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

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4 Protecting Victims of Aggravated Forms of Migrant Smuggling

A Janus-Faced Response

1 Introduction

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

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

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

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

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

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

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

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

2 Policing Humanitarian Borderlands

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

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

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

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

3 Methodology

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

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

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

3.1.1 The Belgian Judiciary System and the Role of Specialized Prosecutors

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

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

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

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

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

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

3.1.2 *Foreword on the Police Organization in Belgium*

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

3.2 Analysis

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

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

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

4 Dealing with Migrant Smuggling in Belgium – A Brief Reminder

4.1 Migrant smuggling and human trafficking as distinct crimes

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

4.2 Acknowledging and harmonizing aggravated circumstances

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

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

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

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

5.1 The legal reality of the third-way approach

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

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

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

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

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

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

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

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

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

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

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

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

5.2 The third-way approach in practice

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

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

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

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

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

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

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

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

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

6.1 Overlapping and clashing competences

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

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

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

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

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

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

6.2 Capacity and the need for sensibilization

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

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

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

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

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

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

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

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

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

6.3 Passing the buck and shifting the blame

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

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

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

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

7 Conclusion

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

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

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

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

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

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