/Criminalisation%20of%20Irregular%20Migration.pdf.

Raymond, J. (2002, September). The new UN trafficking protocol. *Women's studies international forum, 25*(5), 491-502.
Regueiro, R. (2020). Shared responsibility and human rights abuse: The 2022 World Cup in Qatar. *Tilburg Law Review*, *25*(1).
Reitano T (2017, June 14) The role of smugglers in protection for the people they move, Presentation to the UNHCR Annual Consultations with NGOs, Geneva. https://globalinitiative.net/analysis/unhcr_ngos/.
Resch, K., & Enzenhofer, E. (2017). Collecting data in other languages–strategies for cross-language research in multilingual societies. In U. Flick (Ed), *The Sage handbook of qualitative data collection* (pp. 131-146). Sage Publishing.
ReSoma. (2019). The criminalisation of solidarity in Europe. https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf.
Rigby, P. (2011). Separated and trafficked children: The challenges for child protection professionals. *Child Abuse Review*, *20*(5), 324-340.
Rijken, C., & De Volder, E. (2009). The European Union's struggle to realize a human rights-based approach to trafficking in human beings. *Connectictut Journal of International Law 25*, 49-80.
Rijken, C. (2016). *Victimisation through migration*. Inaugural Address. Tilburg University. https://www.comensha.nl/actualiteiten/item/victimisation-through-migration-oratie-conny-rijken/.
Ripoll Servent, A. (2019). The EU's refugee 'crisis': Framing policy failure as an opportunity for success. *Politique Europeenne*, (3), 178-210.
Rodríguez-López, S. (2018). (De) constructing stereotypes: Media representations, social perceptions, and legal responses to human trafficking. *Journal of Human Trafficking*, *4*(1), 61-72.
Rodríguez Oconitrillo, P. (2014). Non-criminalization of smuggled migrants. Notes on the interpretation of article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air. UNCHR.
Rubio Grundell, L. (2015). EU anti-trafficking policies: from migration and crime control to prevention and protection. Migration Policy Centre, Policy Briefs 9, http://hdl.handle.net/1814/35745.
Ruiz, C., Stiplošek D., Tortel, E., Machova, J. & Vudriæ N. (2019). The identification of victims of human trafficking in transit and destination countries in Europe. A practical guideline for frontline implementers. https://www.trafficking-response.org/wp-content/uploads/2019/03/The-identification-of-victims-of-human-trafficking-in-transit-and-destination-countries-in-Europe_English.pdf.
Ruiz Ramos, J. (2020). The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis. *REEI, (39)*10, 1-46.

Sager, A. (2016). Methodological nationalism, migration and political theory. *Political studies*, *64*(1), 42-59.

Sägesser, C. (2016). Législatif, exécutif et judiciaire. Les relations entre les trois pouvoirs. *Dossiers du CRISP*, (2), 9-71.

Salt, J., & Stein, J. (1997). Migration as a business: The case of trafficking. *International Migration*, *35*(4), 467-494.

Salt, J. (2000). Trafficking and human smuggling: A European perspective. *International Migration*, *38*(3), 31-56.

Sanchez, G. (2017). Critical perspectives on clandestine migration facilitation: An overview of migrant smuggling research. *Journal on Migration and Human Security*, *5*(1), 9-27.

Sanchez, G., Arrouche, K., Capasso, M., Dimitriadi, A., & A. Fakhry. (2021). Beyond networks, militias and tribes: Rethinking EU counter-smuggling policy and response. *Euromesco Policy Study, 19*.

Sanchez, G., & Achilli, L. (2020). Stranded: the impacts of COVID-19 on irregular migration and migrant smuggling, Policy Briefs, 20, Migration Policy Centre, http://hdl.handle.net/1814/67069.

Sanchez, G. (2021). Rethinking migrant smuggling through data. In F. Allum, & S. Gilmour, (Eds.), *The Routledge handbook of transnational organized crime* (pp. 409-421). Routledge.

Sani, H. (2020). State law and legal pluralism: towards an appraisal. *The Journal of Legal Pluralism and Unofficial Law*, *52*(1), 82-109.

Sassen, S. (2006). *Territory, authority, rights: From medieval to global assemblages*. Princeton University Press.

Sassen, S. (2007). A sociology of globalization. *Análisis político*, *20*(61), 3-27.

Schapendonk, J., van Liempt, I., Schwarz, I., & Steel, G. (2020). Re-routing migration geographies: Migrants, trajectories and mobility regimes. *Geoforum*, *116*, 211-216.

Scarpa, S. (2008). *Trafficking in human beings: modern slavery*. Oxford University Press.

Scarpa, S. (2020). UN Palermo trafficking protocol eighteen years on: A critique. In J. Winterdyk & J. Jones (Eds.), *The Palgrave international handbook of human trafficking* (pp. 623-640). Springer International Publishing.

Schapendonk, J. (2012). Migrants' im/mobilities on their way to the EU: Lost in transit? *Tijdschrift voor Economische en Sociale Geografie*, *103*(5), 577-583.

Schapendonk, J. (2018). Navigating the migration industry: migrants moving through an African-European web of facilitation/control. *Journal of Ethnic and Migration Studies*, *44*(4), 663-679.

Scheel, S., & Tazzioli, M. (2022). Who is a migrant? Abandoning the nation-state point of view in the study of migration. *Migration Politics*, *1*(1), 1-23.

Schloenhardt, A. (2017). Trafficking in persons in an era of growing irregular migration. *SIAK: Journal for Police Science and Practice (International Edition)*, *7*, 4-12.

Schneider, C. E. (1995). Discretion and rules: a lawyer's view. In K. Hawkins (Ed), *The uses of discretion* (pp. 47-88). Oxford University Press.

Schrooten, M. (2018). Crossing borders, super diverse trajectories: the lived experiences of Brazilians on the move. In *1st Annual CESSMIR Conference: Needs and Care Practices for Refugees and Migrants.* Ghent.

Schumacher, T. (2015). Uncertainty at the EU's borders: narratives of EU external relations in the revised European Neighbourhood Policy towards the southern borderlands. *European Security*, *24*(3), 381-401.

Schuster, L. (2011). Turning refugees into 'illegal migrants': Afghan asylum seekers in Europe. *Ethnic and Racial Studies*, *34*(8), 1392-1407.

Scipioni, M. (2018). Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis. *Journal of European Public Policy*, *25*(9), 1357-1375.

Sciurba, A. (2017). Categorizing migrants by undermining the right to asylum. The implementation of the «hotspot approach» in Sicily. *Etnografia e ricerca qualitativa*, *10*(1), 97-120.

Sembacher, A. (2005). The Council of Europe convention on action against trafficking in human beings. *Tulane Journal of International and Comparative Law*, *14*, 435-456.

Seron, C., & Silbey, S. (2004). Profession, science, and culture: An emergent canon of law and society research. In A. Sarat (Ed), *The blackwell companion to law and society* (pp. 30-59), Blackwell Publishing.

Sharpe, M. (2018). Mixed up: International law and the meaning (s) of 'mixed migration'. *Refugee Survey Quarterly*, *37*(1), 116-138.

Shelley, L. (2010). *Human trafficking: A global perspective*. Cambridge University Press.

Shelley, L. (2014). Human smuggling and trafficking into Europe. A comparative perspective. *Washington DC: Migration Policy Institute.*

Siems, M. (2022). *Comparative law*. Cambridge University Press.

Skelparis, D. (2011). Studying the 'migration-security nexus' in Europe: Towards which end of the 'nexus'. In : *UACES Student Forum 12th annual conference,* University of Surrey, Guildford.

Skilbrei, M. L., and Tveit, M. (2008). Defining trafficking through empirical work: Blurred boundaries and their consequences. *Gender, Technology and Development*, *12*(1), 9-30.

Sklansky, D. A. (2012). Crime, immigration, and ad hoc instrumentalism. *New criminal law review*, *15*(2), 157-223.

Sørensen, N. (2006). Mediterranean transit migration and development: Experience and policy options. In N. Sørensen, N. (Ed.), *Mediterranean transit migration* (pp. 5-24). DIIS, Danish Institute for International Studies.

Spena, A. (2016). Human smuggling and irregular immigration in the EU: from complicity to exploitation? In E. Guild, S. Carrera, J. Allsopp, R. Andrijasevic, M. Collyer, A. Dimitriadi, A. Jokinen, A. Leerkes, M. Manieri, J. Muraszkiewicz, M. Ruete, A. Spena & S. Spencer, S. (Eds). Irregular migration, trafficking and smuggling of human beings: Policy dilemmas in the EU (pp. 33-40). CEPS Paperback. http://aei.pitt.edu/72834/.

Staring, R. (2004). Facilitating the arrival of illegal immigrants in the Netherlands: Irregular chain migration versus smuggling chains. *Journal of International Migration and Integration/Revue de l'integration et de la migration internationale*, *5*(3), 273-294.

Stel, N. (2021). Uncertainty, exhaustion, and abandonment beyond South/North divides: Governing forced migration through strategic ambiguity. *Political Geography*, *88*, 102391.

Stoyanova, V. (2012). Dancing on the borders of article 4: Human trafficking and the European Court of Human Rights in the Rantsev case. *Netherlands Quarterly of Human Rights*, *30*(2), 163-194.

Stoyanova, V. (2017, February 7). J. and Others v. Austria and the strengthening of tates' obligation to identify victims of human trafficking. *Strasbourg Observers*.https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/.

Stoyanova, V. (2018). Sweet taste with bitter roots: Forced labour and Chowdury and Others v Greece. *European Human Rights Law Review*, *1*, 67-75.

Stoyanova, V. (2020). Separating protection from the exigencies of the criminal law: Achievements and challenges under art. 4 ECHR. In L. Lavrysen, & N. Mavronicola (Eds.), *Coercive human rights. Positive duties to mobilise the criminal law under the ECHR* (pp.203-222). Bloomsbury Publishing.

Stoyanova, V. (2020, July 3). The Grand Chamber judgment in SM v. Croatia: Human trafficking, prostitution and the definitional scope of article 4 ECHR. *Strasbourg Observers Blog*. https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/.

Streiff-Fénart, J. (2018). Pour en finir avec la moralisation de la question migratoire. *Mouvements*, *1*, 13-21.

Stumpf, J. (2006). The the crimmigration crisis: Immigrants, crime, and sovereign power. *American University Law Review*, *56*, 367-418.

Swanson, G. (1971). Frameworks for comparative research: structural anthropology and the theory of action. In K. Vallier (Ed), *Comparative methods in sociology: essays on trends and applications* (pp. 141-202). University of California Press.

Tazzioli, M. (2018). Containment through mobility: Migrants' spatial disobediences and the reshaping of control through the hotspot system. *Journal of Ethnic and Migration Studies*, *44*(16), 2764-2779.

Tazzioli, M., & Walters, W. (2019). Migration, solidarity and the limits of Europe. *Global Discourse: An interdisciplinary journal of current affairs*, *9*(1), 175-190.

Tazzioli, M. (2020a). The politics of migrant dispersal. Dividing and policing migrant multiplicities. *Migration Studies*, *8*(4), 510-529.

Tazzioli, M. (2020b). Governing migrant mobility through mobility: Containment and dispersal at the internal frontiers of Europe. *Environment and Planning C: Politics and Space*, *38*(1), 3-19.

Tazzioli, M., & Garelli, G. (2020). Containment beyond detention: The hotspot system and disrupted migration movements across Europe. *Environment and planning D: society and space*, *38*(6), 1009-1027.

Tennant, I. (2021). Fulfilling the promise of Palermo? A political history of the UN Convention Against Transnational Organized Crime. *Journal of Illicit Economies and Development*, *2*(1), 53-71.

Theilen, J. (2021). *European consensus between strategy and principle: The Uses of vertically comparative legal reasoning in regional human rights adjudication*. Nomos Verlagsgesellschaft.

Timmer, A., Baumgärtel, M., Kotzé, L., & Slingenberg, L. (2021). The potential and pitfalls of the vulnerability concept for human rights. *Netherlands Quarterly of Human Rights*, *39*(3), 190-197.

Tinti, P., & Reitano, T. (2016). *Migrant, refugee, smuggler, saviour*. Hunt.

Tomczak, P., & Thompson, D. (2019). Inclusionary control? Theorizing the effects of penal voluntary organizations' work. *Theoretical Criminology*, *23*(1), 4-24.

Trajer, J. (2021, November 18). Hidden in plain sight: Failure to investigate allegation of abuse on public construction projects in Zoletic and Others v. Azerbaijan. *Strasbourg Observers Blog*. https://strasbourgobservers.com/2021/11/18/hidden-in-plain-

sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/.

Triandafyllidou, A. (2018). Migrant smuggling: novel insights and implications for migration control policies. *The ANNALS of the American Academy of Political and Social Science*, *676*(1), 212-221.

Trinczek, R. (2009). How to interview managers? Methodical and methodological aspects of expert interviews as a qualitative method in empirical social research. In A. Bogner, B. Littig, & W. Menz (Eds.), *Interviewing experts* (pp. 203-216). Palgrave Macmillan.

Trondal, J. (2011). Bureaucratic structure and administrative behaviour: Lessons from international bureaucracies. *West European Politics*, *34*(4), 795-818.

Tully, J. (2001). Democracy and globalization: A defeasible sketch. In R. Beiner, & W. Norman (Eds), *Canadian political philosophy: contemporary reflections* (pp.36-62). Oxford University Press.

UN. (1994, August 30). Measures to combat alien-smuggling : report of the Secretary-General. A/49/350. United Nations. https://digitallibrary.un.org/record/163561?ln=fr.

UN. (2012). Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons. *Issue Paper.* https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf.

UNHCR. (2016). Situation of migrant in transit. UNHCR. https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/INT_CMW_INF_7940_E.pdf.

UNHCR. (2019). Guidance on responding to irregular onward movement of refugees and asylum-seekers. UNHCR. https://www.refworld.org/docid/5d8a255d4.html.

UNODC. (2006). Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime. https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf.

UNODC. (2008). Toolkit to combat trafficking in persons. UNODC. https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf.

UNODC. (2020). UNTOC at 20. Commemorating the 20th anniversary of the adoption by the General Assembly of the United Nations Convention against Transnational Crime. UNODC. https://www.unodc.org/documents/treaties/UNTOC/COP/SESSION_10/Website/Practical_info/UNTOC_at_20.pdf.

Valverde, M. (2008). Analyzing the governance of security: Jurisdiction and scale. *BEHEMOTH-A Journal on Civilisation*, *1*(1), 3-15.

Valverde, M. (2009). Jurisdiction and scale: Legal technicalities' as resources for theory. *Social & Legal Studies*, *18*(2), 139-157.

Valverde, M. (2010). Practices of citizenship and scales of governance. *New Criminal Law Review 13* (2): 216-40.

Valverde, M. (2014). Studying the governance of crime and security: Space, time and jurisdiction. *Criminology & Criminal Justice*, *14*(4), 379-391.

Van Audenhove, L., & Donders, K. (2019). Talking to people III: Expert interviews and elite interviews. In H. Van den Bulck, M. Puppis, K. Donders, & L. Van Audenhove

(Eds.), *The Palgrave handbook of methods for media policy research* (pp. 179-197). Springer.

Van Daele, D., & Vangeebergen, B. (2009). *Criminalité et répression pénale dans l'Euregio Meuse-Rhin. Partie 2. L'organisation de la recherche et des poursuites en Belgique, en Allemagne et aux Pays-Bas, et la coopération policière et judiciaire internationale dans l'Euregio Meuse-Rhin*. Interensentia & Anthemis.

Vandevoordt, R. (2019). Subversive humanitarianism: rethinking refugee solidarity through grass-roots initiatives. *Refugee Survey Quarterly*, *38*(3), 245-265.

Vandevoordt, R. (2021). Resisting bare life: civil solidarity and the hunt for illegalized migrants. *International Migration*, *59*(3), 47-62.

Vandevoordt, R., & Fleischmann, L. (2021). Impossible futures? The ambivalent temporalities of grassroots humanitarian action. *Critical Sociology*, *47*(2), 187-202.

van der Leun, J. P., & Staring, R. (2013). Human smuggling. In G. Bruinsma, & D. Weisburd (Eds), *Encyclopedia of criminology and criminal justice* (pp. 2382-2389). Springer Science and Business Media.

van der Leun, J., & van Schijndel, A. (2016). Emerging from the shadows or pushed into the dark? The relation between the combat against trafficking in human beings and migration control. *International Journal of Law, Crime and Justice*, *44*, 26-42.

van der Woude, M. A., van der Leun, J. P., & Nijland, J.A. (2014). Crimmigration in the Netherlands. *Law & Social Inquiry*, *39*(3), 560-579.

van der Woude, M., & van Berlo, P. (2015). Crimmigration at the internal borders of Europe? Examining the Schengen Governance Package. *Utrecht Law Review*, *11*(1), 61-79.

van der Woude, M. (2016). *Chain reactions in criminal justice: discretion and the necessity of interdisciplinary research*. Eleven international publishing.

van der Woude, M., & van der Leun, J. (2017). Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters. *European Journal of Criminology*, *14*(1), 27-45.

van der Woude, M. (2020). A patchwork of intra-Schengen policing: Border games over national identity and national sovereignty. *Theoretical Criminology*, *24*(1), 110-131.

van Houtum, H. (2010). Human blacklisting: the global apartheid of the EU's external border regime. *Environment and Planning D: Society and Space*, *28*(6), 957-976.

van Liempt, I. (2007). *Navigating borders: Inside perspectives on the process of human smuggling into the Netherlands*. Amsterdam University Press.

van Liempt, I. (2011). Different geographies and experiences of 'assisted'types of migration: A gendered critique on the distinction between trafficking and smuggling. *Gender, Place and Culture*, *18*(02), 179-193.

van Liempt, I., & Sersli, S. (2013). State responses and migrant experiences with human smuggling: A reality check. *Antipode*, *45*(4), 1029-1046.

van Liempt, I. (2018). Human smuggling: A global migration industry. In A. Triandafyllidou (Ed) *Handbook of migration and globalisation* (pp. 140-154). Edward Elgar Publishing.

van Meeteren, M., and Wiering, E. (2019). Labour trafficking in Chinese restaurants in the Netherlands and the role of Dutch immigration policies. A qualitative analysis of investigative case files. *Crime, Law and Social Change*, *72*(1), 107-124.

Van Zyl Smit, D. & Snacken, S. (2009). *Principles of European prison law and policy: Penology and human rights*. Oxford University Press.

Vega, I. (2018). Empathy, morality, and criminality: The legitimation narratives of US Border Patrol agents. *Journal of Ethnic and Migration Studies*, *44*(15), 2544-2561.

Ventrella, M. (2017). Identifying victims of human trafficking at hotspots by focusing on people smuggled to Europe. *Social Inclusion, 5*(2), 69-80.

Vermeulen, G. (2005). Matroesjka's: tien jaar later. Repressie en controle als speerpunten van het vernieuwde mensenhandelbeleid? *Panopticon*, *10*, 1-10.

Villacampa, C., & Torres, N. (2019). Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system. *International Review of Victimology*, *25*(1), 3-18.

Villacampa Estiarte, C. (2012). The European directive on preventing and combating trafficking in human beings and the victim-centric treatment of this criminal phenomenon. *European Criminal Law Review 2*, 291-317.

Vogl, U., & Hüning, M. (2010). One nation, one language? The case of Belgium. *Dutch Crossing*, *34*(3), 228-247.

von Benda-Beckmann, K. V., & Turner, B. (2018). Legal pluralism, social theory, and the state. *The Journal of Legal Pluralism and Unofficial Law*, *50*(3), 255-274.

von Benda-Beckmann, K., & Turner, B. (2020). Anthropological roots of global legal pluralism. In P. Schiff Berman (Ed), *The Oxford Handbook of Global Legal Pluralism* (pp. 65-141). Oxford University Press.

.

Wade, M. (2008). The Januses of justice – How prosecutors define the kind of justice done across Europe. *European Journal of Crime, Criminal Law and Criminal Justice*, *16*(4), 433-455.

Walker, P. (2020, November 25). Priti Patel says it is up to France to stop refugees crossing Channel. *The Guardian*. https://www.theguardian.com/uk-news/2021/nov/25/priti-patel-up-to-france-stop-refugees-crossing-channel.

Walters, W. (2011). Foucault and frontiers: Notes on the birth of the humanitarian border. In U. Bröckling, S. Krasmann, & T. Lemke (Eds), *Governmentality: Current issues and future challenges* (pp. 138-164). Routledge.

Warren, C. (2001). Qualitative interviewing. In C. Warren (Ed), *Handbook of interview research: Context and method* (pp.103-116). Sage Publications.

Webber, F. (2018). Refusing refuge. *Race & Class*, *59*(3), 98-105.

Weber, L. (2003). Down that wrong road: Discretion in decisions to detain asylum seekers arriving at UK ports. *The Howard Journal of Criminal Justice*, *42*(3), 248-262.

Welander, M., & Ansems De Vries, L. (2016, September 30). Refugees, displacement, and the European 'politics of exhaustion'. *Open Democracy*. https://www.opendemocracy.net/en/mediterranean-journeys-in-hope/refugees-displacement-and-europ/.

Welander, M. (2021). The politics of exhaustion and the externalization of British border control. An articulation of a strategy designed to deter, control and exclude. *International Migration*, *59*(3), 29-46.

Weissensteiner, M. (2021). Policing-mobilities in the border-strip. Cross-border police cooperation and viapolitics at the internal Schengen-borders of the EU Area of Freedom, Security and Justice. Doctoral dissertation, Utrecht University]. Utrecht University Repository.

Weyembergh, A., & Briere, C. (2013). La Belgique: moteur de l'espace européen de justice pénale? *Revue des affaires européennes*, 105-118.

Willemyns, R. (2002). The dutch-french language border in Belgium. *Journal of Multilingual and Multicultural Development*, *23*(1-2), 36-49.

Wilson, D. (2014). Border militarization, technology and crime control. In S. Pickering and J. Ham (Eds.), *The Routledge handbook on crime and international migration* (pp. 141-154). Routledge.

Wilson, M., and O'Brien, E. (2016). Constructing the ideal victim in the United States of America's annual trafficking in persons reports. *Crime, Law and Social Change*, *65*(1-2), 29-45.

Wimmer, A., & Glick Schiller, N. (2003). Methodological nationalism and the study of migration. *European Journal of Sociology/Archives Européennes de Sociologie*, *43*(2), 217-240.

Winterdyk, J., & Jones, J. (2020). *The Palgrave international handbook of human trafficking*. Springer International Publishing.

Wolff, S., Ripoll Servent, A., & Piquet, A. (2020). Framing immobility: Schengen governance in times of pandemics. *Journal of European Integration*, *42*(8), 1127-1144.

Xhardez, C. (2016). L'intégration des nouveaux arrivants à Bruxelles: un puzzle institutionnel et politique. *Brussels Studies, 105,* 1-19.

Yin, R. (2003). *Case study research: Design and Methods*. Sage.

Zhang, S.X., Sanchez, G.E., & Achilli, L. (2018). Crimes of solidarity in mobility: Alternative views on migrant smuggling. *The ANNALS of the American Academy of Political and Social Science*, *676*(1), 6-15.

Zirulia, S. (2020). Is that a Smuggler?: The blurring line between facilitating illegal immigration and providing humanitarian assistance at the European Borders. In G.L. Gatta, V. Mitsilegas, & S. Zirulia (Eds), *Controlling immigration through criminal law: European and comparative perspectives on 'crimmigration'* (pp. 235-266). Hart Publishing.

Legislative acts, international conventions/ instruments, policy and action plans

European Union

Legislative acts

- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/17 *and* the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/1 (2002/946/JHA). (*Facilitator's Package*).
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/10. (*Residence Permit Directive*).
- Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98. (*Return Directive*).
- Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1. (*Trafficking Directive*).
- Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L180/31. *(Dublin III Regulation).*

Policy and Action Plans

- European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU Action Plan against migrant smuggling 2015-2020, COM (2015) 285 final, Brussels, 27.5.2015.
- European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM (2015) 240 final, Brussels, 13.05.2015.
- European Commission (2015). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

Committee of the Regions – On the EU Security Union Strategy, COM (2015) 185 final, Strasbourg, 28.04.2015.
· European Commission (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -On a New Pact on Migration and Asylum, COM (2020) 609 final, Brussels, 23.09.2015.
· European Commission (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -The European Agenda on Security, COM (2020) 605 final, Brussels, 24.07.2020.
· European Commission (2021). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Renewed EU Action Plan Against Migrant Smuggling 2021-2025, COM (2021) 591 final, Brussels, 29.05.2021.
· European Commission (2021). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the EU Strategy to combat Organised Crime 2021-2025, COM (2021) 170 final, Brussels, 14.04.2021.
· European Commission (2021). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – On the EU Strategy on Combatting Trafficking in Human Beings 2021-2025, COM (2021) 171 final, Brussels, 14.04.2021.

COUNCIL OF EUROPE

Legislation

· Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008). CETS No. 197. (*Warsaw Convention*).
· Council of Europe. Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 2 November 2013). CETS. No. 214.
· Council of Europe. Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 31 October 2021). CETS No. 213.

Policy and Action Plan

· European Committee on Crime Problems (CDPC). Council of Europe Roadmap on Fighting the Smuggling of Migrants (adopted 3 February 2020). https://rm.coe.int/09000016809a4ae3.

Case Law

· *Siliadin v. France* 73316/01 (ECtHR, 26 October 2005).
· *Rantsev v. Cyprus and Russia* 25965/04 (EctHR, 7 January 2010).
· *M.S.S. v. Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011).

- *C.N. and V. v. France* 67724/09 (ECtHR January 2013).
- *C.N. v. United Kingdom,* 4239/08 (ECtHR, 13 February 2013).
- *Söderman v. Sweden* [GC] 5786/08 (ECtHR, 12 November 2013).
- *Khlaifia and Others. v. Italy* [GC] 16483/12 (ECtHR, 15 December 2016).
- *J. and Others v. Austria* 58216/12 (ECtHR, 17 January 2017).
- *Chowdury and Others v. Greece* 21884/15 (ECtHR, 30 March 2017).
- *Correia de Matos v. Portugal* 56402/12 (ECtHR, 4 April 2018).
- *Hoti v. Croatia* 63311/14 (ECtHR, 26 July 2018).
- *Z.A. and Others v. Russia* [GC] 61411/15; 61420/15 and 61427/15 (ECtHR, 21 November 2019).
- *N.D. and N.T. v. Spain* [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020).
- *S.M. v. Croatia* [GC] 60561/14 (ECtHR, 25 June 2020).
- *V.C. L and A.N. v. United Kingdom* 77587/12 and 74603/12 (ECtHR, 5 July 2021).
- *M.A. v. Denmark* 6697/1 (ECtHR, 9 July 2021).
- *Zoletic and Others v. Azerbaijan,* 20116/12 (ECtHR, 7 October 2021).
- *M.H. and Others v. Croatia* 15670/18 and 43115/18 (ECtHR, 18 November 2021).

United Nations

- United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) DOC A/55/383.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507. (*Smuggling Protcol*).
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319. (*Trafficking Protocol*).
- New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1.
- Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) 5 February UN Doc A/Res/73/195.

BELGIUM

Legislative acts

- Law of 15 December 1980 on the entry to the territory, stay, settlement and removal of foreigners. *Moniteur Belge*.
- Law of 10 August 2005 modifying diverse provisions for the purpose of reinforcing the fight against human trafficking, human smuggling and against the practices of slum landlords. *Moniteur Belge.*
- Law of 29 April 2013 seeking to modify the article 433quinquies of the Criminal Code with a view to clarifying and extending the definition of human trafficking. *Moniteur Belge*.

· Circular COL 1/2007 of 17 January 2007 relating to investigations and prosecutions of acts of human trafficking. (Available at www.om-mp.com).
· Circular COL 8/2008 of 26 September 2008 implementing a multidisciplinary co-operation in respect of victims of human trafficking and/or certain aggravated forms of human smuggling. (Available at www.om-mp.com).
· Circular COL 4/2011 relating to investigations and prosecutions of acts of human smuggling. (Confidential).
· Circular COL 1/2015 defining the joint criminal policy in the fight against human trafficking (confidential).
· Circular COL 20/2016 on policy regarding research and prosecution of exploitation of begging (confidential).
· Circular COL 5/2017 of 23 December 2016 implementing a multidisciplinary cooperation in respect of victims of human trafficking and/or certain aggravated forms of human smuggling. (Replaced COL 8/2008 – (Available at www.om-mp.com).

Action and Policy Plans

· Belgian Federal Police. (2016). Plan National de Sécurité 2016-2019. https://www.police.be/5998/sites/5998/files/downloads/PNS2016-2019.pdf.
· Belgian Federal Police. (2022). Plan National de Sécurité 2022-2025. https://www.police.be/5998/sites/5998/files/files/2022-04/PNS2022-2025.pdf.
· Service de Politique Criminelle. (2019). Plan d'Action Trafic des Etres Humains 2015-2019. http://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225 *(NAP – HS 2015-2019)*.
· Service de Politique Criminelle (2021). Plan d'Action Trafic des Etres Humains 2021-2025. http://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225 *(NAP – HS 2021-2025)*.

Jurisprudence

· Corr. Louvain, 12 May 2005 (7e ch). Available at www.myria.be.
· Corr. Brussels, 27 June 2012 (51e ch.). Available at www.myria.be.
· Corr. Anvers, 8 December 2016 (8e ch.). Available at www.myria.be.
· Corr. Gent, 16 October 2017. Available at www.myria.be.
· Corr. Termonde, 13 November 2017. Available at www.myria.be.
· Corr. Brussels, 17 May 2017 (13e ch.). Avaliable at www.myria.be.
· Corr. Brussels, 12 Decembre 2018 (47e ch.). Available at www.myria.be.

Parliamentary sources

· Belgian House of Representative. (2005, August 10). Projet de loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains. *Doc. Parl.*, Chambre, Session 2004-2005, Doc 51 1560/001. https://www.lachambre.be/doc/flwb/pdf/51/1560/51k1560001.pdf.
· Belgian House of Representatives (2018, October 26). Note de politique générale. Asile et Migration, Doc. Parl. Chambre, session 2018-1019, Doc 54 3296/021, https://www.lachambre.be/doc/flwb/pdf/54/3296/54k3296021.pdf.

- Belgian House of Representative (2019, April 9). Proposition de loi du 9 avril 2019 relative au trafic d'organes humains et relative au principe de non sanction des victimes de traite des êtres humains. *Doc. parl*., Chambre, session, 2018-2019, Doc 54-3537/005. https://www.lachambre.be/FLWB/PDF/54/3537/54K3537004.pdf.
- Belgian House of Representative. (2020, November 4). Note de Politique Générale. Asile et Migration et Loterie Nationale. *Doc. Parl.,* Chambre, Session 2020-2021, Doc 55 1580/014. https://www.lachambre.be/doc/flwb/pdf/55/1580/55k1580014.pdf.
- Belgian House of Representative (2020, December 22). Rapport final de la Commission chargée de l'évaluation de la politique du retour volontaire et de l'éloignement forcé des étrangers. *Doc. parl*., Chambre, Session 2020-2021, Doc 55 1707/001. https://www.lachambre.be/doc/flwb/pdf/55/1707/55k1707001.pdf.
- Belgian House of Representative. (2021, January 11). Proposition de loi modifiant le Code penal en vue d'incriminer l'entrée ou l'intrusion de toute personne non habilitée ou non autorisée dans un véhicule, un navire, un wagon, un conteneur, une semi-remorque ou un avion déposée par M. Jasper Pillen et Mme Katja Gabriëls. *Doc. parl*., Chambre, Session 2020-2021, Doc 55 1729/001. https://www.lachambre.be/doc/flwb/pdf/55/1729/55k1729001.pdf.
- Belgian House of Representative. (2021, January 14). Proposition de resolution sur la transmigration déposée par Mr. Theo Francken et consorts. *Doc. parl*., Chambre, Session 2020-2021, Doc 55 1740/001. https://www.lachambre.be/doc/flwb/pdf/55/1740/55k1740001.pdf.
- Belgian House of Representative (2021, October 10). Questions et réponses écrites. *Doc. parl*., Chambre, Session 2021-2022, QRVA 55 067. https://www.lachambre.be/doc/qrva/pdf/55/55k0067.pdf.
- Belgian House of Representative (2021, November 3). Note de Politique Générale. Asile et Migration et Loterie Nationale. Doc. parl., Chambre, Session 2021-2022, Doc 55 2294/022. https://www.lachambre.be/doc/flwb/pdf/55/2294/55k2294022.pdf (p. 34).

Annexes

Annex I

Examples Interview Guides

QUESTIONNAIRE MINISTRY OF JUSTICE

General

1. Can you each describe your role within the Ministry of Justice?

2. Can you describe the role of Ministry of Justice in practice within the Inter-departmental Coordination Unit for combating smuggling and trafficking in human beings?

3. Do you see the fight against irregular migration and smuggling and trafficking as related? If so, can you give an example of this link?

4. Based on your experience, what would be the biggest challenges that you face to tackle human trafficking and/or human smuggling?

5. Did you perceive an evolution/change when it comes to the phenomena of human smuggling? More or less professionalization of the actors, new techniques, new modus operandi, new routes, different groups involved, etc.?

EU

6. To what extent do you feel that the decisions that are taken at the European Union level with regard to migration and border control as well as with regard to the fight against human trafficking and human smuggling, affect your daily work?

7. Do you feel it is useful to be part of the European Union when it comes to combatting human trafficking and human smuggling?

8. How do you concretely are kept up to date with the European legal/policy changes that occurred in the field of human trafficking/smuggling and irregular

migration? Do you have a role in terms of the communication of these information to the other actors (newsletter/training/staff meeting, etc.)?

9. What changes do you see in your daily work since the permanent border control at Schengen borders was abolished?

Institutions

10. What is the relationship between the local and/or federal police and the Ministry of justice in the event of HS and HT cases?
    a. Same question with the relation with the ministry of foreign affairs.

11. Could you describe your relationship with the Public Prosecutor Office (at all levels including the federal one) for cases of human trafficking and human smuggling? What are the procedures put in place?

12. The fight against 'transmigration' is a priority of the government and is currently high on the agenda. The same applies to the fight against smuggling and trafficking in human beings, with a view to the national security plan (2015-2018). Do you consider these different priorities to be complementary or contradictory?

13. What is your perception on the international collaboration in cases of human trafficking and human smuggling.

14. In particular, how do you perceive the roles of Frontex, Europol and Eurojust.

15. Do you collaborate and exchange with other Ministries of Justice at the European level? If so, how and at what frequency?

Policy-making

16. General: could you provide us some insight on the policy-making process related HS and HT.

17. Who are the main actors involved in the policy-making process related to matters of HS and HT?
    a. More specifically, could you pinpoint the organizations/institutions (whether governmental or non-governmental/experts/partners) that are consulted when new laws/drafts/policies are adopted?
    b. Are first line actors (police officers, labor inspectors, members of the specialized reception centers) consulted in that process?
    c. How would you describe their roles (daily work) on the ground?

18. As these matters are subject to EU regulations, who is representing Belgium at this level and how? Do you feel like the Belgian approach on these phenomena is being adequately represented? If so, could you provide an example?

EXAMPLE INTERVIEW GUIDE – PROSECUTOR

*translated from French/Dutch – adapted to each prosecutor depending on their PPO which includes the Labour Prosecutor Office. The interview guide also contained quotes from the work published (either in doctrinal articles/national rapporteur reports or in the press by themselves or by other specialised prosecutors. These quotes were used as prompts and selected based on the specialisation of the respondent.

General

1. Can you each describe your role within your institution (depending on the public prosecutor office/also several (former and current) members of the GRETA?

2. In your daily work, how do you concretely distinguish between cases of trafficking and smuggling of human beings?

3. What is the distinction between article 77bis (assistance to entry/transit/stay) and the migrant smuggling stricto sensu (77) when there is no patrimonial benefit? What constitutes concretely « intention délictuelle » (how is interpreted)?

Institutions

4. Can you describe the relationship between the federal police, the local police when it comes to identifying and investigating cases of trafficking and smuggling of human beings?

   a. Can we talk about systematic contact and assistance between the different levels?

5. Could you describe your relationship with the police (both local and federal) for cases of human trafficking and human smuggling? What are the procedures put in place?

6. Can you describe the relations between the different public prosecutor offices: Public Prosecutor, Labour Prosecutor and Federal Prosecutor's Office?

7. Can you describe the relationship between the PPOs and the NGOs (reception centre) in charge of victims of human trafficking/migrant smuggling.

   a. Are there conflicts/clashes of priorities in practice? And if so, what are the consequences? E.g.: difference between zonal security plan and national security plan?

8. Based on the national security plans (2015-2018) : the fight against migrant smuggling is now a priority. Do you perceive a change in terms of investigation due to this change (proactive and not reactive/ increase of means/ training)?

9. Are there conflicts/clashes of priorities in practice? And if so, what are the consequences? E.g.: difference between zonal security plan and national security plan?

Legal/technical (questions selected based on the specialisation of the respondent)

10. Reaction on doctrinal opinion written by on specialised magistrate: "The law seems to protect the national borders more than the migrants in the sense that the one who transports an irregular migrant or rents him a flat at normal price can be prosecuted on the basis of article 77bis of the law of 15 December 1980".

11. The offence of HT in Belgium is broad. Consequence: jurisdictions reluctant to use it and divergence of interpretation between prosecutors/judges in practice (doctrinal opinion). Is this a reality and if so, how do you explain it? "Only the most serious cases can be qualified as trafficking.

12. In the last report issued by the National Rapporteur, one of your colleague stated that 'police officers with empathy' were the most able to pick the 'good migrant' to talk to in order to have concrete intelligence on the situation. Could you elaborate on that? What is an empathic police officer?

13. Clash between the HT offence and the representation that people of the ideal victim (work of Lavaux-Legendre – sexually exploited, passive, female and weak). Impact of these stereotypes on the fight against the phenomena, notably for trafficking for labour exploitation ?

14. Reflections on the use of the term 'transmigrant' – potentially using Claes' (2018) quotes on the term described as 'dehumanising', allowing for the offloading of responsibility.

EU

15. Do you think it is useful to be part of the European Union when it comes to combatting human trafficking and human smuggling?

16. To what extent do decisions taken at EU level on migration, border control and anti-trafficking affect your daily work?

17. How does the lack of permanent border control in the Schengen area affect migrant smuggling in Belgium?

18. Has your work changed since 2015 and if so, to what extent?

19. What is your perception on the international collaboration (particularly at the EU level) in cases of human trafficking and human smuggling.

a. In particular, how do you perceive the roles of Frontex, Europol and Eurojust.

EXAMPLE INTERVIEW GUIDE – POLICE

General

1. Could you describe your role within your institution?

2. In your day-to-day work, how do you distinguish cases of human trafficking and human smuggling? Could you provide a concrete example?

EU

1. To what extent do you feel that the decisions that are taken at the European Union level with regard to migration and border control as well as with regard to the fight against human trafficking and human smuggling, affect your daily work?

2. Does the Federal Police keep you up to date with the European and/or national legal/policy changes that occurred in the field of human trafficking/smuggling and irregular migration? And if so, how (newsletter/training/staff meeting, etc.)?

3. Do you feel it is useful to be part of the European Union when it comes to combatting human trafficking and human smuggling?

Perception with regards to migration and border(s)

1. Based on your experience, what would be the biggest challenges that you face to tackle human smuggling?

- Based on your experience? Is the transit migration a new phenomenon? If so, how?

- How does transit migration affects your daily work? (Also prompt/quote on the use of the term transmigrant – useful and why?)

- Is there a conflict in terms of priorities at the different levels of governance?

2. What would be a memorable work story or a memorable individual(s) that you encountered while doing your job? You may also retell a story that happened to one of your colleague, even if you are not a character in the story.

3. What changes do you perceive in your day-to-day work since the permanent control at the intra-Schengen borders were removed?

4. In the same line, did you perceived a change in your work (related to human trafficking/smuggling) since the start of the migration crisis of 2015? Is so, do you have concrete examples on how your work has changed?

5. Did you perceive an evolution/change when it comes to the phenomena of human smuggling? More or less professionalization of the actors, new techniques, new modus operandi, new routes, different groups involved, etc.?

- Could you describe the smuggler's profile?

6. When you encounter a migrant that is a possible victim of human trafficking/ aggravated form of smuggling, could you describe the feelings that you have towards him/her?
   a. Does this feeling change depending on the circumstances and if so which ones?

Institutional collaboration

a. National level

1. Could you describe the relationship between the Federal Police and the Local Police when it comes to identify and investigate cases of human trafficking and human smuggling?
   a. Is there a clear division of tasks?

2. Can we talk about contact and assistance between the local police and the federal police in cases of human trafficking and human smuggling?

3. Could you describe your relationship with the Public Prosecutor Office and judges for cases of human trafficking and human smuggling? What are the procedures put in place?

4. Could you describe your relationship with the specialized NGOs for cases of human trafficking/smuggling? What are the procedures put in place and how does this exchange of information work in practice?

b. International level

5. What is your perception on the international collaboration in cases of human trafficking and human smuggling. In particular, how do you perceive the roles of Frontex, Europol and Eurojust.

6. Do you remember cases where you received the assistance of one of these three institutions and if so, how did it take place?

Annex II

Example Consent Form (non-anonymisation)

CONSENT FORM

Project: Combatting Human Trafficking and Human Smuggling in intra-Schengen Border Areas

Who is responsible for this research project? Maartje van der Woude, Professor, Chair of Law and Society, Leiden University; Roxane de Massol de Rebetz, PhD candidate, Leiden University. Both are researchers at the Van Vollenhoven Institute for Law, Governance and Society (Leiden Law School – vollenhoven@law.leidenuniv.nl). The research is partially funded by the National Dutch Police (The Hague).

What is the aim of the project?
This research aims to better understand the phenomena of human trafficking and human smuggling and their intersection in practice in the specific context of intra-Schengen border areas (focus Western Mediterranean Route). For this purpose, the research aims to:

- Identify the legal and operational framework set in place to tackle these phenomena in the different European Member States under studied (Spain, France, Belgium).

- Understand the perception of relevant actors (e.g. border police officers, workers of NGOs) on human smuggling and its eventual intersection with human trafficking.

- Understand how first line actors deal with these types of crimes and the everyday conditions and organisational culture that allow them to tackle these phenomena or, eventually the conditions/difficulties that prevent them to do so.

What is asked of you during this research:
You are asked to participate in an interview or a focus group discussion of 1 to 2 hours with the researchers. The focus group discussion will revolve around the topic mentioned above and the experience, perception and view of the professional on the phenomena of human trafficking and human smuggling in their specific countries. In order to have the most accurate information, this interview/focus group discussion will be recorded, with the help of a digital recorder.

Are there risks or advantages to participate in this research?
We do not foresee any risks or discomfort from your participation in the research. There are no anticipated direct benefits of the research to you. There is no financial compensation for the participation in the research. However, your participation will help to better understand the challenges faced by the authorities to combat human smuggling and human trafficking.

What do you do with my answers?
The answers in the form of transcripts and researchers' notes will be analysed and compared with the answers of other research participants together with desk research results and a legal analysis on the legislation on human trafficking and human smuggling in the countries aforementioned. The results will be the basis for a report for the National Dutch Police and academic outputs such as publication in academic journals and conference presentations.

How will you handle the information gathered?
As your are taking part of this research as a unique national expert on human trafficking and/or human smuggling, we foresee difficulties in the process of complete de-identification. Various experts on the topic might be able to deduct your identity on the basis of the information provided. Your crucial role and expertise on human trafficking and/or human smuggling in your country constitutes the value of the data gathered. Hence, the quality guarantee of the information is dependent of your specific position and expertise on the topic.

For that reason, personally identifiable information will be reported in the research product(s) in the form of your professional function. Moreover, only trained research staff will have access to your responses. Within these restrictions, academic results of this study will be made available to you upon request. As indicated above, this research project involves making audio recordings of interviews with you. The audio recordings will be transcribed either by the researchers or by a third party that is bound to strict secrecy and confidentiality which is enshrined in a data processing agreement between the firm and the University. Transcribed segments from the audio recordings may be used in published forms (e.g. Journal articles and book chapters). The audio recordings and the transcripts, forms, and other documents created or collected as part of this study will be stored securely at Leiden University. For academic integrity, data is being kept securely for 10 years after the end of the study.

Do I have to answer all the questions?
No. Your participation is entirely voluntary. You may refuse to answer any question. You may decide to remove yourself from the research also during the interview/focus group discussion. You may signify your wish to have your personal data remove from the research by contacting one of the two principal investigators.

What if I have other questions during the study?
If you have more questions about this research or your role in it, please contact Maartje van der Woude at M.A.H.vanderWoude@law.leidenuniv.nl or by phone at Leiden University at tel:+31 71 527 7552 or Roxane de Massol de Rebetz at r.m.f.de.massol.de.rebetz@law.leidenuniv.nl or by phone at Leiden University at tel: +31 71 527 7260.

CONSENT

Please tick the YES/NO boxes below	YES	NO
I have read the information provided above, I understand the purpose of this research and I have obtained answers to my questions regarding my participation. I know that I can stop participating at any time without having to justify my decision.		
I freely consent to take part in this research by giving this interview.		
I understand that personal information collected about me that can identify me [e.g.,my name or professional contact details] will be shared within the study team		
I give my consent to the digital audio recording of the interview		
I am aware that I can withdraw my consent to the digital audio recording during the interview at any time		
I give my consent that my answers can be quoted in the form of my professional function and not include any other personal details in research outputs		
I give permission for the de-identified transcripts of my answers as well as the researchers' notes will be archived so it can be used for future research and learning.		
I have been given a copy of this consent form co-signed by the interviewer.		
I agree that personal name can be used for quotes		

_____

My name (capital letters)

_____ _____

My signature Date

As researcher for the project, I have explained the whole of the project and remain available to answer your questions.

_____ _____

Signature of the researcher Date

Curriculum vitae

Roxane de Massol de Rebetz was born in Liège (Belgium) on August 10, 1991. She obtained her bachelor's degree in Law from the University of Namur (Belgium) in 2013 and her master's degree in Law (specialization in Public Law) *magna cum laude* from the Université Libre de Bruxelles (Belgium) in 2015. After an internship in private banking, she started a master at Leiden University (the Netherlands) in Crime and Criminal Justice from which she graduated *cum laude* in March 2017. For her master thesis, she conducted a critical analysis of newly adopted French counterterrorist reforms through the lens of exceptionalism. From August 2017, she started to work at the Van Vollenhoven Institute for Law, Governance and Society (VVI) at Leiden University, Leiden law School, as a teaching assistant. Together with her supervisor prof. dr. mr. Maartje van der Woude, she obtained funding from the National Dutch Police to research questions related to migrant smuggling and human trafficking within the context of Intra-Schengen mobility and conducted experts' interviews in France, Spain, and Belgium. From August 2018, she worked as a PhD candidate within the VVI under the supervision of prof. dr. mr. Maartje van der Woude, prof. dr. Masja van Meeteren and prof. dr. Joanne van der Leun. Since December 2023 she works as an assistant professor of Law and Society at the VVI.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2021, 2022 and 2023

MI-365 M.P.A. Spanjers, *Belastingbudget. Onderzoek betekenis budgettaire impact belastingen bij parlementaire vaststelling belastingwetgeving* (diss. Leiden), Den Haag: Flosvier 2021, ISBN 978 90 8216 072 7

MI-366 J. Zhang, *The Rationale of Publicity in the Law of Corporeal Movables and Claims. Meeting the Requirement of Publicity by Registration?* (diss. Leiden), Den Haag: Boom juridisch 2021

MI-367 B.C.M. van Hazebroek, *Understanding delinquent development from childhood into early adulthood in early onset offenders* (diss. Leiden), Amsterdam: Ipskamp Printing 2021, ISBN 978 94 6421 2723

MI-368 M.R. Manse, *Promise, Pretence and Pragmatism – Governance and Taxation in Colonial Indonesia, 1870-1940* (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-369 M.E. Stewart, *Freedom of Overflight: – A Study of Coastal State Jurisdiction in International Airspace* (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-370 M.T. Beumers, *De bescherming van immateriële contractuele belangen in het schadevergoedingsrecht* (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 962 5

MI-371 C.M. Sandelowsky-Bosman, T. Liefaard, S.E. Rap & F.A.N.J. Goudappel, *De rechten van ongedocumenteerde kinderen in Curaçao – een gezamenlijke verantwoordelijkheid*, Den Haag: Boom juridisch 2021, ISBN 978-94-6290-965-6

MI-372 G.J.A. Geertjes, *Staatsrecht en conventie in Nederland en het Verenigd Koninkrijk,* (diss. Leiden), Zutphen, Uitgeverij Paris bv 2021, ISBN 978 94 6251 270 2

MI-373 L. Noyon, *Strafrecht en publieke opinie. Een onderzoek naar de relatie tussen de strafrechtspleging en het publiek, met bijzondere aandacht voor het Openbaar Ministerie,* (diss. Leiden), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 978 6

MI-374 F. Behre, *A European Ministry of Finance? Charting and Testing the National Constitutional Limits to EU Fiscal Integration*, (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-375 R. Spence, *Collateral transactions and shadow banking* (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-376 B.H.M. Custers, F. Dechesne & S. van der Hof (red.), *Meesterlijk. Liber amicorum ter gelegenheid van het emeritaat van prof. dr. Jaap van den Herik,* Amsterdam: Ipskamp Printing 2021

MI-377 E. Campfens, *Cross-border claims to cultural objects. Property or heritage?*, (diss. Leiden), The Hague: Eleven 2021, ISBN 978 94 6236 250 5

MI-378 S.R. Bakker, *Uitzonderlijke excepties in het strafrecht. Een zoektocht naar systematiek bij de beslissingen omtrent uitsluiting van strafrechtelijke aansprakelijkheid in bijzondere contexten,* (diss. Rotterdam), Den Haag: Boom juridisch 2021, ISBN 978 94 6290 998 4, ISBN 978 90 5189 194 2 (e-book)

MI-379 M. Gkliati, *Systemic Accountability of the European Border and Coast Guard. The legal responsibility of Frontex for human rights violations,* (diss. Leiden), Alblasserdam: Ridderprint 2021

MI-380 C.-I. Grigorieff, *The Regime for International Air Carrier Liability. To what Extent has the Envisaged Uniformity of the 1999 Montreal Convention been Achieved?,* (diss. Leiden), Amsterdam: Ipskamp Printing 2021

MI-381 M. Stam, *Essays on Welfare Benefits, Employment, and Crime,* (diss. Leiden)

MI-382 C.M.F. Mommers, *Voluntary return and the limits of individual responsibility in the EU Returns Directive,* (diss. Leiden), Amsterdam: Ipskamp Printing 2022, ISBN 978 94 6421 583 0

MI-383 M.E. Franke, *Over de grens van de onrechtmatige daad. Een onderzoek naar de plaats van de rechtvaardiging in het buitencontractuele aansprakelijkheidsrecht*, (diss. Leiden), Den Haag: Boom juridisch 2022, ISBN 978 94 6290 152 0

MI-384 B.L. Terpstra, *Instrumental and normative pathways to compliance. Results from field research on moped drivers,* (diss. Leiden), Amsterdam: Ipskamp Printing 2022

MI-385 Q. Mauer, *Application, Adaptation and Rejection. The strategies of Roman jurists in responsa concerning Greek documents*, (diss. Leiden), Den Haag: Boom juridisch 2022, ISBN 978 94 6236 291 8, ISBN (e-book) 978 90 5189 952 8

MI-386 F. Tan, *The Duty to Investigate in Situations of Armed Conflict. An examination under international humanitarian law, international human rights law, and their interplay*, (diss. Leiden), Amsterdam: Ipskamp Printing 2022

MI-387 G.G. Lodder, *Recht doen of Recht hebben. Een analyse van de rechten van de migrant op bescherming door de staat tegen arbeidsuitbuiting*, (diss. Leiden), Amsterdam: Ipskamp Printing 2022, ISBN 978 94 6421 679 0

MI-388 M. Mannan, *The Emergence of Democratic Firms in the Platform Economy: Drivers, Obstacles and the Path Ahead*, (diss. Leiden), Amsterdam: Ipskamp Printing 2022

MI-389 A.M. Bouland, *'Please Give Me My Divorce'. An Ethnography of Muslim Women and the Law in Senegal*, (diss. Leiden), Amsterdam: Ipskamp Printing 2022

MI-390 B.J. Braak, *Overcoming ruptures: Zande identity, governance, and tradition during cycles of war and displacement in South Sudan and Uganda (2014-9),* (diss. Leiden), Amsterdam: Ipskamp Printing 2022

MI-391 S.R. Varadan, *Article 5 of the UN Convention on the Rights of the Child. Parental guidance and the evolving capacities of the child*, (diss. Leiden), Amsterdam: Ipskamp Printing 2022, ISBN 978 94 6421 700 1

MI-392 J.M.W. Pool, *De rol van de curator bij de aanpak van onregelmatigheden. Een empirisch-juridisch onderzoek naar de rol van de curator in de praktijk bij de aanpak van onregelmatigheden voor en tijdens faillissement*, (diss. Leiden), Amsterdam: Ipskamp Printing 2022, ISBN 978 94 6421 827 5

MI-393 D.S. Verkroost, *'Met zachte drang'. Uitgangspunten voor jeugdhulpverlening op het snijvlak van vrijwilligheid en dwang,* (diss. Leiden), Den Haag: Boom juridisch 2022, ISBN 978 94 6212 735 7, ISBN 978 94 0011 197 4 (e-book)

MI-394 D. Mândrescu, *The application of EU antitrust law to (dominant) online platforms,* (diss. Leiden), Amsterdam: Ipskamp Printing 2022

MI-395 A.H.A. Mohammad, *De normering van academisch ondernemerschap. Perspectieven vanuit het onderwijs(bekostigings)recht, het Europees staatssteunrecht en de academische vrijheid & wetenschappelijke integriteit*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023

MI-396 T.L. Masson-Zwaan, *Widening the Horizons of Outer Space Law*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023, ISBN 978 94 6421 977 7

MI-397 W. Zhang, *Achieving decent work in China. A case study of decent working time*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023

MI-398 T.M. Vergouwen, *The effect of directives within the area of direct taxation on the interpretation and application of tax treaties*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023

MI-399 R. de Massol de Rebetz, *Beyond the Dichotomy between Migrant Smuggling and Human Trafficking. A Belgian Case Study on the Governance of Migrants in Transit*, (diss. Leiden), Amsterdam: Ipskamp Printing 2023, ISBN 978 94 6473 099 9