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

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5 | Passing the Buck, Discretion & Jurisdictional Games

1 INTRODUCTION

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

Since the dismantling of the infamous ‘jungle’ of Calais in 2016 by the French authorities, the presence of migrants transiting and settling temporarily in Belgium, mainly in the Brussels’ North railway station and the nearby Maximilian Park, as well as the many parking areas on the Belgian highways in the direction of the UK, has triggered debates on a sensitive issue of migrants transiting through the territory that is now politically referred to as ‘transmigration’ (Vandevoordt 2021; Myria 2020; see also the Chapter 1, Section 5 on terminology). The case of Belgium as a transit and destination country for migrants is an interesting one for a couple of reasons: 1) the country’s specific geographical position with its dense road network and its strategic location on the journey to the UK makes it an attractive site for migrant smuggling activities, and 2), the Belgian legislature developed a unique protective approach to deal with aggravated forms² of migrant smuggling, allowing its victims to, under certain conditions, access the protective status, which is otherwise strictly reserved to human trafficking victims. Individuals stranded in limbo or ‘stuck in motion’ in transit spaces, particularly in Brussels, thus

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

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

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

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

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

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

2 CONCEPTUAL FRAMEWORK: JURISDICTIONAL GAMES, INTERLEGALITY AND THE ROLE OF DISCRETION

2.1 Jurisdictional Games & Interlegality as an Analytical Lens

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

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

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

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

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

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

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

3 METHODOLOGY

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

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

4 GOVERNING MIGRANT SMUGGLING IN BELGIUM: A MULTI-LAYERED ISSUE

4.1 Belgium as a Transit Country

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

Broekaert 2005). Hence, the role of Belgium as a transit country is well established and issues such as migrant smuggling involving secondary migration movements³ of migrants transiting via Belgium to reach the UK are not novel (Leman & Janssens, 2015). However, the so-called migration ‘crisis’ (see Collyer & King 2016) in 2015 and the destruction of the infamous ‘Jungle of Calais’ by the French authorities in 2016 led to a displacement of migrants in the capital of the country and in its hinterland. The shift to Brussels can also be explained by the intensification of controls in parking areas along the highways (part of distinct plans to ‘fight transmigration’⁴) as Belgian politicians started to fear semi-permanent settlements by migrants at the French/Belgian border (Vandevoordt 2021). The neighbourhood of the North railway station of the capital as well as its nearby Maximilian Park turned into a humanitarian hub where civil actors, from citizens to NGOs, supported the hundreds of (vulnerable) individuals in transit gathering in the area every day with shelter, food, medical and legal assistance. On the term ‘transmigrant’, see Introduction (Section 5). This gathering elicited political attention and parliamentary debates took place to address the role of Brussels as a ‘Mini-Calais/pit stop’ in the migrants’ journey towards the UK (European Migration Networks 2017; Interview Federal Police 3).

4.2 Legislative Frameworks – A Reminder

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

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

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

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

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

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

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

4.3 Actors

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

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

'So, each mayor decides for himself what his local police can do with regard to illegals. Then, you see political differences. For example, the mayor of Brussels does not want the police, the local police, to act too restrictively with regards to the transmigrants in the Maximilian Park because that is Brussels territory.'

Int: How does that translate into action?

Resp2: For example, here in the Maximilian Park, once a week the police will ask people to please leave the park for a while so that the garbage service can clean it up and then they can come back. If at that time they don't want to leave, then they may be arrested, but otherwise not. Instructions from the mayor. There are other municipalities, e.g., on the coast where there is also a lot of nuisances, different political alliances. There, the mayor asks for the strictest, the most repressive possible action of their police forces.'

Int: Which would be?

Resp 2 : 'Constant actions, constant arrests'.

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

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

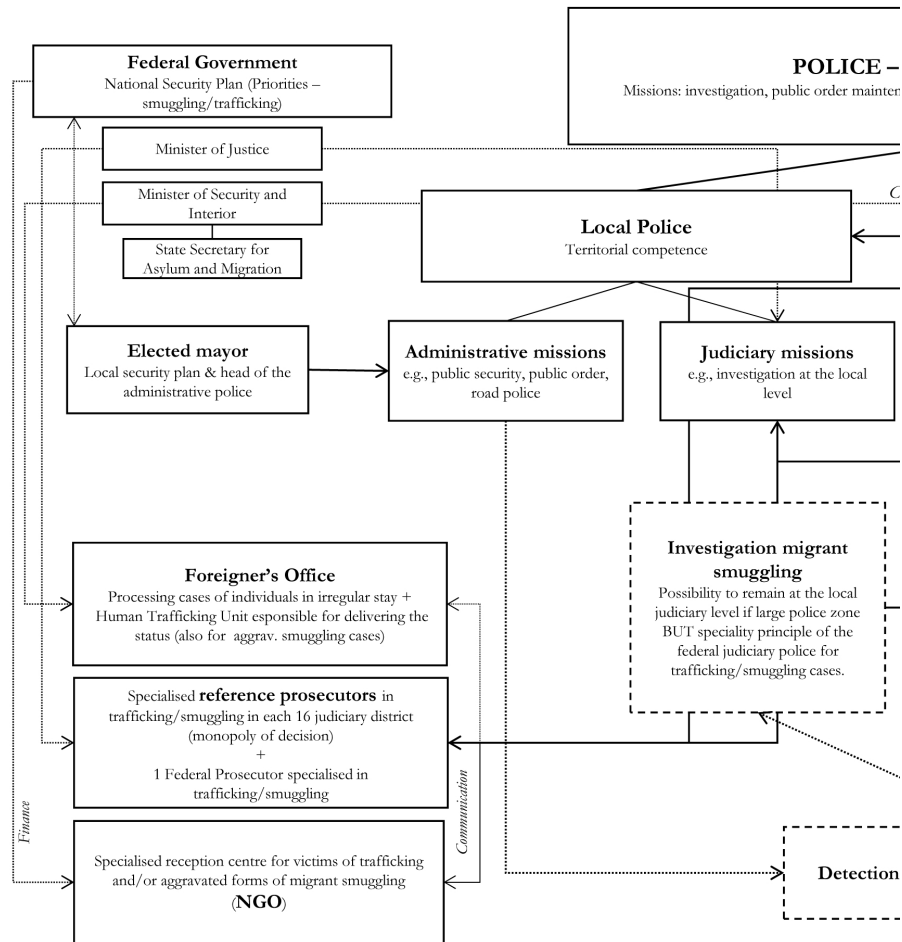
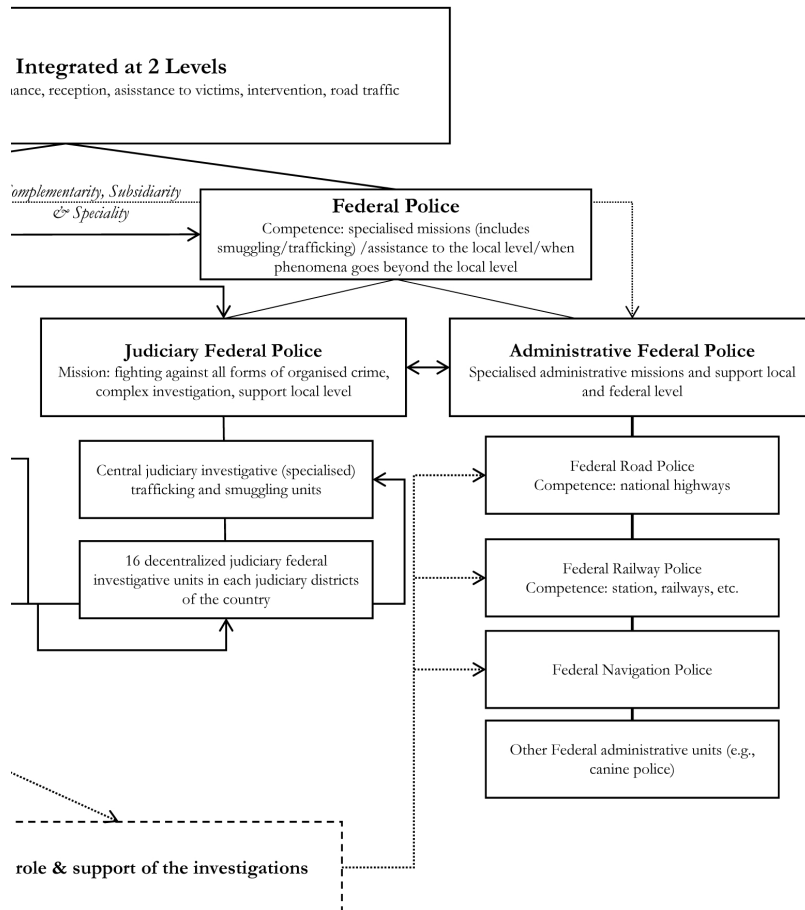


Figure 2. Simplified organigram of the Belgian police organization relevant for smuggling/trafficking cases.

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

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



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

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

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

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

Int: So, the mayor wants that too?

Resp: Yes. And then you say ok. Then they ask us, How do we get that out? And then you say, 'I don't like having that gone'. But well, I understand that they want it gone. So, then you say: you can get rid of it by, for example, saying do massive checks. Make sure that that park is no longer attractive to people'.

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

5 FINDINGS: JURISDICTIONAL GAMES AT THE NATIONAL, LOCAL AND EUROPEAN SCALES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

‘When you’re facing a group of ‘transmigrants’, maybe there is migrant smuggling, and you shouldn’t forget that there are things that you [referring to police officers] shouldn’t forget, that there are things you should be looking at, for example indicators⁷ and then start to investigate and that you simply tell yourself: ‘oh it’s a transmigrant: ok then nothing’.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in transit in (low-level yet visible) smuggling activities can involve distinct legal responses and lead to the criminalization of migrants. To understand the complexity of the thorny ‘smuggler, irregular migrant or victim’ issue, it is important to discuss the legal framework as well as a recent jurisprudential case. It is also required to signal that the UN Palermo Protocol on migrant smuggling states in its article 5 that an irregular migrant should not be punished for being smuggled and that this Protocol was followed by the Belgian legislature (see Chapter 2 and see also below on the *ratio legis*). The migrant smuggling offence (art. 77bis of the Law on Foreigners 15 December 1980) penalizes the ‘contribution, in some way or another, be it directly or by an intermediary, to the unauthorized entry, transit, or stay of a non-EU citizen into or through an EU member state, in violation of state law, directly or indirectly with a view of obtaining a patrimonial benefit’. The potential punishment is imprisonment of 1 to 5 years and a fine of 500 to 50 000 euros (fine multiplied by the number of victims). The term ‘contribution’ covers a vast array of behaviours such as the payment of a transportation fee of an individual to the migrant or the depiction of a country of destination as ideal to encourage individuals to go there to benefit financially from their migration journey (Clesse 2013). The concept of ‘patrimonial benefit’, in French *avantage patrimonial*, referring broadly to a financial or material gain, is central as it has a direct impact on the criminalization of migrants in transit. A recent case of the Correctional Tribunal of Brussels⁸ stirred an important debate on the notion. Indeed, while the (European) Facilitation Directive 2002/90/EC refers to the notion of ‘for profit’ meaning a substantial financial/material gain, the Belgian legislature adopted the broader notion of ‘direct or indirect patrimonial benefit’, which leaves substantial room for interpretation and is often interpreted in light of the circumstances of a case (Hardt 2019; see also Chapter 2). The leading French dictionary Larousse defines the term ‘patrimonial’ as ‘something having an economic value’ and the court has to prove the willingness of the migrant smuggler to enrich themselves at the expense of the victim or the family of the victim (Huberts 2006).

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

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

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

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

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

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

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

5.2 Scaling up: territorial jurisdictional games at the European scale

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

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

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

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

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

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

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

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

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

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

6 CONCLUSION

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

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

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

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

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

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

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

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