2 Counter-smuggling in the European Union and in Belgium

1 INTRODUCTION

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

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

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

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

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

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

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

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

2 The EU Facilitators Package

2.1 Context of the adoption

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

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

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

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

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

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

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

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

2.2 The facilitation of unauthorised entry, transit, and residence

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

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

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

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

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

2.3 Departure from Palermo

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

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

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

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

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

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

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

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

3 Other Relevant European Instruments

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

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

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

3.1 The European anti-trafficking legal framework

3.1.1 European Union

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1.2 Council of Europe[10]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 A Belgian Case Study

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

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

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

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

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

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

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

5.1 Legal definitions

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

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

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

5.1.1 The Dichotomy

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Aggravated Smuggling Offence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Human Trafficking

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

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

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

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

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

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

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

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

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

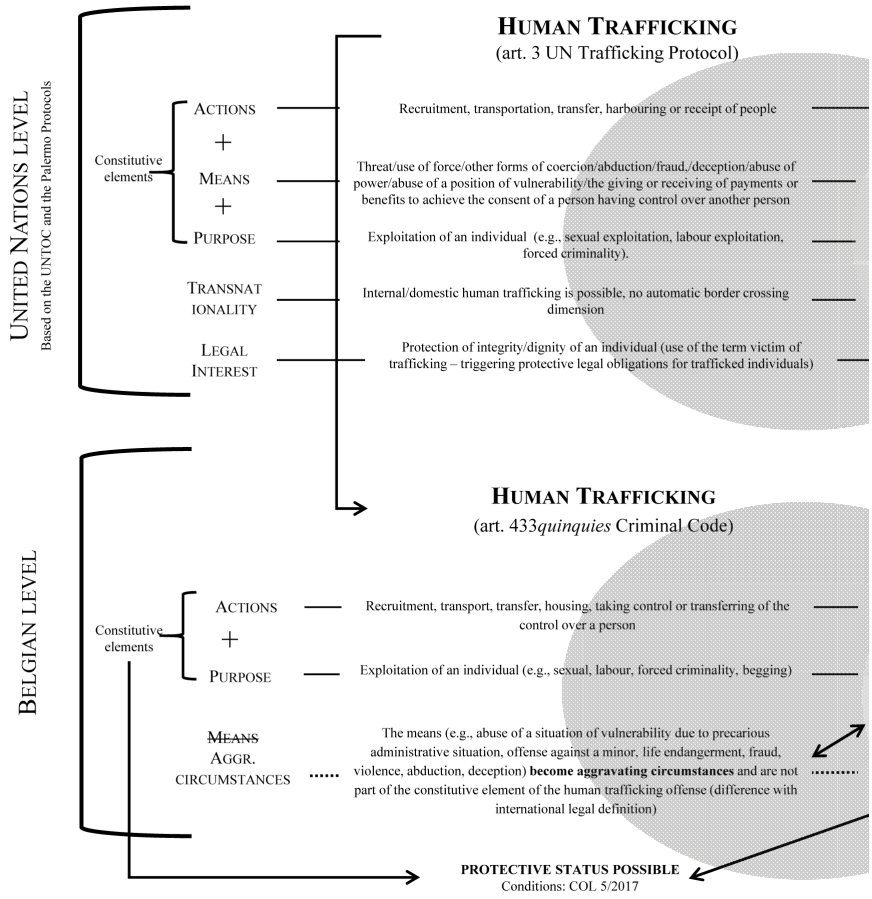
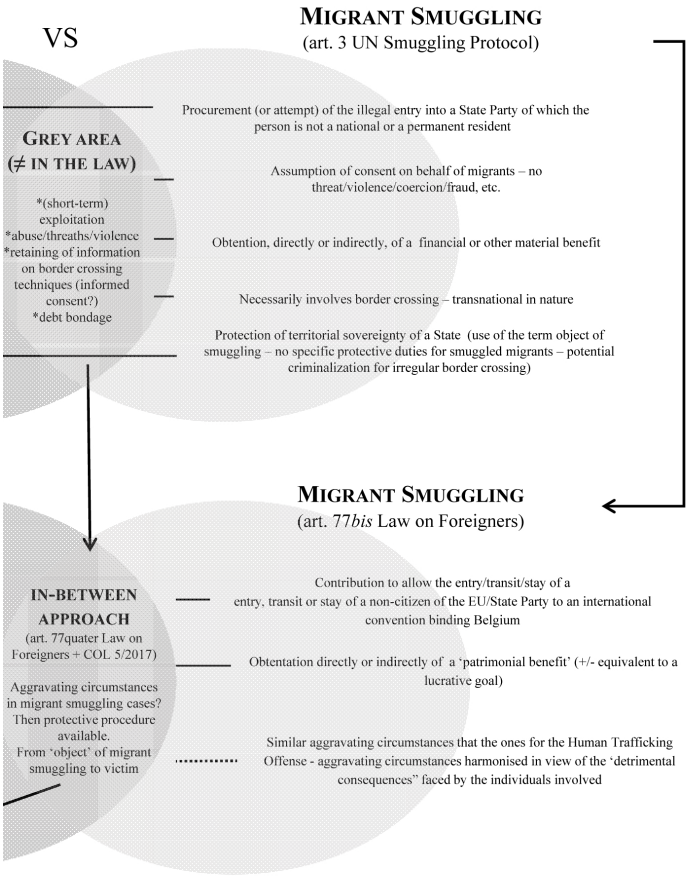


Figure 1. Simplified distinction between human trafficking and migrant smuggling and the 'grey area' between both phenomenon at the UN level and at the Belgian level.

5.2 Protection Dimension

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



5.2.1 National Orientation Mechanism – A Multi-Disciplinary Approach

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

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

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

5.2.2 Rights and Obligations

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

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

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

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

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

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

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

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

6 CONCLUSION

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

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

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

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

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