



Universiteit
Leiden
The Netherlands

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

Citation

Massol de Rebetz, R. M. F. A. de. (2023, May 25). *Beyond the dichotomy between migrant smuggling and human trafficking: a Belgian case study on the governance of migrants in transit*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/3618746>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/3618746>

Note: To cite this publication please use the final published version (if applicable).

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

© 2023 R. de Massol de Rebetz

Behoudens de in of krachtens de Auteurswet gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Voor zover het maken van reprografische verveelvoudigingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.stichting-pro.nl).

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.

*'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
1	Contextualization and Impetus for the Research	1
1.1	Globalisation, Sovereignty, and the Securitization of Migration	1
1.2	The origin of the legal dichotomy between migrant smuggling and human trafficking	3
1.3	Consequences of the dichotomy: who deserves protection?	7
1.4	Impetus for the dissertation and main research question	10
2	Migrant smuggling as a Multi-Faceted Phenomenon	13
2.1	An Overview of Overviews	13
2.2	Locating the Dissertation	17
3	A Study of the 'Real Law'	19
4	Methodological approach	22
4.1	Document sources	26
4.2	Qualitative Expert Interviewing	26
4.3	Data, access to the field and selection of respondents	28
4.4	Reflexivity and positionality	30
5	Terminology matters	32
6	Reader's guide	35
2	COUNTER-SMUGGLING IN THE EUROPEAN UNION AND IN BELGIUM	39
1	Introduction	39
2	The EU Facilitators Package	41
2.1	Context of the adoption	41
2.2	The facilitation of unauthorised entry, transit, and residence	43
2.3	Departure from Palermo	44
3	Other Relevant European Instruments	47
3.1	The European anti-trafficking legal framework	48
3.1.1	European Union	48
3.1.2	Council of Europe	52
3.2	A Domination of the crime (and migration) control approach to deal with human trafficking at the EU level?	52
4	Narratives Matter – A Review of the EU 'Policy Package' post Migration 'Crisis'	54
4.1	2015-2020: Domination of the 'Criminal/Security' Narrative	55
4.2	2021-2025: Idem – Domination of the Criminal/Security Narrative	56
5	A Belgian Case Study	59
5.1	Legal definitions	61
5.1.1	The Dichotomy	62

5.1.2	Migrant Smuggling, Aggravated Migrant Smuggling, the 'Facilitation' Offence & Human Trafficking	63
5.2	Protection Dimension	72
5.2.1	National Orientation Mechanism – A Multi-Disciplinary Approach	73
5.2.2	Rights and Obligations	74
6	Conclusion	77
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	79
1	Introduction	79
2	Approach and Methodology	82
3	Transit Migration in the Intra-Schengen Mobility Context	84
3.1	Transit migration: a difficult concept to define	84
3.2	On the presence of transit zones within the Schengen Area	85
4	Blurry Lines: Reflection on the Notions of Consent/Agency, Exploitation, and Debt	87
4.1	Law in the books: on the strict distinction between human trafficking and migrant smuggling	87
4.2	Law in action: when exploitation, consent and debt complicate the dichotomy	89
5	The Impact of Stereotypes on Policymaking and Implementation	92
5.1	The prototypical construction of human trafficking victims and villains	93
5.2	The prototypical construction of the evil ruthless human smuggler part of an organized crime group	94
5.3	The dangers of the instrumental conflation between human trafficking and migrant smuggling	96
6	Discussion	97
7	Conclusion	99
4	PROTECTING VICTIMS OF AGGRAVATED FORMS OF MIGRANT SMUGGLING	
	A Janus-faced response	103
1	Introduction	103
2	Policing Humanitarian Borderlands	105
3	Methodology	107
3.1	Mirroring the fragmented Belgian institutional framework: respondent's selection	107
3.1.1	The Belgian Judiciary System and the Role of Specialized Prosecutors	108
3.1.2	Foreword on the Police Organization in Belgium	110
3.2	Analysis	110

4	Dealing with Migrant Smuggling in Belgium – A Brief Reminder	111
4.1	Migrant smuggling and human trafficking as distinct crimes	11
4.2	Acknowledging and harmonizing aggravated circumstances	112
5	The Third-Way Approach Through the Eyes of State Agents	113
5.1	The legal reality of the third-way approach	113
5.2	The third-way approach in practice	115
6	A More Complex Answer: Institutional Forces and Dynamics at Play	118
6.1	Overlapping and clashing competences	118
6.2	Capacity and the need for sensibilization	120
6.3	Passing the buck and shifting the blame	122
7	Conclusion	123
5	PASSING THE BUCK, DISCRETION & JURISDICTIONAL GAMES	127
1	Introduction	127
2	Conceptual Framework: Jurisdictional Games, Interlegality and the Role of Discretion	129
2.1	Jurisdictional Games & Interlegality as an Analytical Lens	129
2.2	Enacting Jurisdictions and the Role of Discretion in the Jurisdictional Games	130
3	Methodology	132
4	Governing Migrant Smuggling in Belgium: A Multi-Layered Issue	132
4.1	Belgium as a Transit Country	132
4.2	Legislative Frameworks – A Reminder	133
4.3	Actors	135
5	Findings: Jurisdictional Games at the National, Local and European Scales	140
5.1	Scaling down: jurisdictional games at the national and local scales	140
5.1.1	Thematic Jurisdictional Games: Does the Administrative Dimension Take the Lead and the Judiciary One Follows in the Tango?	142
5.1.2	Territorial Jurisdictional Games: On the Crucial Role of the Mayors in the Tango	146
5.1.3	Thematic Jurisdictional Games: A Smuggler Needed to Be Punished?	147
5.2	Scaling up: territorial jurisdictional games at the European scale	150
6	Conclusion	152
6	AGGRAVATED MIGRANT SMUGGLING IN A TRANSIT MIGRATION CONTEXT	
	Criminal victimization under positive obligations case law	155
1	Introduction	155
2	The Belgian Case: Context, Legal Framework & Limitations	160
2.1	Migrant Smuggling within the Schengen Area	161
2.2	Fight against ‘Transmigration’ and Migrant Smuggling in Belgium	163
2.3	Legal Framework: A Protective Approach Towards Victims of Aggravated Forms of Migrant Smuggling ...	166
2.4	... Scarcely Used in Practice	168

3	Turning empirical evidence into human rights currency	169
3.1	Deference practices in the migration field	169
3.2	(Non-)deference in the Context of Criminal Justice Related Positive Obligations	171
3.3	Evidence-based adjudication and recognition of (particular) vulnerability	175
3.4	Theoretical Reflections on the Vulnerability Concept	176
3.5	The ECtHR's Ability to Deploy (New) Vulnerability Markers	178
3.6	The (Particular) Vulnerability of the Transiting Smuggling Victim	179
3.6.1	The Profile of the Transiting Migrant	180
3.6.2	The Profile of the Aggravated Smuggling Victim	183
3.7	Constructed vulnerability	188
4	Legal Effects: Application of Criminal Justice Related Positive Obligations Framework	190
4.1	Applicability of the Convention to Transiting Migrant? Trafficking Case Law as a <i>Model</i>	191
4.2	A Consolidated and Fluid Approach Under Articles 2, 3, 4 and 8 ECHR	195
4.3	Sorting through reliance on empirical information and insights	198
5	Conclusion	203
7	CONCLUSION	
	Connecting the dots, avenues for further research and plausible solutions	207
1	Introduction	207
2	Answering the Central Research Question and Unpacking the Main Findings	208
2.1	Answer to the central research question	208
2.2	A dichotomy under scrutiny: a multi-scalar overview of the legal and policy instruments to deal with migrant smuggling and human trafficking	211
2.3	Transit migration and onward migration movements within the Schengen Area	212
2.4	On decisions and jurisdictions	216
3	Taking the Nation-State as the Default Scalar Setting?	218
4	Avenues for Further Research and Limitations	222
5	Looking into the Future: Finding Solutions to Enhance Protection?	225
	SUMMARY	229
	SAMENVATTING (DUTCH SUMMARY)	237
	GENERAL BIBLIOGRAPHY	247
	LEGISLATIVE ACTS, INTERNATIONAL CONVENTIONS/INSTRUMENTS, POLICY AND ACTION PLANS	275
	ANNEXES	281
	I – Examples interview guides	283
	II – Example consent form (non-anonymisation)	289
	CURRICULUM VITAE	293