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

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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

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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