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

Massol de Rebetz, R.M.F.A. de

6 Aggravated Migrant Smuggling in a Transit Migration Context

Criminal Victimization under Positive Obligations Case Law

1 INTRODUCTION

In recent years and particularly since 2015, migrant smuggling has solidified as a salient policy issue for Europe. At the EU level, in accordance with the renewed EU Action Plan against Migrant Smuggling contributing to the implementation of the New Pact on Migration and Asylum, the current position is that the phenomenon requires a 'strong European response'.[1] The current response emerged from an older one dating back from the the mid-1990s, which has primarily been conceptualised as a need to combat cross-border (organised) crime.[2] The underlying rationale is that 1)on the one hand, migrant smuggling 'puts the migrant's lives at risk, showing disrespect for human life and dignity in the pursuit of profit', and '(undermines (…) the fundamental rights of the people concerned'[3] and 2) migrant smuggling, or the 'facilitation of irregular entry, transit and stay', disrupts 'the migration management objectives of the EU'.[4] Whereas the detrimental impact of smuggling on life, dignity and rights resonates in policy narratives and smuggling is clearly circumscribed as a crime, the framing of the smuggled migrants is less clear and does not resonate with the depiction of the impact of migrant smuggling. Arguably, the second rationale, centred on migration management, predominates the legal and policy responses, rendering them perpetrator-centric in nature.[5] Policy actions are primarily oriented on breaking the 'business

1 Nina Perkowski and Vicki Squire, 'The Anti-Policy of European Anti-Smuggling as a Site of Contestation in the Mediterranean Migration 'Crisis'' (2019) 45(12) JEMS 2167; Commission (EC), 'A Renewed EU Action Plan Against Migrant Smuggling (2021-2025)' COM (2021), 1, 29 September 2021 < https://ec.europa.eu/home-affairs/renewed-eu-action-plan-against-migrant-smuggling-2021-2025-com-2021-591_fr>.

2 Ilse van Liempt, 'Human Smuggling: A Global Migration Industry', in Anna Triandafyllidou (ed), *Handbook of Migration and Globalisation,* (Edward Elgar Publishing 2018) 140. Gabriella Sanchez, Kheira Arrouche, Matteo Capasso, Angeliki Dimitriadi and Alia Fakhri. 'Beyond Networks, Militias and Tribes: Rethinking EU Counter Smuggling Policy and Response' (April 2021): <https://www.euromesco.net/publication/beyond-networks-militias-and-tribes-rethinking-eu-counter-smuggling-policy-and-response/> accessed 20 February 2022.

3 Renewed EU Action Plan (n 1).

4 Renewed EU Action Plan (n 1).

5 See Valsamis Mitsilegas, 'The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law' (2019) 10(1) New Journal of European Criminal Law 68.

model of the smugglers', and, under the primary aim of the Facilitator's package, the effective criminalization and sanctioning of perpetrators.[6] The criminal profile of the perpetrator being unequivocal,[7] the conceptualisation of the smuggled migrant is however less clear.

This approach resonates with the legal frameworks adopted at the UN level, wherein the smuggled migrant also resides in somewhat of a limbo in terms of victimization, notably in a criminal justice sense. A focal point of consideration relates to the legal distinction between migrant smuggling and human trafficking embedded in the UNTOC and its two additional protocols.[8] Sometimes referred to as a 'strange legal fiction',[9] this distinction resolves into significant differences in the legal and practical treatment of trafficked versus smuggled persons. This is underscored by the nomenclature used in the two Protocols. The Trafficking Protocol refers structurally to 'victims' (also in a criminal justice sense), while the Smuggling Protocol refers to persons who have been the 'object' of criminal conduct.[10] However, as will be further developed in this chapter, the figure of the smuggled migrant is not unambiguously framed.[11]

At the European level, the disparity plays out even more strongly. Both the Council of Europe (CoE) and the EU have established their own regulatory frameworks with respect to trafficking, securely recognizing criminal victimiza-

6 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1; Renewed EU Action Plan (n 1) 17.

7 For a critique and overview, see Federico Alagna, 'Shifting Governance: Making Policies Against Migrant Smuggling Across the EU, Italy and Sicily' (PhD Thesis, Radboud University 2020).

8 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319. On the history of these protocols and the legal dichotomy, see Yvon Dandurand and Jessica Jahn, 'The Failing International Legal Framework on Migrant Smuggling and Human Trafficking' in John Winterdyk and Jackie Jones (eds.), *The Palgrave International Handbook of Human Trafficking* (Springer International Publishing 2020) 783; James Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49 Va. J. Int'l L. 1.

9 Anne Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground – A Response to James Hathaway' (2008) 49 Va. J. Int'l L 792; Dandurand and Jahn (n 8).

10 On the notion of victims, see the notes made by the Secretariat in UNTOC 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime' (2006), < https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>, 461, 483.

11 See section 2.5. See also Alessandro Spena, 'Smuggled Migrants as Victims?: Reflecting on the UN Protocol against Migrant Smuggling and on Its Implementation' (2021) 3(4) Brill Research Perspectives in Transnational Crime 43.

tion of the trafficked person and prescribing significant duties of protection in that regard.[12] The same has not occurred for smuggled migrants, however.[13] Importantly, despite a visible ambivalence in the conceptualisation of smuggled migrants in all three legal frameworks, recent developments at the UN[14] and CoE[15] levels do demonstrate a growing awareness on the inherent risks faced by smuggled migrants to abuse and exploitation, underscoring, amongst other things, the operational links between human trafficking and migrant smuggling and acknowledging the need to take action.[16] With potential shifts in thinking on the horizon, it is a propitious time to contemplate how any momentum in this regard can be fortified through recourse to human rights law. This contribution argues that an important locale for the (re-)conceptualisation of the smuggled migrant is at the crossroads of criminal justice and human rights, with a focus not on the perpetrator but the smuggled migrant as a victim.

Holding that that a differentiated approach is critical to the development of protection within the ECHR framework, two important demarcations are maintained here. Firstly, the multiple issues and consequences surrounding the framing of the complex and multi-faceted smuggling phenomenon have increasingly captured the attention of scholarship.[17] The implications for the

12 Council Directive 2002/90/EC (n 6).

13 See for instance Joanne Van der Leun and Anet van Schijndel, 'Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat against Trafficking in Human Beings and Migration Control' (2016) 44 International Journal of Law, Crime and Justice 26.

14 New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1; Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) 5 February UN Doc A/Res/73/195.

15 European Committee on Crime Problems (CDPC). Council of Europe Roadmap on Fighting the Smuggling of Migrants (adopted 3 February 2020). The document mentions the possibility of creating a legally binding instrument on migrant smuggling considering the 'grave' legal discrepancies found in the legislations of its Member States. Despite its dominant perpetrator/crime-centric orientation, the document emphasises the necessity to adopt a multi-disciplinary approach which includes the safeguard of migrant's human rights considering the life-threatening risks and exploitation to which they are exposed (point III).

16 Whereas the Global Compact (n 14) underlines the necessity to secure the human rights of smuggled migrants, the emphasis on the dichotomy between smuggling and human trafficking remains omnipresent (see objective 9). However, the New York Declaration (n 14) concretely highlights the interconnections between migrant smuggling and human trafficking (see objectives 5-6). Besides, the text operates a terminological turn from the Smuggling Protocol in referring to 'people in vulnerable situation' and more importantly 'to *victims* [emphasis added] of exploitation and abuse in the context of the smuggling of migrants' (objective 23). See also Jean-Pierre Gauci and Vladislava Stoyanova, 'The Human Rights of Smuggled Migrants and Trafficked Persons in the UN Global Compacts on Migrants and Refugees' (2018) 4(3) International Journal of Migration and Border Studies 222.

17 Anna Triandafyllidou, 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' (2018) 676(1) The Annals of the American Academy of Political and Social Science 212; Gabriella Sanchez, 'Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research' (2017) 5(1) Journal on Migration and Human Security 9; Alagna, (n 7); Enrico Fassi, 'The EU, Migration and Global Justice. Policy

human rights needs of smuggled migrants extend well beyond the domain of criminal justice.[18] An isolated approach, focusing only on protective duties in a criminal justice sense would indeed itself be reductive, even detrimental, if that would mean a lack of regard for other types of needs.[19] While it is important to emphasize that a holistic understanding and strategy are required to address the full gamut and intersectionality thereof,[20] this chapter does focus solely on the criminal justice domain, examining if and how *certain smuggling experiences*, of *migrants with a (particular) (vulnerability) profile*, can be positioned within the *criminal related positive obligations* framework developed in the case law of the European Court of Human Rights (ECtHR), under the European Convention on Human Rights (ECHR). We argue that *categorically* approaching migrant smuggling as victimless crime or downplaying the criminal victimization of the smuggled migrants – envisaging them always as 'willing' participants, at worst as a co-perpetrators[21] – would be iniquitous. That also holds because *it is* recognized that smuggling leads to human rights abuses, potentially *also* in the form of criminal victimization. That should create a responsibility of clarity with respect to the type of criminal victimization, which can be at issue, and to provide protection in that respect.

The choice to seek recourse to the ECtHR framework lies in the prolific nature of its positive obligations case law, its unique interpretative arsenal and its responsiveness to social scientific information,[22] all making the ECtHR uniquely positioned to disrupt protective disparities in the trafficking/smuggling dichotomy. While restricting discussion to the interface between human

Narratives of Human Smuggling and their normative implications' (2020) 1 Rivista Trimestrale di Scienza dell'Amministrazione 1.

18 With respect to the right to residence, see Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in Baþak Çalý, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

19 Even within the context of criminal justice positive obligations in relation to human trafficking, the identification duties exist autonomously from criminal proceedings. See for instance Vladislava Stoyanova, 'Separating Protection from the Exigencies of the Criminal Law, Achievements and Challenges under art. 4 ECHR' in Laurents Lavrysen and Natasa Mavronicola (eds.) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Bloomsburg Publishing 2020). See also Vladislava Stoyanova, 'J. and Others v. Austria and the Strengthening of States' Obligation to Identify Victims of Human Trafficking' (Strasbourg Observers, 7 February 2017) <https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/> accessed 19 June 2022.

20 Ibid on the prescribed holistic approach required by the Court.

21 As distinct from the issue of criminalization of humanitarian aid, see Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan' (CEPS Policy Brief, December 2021) <https://www.ceps.eu/wp-content/uploads/2021/12/CEPS-PB2021-01_Between-politics-and-inconvenient-evidence.pdf> accessed 12 May 2022.

22 Besides, all EU Member States are also CoE members which *de facto* entails that ECtHR case law apply to them.

rights and criminal justice related obligations, the argument may also be made that crafting an evidence-based (vulnerability) profile under the framework of criminal justice related positive obligations, resonating better with the experience of smuggled migrants, can function as an important pivot to improve the conceptualisation of smuggled (transiting) migrants vis-à-vis other types of human rights' needs.

Secondly, considering the need for differentiation and care in the construct of a legitimate, evidence-based needs profile, this contribution focuses particularly on cases where smuggled migrants take on the feature of being *migrants in transit*. Holding that characteristic especially contributes to the (particular) vulnerability of smuggled migrants. The argument is made here that the Court, as it has been inclined to do so, among other things, in trafficking cases, can operationalize empirical evidence to enhance protection, with an emphasis on the transit element.[23] In light of the focus on the implications of a transit context, this contribution turns to the Belgian jurisdiction as a concrete illustration. Based on empirical research conducted by the first author, the functioning of the unique legal model developed in this jurisdiction to deal with aggravated forms of migrant smuggling is reviewed. Focusing on Belgium is of particular interest for two reasons. From a legal perspective, going beyond international obligations, the Belgian legislation seems to respond well to operational links, or the grey area found at the nexus between migrant smuggling and human trafficking.[24] It does so through the recognition of an unjust disparity in the treatment of trafficking and smuggling victims. Taking as a point of departure that the circumstances of such persons are similar where *aggravated forms of migrant smuggling* can be found, Belgium law accords smuggled individuals the protective status exclusively reserved for trafficking victims in other jurisdictions. From an empirical perspective, the fact that Belgium, both an EU and Schengen member, is a *transit* country and, as such, faces significant challenges arising from the presence of large numbers of irregular migrants *en route* to other destinations on its territory is of particular interest.

In order to build a realistic argument as to how the ECtHR can extend its protective umbrella through recognition of criminal victimisation, the first section provides an overview of the Belgian legal and policy framework. Section 2 also outlines, based on empirical insights, how and why that framework is not fully effectuated in practice. Drawing on the problematic as demonstrated in the Belgian case study, Section 3 discusses how the ECtHR, as it has done in other contexts, can turn robust empirical information and scholarly

23 See, with respect to the Court's margin of appreciation in its 'free evaluation of all evidence' in *Zoletic and Others v. Azerbaijan* 20116/12 (ECtHR, 7 October 2021) para 135.

24 Van der Leun and van Schijndel (n 13); Anette Brunovskis and Rebecca Surtees, 'Identifying Trafficked Migrants and Refugees along the Balkan Route. Exploring the Boundaries of Exploitation, Vulnerability and Risk' (2019) 72(1) Crime, Law and Social Change 73.

insights into human rights currency. Specific attention is devoted in this regard to the concept of vulnerability, both from a theoretical and empirical perspective. To that end, the real-life profiles and experiences of smuggled migrants as they transit throughout European jurisdictions will be developed, with an eye on stressing the need to securely recognize victimization under the intersection of human rights and criminal law in light of the evidence presented. Subsequently, Section 4 concretely outlines the potential for the development of criminal justice related positive obligations protection for smuggled migrants, utilizing the Court's human trafficking case law as a model. This section discusses *how* the ECtHR has also relied on empirical information, advancing that, with an even commitment to this methodology, it can identify similar protective needs for smuggled migrants. Section 5 concludes the chapter with some over-arching reflections.

2 The Belgian Case: Context, Legal Framework & Limitations

In examining the potential for the positioning of smuggled migrants with a particular (vulnerability) profile within the ECtHR's criminal related positive obligation framework, it is useful to explore a real-life scenario showcasing relevant legal and factual issues and illustrating needs and difficulties in this regard. Belgium provides a particularly apt case study, not only because of its unique legal framework, but particularly also because it is an important transit jurisdiction within the Schengen area. This allows to examine the under-researched situation of migrants in transit and 'secondary' or 'unauthorized' migration movements.[25] To understand the Belgian situational context, it must first be envisaged as an EU member state and as a Schengen member. Looking specifically at the distinct issues within the Schengen Area with regards to secondary migration movements and the potential links between migrant smuggling and human trafficking in a transit migration context, recent EU initiatives to tackle these phenomena and EU agency reports on the situation at the internal borders of the Schengen Area should be highlighted as part of the contextual architecture.

25 In contrast, more scholarly attention is already devoted to the situation of migrants at EU external borders. The authors are aware that the terminology 'secondary' or 'unauthorized' migration movements as used in EU policy documents can be problematic. See Sergio Carrera, Marco Stefan, Roberto Cortinovis and Ngo Chun Luk, 'When mobility is not a choice. Problematising asylum seekers' secondary movements and their criminalisation in the EU' (CEPS, December 2019): <http://aei.pitt.edu/102277/1/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf> accessed 15 May 2022. While being mindful of these important terminological concerns, the authors will still refer to the term secondary migration movements when described as such either in policy/media documents and by the respondents.

2.1 Migrant Smuggling within the Schengen Area

Taking together the adoption of the renewed Action Plan against Migrant Smuggling (2021-2025) and the incorporation of the fight against migrant smuggling as priorities in both the New Pact on Migration and Asylum[26] and the European Agenda on Security,[27] the EU message is clear: anti-smuggling efforts should be intensified in order to 'prevent the exploitation of migrants by criminal networks and reduce incentives for irregular migration'.[28] The dual rationales underpinning the fight against migrant smuggling at the EU level, outlined in the introduction, are henceforth clearly maintained. Moreover, an evolving sophistication can be identified in the understanding of smuggling *within* the Schengen Area.

Looking at counter-smuggling policies and the ways in which the phenomenon is framed, it is interesting to examine the connections created between secondary migration/unauthorized movements, migrant smuggling and human trafficking. Following EU narratives, secondary migration movements are deemed to 'feed human smuggling and trafficking networks'.[29] Also connecting these phenomena and demonstrating awareness of the victimisation risks faced by smuggled migrants, the EU agency Europol signalled in 2011 an intersection between transit migration, migrant smuggling and human trafficking by stating that 'transiting migrants are frequently exploited in illicit labour'.[30] Interestingly, while the phenomenon of migrant smuggling and human trafficking are always described in official reports as clearly distinct in light of the absence of exploitation in the migrant smuggling context, the fourth annual EMSC report uses confusing phrasing in this regard, referring to the particular vulnerability to *exploitation* of 'potential irregular migrants in remote locations and so-called bottlenecks.'[31] Distinct annual reports of the European Migrant Smuggling

26 Renewed EU Action Plan (n 1); Commission (EC), 'New Pact on Migration and Asylum', COM (2020) 609 final, 23 September 2020 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0609&from=EN.

27 Commission (EC), 'EU Security Union Strategy', COM (2020) 605 final, 24 July 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0605&from=EN>

28 Commission (EC) website <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en> accessed 10 June 2022.

29 European Parliament, 'EU Parliament Briefing on EU Secondary Movements of Asylum Seekers in the EU Asylum System (October 2017), https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf accessed 10 June 2022; see also New Pact on Migration and Asylum (n 26).

30 European Police Office (Europol), 'OCTA 2011 EU Organized Crime Threat Assessment', <https://www.europol.europa.eu/publications-events/main-reports/octa-2011-eu-organised-crime-threat-assessment> accessed 3 May 2022; Dunja Mijatovic, 'Time to Deliver on Commitments to Protect People on the move from Human Trafficking and Exploitation' (12 September 2019), <https://www.coe.int/en/web/commissioner/-/time-to-deliver-on-commitments-to-protect-people-on-the-move-from-human-trafficking-and-exploitation> accessed 25 June 2022.

31 European Migrant Smuggling Centre, 4th Annual Activity Report 2019 12.

Centre (EMSC) recently established within Europol contain references to 'bottleneck' areas or 'migrant hubs', also within the Schengen Area, where a high concentration of migrants gather in order to circumvent obstacles (whether physical barriers or permanent/temporary border controls), to continue their journeys onwards.[32] These areas, where the presence of organized crime groups are particularly visible, are 'increasingly targeted by law enforcement authorities' which in turn drives migrant smugglers to further displace their activities, such as around the English Channel, where facilitation activities increasingly take place inland (such as in Belgium and the Netherlands). In the same report, specific attention is paid to secondary migration movements, with respect to which an increase in migrant smuggling services has been observed.[33] Looking at the impact of Covid-19 measures on the phenomenon, notably vis-à-vis the stranding conditions faced by migrants, Europol has signalled a general shift in facilitation activities. The agency describes the crossings as becoming riskier and dangerous, also for migrants already present in European territories. This shift is explained by restrictive border controls and travel restrictions leading, among other things, to an increase in the use of small rubber boats to cross the English Channel and a boost in the practice of hiding migrants in (refrigerated) concealed compartment of trucks.[34] Regarding sea crossings, this dangerous technique often involves migrant smugglers overcharging their fees and making migrants steer the boats, who in turn end up being arrested as co-perpetrators of smuggling.[35]

The ambiguous position of the EU and its agencies on the migrant smuggling phenomenon and its intersection with human trafficking, exploitation and abuse is visible and becomes even more complex. Whereas the necessity to distinguish migrant smuggling and human trafficking is reiterated, the simultaneous recognition of fluidity between the phenomena and the (increased) intersectional hazards faced by smuggled (transiting) migrants is crucial to underline. Moreover, developing narratives outlining the difficulties faced by migrants in transit zones display how vulnerability can be exacerbated by these policies and actions. This is, for instance, the case for narratives pointing to the relationship between restrictive border policies and the presence of organised crime groups.

These developments were important to emphasise because onwards unauthorised movements within the Schengen Area and actions undertaken in other EU Member States and in the United Kingdom (UK) have bearing on both the legal and factual situation in Belgium. From a legal standpoint, the

32 European Migrant Smuggling Centre, 3rd Annual Activity Report 2018 (2019) 12; European Migrant Smuggling Centre, 4th Annual Activity Report 2019 (n 31); European Migrant Smuggling Centre, 5th Annual Activity Report 2020 (2021).

33 Ibid.

34 European Migrant Smuggling Centre, 4th and 5th Annual Activity Reports (n 31 and n 32).

35 Maël Galisson, 'Deadly Crossing and the Militarisation of Britain's Borders' (2020) < https://irr.org.uk/wp-content/uploads/2020/11/Deadly-Crossings-Final.pdf> accessed 3 May 2022.

EU legal instruments related to migration, asylum, migrant smuggling, and human trafficking influence the Belgian legal framework, even with some room for manoeuvre in the implementation process.[36] Without discussing extensively relevant EU legal instruments for the governance of smuggled migrants, it is important to highlight that ambiguity vis-à-vis the framing of the figure of the smuggled migrant (see also Chapter 2). Notable in that regard is the adoption of the EU Directive on Short-Term Residence Permits in 2004, which assured that the blurry area between smuggling and trafficking is formally acknowledged at the EU level.[37] Whilst the approach in this Directive remains perpetrator-centric, as the assistance and protection is dependent on the collaboration of the victim with the authorities, it represents a step in the direction of the reconceptualization of smuggled migrants in terms of victimization. Indeed, besides trafficking victims, the Directive leaves the option to the Member States to extend the scope of protection to smuggled individuals (see also Chapter 2). Belgium is one of the nine Member States who have made use of the facultative option, even going further in that regard (see below 1.3).[38]

2.2 Fight against 'Transmigration' and Migrant Smuggling in Belgium

Focusing now on the Belgian factual situation, the historical role of the country as a jurisdiction of transit has been extensively documented in scholarship and underlined in Chapter 2, Chapter 4 and Chapter 5.[39] Since 2015, in response to rising numbers of migrants transiting through the country, and on the initiative of the then Secretary of State and Asylum and Migration, a

36 We can *inter alia* refer to the Facilitator's Package (n 6), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 ; Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/10; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

37 Directive 2004/81/EC (n 36).

38 Conny Rijken, 'Inaugural Address: Victimisation through Migration' (2016) <https://research.tilburguniversity.edu/en/publications/victimisation-through-migration> accessed 5 January 2022.

39 See Ilse Derluyn and Eric Broekaert, 'On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors' (2005) 43(4) International Migration 31. See also Chapter 2, Chapter 4 and Chapter 5.

'transmigration' task force has been put in place to combat illegal migration.[40] This was followed in 2018, the issue now seen as a federal priority, with the creation of a special Action Plan on Transmigration whose primary objective was preventing the creation of a 'minis-Calais' or other forms of migrant settlements on Belgian soil.[41] The plan included the evacuation of Maximilian Park, considered to represent a pull-factor for so-called 'transmigrants',[42] the intensification of police controls, the creation of an administrative detention centre for transmigrants (subsequently closed in December 2019) and the high securitization of parking areas along the highways. Due to the Covid 19 pandemic, Maximilian Park was evacuated by the authorities in 2020. Since then, migrants in transit are more dispersed but many remain in the North Station neighbourhood. The humanitarian hub established in that region moved to another building and currently shelters hundreds of migrants in transit providing direct humanitarian assistance such as through the provision of food, clothes, and medical care.[43]

As highlighted in the former National Action Plan against Migrant Smuggling (2015-2019) and reiterated in the new plan (2021-2015),[44] actions undertaken on Belgian territory to push back transmigration often focus exclusively on that objective, without necessarily considering the human rights position of the migrants from a (criminal) victimization perspective. Thus, legally prescribed protection, which is available not only for potential victims of human trafficking, but also for 'victims' of aggravated forms of migrant smuggling, remains under administered.[45]

In 2020, the National Rapporteur on human trafficking and migrant smuggling (Myria), clearly underlined the links between migrant smuggling

40 European Migration Network, 'Belgian Annual Report on Asylum and Migration Policy in 2015' (2016) < https://emnbelgium.be/publication/annual-report-asylum-and-migration-policy-belgium-and-eu-2015-emn> accessed 24 January 2021.

41 Belgian House of Representatives, 'Note de Politique Générale. Asile et Migration' (26 October 2018), (Doc 54 3296/021).

42 The neologism 'transmigrant/transitmigrant', which appeared in 2015, refers to a migrant who only passes through or resides temporarily in the territory and aims to reach the United Kingdom. This term, which does not refer to any formal legal category, creates a distinction between migrants who are applying for asylum in the country and those who are not. See Robin Vandevoordt, 'Resisting Bare Life: Civil Solidarity and the Hunt for Illegalized Migrants' (2021) 59(3) International Migration 47?

43 See Elsa Mescoli and Antoine Roblain, 'The ambivalent relations behind civil society's engagement in the 'grey zones' of migration and integration governance: Case studies from Belgium' (2021) 91 Political Geography 102477.

44 Service de Politique Criminelle, 'Plan d'Action Trafic des Etres Humains 2015-2019' (2019) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 May 2022; Service de Politique Criminelle, 'Plan d'Action Trafic des Etres Humains 2021-2025' (2021) <https://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid=225> accessed 23 January 2021.

45 Ibid.

and transit migration in a report specifically dedicated to the matter.[46] The National Action Plan (2015-2019) invited relevant actors (e.g. federal and local police) to approach both phenomena in a holistic manner and emphasizes the need to check, during control operations, not only for potential signs of human trafficking, but also aggravated forms of migrant smuggling, so that protective mechanisms available by law can be operationalized. In this regard, calls are made for a continuation of training efforts for police officers.[47] Moreover, there is an observable growing awareness of various actors, including some regional Governments (in this case in Wallonia)[48] on the vulnerable situation of migrants in transit. The Circular Letter indeed highlights the potential for exploitation and human rights abuses faced by migrants whilst transiting through Belgium and subsequently informed relevant actors on their human rights' protective duties at the local and regional level.

In recent years, attention has also been devoted to the treatment of migrants in transit by the police. In 2018, the NGOs 'Médecins du Monde' and 'Humain' issued a report based on quantitative and qualitative research establishing the existence of physical and psychological police violence towards migrants stranded in Maximilian Park and its surrounding area.[49] The Permanent Oversight Committee of the Police Service (Comité P) also launched an investigation on police control and detention of migrants taking place during large-scale administrative arrest operations (often in parking areas along the highways).[50] Whereas the focus of these two reports is not completely aligned, the Myria underlined important commonalities. It was emphasised that in briefings, police forces took little to no account of the guidelines on human trafficking, migrant smuggling or the protective status reserved for victims of trafficking and aggravated forms of smuggling,[51] indicating a discrepancy

46 Myria, 'Myriadoc 10: Belgium, on the Road to the United Kingdom' (2020) <https://www.myria.be/en/publications/myriadoc-10-belgium-on-the-road-to-the-united-kingdom> accessed 24 January 2021.

47 Ibid.

48 Ibid; see the Circular Letter on the Situation of Migrants in Transit in Wallonia (20 September 2020) < https://interieur.wallonie.be/sites/default/files/2020-10/20201001164241354.pdf> accessed 5 January 202; see also the collaborative report created by 5 NGOs on the topic of migrants in transit in Belgium by Caritas International, 'Migrant en Transit en Belgique' (February 2019) < https ://www.caritasinternational.be/wp-content/uploads/2019/02/Migrants-en-transit-en-belgique.pdf> accessed 5 January 2021.

49 Médecins du Monde, 'Violence Policières envers les Migrants et les Réfugiés en Transit en Belgique' (October 2018) < https://medecinsdumonde.be/actualites-publications/publications/violences-policieres-envers-les-migrants-et-les-refugies-en> accessed 5 January 2021; see also Mescoli and Roblain (n 100) on the securitization approach adopted at the Federal level to organise frequent police raids to disperse and at times arrest irregular migrants.

50 Comité P, 'Le Contrôle et la Détention de Transmigrants par la Police à l'Occasion d'Arrestations Administratives Massives' (2019) <https://comitep.be/document/onderzoeksrapporten/2019-02-06%20transmigrants.pdf> accessed 5 January 2021.

51 Ibid; Myria, 'Police et Migrants de Transit' (2019) <https://www.myria.be/files/Note_Police_et_migrants_de_transit.pdf> accessed 27 January 2021.

between law and practice as far as (vulnerable) migrants in transit spaces using smuggling services are concerned.

2.3 Legal Framework: A Protective Approach Towards Victims of Aggravated Forms of Migrant Smuggling …

As explained in further details in Chapter 2, the criminal offences of migrant smuggling and human trafficking are also considered distinct in Belgium since the legislative reform of 2005. Nonetheless, the aggravating circumstances for trafficking and smuggling were harmonized. Recognizing the 'dramatic consequences' of both offences, with an eye on maintaining coherence and consistency,[52] article *77quater* of the Law on Foreigners of 15 December 1980 was amended to provide that, if aggravated circumstances are found in migrant smuggling cases, the smuggled person should be able to access the protective status normally reserved for human trafficking victims.

On the basis of the insights gathered through interviews with Belgian experts,[53] the following aggravating circumstances[54] can often be found in smuggling situations: abuse of a situation of vulnerability of an individual (which includes his/her irregular or precarious administrative situation) in a way that the individual has no real and acceptable alternative to submit her/himself to the abuse; the endangerment of the victim's life either deliberately or through gross negligence; the (direct or indirect) use of fraud, violence, the use of threats or other form of coercion (e.g., debt bondage), abduction, deception and abuse of power.

The design of the Belgian approach to both migrant smuggling and human trafficking is multi-disciplinary in nature,[55] all actors, in accordance with their own expertise, have a specific role within established procedures. Particularly important are the prosecutors specialised in human trafficking and migrant smuggling, the reception centres for victims present in each of the three regions of the country, the federal police, the local police, the Foreigner's Office and

52 Belgian House of Representative, 'Explanatory Statement' (10 August 2005) 11.

53 See Chapter 1.

54 For the complete list of aggravating circumstances, see article 77q*uater* of the Law on Foreigner of 15 December 1980. See Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

55 Circular COL 5/2017 of 23 December 2016 Implementing a Multidisciplinary Cooperation with regard to Victims of Human Trafficking and/or Certain Aggravated Forms of Human Smuggling available on the website of the Public Prosecutor's Office < https://www.om-mp.be/fr/savoir-plus/circulaires> accessed 22 January 2021. For detailed information on the procedure, see also the two English reports of the Group of Experts on Action against Trafficking in Human Beings (GRETA) on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium issued respectively in 2013 and 2018 available on the website of the GRETA <https://www.coe.int/en/web/anti-human-trafficking/belgium> accessed 10 July 2021.

the Labour Inspectorate. On the rights and conditions attached to the protective status, the reader is referred to Chapter 2.

To an extent, this system has an impact on the situation of the smuggled migrant. Belgian case law provides at least two indications in which national courts regard smuggled migrants as victims from a criminal law perspective. Firstly, they are referred to as such in verdicts against perpetrators. In a 2017 judgment, the Brussels Court of Appeal,[56] finding that the offence had been committed through abuse of the vulnerable situation of the migrant victims, leaving them with no other choice than to be smuggled. The Court added that the fact that they had perhaps in part contributed to their own vulnerability did not take away from the abuse of a situation of vulnerability. The Court of Appeal explicitly held that the offences were serious and especially morally objectionable, not only because of the impact on public order and security, but also because of the effect on the individuals, being vulnerable persons from whom money had been obtained.[57] Secondly, Belgian Courts allow third parties, notably the Myria, to join criminal proceedings against smugglers as civil parties on behalf of smuggled migrants, a procedural position reserved for criminal victims or those acting on their behalf.[58]

The recognition of victimization is weaker however where aggravating circumstances are not under discussion. In 2015, the Correctional Court of Louvain[59] also dealt with the claim of an individual smuggled migrant who was a victim of both trafficking and aggravated smuggling. Not finding trafficking or the *aggravated form* of smuggling to have been proven in that case, the Court rejected the claim, because it had not been proven that the suspect had abused the particularly vulnerable position of the 'foreigners', or had directly or indirectly made use of trickery, violence, or any other form of coercion. Nonetheless, Belgian courts seem to have developed a sensitivity to the trafficking/smuggling nexus, particularly induced to do so via the special legislation creating a bridge between the phenomena in the event of aggravated circumstances.[60] Where cases involving those do come to criminal courts, the special system does therewith seem to have important effect.

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56 Bruxelles (13e ch. Corr.), 17 May 2017.

57 See also the judgment Corr. Anvers (8e ch.), 8 December 2016 in which the Court sheds light on the abuse of the precarious administrative, social, and financial situation of the smuggled victim. For an overview of the jurisprudence, see the website of the National Rapporteur Myria gathering key court cases on migrant smuggling <https://www.myria.be/fr/jurisprudence/eyJyZXN1bHRfcGFnZSI6ImZyXC9qdXJpc3BydWRlbmNlIiwiY2F0ZWdvcnkiOiIzMzEiLCJyZXF1aXJlX2FsbCI6ImNhdGVnb3J5In0> accessed 12 January 2022.

58 Ibid.

59 Corr. Louvain (17e ch.), 12 May 2015.

60 Ibid. The Correctional Court of Louvain held that the line between human trafficking and human smuggling is thin and that human smuggling can evolve into human trafficking when free will is brought under pressure.

2.4 … Scarcely Used in Practice

The protective status for aggravated smuggling is scarcely used in practice, however (see Chapter 4 on the statistics provided by National Rapporteur). In line with national jurisprudence,[61] and to underscore that migrants intercepted in lorries in parking areas qualify as victims of aggravated forms of migrant smuggling, expert respondents explained that they can establish the aggravated circumstances automatically in the case of irregular migrants being transported to the UK and that it would be inconceivable for them to not be considered as vulnerable. The fact that migrants often significantly overpay for their journeys was also considered by respondents as sufficient proof of abuse.[62] These views emphasize the discrepancy between the law and reality,[63] showing, as summarized by one specialised Prosecutor, that '*the system is not working*'.[64]

The semi-structured interviews with Belgian experts provide insights as to the distinct causes of the shortcomings. Firstly, many respondents explained that smuggled migrants have no interest in entering the protective status, as their goal is to stay 'off the grid'[65] and reach the UK at all costs. The threshold to enter the status was also considered 'too high',[66] particularly because of the condition of turning against one's smuggler.[67] A further impediment identified was the fear of being sent back to another EU country via the Dublin III regulation.[68] Secondly, several respondents acknowledged various issues concerning: informational deficiencies with respect to the option of the special status became apparent,[69] the lack of authorities' awareness of legal procedures, due to insufficient training and/or sensibilization of first line officers.[70] Thirdly, time and operational capacity issues were pointed out in relation to the administrative and judicial formalities involved.[71] Shortages, in this sense, were identified as important concerns by the majority of respondents at all levels, from police officers to prosecutors. Fourthly, dealing with migrant smuggling is located at the crossroads of distinct fights, namely the fight against illegal migration, the fight against human trafficking and the maintenance of safety and public order. This entails a problematic scattering of powers between different actors, whose respective agendas and priorities do not necessarily

61 Charles-Eric Clesse, *La Traite des Êtres Humains. Droit Belge Eclairé des Législations Française, Luxembourgeoise et Suisse* (Larcier 2013).
62 Interview, Federal Police Investigator in Migrant Smuggling.
63 Interview, Specialised Prosecutor 1.
64 Interview, Specialised Prosecutor 2.
65 Interview, Director NGO.
66 Interview, Respondent 3 Foreigner's Office.
67 Interview, Specialised Prosecutor 2 and 3.
68 Interview, Respondents 1, 2 and 3 Foreigner's Office.
69 Interview, Investigative Journalist; Interview, Volunteer Citizen's Platform.
70 Interview, Respondents 1 and 2 Ministry of Justice.
71 Also emphasised in the recent National Action Plan 2021-2025 (n 101) section 2.2.3.

align. Finally, the absence of unicity, structural and harmonized solutions, also at the European level, were recognized by most respondents as key challenges.

3 Turning empirical evidence into human rights currency

3.1 Deference practices in the migration field

Taking into consideration empirical realities in aid of legal revision is always useful but becomes critical where advocated change is likely to conflict with policy goals. The Belgian case clearly reveals an under addressed problem with respect to transiting smuggled migrants. The fact remains, that even if the position of smuggled migrants is fortified in the Belgian legal framework, the general position of the smuggled migrant remained weaker than the position of the trafficking victims. This can notably be explained by the endurance of the legal trafficking/smuggling dichotomy which follows from a conscious choice. Ultimately, this can be related to the strong juncture between migrant smuggling and robustly guarded (national and regional) (im)migration and asylum policies. Challenges presented therewith extend to any room the ECtHR may see to manoeuvre in bringing about paradigm shifts in the conceptualisation of the transiting smuggled migrant.

As highlighted by Baumgärtel, 'the politicized question of migration has been a persistent headache for the ECtHR', with criticism of the Court's handling of the theme generally coming from 'diametrically opposed perspectives.'[72] The ECtHR is being charged simultaneously with judicial activism and under-intervention in this terrain.[73] Where human trafficking is concerned, the Court has been able to enhance protection, among other things, by relying on the broad and strong legal recognition that criminal victimization associated with that phenomenon requires rigorous protection. While trafficking victims are not always irregular migrants (although, in ECtHR trafficking case law, they often are),[74] all smuggled migrants always are (barring those attaining asylum or refugee status). This potentially lands the plight of the smuggled migrant in the centre of a difficult deference problematic, within the forcefields of what

72 Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2021) 38(1) Netherlands Quarterly of Human Rights 12.

73 Baumgärtel (n 72) 12-13.

74 See *Siliadin v. France* 73316/01 (ECtHR, 26 October 2005); *C.N. v. United Kingdom* 4239/08 (ECtHR, 13 February 2013); *Chowdury and Others v. Greece* 21884/15 (ECtHR, 30 March 2017); *Rantsev v. Cyprus and Russia*, 25965/04 (EctHR, 7 January 2010); *J. and Others v. Austria* 58216/12 (ECtHR, 17 January 2017); *S.M. v. Croatia* [GC] 60561/14 (ECtHR, 25 June 2020); *V.C. L and A.N. v. United Kingdom* 77587/12 and 74603/12 (ECtHR, 5 July 2021); *Zoletic and Others v. Azerbaijan* 20116/12 (ECtHR, 7 October 2021). In *C.N. and V. v. France*, the applicants were French nationals who were born in Burundi. However, facing threats to be sent back to Burundi by their aunt, the victims believed that her residence in France was irregular. See *C.N. and V. v. France* 67724/09 (ECtHR January 2013).

Dembour has dubbed the 'Strasbourg reversal.' In this approach, notwithstanding important successes which have been achieved by the Court,[75] the ECtHR 'generally privileges state sovereignty over migrants' rights', meaning that in the totality of case law, it 'rarely' finds for migrant applicants.[76]

Dembour's 'reversal' refers to a particular formula used by the Court, in which it declares Member States to be 'entitled, as a matter of international law and subject to (…) treaty obligations, to control the entry of aliens into its territory and their residence there [...]'.[77] This principle has more than abstract or symbolic impact. Rather, it is 'just one particularly striking pointer that indicates that the Strasbourg case law is not resolutely on the side of migrants' human rights.'[78] Concrete strategies give the principle actual effect. These include 'an interpretation of substantive rights that makes it difficult for violations to be declared and processual choices that tend to leave states off the hook'[79] in which the Court declines to recognize the existence of particular rights. Over time, the principle has gained importance. While when it first 'appeared in case law', it 'was simply presented as one important consideration to bear in mind amongst others',[80] the Court subsequently opted to prelude its assessments with it as an opening consideration, '(reaffirming) at the outset the 'entitlement'.[81]

In the European context, the prerogative becomes stronger still through consideration of the joint interests of Member States in this respect. The Court namely not only holds that 'Contracting States have the right to control the entry, residence and removal of aliens' and to 'establish their own immigration policies' as a self-standing national entitlement, but also '*potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the European Union* [emphasis added]'.[82] Underlining 'the importance of managing and protecting borders for distinct purposes such as preventing threat to internal security, public policy and public health',[83] the Court also has regard for the joint 'challenges facing *European States* [emphasis added] in terms of immigration control as a result of the economic crisis and recent social and political changes (…)'.[84] Deference to policy in this respect thus plays out in two manners, not only with respect to *national* immigration policies, but also with respect to the right of States to fulfil international

75 Dembour (n 18) 19; with respect to the protection provided for asylum seekers, see also Juan Ruiz Ramos, 'The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis' (2019) 39 REEI 45.
76 Dembour (n 18) 29.
77 Ibid 32.
78 Ibid.
79 Ibid 23.
80 Ibid 30.
81 Ibid 29.
82 *N.D. and N.T. v. Spain* [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 167.
83 Ibid para 168.
84 Ibid para 169.

obligations and in that light implement common policies and mindfulness of the disparate (burdens) which may rest on different States.

The 'reversal' takes effect, in some shape or form, even for (irregular) migrants who, under various international law sources as well as in the basis of standing ECtHR case law, qualify for greater protection because of a special status (e.g., asylum seekers).[85] Nevertheless, even if criticized for not intervening more because international law sources prescribe further protection for them, the Court is able to feed off international law sources to significantly restrict discretion where such rights bearers are concerned.[86] For the smuggled migrant, the absence of such a springboard means that the prerogative enjoyed by Member States in the determination and effectuation of their (national and common European) asylum and migration policies may be conceived as presenting greater challenges for the Court in prescribing the same or similar positive criminal justice protective duties with respect to smuggled migrants as it does for trafficking victims.

3.2 (Non-)deference in the Context of Criminal Justice Related Positive Obligations

Nevertheless, impediments may exist in the general development of rights of 'particular benefit'[87] to migrants, but there is 'nothing in international human rights law [which] would inherently prevent the ECtHR from adopting more progressive interpretations of the ECHR.'[88] Dembour rejects the ECtHR's claim that in the domain of migration 'the principle of state control' – absent in the text of the Convention[89] – is 'well-established in international law', holding rather that it is 'spurious, both on historical and on legal grounds',[90] as well as '(fiercely opposed)', also by Judges of the Court.[91] As such, she maintains that '[t]he ECtHR should find the courage to veer in a direction that is more protective of the migrant applicant'[92] in an over-all sense.

Taking as a point of departure that deference in migration is a reality – and to an extent is legitimate – there are, however, ways to manage it. The Strasbourg reversal easily connects to the principle of subsidiarity and the margin

85 See Ruiz Ramos (n 75) in the context of administrative detention of asylum seekers under articles 5 and 3 ECHR.
86 Trafficking victims need not be migrants, the ECtHR recognizing internal trafficking as typology requiring position obligations protection (see section 4).
87 Dembour (n 18) 21.
88 Ibid 19.
89 Ibid 30.
90 Ibid 31.
91 Ibid.
92 Ibid 19; see also Ruiz Ramos (n 75) 45.

of appreciation doctrine.[93] Recently fortified by the entry into force of the 15th Protocol to the Convention (through which, among other things, a new recital has been added to the Preamble, with an explicit reference to them),[94] these foundational interpretative principles are used to generally navigate the role of the ECtHR vis-à-vis national discretion.[95]

Importantly, they are not applied in a set manner. Firstly, ECtHR adjudicative technologies include an array of devices, which intrinsically direct *towards* ECtHR engagement. The principle of autonomous interpretation, the maxim that the Convention is a living instrument, which must be interpreted 'evolutively and dynamically', in accordance with 'object and purpose' of the Convention and that protection cannot be 'theoretical and illusory' but must be 'practical and effective',[96] all present powerful tools which can reduce national discretion. Notably, these devices have played an important role in the development of criminal justice related positive obligations case law relating to trafficking.[97] Again, the interpretative principle that the ECHR must, as an instrument of international law itself, be read in harmony with other such sources[98] does not currently push towards enhanced protection in the context of smuggling. The same holds with respect to the consensus method[99] in as far as the Court cannot gauge common ground amongst Member States in that respect. Nevertheless, harmony and consensus considerations can also work in favour of the smuggled migrant. Even if they are only slight, any shifts in (softer) international law sources, or emerging standards at national levels[100] can be picked up through early signalling and be operationalized by the ECtHR.[101]

93 See, amongst others, the recent case *M.A. v. Denmark* 6697/1 (ECtHR, 9 July 2021) para 162.

94 Council of Europe, Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, No.: 213 (31 October 2021). See also Ruiz (n 132).

95 See also in that light the 16th Protocol, which has a similar objective. Council of Europe, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, 2 November 2013 (CETS, No. 214).

96 See amongst many others the recent case *M.A. v. Denmark* (n 93) para 162.

97 See among others *Rantsev* (n 74) para 273-277 and the Grand Chamber confirming, *S.M.* (n 74) para 286-292.

98 See amongst others *Correia de Matos v. Portugal* 56402/12 (ECtHR, 4 April 2018) para 134. See also Separate Opinion of Judge Pinto de Albuquerque in *Söderman v. Sweden* [GC] 5786/08 (ECtHR, 12 November 2013).

99 Jens Theilen, *European Consensus Between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*. (Nomos Verlagsgesellschaft 2021).

100 See for an illustration, *M.H. and Others v. Croatia*, 15670/18 and 43115/18 (ECtHR, 18 November 2021), paras 200 and 236, the Court, in the context of complaints of unlawful deprivation of liberty and detention conditions, responding to 'increasing' calls of 'various international bodies' to 'expeditiously and completely cease or eradicate the immigration detention of children'.

101 See also Baumgärtel (n 72).

Secondly, deference determination also occurs through a complex algorithm in which different variables and interests are weighed against each other. The nature of a (policy) domain is certainly amongst those. There are clearly identifiable terrains with respect to which the Court by default adopts a position of more than standard deference because it finds the subject matter to fall under a hard-core public law prerogative. Thematically, the domain of (im)migration and asylum indeed squarely falls under those (although it is certainly not the only one).[102] However, in case law at large, but *also* in such 'deference by default' areas, whether or not the Court will opt to intervene, is also determined on the basis of the facts and circumstances of the case, the (vulnerability) profile of the rights bearer and the nature and aspect of the rights at stake, which are more or less susceptible to deference considerations.

As for the nature of rights at stake and the contexts in which they are invoked, Dembour analyses deference in relation to particular types of issues, attaching to different (aspects and types of) rights. These are issues relating to residence, family reunification, access to social services, deportation and removal in the context of rights guaranteed mainly under art. 8 and 6 (although sometimes also art. 3 ECHR).[103]

National prerogative has (or should have) greater competition however where other issues and rights are concerned. It is from this perspective that Ruiz Ramos examines the ECtHR's management of margins in the context of administrative detention of asylum-seekers, under art. 5 par. 1 (f) and 3 ECHR.[104] Analysing what the impact of the 2015 refugee crisis has been on the ECtHR's approach, he signals that while deference was already strong, rather than the crisis leading to amplified protection, it has 'in some cases' become both 'clearer' and 'expanded'.[105] Associating the proclivity of deference with 'political tensions', he concludes 'that European States' renewed preoccupation with strengthening their borders after 2015 has led the Court to widen the scope of the margin of appreciation',[106] *inter alia* on the basis of its 'consideration (…) of States' difficulties in managing a migration crisis'.[107]

It is argued that this would hold *a fortiori* in the context of the rights issues of concern here being positive obligations in relation to (i) critical rights, invoked in (ii) a criminal justice context. Positive obligations case law with respect to trafficking confirms that logic. Not only is the 'Strasbourg reversal formula' never invoked by the ECtHR but mention of the margin of appreciation doctrine (or related devices) is scarce. Deference is thus not part of the mainframe of principles and standards governing positive obligations. The Court

102 For an overview of such domains, see separate opinion of Judge Pinto de Albuquerque in *Correia de Matos* (n 98).
103 Dembour (n 18).
104 Ruiz Ramos (n 75).
105 Ibid 43.
106 Ibid.
107 Ibid 38.

does cap positive obligations, but endeavouring to not impose 'impossible or disproportionate burdens',[108] does so via testing against proportionality(-type) considerations. In this context, the testing does not focus on national prerogatives with respect to policy choices, but rather constitutes mindfulness of the limits of the ability of states to positively protect against crime.

In criminal justice related positive obligations case law, there is only one set role for margin of appreciation considerations, albeit, as will be discussed further below, it is an important one. Attached to the nature of (the aspect of) the right at stake, margins are recognized where 'lesser' horizontal abuses (falling under the scope of art. 8 ECHR) are concerned. The Court holds that a criminal justice response is not necessarily required, leaving that decision to the State, as long as other appropriate remedies are available.[109] However, where the Court itself determines with respect to more serious abuse that it can only be dealt with as criminal victimization, a threshold is crossed. All criminal justice related obligations then come into effect, with no room for national preferences for a different approach.

The smaller role for deference in this context makes sense. Dembour argues that the Court's restrictive approach to the development of migrant rights plays out poorly from an equality perspective. She argues that it would be absurd if fair trial rights in a criminal process would be diminished on the basis that the suspect/defendant is a migrant and furthermore that States must be granted leeway in managing migration.[110] That is entirely true, but more so because a *criminal process* – as opposed to an administrative procedure relating to denial of residence rights – would be under discussion. If there is (serious) criminal victimization on European soil, the fact that the victim is a migrant, and that full effectuation of protection would undermine migration policy cannot be a concern.

In criminal justice related positive obligations case law, there is one (important) context where the Court leaves room for national (policy) choices. As will be discussed below, that is where (horizontal) rights abuses are not per se grave and therefore do not necessarily warrant State intervention through criminal justice means. In such cases, other remedies, such as civil ones, may be sufficient.[111] However, where the Court itself determines with respect to more serious abuse that it can only be dealt with as criminal victimization, a threshold is crossed. All criminal justice related obligations then come into effect, with no room for national preferences for a different approach. If the Court were to determine, as it has done with respect to trafficking, that particular types of migrant smuggling with a particular profile entails grave abuse,

108 See among others, *Rantsev* (n 74) and para 287, *Zoletic* (n 23), para 188.
109 See further, section 4.
110 Dembour (n 18).
111 See further, section 4.

the fact that the victim is a migrant and that stringent protective standards would undermine European or national migration policies cannot be a concern.

3.3 Evidence-based adjudication and recognition of (particular) vulnerability

Nevertheless, taking the step to underscore deficiencies in the framing of the smuggled migrant as a victim in a criminal law sense would still require a forceful stand on the part of the Court and a legitimizing basis to counter deference considerations. It is held here that the ECtHR can justifiably expand protection for transiting smuggled migrants by doing so in a *differentiated and evidence-based manner*, bolstering enhanced protection through reliance on empirical evidence pointing to particular needs. Differentiation is key because the rights needs and profiles of the migrant – 'anybody outside their country of origin'[112] – are highly variable, meaning that the 'smuggled migrant' also does not constitute a homogenous category. Not all smuggled migrants or smuggling experiences should therewith qualify for this type of protection. As for evidence-based appraisal, while the empirical information is used in a myriad of different types of decisions by the ECtHR, notably also in trafficking case law, discussion here will focus on the concept of (particular) vulnerability. In framing the needs of the transiting smuggled migrant, this notion holds great potential as an ordering device and can function as a channel to convert real life issues into protection. Used as a heuristic device in scholarship, the vulnerability concept also has important practical application as a sorting mechanism in ECtHR case law.[113] Reviewing the Court's application of the concept, vulnerability theorists explore its capabilities to reduce protective deficiencies, including through sounder theoretical grounding, enabling its ordered deployment in litigation, with an eye on better approximation of the lived realities of (distinct types of) rights bearers.[114]

Two main queries of vulnerability scholarship are of importance here: how (particular) vulnerability can be identified and once recognized, what legal effect that should have.[115] While the first question will be dealt with here,

112 Ibid 19.

113 For an overview on the potential and pitfalls of the vulnerability concept for human rights, see Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133; Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056; So Yeon Kim, 'Les Vulnérables: Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights' (2021) 41(4) Legal Studies 617; Baumgärtel (n 72).

114 Other scholars however argue for an alternative approach to group vulnerability, although in the specific context of art. 14 ECHR and the manner in which vulnerability interacts with discrimination grounds. See Kim (n 113).

115 Baumgärtel (n 72).

second will be discussed in the next section, as it can more appropriately be embedded in arguments relating to the scope and locale of protection under the ECHR. Briefly discussing the vulnerability concept at a theoretical level (3.4), some remarks need to be made with respect to the Court's ability to register new forms of (particular) vulnerability (3.5). Building thereupon, utilizing insights to be extracted from recent scholarly and NGO research and enriching those with concrete empirical markers gathered through research, a basis is laid for a particular (legal) vulnerability construct for the smuggled transiting migrant, based on its own traits (3.6) as well as constructed situational and contextual factors (3.7). What is critical to signal is that (empirical and scholarly insights) increasingly point to strong conceptual similarities in smuggling and trafficking phenomena. While it may not be necessary to fully equate smuggling and trafficking experiences, on the basis of empirical evidence, the Court can break through protective disparities in the trafficking/smuggling dichotomy, or at least provide some form of similar protection for the smuggled migrant, where necessary.

3.4 Theoretical Reflections on the Vulnerability Concept

Building on the work of Fineman, vulnerability theorists have reviewed the manner in which the notion is and should be enacted in human rights law, including in ECtHR litigation. A critical question in this regard is who the primary subject of human rights is.[116] Fineman holds that 'much of legal theory has been centred around an illusory 'universal human subject' defined by 'autonomy, self-sufficiency, and personal responsibility.'[117] This boils down to the particular ideal profile of a 'male, heterosexual, white, able-bodied Christian' to whom applicants are mostly compared.[118] From the viewpoint of the transiting smuggling victim, an added characteristic would be that that the rights bearer is a person regularly and stably residing in Europe, living with a level of socio-economic welfare associated with that status. Where human rights are 'calculated' departing from this archetype, vulnerability is circumscribed through a 'sameness/difference' algorithm.[119]

Summarily stated, Fineman's argument is that the archetypical profile should be discarded as a measuring device[120] and vulnerability should be conceptualised as universal, as the potential for 'harm, injury and misfortune'

116 Peroni and Timmer (n 113).
117 Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism, 10.
118 Kim (n 113) 623 referring to Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211.
119 Kim (n 113) 624.
120 For a complete criticism on the group vulnerability model, see Fineman (n 113 and n 117) and Kim (n 113).

is innately ever-present inherent in the human condition, while persons can be impacted differently by them.[121] Thus, vulnerability is formed through *social processes and institutional interactions*, meaning that it is *situational, context-sensitive and produced*. Using (set) 'identity categories' creates a hazard that individual vulnerabilities not aligning therewith will be excluded, or, conversely, that categories will be drawn too broadly.[122] Discarding them allows for a more fine-tuned approach, with a focus on the 'socially embedded processes that will affect persons differently'.[123] This creates the opportunity to 1) recognise sources and states of vulnerability arising as 'a socially induced condition' and 2) expose 'the institutional practices that produce the identities and inequalities in the first place'.[124] Crucially, this 'promotes' the concept of the 'responsive state'. The concept conceives the State as an important part of the apparatus creating vulnerability and resolves into state responsibility to redeem and build (back) resilience.[125]

Scholars point out that the hazard to such an individualized universal approach (in which everyone is vulnerable),[126] is that vulnerability becomes too broad, in a manner which can cloud the needs of particular individuals or groups.[127] In litigation, where the use of taxonomies is required, the universal notion moreover does not provide a workable legal concept.[128] Peroni and Timmer point out however that the ECtHR's use of 'group vulnerability' is not irreconcilable with the universal notion.[129] Referring to an ECtHR judge's depiction that the Court sees all applicants as vulnerable, but some as 'more vulnerable than others',[130] Peroni and Timer see a merger between the two approaches[131] while further alignment is to be found in the fact that the Court's group vulnerability notion itself is 'relational.' Thus, 'the Court links the individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of.'[132] The focus on social context is consistent with recent analysis using vulnerability as a 'critical tool' as it encourages scrutiny of the role of institu-

121 Baumgärtel (n 72) 14.
122 Ibid 15.
123 Ibid citing Fineman.
124 Ibid. For further discussion of the disadvantages of the group vulnerability approach in Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé, and Lieneke Slingenberg, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (2021) 39(3) Netherlands Quarterly of Human Rights 190, 195.
125 Baumgärtel (n 72) 15.
126 Kim (n 113).
127 Alyson Cole, 'All of Us Are Vulnerable, But Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 Critical Horizons 260.
128 Baumgärtel (n 72).
129 Peroni and Timmer (n 113).
130 Fineman (n 117) 13.
131 Peroni and Timmer (n 113).
132 Ibid 1064.

tional or societal environments which create and maintain vulnerability.[133] The context-based and situational construct of universal vulnerability theory therewith does not necessarily exclude the use of group vulnerability.[134] Thus, vulnerability can be 'existential'[135] but also accommodate broader group or individual recognition through a context sensitive approach.[136] For Baumgärtel, vulnerability theory provides 'several potentially important insights for developing a notion of *migratory vulnerability* within the context of the ECHR'.[137] According to the author, migratory vulnerability 'describes a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and forms. It therefore should be conceptualized neither as group membership nor as a purely individual characteristic, but rather determined on a case-by-case basis and in reference to identifiable social processes'.[138] Important in that regard is '(t)he fact that both State and societal institutions are critical to enhancing resilience in the face of vulnerability comes as an important reminder when we look at the situation of vulnerable migrants', in that '(e)ven where migration control is the priority, it mostly falls upon those same institutions to respond to the most detrimental difficulties that policies may create'.[139]

3.5 The ECtHR's Ability to Deploy (New) Vulnerability Markers

As underscored in scholarship, theoretical and empirical grounding of vulnerability clearly offers critical opportunities and could aid in the resolution of gaps and inconsistencies which exist in the ECtHR's vulnerability catalogue.[140] Even with such an open approach to vulnerability, its practical deployment can be difficult and requires identifying markers. The ECtHR's approach therein leads to differing appraisals. Baumgärtel as well as Peroni and Timmer commend the fact that the ECtHR, in *M.S.S. v. Belgium and Greece,*[141] worked from a 'textured and complex evaluation' basing itself on various reports issued by international organizations on the situation of asylum seekers in Greece to evaluate the applicant's vulnerability.[142] As will be discussed further below, (particular) vulnerability is also vividly present as a pivot to expansion protection in trafficking case law. At the same time, the Court is not always as

133 Ibid 1057.
134 Kim (n 113).
135 Baumgärtel (n 72) 15.
136 Peroni and Timmer (n 113).
137 Baumgärtel (n 72) 16.
138 Ibid 13.
139 Ibid 16.
140 For an overview, see ibid and Peroni and Timmer (n 113).
141 *M.S.S. v. Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011).
142 Peroni and Timmer (n 113) 1070.

mindful as it could be. Militating against overbroad deference in the context of administrative detention of asylum-seekers, Ruiz Ramos points out that 'significance of the vulnerability' of this group has become 'blurred' by the Court. Not recognizing or giving appropriate effect to vulnerability profiles therewith becomes another 'form of granting more power to States as it weakens their responsibility to adapt detention conditions to their needs'.[143] It is therefore fundamental that the ECtHR is aided in vulnerability identification and appraisal through the availability of empirical information and that the Court commits itself to this methodology.

3.6 The (Particular) Vulnerability of the Transiting Smuggling Victim

Proceeding through the lens of this theoretical approach, the position adopted in this contribution is that an error needs to be corrected if the actual vulnerability profiles of trafficking and (some) smuggling victims is considered. Under hard positive law, trafficking victims are (rightly), as a group, recognized as so (particularly, inherently) vulnerable that they require a certain type of protection, while smuggled migrants, by default, are not. Looking more deeply at the contextual, situational factors and the role played by the policies and actions of state authorities in constructing vulnerabilities experienced by smuggled migrants, a better understanding can be achieved.

Again, given that 'smuggled migrants' constitute a group that is way too large (in that not all will qualify as (sufficiently) vulnerable), differentiation is necessary. To narrow down the scope, the particular harm or endangerment which can associate with that status, smuggled migrants who already fall under another group already designated a particularly vulnerable status (such as trafficking victims, asylum seekers and minors), for whom heightened protective duties arise on that basis, particularly if such features are present in aggregate form, are excluded from the following discussion.

This section will explore a vulnerability profile arising out of the intersectional aggregation of the two features at the focus of this analysis, arguing that both qualify for at least presumptive identification under (group) vulnerability and that this is particularly the case when they are both at issue. These are the following: the individual is an *irregular migrant in transit* within Council of Europe territories and, inspired by the distinction incorporated in Belgian legislation, is also a migrant who has been *smuggled (or stands to be smuggled further) under aggravated circumstances.*

143 Ruiz Ramos (n 75) 43.

3.6.1 The Profile of the Transiting Migrant

Deconstructing both profiles, the ECtHR's stance with respect to *irregularity* seems to be that this does not give rise to particular vulnerability. In *Khlaifia and Others. v. Italy*,[144] reversing the violation established by the chamber of art. 3 ECHR due to the detention conditions of the applicants, the Grand Chamber, while holding that the chamber had been right to point out the migrants weakened state following a sea-crossing,[145] found however that they 'were not asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin'.[146]

Such a categorical rejection points to a too broad strokes approach where transiting migrants living in situations such as depicted above with respect to Belgium are concerned. Diverse vulnerability markers flagged in scholarship already provide useful anchoring-points in this regard, such as power differentials and dependency on (State) institutional and social structures, social disadvantages, and absence of resources.[147] Baumgärtel specifically argues for the recognition of the notion for 'migratory vulnerability',[148] in a manner accommodating differentiation. Because migratory vulnerabilities affect migrants differently depending on distinct factors (age, socioeconomic status, gender, race, etc.), Baumgärtel et al. state that with a 'context-sensitive approach', a better alignment with lived realities is possible 'to analyse what specific disadvantages are being created, whether these are indeed conducive to immigration control (or merely based on an unproven assumption based on deterrence), and what the State and courts can and should do to offset them'.[149] Both systematic reviews of reports from NGOs and international organizations attesting to such vulnerabilities and growing (empirically grounded) sociolegal and migration scholarship could be utilized by the Court to investigate the relationship between vulnerability and migration.[150]

Departing from the perspective that migratory vulnerability is underrecognized,[151] overreach in group vulnerability designation can thus be avoided through evidence-based (group) distinctions, such as between the situation of an irregular migrant while attempting entry via external borders,

144 *Khlaifia and Others. v. Italy* [GC] 16483/12 (ECtHR, 15 December 2016) para 194.
145 Ibid.
146 Ibid para 194; see also Ruiz Ramos (n 75) 33 et suivant.
147 Peroni and Timmer (n 113) 1078. See for typologies of vulnerability Kim (n 113) 3-5.
148 Baumgärtel (n 129).
149 Timmer, Baumgärtel, Kotzé, and Slingenberg (n 124) 196.
150 See for instance Theodore Baird and Ilse Van Liempt, 'Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling' (2016) 42(3) JEMS 400; Martina Tazzioli, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) 38(1) Environment and Planning C: Politics and Space 3.
151 See also categories of citizenship referred to by Kim (n 113).

as opposed to that of the transiting irregular migrant who has entered and continues to irregularly move about European soil. The ECtHR's recent judgment in *M.H. and Others. v. Croatia* is indicative of a move towards such recognition.[152]

In a nutshell, the case relates to topic of pushbacks of migrants and asylum-seekers taking place in Croatia. More specifically, at the Serbian-Croatian border, an Afghan family was denied access to asylum in Croatia and was prescribed by the authorities to follow the tracks of the train in the direction of Serbia. In the course of event, a six-years old child was struck by a train and subsequently lost her life. Moreover, this push-back from Croatia took place without an examination of the individual circumstances of the individuals involved.[153] Not going into the details of the case, it is important to underline the Court's conceptualization of vulnerability.

Following the incident, and due to the lack of identification document, the applicants were detained in Croatia. With respect to the detention conditions, the Court, establishing, on the basis of *their* particular vulnerability, a violation as far as the minor applicants were concerned,[154] declined to do so in relation to the adult applicants, however not categorically. The Court, finding 'it useful to emphasise that the adult applicants were not persons suspected or convicted of a criminal offence', depicting them as 'migrants detained pending the verification of their identity and application for international protection',[155] some of its considerations militated for recognition of (particular, group) vulnerability. Firstly, the Court noted that 'asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they are likely to have endured previously and that the applicants had been in a state of migration starting from 2016.[156] This observation underscores a situational feature associated with the difficulties of a long and fragmented journey,[157] while given the profile of the applicants, the lines between asylum seekers and irregular migrants seems to be blurred. Secondly, the Court recognized that the applicants 'must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied', underscoring the complexity of their legal status. At an individual

152 *M.H. and Others* (n 100).

153 Hanaa Hakiki and Delphine Rodrik, 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (VerfBlog, 29 November 2021) <https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot> accessed 10 July 2022.

154 For the examination of the art. 3 ECHR with respect to the minor applicants, see ibid paras 191-204.

155 Ibid para 205.

156 Ibid para 207.

157 See also in that regard *M.S.S.* (n 141) para 232 and *Z.A. and Others v. Russia* [GC] 61411/15; 61420/15 and 61427/15 (ECtHR, 21 November 2019) para 193.

level, the Court was 'mindful' of the fact that the applicants were mourning the death of their daughter, referred in the case as MAD. H.

Building a vulnerability profile in this manner, the Court found no violation of art. 3 ECHR, however not because the applicants were not found to be sufficiently vulnerable, but because of the way issues were offset.[158] The negative effects of legal uncertainty must according to the Court have been allayed through the support of their legal aid lawyer and visits paid to them by the Croatian Ombudswoman and the Croatian Children's Ombudswoman.[159] With respect to the death of MAD. H., the Court found that they had been provided with appropriate psychological support.[160] Importantly however, in the absence of such ameliorating circumstances, the aggregated situational vulnerability of the applicants, importantly determined by their experiences preceding their detention as well the situational unclarity of their status, could have swayed the balance, even though their detention conditions were found not be to materially unsatisfactory.[161]

This judgment importantly demonstrates a *general* sensitivity to the special circumstances of *transiting* migrants. Emphasized in the Court's considerations with respect to the public interest involved in the case[162] and the ample sources cited in the judgment with respect to pushbacks of asylum seekers and migrants at the Croatian border (including that provided by the five third party interveners), awareness of transiting vulnerability was strongly emphasized in Judge Turković's attached concurring opinion.[163] Therein, she proclaims irregular migration to be 'one of the biggest challenges of today's society' and underlines that 'Croatia, together with several other countries, is at the front line' thereof, given its 'geographical position in the European Union'.[164] Referring to research indicating that 'Croatia is a transit State', this 'meaning that most migrants do not wish to stay there, but clandestinely cross through that country in order to reach western Europe', Judge Turković pointed out that '[t]his leads to a situation where numerous attempts are made to irregularly enter and cross Croatia, which understandably creates a range of difficulties for its authorities'.[165] Nevertheless, 'duly taking into account Croatia's difficult position', she holds that 'it is possible to meet these chal-

158 The negative effects were alleviated, among other things, by the legal aid lawyer, the visits of the Croatian Ombudswoman, the provision of psychological support etc. See *M.H. and Others* (n 100) paras 211-212; 208-209.
159 *M.H. and Others* (100) paras 211-212.
160 Ibid paras 208-209.
161 Ibid para 193.
162 Ibid para 123.
163 See also Hakiki and Rodrik (n 153).
164 *M.H. and Others* (100), concurring Opinion of Judge Turković, para 1.
165 Ibid.

lenges while at the same time complying with the Convention requirements'.[166]

Moreover, while the vulnerability designated by the Court to the adult applicants did not resolve into a violation of art. 3 ECHR on the basis of their detention conditions, arguably, it did play out in the context of the applicants' other complaints. This is notably the case with respect to the established violations of the positive procedural obligation to effectively investigate the death of MAD. H. These obligations were importantly linked to the particular contextual, situational vulnerability, extracted from evidence depicting the general situation of migration border management in Croatia, provided in various reports as well as through the submissions of the five third party interveners.

3.6.2 The Profile of the Aggravated Smuggling Victim

(i) Object vs. Victim of Migrant Smuggling?

Reviewing what add-on effect aggravated smuggling victimization could potentially have in a vulnerability profile, as underscored in the introduction, an important feature of the smuggled migrant is his ambiguous conceptualisation in international and national frameworks (see Introduction of the dissertation). On the one hand, a sharp divide exists between the rights bearer who has been trafficked and smuggled. Moreover, tendencies to criminalise the smuggled individuals are also visible (see Chapter 2 and Chapter 3). On the other hand, there is also an inescapable – and growing – recognition of harm or endangerment in the context of smuggling, although this does not transpose into disruption of the strongly perpetrator-centric approach. As discussed in the introduction of this chapter but also in the Introduction of the dissertation, the smuggled migrant resides in somewhat of a limbo as far as framing in terms of victimization is concerned, notably in a criminal justice sense. Besides differences in concrete obligations arising with respect to both categories, the legal dichotomy between trafficked and smuggled persons is strongly underscored through the nomenclature used in the UN trafficking and smuggling protocols, the former referring structurally to 'victims' (as follows from the content of the protocol otherwise, also in a criminal justice sense), the latter, in contrast, to persons who have been the 'object' of criminal conduct as set forth in art. 6 of that Protocol.[167] As underlined in the Introduction and in section 1, this conceptual ambiguity drips down to European and national frameworks.

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166 Ibid.

167 For an exhaustive overview, see François Crépeau, 'The Fight Against Migrant Smuggling: Migration Containment over Refugee Protection' in Joanne van Selm, Khoti Kamanga, John Morrison, Aninia Nadig, Sanja Spoljar-Vrzina and Loes van Willigen (eds), *The Refugee Convention at Fifty. A View from Forced Migration Studies* (Lexington Books 2003); Spena (n 11).

The manner and locale of regulation of smuggling offences is of great import at the national levels. The regulation of the phenomenon under titles relating subsuming offences against collective interests as public order or the public purse (as opposed to personal integrity or dignity of individuals) will direct towards exclusion of the smuggled migrants as victims. Going back to the Belgian illustration, an important ambivalence arises in that regard. On the one hand, human trafficking is regulated as an offence in the Criminal Code under Title VIII regulating offences against persons whereas migrant smuggling is regulated outside the Criminal Code, in the hybrid Foreigners Act, in a section designated for criminal offenses. On the other hand, Chapter IV of that Foreigners Act, containing provisions with respect to the special status contains multiple references to 'foreigners who are *victims*' (of aggravated forms of smuggling). During an interview with a Belgian specialised prosecutor, the project to place the human smuggling offence in the Criminal Code was mentioned. The project was subsequently dropped as no government coalition could be formed at the time and the interim government lacked legitimacy to undertake substantial reform of the Criminal Code. Interestingly, the specialised prosecutor firmly expressed the preference to keep both offences separated as human trafficking is 'an offence against the dignity of a person' whereas 'smuggling is an offence against public order and the State as it's about migration law'.[168] Yet, the respondent also pointed out that both phenomena can 'converge' because, even if migrant smuggling is not at first glance an infringement on human dignity, it can also become so. Adding to the confusion, and reiterating the necessity to keep the offences apart, the specialised magistrate further argued on the distinct 'aim' of the offences: 'exploitation for human trafficking' and 'making money' for human smuggling whilst still acknowledging the difficult circumstances that migrants can face during their journey.[169]

This lack of conceptual clarity may be one of the drivers behind the discrepancies between the law in the books and the effective implementation of the protective Belgian model developed in section 2. The scarce use of the special status could be also explained because it is not *clear enough* to important stakeholders that criminal victimization is at issue. As discussed further below, empirically supported deficiencies in the mode of criminalization can give rise to positive obligations violations, notably to have an effective legal framework, appropriate to the victimization and vulnerability needs in question.[170] ECtHR recognition of a strong vulnerability profile, akin to that of trafficking victims, thus (also) based on individual harm and endangerment of the smuggled migrant therewith could lead to prescription of a more robust

168 Interview, Specialised Prosecutor 1

169 Ibid.

170 See, with respect to deficiencies in criminalization, the Concurring opinion of Judge Pinto de Albuquerque, attached to *Söderman* (n 98).

criminal victimization profile, this in turn holding strong potential to incentivize resolution of more concrete issues established above.

(ii) Aggravated Smuggling Victims – A Profile Resembling Human Trafficking Victims?

Beyond legal delineation, empirically supported opinion increasingly points out the resemblance between the profiles of smuggled migrants and victims of human trafficking, notably where transit conditions and fragmentation of the migration journey can bolster the migrant's vulnerability to abuse and/or exploitation.[171] The fieldwork depicted in Section 2 of the Belgian scenario confirms the similarities. The dichotomy between the two phenomena is considered particularly problematic because of the complex notions of consent,[172] debt bondage[173] as well as the increased vulnerability to exploitation in a mixed migration context.[174] The framing used in EU policy documents on these issues also indicates the growing recognition of a nexus, such as where the New Pact on Migration and Asylum underscores that '[s]muggling involves the organised *exploitation* of migrants, showing scant respect for human life in the pursuit of profit'.[175]

The (empirical) findings of two recent reports, also focusing on transit zones within the EU and mapping the vulnerabilities of individuals on the move, verify the impact of both the cumulation of different types of vulnerabilities as well as the problematic attaching to the trafficking/smuggling dichotomy.[176] The ECPAT report, gathering research conducted by NGOs and co-funded by the UK Home Office, focuses with precision on precarious transit journeys undertaken by Vietnamese nationals designated therein as human trafficking victims. Likewise, the France Terre d'Asile report reveals identification and protection issues in a transit migration context, particularly in the north of France. A crucial observation in both reports is that migrant smuggling and human trafficking can rarely be differentiated in a transit migration

171 See Brunovskis and Surtees (n 24); Dandurand and Jahn (n 8).

172 See for example, Christian Kemp, 'In Search of Solace and Finding Servitude: Human Trafficking and the Human Trafficking Vulnerability of African Asylum Seekers in Malta' (2017) 18(2) Global Crime 140.

173 Julia O'Connell Davidson, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1(2) Migration studies 176.

174 See in particular the argument and the hazy scenarios depicted in Chapter 6 of Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2009); Brunovskis and Surtees (n 24); Dandurand and Jahn (n 8) for an overview of the criticism.

175 New Pact on Migration and Asylum (n 26) 15.

176 ECPAT, 'Precarious Journeys: Mapping Vulnerabilities of Victims of Trafficking From Vietnam to Europe' (March 2019): < https://www.ecpat.org.uk/precarious-journeys> accessed 12 May 2022; France Terre d'Asile, 'Identification et Protection des Victimes de la Traite dans un Contexte de Migration de Transit' (April 2017): <https://www.france-terre-asile.org/toutes-nos-publications/details/1/212-identification-et-protection-des-victimes-de-la-traite-dans-un-contexte-de-migration-de-transit> accessed 12 May 2022.

context because being 'on the move' enhances the vulnerability of migrants. Both reports indicate that migrants in transit are, also within the EU, in or outside transit camps, subjected to labour and/or sexual exploitation.[177] The France Terre d'Asile report underlines the superficiality of the legal dichotomy, pointing out that smuggling also entails advantage being taken of vulnerable individuals because of their desire to migrate, which creates a vulnerability to exploitation and/or abuse through diverse non-static factors. Amongst these are the precarious legal status of transiting migrants (de facto limiting their access to protection) and strict border control policies which push migrants to higher-risk border-crossing alternatives (also on their own when they lack financial resources and resort to acts of 'self-facilitation'[178]) or towards more 'professionalized' smuggling networks demanding higher fees.[179] Smuggling fees and debt bondage are cited in the scholarship as a key element placing migrants in transit at risk of (future) exploitation.[180] Facing long and perilous migration journeys, migrants often face no alternative but to work in exploitative conditions to finance their journeys. Abuse and/or exploitation of migrants in transit susceptible to smuggling is *not* automatic, but the *risk* thereof is systemically present to such an extent as to warrant presumptive flagging as a particularly vulnerable group.[181]

Two important general vulnerability markers may be further adduced, namely the interrelated (i) fluidity of factual profiles and (ii) the complexity of legal position. The transit migrant has a kaleidoscopic profile, making factual and legal sorting difficult, including through normative distinction which may arise considering movements between jurisdictions. Factual inability to do so becomes aggravated by a conscious policy to remove ambivalence. Taken together, access to and effectuation of rights is impeded by unclear legal standing. This issue becomes practically evident through the challenges with respect to *victim identification and protection* as well as provision of *information* as depicted in section 1 (see also Chapter 5). The presence of migrants in

177 Also confirmed in Interview, Volunteer Citizen's Platform.

178 On the complexity of the migrant smuggling phenomenon and the deconstruction of taken for granted concepts, see Sanchez, Arrouche, Capasso, Dimitriadi and Fakhri (n 2). On the operational definition of migrant smuggling as 'the smuggling spectrum' in line with the multifaceted nature of the phenomenon, see Alagna (n 7). The recourse to self-facilitation or migrants 'copycatting' on their own professional smugglers when lacking alternatives was also observed in the Belgian context (Interview, Prosecutor 1; Interview, Federal Police Investigator).

179 Ibid. See also Jørgen Carling, 'Batman in Vienna: Choosing How to Confront Migrant Smuggling' (*PrioBlog*, 12 September 2017): <https://blogs.prio.org/2017/09/batman-in-vienna-choosing-how-to-confront-migrant-smuggling/> accessed 16 January 2022. On the lack of information given to migrants in transit zones, see Giacomo Donadio, 'The Irregular Border: Theory and Praxis at the Border of Ventimiglia in the Schengen Age' In Livio Amigoni, Silvia Aru, Ivan Bonnin, Gabriele Proglio, Cecilia Vergnano (eds), *Debordering Europe: Migration and Control Across the Ventimiglia Region* (Springer Nature 2020).

180 Carling (n 179); Triandafyllidou (n 17).

181 See France Terre d'Asile (n 176).

different jurisdictions can vary between days, weeks and months, exacerbating difficulties in this respect, including in necessary follow-up, both by governmental and non-governmental entities.[182] Moreover, the ambiguity of factual and legal profiles fosters opportunities to look away, driven, as observed in Belgium, by a 'not our problem' mentality in transit countries, relegating responsibility to destination countries.[183] Thus, '*[m]ember states are happy when an illegal leaves the territory. How or what, when? Preferably as soon as possible and it's not our responsibility anymore, period*'.[184]

This idea has registered in ECtHR case law, in the specific context of distinct rights. As discussed above, in *M.H. and Others v. Croatia*, the legal uncertainty about the applicant's status was marked by the ECtHR as a vulnerability indicator. In *Khlaifia and Others v. Italy*, in the context of the applicants' complaint of violation of art. 5 ECHR, because of the unlawfulness of their deprivation of liberty following a sea-crossing, as a third-party intervener, the Centre for Human Rights and Legal Pluralism of McGill University put forward that an inherent vulnerability should be recognized in the context of this provision for the applicants. Arguing that 'the law and legal theory were lacking when it came to the status and protection applicable to irregular migrants who did not apply for asylum' and that 'this legal void made them particularly vulnerable',[185] this intervener argued for the transposition of that consideration into proportionality requirements. The Grand Chamber established a violation of art. 5 ECHR in that case,[186] holding that 'the provisions applying to the detention of irregular migrants were lacking in precision' and that there was thus a 'legislative ambiguity'. Although it did not explicitly incorporate the (legal) vulnerability aspect argued for by the intervener in its judgment, the idea that irregular migrants not applying for asylum are notably confronted with a precarious legal position, remains upright in the outcome.

What emerges then is that different types of harm or endangerment risks exist for the smuggled migrant. Following the empirical narratives discussed above, with respect to operational links between smuggling, trafficking, and the circumstances of being in migratory transit, a first type of abuse is at smuggled migrants are susceptible to becoming trafficking victims. Beyond that, further types of *sui generis* abuse can also be linked to the experience of being smuggled (multiple times). While that abuse is not identical to that associated with trafficking, there are strong similarities, particularly in terms of exploitation and the assault on human dignity incurred therewith. Exploitation can take many forms. The commodification of desperation and vulnerability as a business model should certainly be considered as an egregious variant

182 See France Terre d'Asile (n 176).
183 ECPAT (n 176); Interview, Respondent 1, Federal Belgian Police.
184 Interview, Respondent 3 Foreigner's Office.
185 *Khlaifia and Others* (n 144) para 86.
186 Ibid paras 93-108.

thereof. The problem is exacerbated because the abuse attached to smuggling is not adequately conceptualised, let alone legally defined *in abstracto*, while the fluidity and changeability of smuggled migrants factual and legal profiles renders it challenging to capture a full (vulnerability) conceptualisation *in concreto*.

3.7 Constructed vulnerability

Going back to Fineman's vulnerability concept (see 3.1), the *constructed* nature of vulnerability and the role of and responsibility of institutional or societal environments and actors in its construction needs to be reflected upon. Indeed, factual and legal vulnerability can also be considered as being aggravated because of the intentional stratagems underlying it. Discussing migration governance in the EU, observing that the migrant can be 'trapped in legal ambiguity', Stel charts how migrants experience continuous dispersal and displacement between distinct national jurisdictions, underlining deficiencies in the provision of information in that process.[187] Along with other scholars, Stel links the 'constructed' uncertainty to the policies managing migration.[188] The production of continuous uncertainty and ambiguity, arising from the lack of regulatory precision is even described as a key governance strategy within the EU, its aim being to deter and generate disillusionment, a sense of abandonment and exhaustion.[189] Accounts of Davies et al. with respect to Calais also depict a strategic approach, concentrating rather on non-governance rather than governance, made visible by the 'violent inaction' of authorities as well as by the 'turning a blind eye' behaviours to the living conditions in the camps.[190]

With regards to the legal governance of the mobility of 'illegalized migrants' stranded in transit spaces within the Schengen Area, scholars have also highlighted distinct governance strategies other than the abovementioned inaction. Based on ethnographic work conducted at the EU internal borders, Tazzioli coined the term 'governing through mobility' to describe techniques

187 Nora Stel, 'Uncertainty, Exhaustion, and Abandonment Beyond South/North Divides: Governing Forced Migration Through Strategic Ambiguity' (2021) 88 Political Geography 102391.

188 Ibid. See also Leonie Ansems de Vries and Marta Welander, 'Politics of Exhaustion: Reflecting on an Emerging Concept in the Study of Human Mobility and Control. (*Border Criminologies*, 15 January 2021) :<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/politics> accessed 12 May 2022; Alessandra Sciurba, 'Categorizing Migrants by Undermining the Right to Asylum. The Implementation of the 'Hotspot Approach' in Sicily' (2017) 10(1) Etnografia e Ricerca Qualitativa 97; Thom Davies, Arshad Isakjee, and Surindar Dhesi, 'Violent Inaction: The Necropolitical Experience of Refugees in Europe' (2017) 49(5) Antipode 1263.

189 Scurbia (n 188).

190 Davies, Isakjee and Dhesi (n 188).

going beyond detention, surveillance and forced immobility.[191] Examining administrative measures and local decrees, she observes techniques aimed at disrupting migrants' journeys by dividing, scattering, and forcing migrants to be continuously on the move. These techniques are depicted as instruments to evacuate sensitive border zones, as a strategy of deterrence, and as a 'frantic attempt rather than a planned strategy' to take back control over so-called 'unruly movements'.[192] Fontana's findings echo Tazzioli's arguments, with her research focusing on vulnerabilities and insecurities faced by migrants at the external *and* internal EU borders. Fontana outlines how bordering practices of EU Member States 'cast migrants into spaces of containment and vulnerability'.[193] Touching upon both smuggling practices and the constructed nature of vulnerability, Fontana provides an overview of the causes of death in secondary onwards movements across the EU between 2014 and 2020. The author reached the conclusion that when migrants find themselves contained in transit spaces without legal channels available to move onwards, they have no other possibilities but to resort to dangerous alternatives to cross borders which enhances significantly the risk of injuries and death.[194] Importantly, the cause of these dynamics is located, among other things, in the (mis)management of migrants and asylum seekers by the Member States and their bureaucratic barriers, which lead individuals on the move to end up into a 'bureaucratic limbo'.[195] Similarly, Menghi, focusing on the Roya Camp, describes an 'economy of containment beyond detention'.[196] Ansems de Vries and Welander use the concept of the 'politics of exhaustion' to refer to a technology of governance used in places of transit which is aimed at 'pushing people to the edge, directly or indirectly'.[197] The authors depict a feeling of exhaustion experienced by migrants in settlements in Calais, Brussels and the nearby UK border regions, due to 'repeated evictions, detention, push-backs, deportations, sub-standard living conditions, fundamental uncertainty, the continuous threat and reality of violence, etc.'.[198] These practices are regarded by these scholars as a deterrent strategy, the objective being to exhaust and discourage migrants'

191 Martina Tazzioli, 'Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe' (2020) 38(1) Environment and Planning C: Politics and Space 3.

192 Ibid 11.

193 Iole Fontana, 'The Human (In) security Trap: How European Border(ing) Practices Condemn Migrants to Vulnerability' (2022) 59(3) International Politics 480.

194 Ibid.

195 Ibid.

196 Marta Menghi, 'The Moral Economy of a Transit Camp: Life and Control on the Italian-French Border', in Amigoni, Aru, Bonnin, Proglio and Vergnano (n 182) 94.

197 Ansems de Vries and Welander (n 188). See also Leonie Ansem De Vries and Elspeth Guild, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2018) 45(12) JEMS 2156; Anja Edmond-Pettitt, 'Territorial Policing and the 'Hostile Environment' in Calais: From Policy to Practice' (2018) 2(2) Justice, Power and Resistance 31.

198 Ansem de Vries and Welander (n 188).

attempts to access the UK or another EU country to lodge asylum requests. In his recent empirical research focusing on migrants in Brussels, Vandevoordt describes policing practices framed as games of 'cat and mouse' where migrants are 'hunted down', arrested and subsequently released.[199]Also using the concept of the politics of exhaustion, Vandevoordt signals that these police actions are aimed at deterring migrants who do not wish to apply for asylum from staying in Belgium.[200]

4 Legal Effects: Application of Criminal Justice Related Positive Obligations Framework

Empirical insights such as those discussed above can be used in different ways by the ECtHR. As will be discussed further below, the ECtHR has deployed such information in different types of decisions in the context of trafficking. The Court could also utilise information reviewed in Sub-Section 3.6.2 with respect to different types of concrete decisions in relation to aggravated smuggling in a transit context. It is argued here that the operationalization by the Court of such information, through the construction of a specially calibrated (particular) vulnerability profile, would represent a fundamental step forwards, also in terms of facilitating evidence-based determinations with respect to more concrete issues. Vulnerability recognition is, namely not 'mere rhetorical flourish', but actually '*does* something' in ECtHR case law.[201] The strongest legal impact of vulnerability arises where vulnerability becomes so crystallized that it transposes into the right to not be kept in that situation. This engenders obligations on the part of the State to prevent such vulnerability from occurring, cease its continuation and provide redress for it.[202] With the Court structurally referring to particular vulnerability in that context, this route is arguably also the one taken in the recognition of positive obligations in art. 4 ECHR, with respect to forms of victimization not referred to in the text of the provision, namely human trafficking and other forms of exploitation not (clearly) qualifying as slavery, servitude or forced labour.[203]

199 Vandevoordt (n 42) 53. See also Mescoli and Robain (n 43) reporting the frequent police raids in transit spaces in Brussels.

200 Ibid.

201 Peroni and Timmer (n 113) 1057.

202 In the intimate relationship between vulnerability and discrimination grounds in the sense of art. 14 ECHR, the former can solidify to such an extent that it becomes a distinct, new ground of discrimination. See ibid. Something similar has occurred in the context of statelessness and art. 8 ECHR in *Hoti v. Croatia* 63311/14 (ECtHR, 26 July 2018).

203 Likewise, this provision makes no mention of positive obligations ensuing from it, while the Court holds that it is in this format that obligations particularly arise under art. 4 ECHR. See *S.M.* [GC] (n 74).

Via an overview of human trafficking case law in relation to criminal justice related positive obligations, this section first explores the feasibility of expansive interpretation of art. 4 ECHR to include aggravated smuggling in a transit context under its protective umbrella (4.1). Subsequently, the second sub-section develops a fluid and flexible approach including other protective bases existing outside of art. 4 ECHR, which can apply in conjunction with the latter or independently to forms of ill-treatment faced by smuggled transiting migrants (4.2). The final sub-section discusses how the Court has relied consistently on empirical information to develop its human trafficking case law (4.3) and how the same approach can be taken to circumscribe and operationalize vulnerability of aggravated smuggling of transit migrants.

4.1 Applicability of the Convention to Transiting Migrant? Trafficking Case Law as a *Model*

Given the nexus between trafficking and smuggling vulnerability and victimization, the optimal location for protection within the ECHR arguably would be art. 4 ECHR. Firstly, protection against trafficking victimization requires specific types of measures – built by the Court into art. 4 ECHR – which, given the resemblance between the phenomena, would also be appropriate in the context of (transiting) smuggling victimization. In its 13 judgments regarding criminal justice related positive obligations with respect to trafficking,[204] the ECtHR has addressed and established violations with respect to precisely these types of issues, as they have arisen in *that context*. Mainly (and through an explicit preference therefore),[205] positioning that protection in art. 4 ECHR, the Court has demonstrated a willingness to expansively interpret the 'restrictive wording'[206] of this provision 'in such a way as to allow it to cover rights unthought of when it was conceived',[207] modernizing it in line with contemporary protective needs in 'modern European democracies'.[208] Relying on its own 'general principles' applicable in this context,[209] the Court has responded to the protective needs in two important manners.

Firstly, not only taking a broad approach to its understanding of the forms of abuse explicitly prohibited in this provision (slavery, servitude and forced

204 The result of 13 judgments is obtained through a search of HUDOC using art. 4 ECHR, English language, and the exact term 'human trafficking' as filters. Adjudicated both at the chamber and Grand Chamber level, *S.M.* (n 74) counts twice.

205 *S.M.* [GC] (n 74) paras 242-243.

206 Kirsty Hughes, 'Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR' (2022) 85(4) *The Modern Law Review* 1045 referring to Helen Fenwick, *Civil Liberties and Human Rights* (Routledge, 2007).

207 Ibid.

208 Hughes (n 206) 1045 referring to Fenwick.

209 *J. and Others* (n 74) para 103.

or compulsory labour), the Court has critically added to its scope by adding human trafficking as a further autonomous category of prohibited horizontal abuse.[210] The Court's open approach is moreover facilitated by the fact that it does not see the need for exact classification, holding that pertinent typologies of harm or endangerment often overlap, not only within the categories in art. 4 ECHR,[211] but can also be covered by other Convention provisions, notably articles 2, 3, and 8 ECHR.[212] Protection in one instance has also been innovatively extended to art. 6 ECHR.[213] The Court has been lenient with not clearly formulated applications (either with respect to the Convention provision(s) on which complaints were based, or the format of alleged positive failings on the part of the State).[214] Where necessary, it has characterized complaints in the most suitable construct itself, demonstrating therewith awareness difficulties involved in capturing the complex phenomena in terms of human rights' deficiencies.[215] As such, diverse (sub-)categories of abuse have been drawn under Convention protection (trafficking (of minors) in association with domestic servitude, labour or sexual exploitation and forced prostitution).[216]

With one – perhaps two- exception(s),[217] in none of the judgments has the Court ever determined that the scenarios presented therein, legally or factually, could not fall within the scope of Convention protection, even though

210 The Court did so first in *Rantsev* (n 74).

211 See the discussion and clarification also in relation to exploitation for the purpose of prostitution in *S.M* (n 74).

212 *S.M.* [GC] (n 74) para 297; see also *M. and Others. v. Italy and Bulgaria* 40020/03 (ECtHR, 31 July 2012), Factsheet art. 4 ECHR.

213 That occurred in *V.C.L. and A.N.* (n 74) in which the minor applicants complained of their criminal prosecutions despite their (recognized) status as trafficking victims. The Court established a violation of art. 6 ECHR, *inter alia* because the national court had not 'consider(ed) their cases through the prism of the State's positive obligations under (art. 4 ECHR)' para. 208.

214 *S.M.* [GC] (n 74) para. 240. See with respect to *S.M* (n 74) in Hughes (n 206) 1049-1051; see also *Zoletic* (n 23) paras 121-133.

215 *S.M.* [GC] (n 74) para. 240.

216 In *V.C.L and A.N.* (n 74) the second applicant put forward a further typology of trafficking abuse, holding that 'as a victim of trafficking exploited for the purposes of producing illegal drugs he was treated differently from victims of trafficking exploited for other criminal purposes'. This complaint was found to be inadmissible by the Court, but only did so because of non-exhaustion of domestic remedies. See paras 211-213.

217 See the case of the second applicant in *C.N. and V* (n 74) para 94. In the case of *M. and Others* (n 212), it is difficult to say whether or not the Court found that the first applicant could potentially have been trafficked. The case is an an outlier in that the Court, establishing a violation of the procedural obligation under art. 3 ECHR to investigate the treatment to which the first applicant had been subjected, considered in that regard that she was potentially also a trafficking victim. In its examination of the art. 4 ECHR complaint relating specifically to trafficking in that case, the Court seems however to have backtracked to a certain extent, in the context of other obligations than the procedural one. See in this judgement, with respect to the art. 3 ECHR complaint, para. 106 and, in contrast, in relation to the art. 4 ECHR complaint, paras 154-155.

all cases arguably presented hazy narratives.[218] The Court's open approach is made visible between its first judgment (*Siliadin v. France* in 2005), up to the most recent judgment (*Zoletic and Others v. Azerbaijan* in 2021) in the catalogue of pertinent case law. The Court has indeed consistently broadened its scope. Even where the Court has itself not been able to establish that treatment alleged by applicants amounted to treatment prohibited under art. 4 ECHR, it has found procedural violations in the sense that *national authorities* did not do enough to determine (or exclude) prohibited behaviour under art. 4 ECHR in domestic investigations and proceedings.[219] Generally, the Court established, in its assessments of compliance, at least one (type of) violation in nearly all cases.[220] Inclusion of the transiting smuggling victim under the scope of art. 4 ECHR would mean that such specific obligations would also apply. This inclusion would moreover have important symbolic and norm-transferring impact, emphasizing the conceptual proximity between trafficking and smuggling and underscoring the victimizing aspects of the latter.

Secondly, while the concrete criminal justice positive obligations in art. 4 ECHR, in their base form, follow the same format as those which apply in relation to other types of horizontal abuse,[221] in trafficking case law, the Court reads these in line with specific protective needs associated with this type of abuse, in some instances prescribing specific further obligations in that regard.[222] As such, the Court established obligations to (*inter alia*) ensure: (i) *effective* criminalizations, interpretations and classifications[223] which adequately capture the full gamut of abuse; (ii) that the overall legal and practical apparatus is effectuated in practice, in this context emphasizing the importance of victim identification and the training of officials;[224] (iii) that impediments

218 The same holds for the 9 decisions, in which inadmissibility was established for other reasons.

219 *Zoletic* (n 23), paras 193-210; *S.M.* [GC] (n 74) paras 336-347.

220 *J. and Others* (n 74) and with respect to the second applicant in that case, *C.N. and V.* (n 74) paras 93-94 form the exceptions.

221 From a criminal justice perspective, these are: (i) the (first) substantive obligation to have in place an adequate protective legal and administrative framework and the means to effectively operate it; (ii) the (second) substantive obligation) to prevent or stop harm from occurring and (iii) the procedural obligation to provide effective (criminal law) redress, including via adequate investigation, adjudication and sanctioning. See, among others, *S.M.*[GC] (n 74) para 306; *Zoletic* (n 23) para 182.

222 In that 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking', the Court also prescribes non-criminal measures specifically important in the trafficking context, such as 'adequate measures regulating businesses often used as a cover for human trafficking', while 'a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'. *Rantsev* (n 74) para 284.

223 See *Siliadin* (n 74), paras 147-148; *C.N. and V.* (n 74) paras 107-108; *C.N.* (n 74), para 80; *Chowdury* (n 74) para 123.

224 *J. and Others* (n 74) para 110-113 and, distinctly in terms of criminal victimization, para 115.

thereto do not arise through the existence of conflicting criminal justice and (immigration) policies, the latter undermining the former;[225] and (iv) shortcomings in investigations in association with the features of the crime phenomenon,[226] *inter alia* by emphasizing that the often cross-border aspect of trafficking gives rise to robust duties of international cooperation.[227] In so doing, the ECtHR has incorporated special features of trafficking victimization in its appraisals to the advantage of applicants. These include, strongly relying in this regard on empirical evidence extracted from diverse sources, the problems related to the (over) reliance on victims' statements, which may be problematic in light of (i) psychological pressure and burdens felt by them before and in the course of proceedings, (ii) prejudice and insensitivity to victims' problems on the part of officials taking testimony, (iii) credibility of statements, in light of changes therein over time and (iv) fear and reluctance on the part of victims because of threats of reprisals or a lack of trust in 'the effectiveness of the criminal justice system'.[228] The Court has alleviated the burdens of victims by lowering thresholds in terms of (*prima facie*) evidence which they must show to trigger (the applicability of) positive obligations (to protect and provide criminal procedural remedies) at the national level.[229] Critical for the context of aggravated smuggling is that the Court also recognizes the complexities of the notion of consent by being sensible to the possibility that this can dissolve or be diluted.[230] Overarchingly, the ECtHR emphasizes the particular vulnerability arising from this type of victimization. Importantly, with most applicants falling under that category, the vulnerability of trafficking victims is often (in part) related to the fact that they are also *irregular migrants*.[231]

That is not to say that the Court can or should equate aggravated smuggling victimization (notably in a transit context) with trafficking. As discussed below, the current position of the ECtHR is that abuse can only qualify as trafficking if it meets the constituent aspects of that phenomenon as it is circumscribed in pertinent international law definitions.[232] While there may be strong similarities between smuggling and trafficking experiences and there

225 *Rantsev* (n 74) paras 291-293.

226 See *S.M.* [GC] (n 74), para 337, where the Court emphasized the importance of investigating contacts on social media, in that 'such contacts represent one of the recognized ways used by traffickers to recruit their victims'.

227 *Zoletic* (n 23) para 191; *Rantsev* (n 74) para 289; see also *J. and Others* (n 74) para 105.

228 *S.M.* (n 74), para 344, referring to empirical evidence cited in paras 138, 171, 206 and 260. See also in *Chowdury* (n 74) para 121, the reference to the recovery and reflection period in art. 13 of the Council of Europe Convention on Action against Trafficking in Human Beings, with the aim allowing a potential victim time to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.

229 *S.M.* [GC] (n 74), 324-332. See also Hughes (n 206) 1053-1054 on *S.M.* (n 74).

230 *Chowdury* (n 74) paras 96-97; *Zoletic* (n 23) para 167.

231 See footnote 74.

232 *S.M.* [GC] (n 74) para 303.

may be concrete instances in which the Court could interpret horizontal abuse as falling under those definitions, it is unlikely that the Court would create full identity between the two groups. That would not be necessary, however, in that the Court, on the basis of evidence recognizing *sui generis* harm and endangerment and vulnerability associated with certain types of smuggling, could understand these specific (aggravated) forms of smuggling as falling under the scope of art. 4 ECHR, under their own category.[233]

4.2 A Consolidated and Fluid Approach Under Articles 2, 3, 4 and 8 ECHR

The fact remains, however, that the range of smuggling experiences and the profiles of smuggled migrants is highly varied, also in the sense that the similarity to trafficking may be more or less strong. It is further important, in this regard, that art. 4 ECHR is not the only locale in which the Court can establish protective duties. The question then becomes which provisions can be considered as alternative for which types of smuggling situations.

Again, taking Belgian law as an illustration, when implementing the EU Facilitator's Package, article 77*bis* of the Foreigners Act criminalizes preparing, facilitating, or effectuating (attempted) of the irregular entry, residence, and transit by a non-EU subject, for direct or indirect financial gain. A reading of the legislative proposal makes it clear that the legal provision, which is purposefully placed in the Foreigner's Act as opposed to the Criminal Code, protects the interests of the State. Indeed, when modifying former article 77*bis*, which did not differentiate migrant smuggling from human trafficking, the positioning of the trafficking offence in the Criminal Code under the title 'Crimes and Offences against Persons' allowed to 'make a stark distinction between migrant smuggling and human trafficking' in line with international instruments.[234] Prescribed as such, difficulties may arise in the qualification of this act as a horizontal human rights abuse under any Convention provision. Moreover, articles 75 and 76 of the Foreigner's Act criminalize the illegal entry, residence and non-compliance with removal orders by an alien himself, with the provisions taken together rather framing this migrant as a consensual participant within the smuggling narrative.

The dynamics change, however, where aggravated circumstances mentioned in articles 77*quater* and 77*quinquies* are at issue. Some of those may (even without a smuggling context), trigger articles 2 and 3 ECHR. Thus, positive obligations under art. 2 ECHR could become engaged under aggravated circum-

233 See in that regard, *S.M.* (n 74) para 307, where the Court considered that 'the relevant principles relating to trafficking' are also applicable to cases of forced prostitution, 'given the conceptual proximity of human trafficking and forced prostitution under Article 4 (…)'. Also referring in that regard to *C.N.* (n 74), paras 65-69, with respect to domestic servitude.

234 Belgian House of Representative, Legislative Proposal (10 August 2005), 9-10.

stance (iv) of art. 77*quater*, where the life of the victim is endangered, intentionally or through gross negligence, or art. 77*quinquies* (i), if the crime causes the (unintentional) death of the victim.[235] Aggravated circumstance (v) under art. 77*quater*, where the crime causes a seemingly incurable disease, an inability to perform personal labour for more than four months, full loss of an organ or the use thereof or serious mutilation, could correspond with the requisite level of severity of ill-treatment in art. 3 ECHR.[236] The same may hold true, although less categorically, for the aggravated circumstances of art. 77*quater* under (iii), where smuggling is committed through direct or indirect use of cunning trickery, violence, threat or any form of coercion, or by kidnapping, abuse of power or deceit, particularly if violence is involved. Where art. 3 ECHR would not apply (because the requisite level of severity is not attained), an alternate basis may be found in art. 8 ECHR which is broad enough to cover a great variety of horizontal abuse. That would also be an option for the aggravated circumstances meant under art. 77*quater*, where the crime is committed (i) in relation to a minor; (ii) through abuse of the vulnerable situation of a person as a result of his irregular or precarious administrative situation, his age, pregnancy, illness or physical or mental deficiency, to such an extent that that person in fact has no other real and acceptable choice than to allow themselves to be abused or (iii) by offering or accepting payments or other advantages from a person holding authority over them.

Diverse issues arise however with these locales. Horizontal abuses falling under articles 2 and 3 ECHR may be grave enough to trigger criminal justice positive obligations, but there is no guarantee of that. It would moreover be problematic if appraisal were to focus in isolation on the impact on life or physical or psychological integrity, thus only the aggravated circumstances themselves without consideration of the smuggling backdrop. In such a an approach, aspects of abuse associated with aggravated *smuggling* would not (necessarily) come to the fore, meaning that any protection provided would be disengaged therefrom. While the same issues could arise with art. 8 ECHR, a further problematic attaching to this provision is that this is the location where the Court does administer a margin of appreciation in that national authorities can be left a choice of means of redress for lesser abused criminal remedies (and therewith criminalization) not necessarily being required.[237]

235 Art. 2 ECHR would also apply in loss of life under such circumstances, regardless of Belgian law.

236 See also art. 6 par. 3 of Palermo Smuggling Protocol, 3 on the necessity to establish aggravating circumstances in life endangerment situations, inhuman or degrading treatment which include the exploitation of migrants.

237 In the framework of art. 8 ECHR, the 'nature of the State's obligation' depends on 'the particular aspect of private life that is in issue', the margin becoming 'correspondingly narrower' if 'a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life.' That will be the case where 'physical and psychological integrity' are involved. Particular vulnerability

The hazard is then that in the blurry environment of art. 8 ECHR, where 'lesser' aggravated circumstances are involved, that the Court will not recognize a deficiency in recognition of criminal victimization.

Such concerns again render the option of art. 4 ECHR an important locale to consider. While the ECtHR has on numerous occasions made clear that prohibited forms of treatment under this provision, including trafficking, can overlap with abuse in the sense of articles 2, 3 and 8 ECHR, it is critical that it *prefers* to examine trafficking complaints under art. 4 ECHR. This is precisely the case in order to capture all aspects of the complex phenomenon. Underscoring that 'in its case-law it has tended to apply Article 4 to issues related to human trafficking',[238] the Court explains 'that this approach allows it to put the possible issues of ill-treatment (under Article 3) and abuse of the applicant's physical and psychological integrity (under Article 8) into their general context, namely that of trafficking in human beings (…)' holding further that 'allegations of ill-treatment and abuse are inherently linked to trafficking and exploitation, whenever that is the alleged purpose for which the ill-treatment or abuse was inflicted'.[239]

(Aggravated) smuggling can be as complex – and in terms of ill-treatment and abuse – as aggregated a phenomenon as trafficking. It is paramount then that harm associated with it are adequately addressed. It is also only in this manner that concrete obligations, which may arise specifically in relation to this phenomenon, can be developed, as they have been for trafficking. Understanding however that not all smuggling experiences will be the same, a resolution would lie in envisaging articles 4, 2, 3 and 8 ECHR as points on a variable scale of ill-treatment, the (greater) relevance of one or the other provision depending on the type and gravity of abuse. Taking all bases together, a broad matrix of potential protection would then be established, allowing for optimal approximation of the concrete situation of the smuggled migrant. Art. 4 ECHR could then be reserved for cases in which the abuse undergone by the smuggled migrant is found to have such close conceptual proximity to the types of treatment prohibited in that provision, with the other provisions serving as fallback bases. Using them as alternates would not be problematic as long as specific types of obligations associated with the type

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can also reduce margins, such as is the case for minors, notably where 'serious acts such as rape and sexual abuse' – which also engage 'fundamental values' – are concerned.' See *Söderman* (n 155) paras 78-82.

238 *S.M.* [GC] (n 74) para 241 referring to *Rantsev* (n 74) paras 252 and 336; *C.N. and V.* (n 74) para 55; *C.N.* (n 74) para 84; and *J. and Others* (n 74) para 123.

239 *S.M.* [GC] (n 74) para 242.

of abuse (corresponding to the needs and problematic arising from the crime phenomenon) are also read into those provisions.[240]

4.3 Sorting through reliance on empirical information and insights

In positioning the transiting migrant smuggled under aggravating circumstances within such a protective matrix (see sub-sections 3.6.1 and 3.6.2), the Court can importantly rely on empirical evidence and the insights of expert bodies and scholars to interpret such information. Again, this is an approach also taken in trafficking case law in which the Court has utilized empirical evidence in different manners. As will be addressed more specifically directly below, the Court arguably and critically operationalized such evidence in its fundamental decision to recognize trafficking as creating a state of vulnerability, which qualifies as a separate category of prohibited treatment under art. 4 ECHR.[241] This prohibited treatment which henceforth cannot be protected against and remedied through any other means than through criminal law enforcement.

The Court has also used empirical information in assessing applicability and whether or not a *prima facie* case of victimization was at issue,[242] in support of its findings with respect to specific types of obligations[243] and in assessing applicability and whether manners in which they can be triggered, in the

240 See in this respect, *M. e.a. v. Italy and Bulgaria* (n 212) paras 156 and 157, where the Court determined in its assessment of the art. 4 ECHR complaint that 'irrespective of whether or not there existed a credible suspicion that there was a real or immediate risk that the first applicant was being trafficked or exploited', the complaint of violation of the procedural obligation to effectively investigate established under art. 3 ECHR (see para 103), also covered any problematic which may have existed in that regard in the context of art. 4 ECHR.

241 In *Siladin* (n 74) in which the Court did not establish trafficking, but servitude and forced or compulsory labour, the Court relied in part on empirical information with respect to its findings that positive obligations are to be read into art. 4 ECHR and that the type of abuse at issue can only be addressed via criminal justice protection. In *Rantsev* (n 74), as will be discussed further below, the Court relied in part on empirical information in finding that trafficking is to be considered an autonomous form of abuse within art. 4 ECHR.

242 See with respect to the use of empirical evidence in aid of rights bearers' burden of presenting *prima facie* evidence of victimization, *Zoletic* (n 23), paras 156-170 and 193-200. See also in this regard John Tajer, 'Hidden in Plain Sight: Failure to Investigate Allegation of Abuse on Public Construction Projects in Zoletic v. Azerbaijan. (Strasbourg Observer, 18 November 2021). <https://strasbourgobservers.com/2021/11/18/hidden-in-plain-sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/>.

243 See with respect to the identification duty in *J. and Others* (n 74), paras 110-113 and 115 and in that light, Stoyanova (n 19). See also *S.M.* (n 74) paras 295-296, where the Grand Chamber found that internal trafficking of nationals also falls under the concept of trafficking in art. 4 ECHR, *inter alia*, relying on the information provided by one of the third-party interveners 'that internal trafficking is currently the most common form of trafficking'.

assessment of compliance in concrete cases[244] and, as discussed below, in recognition of specific implications of the (particular) vulnerability of trafficking victims.[245] A broad capital of information in the form of opinions, reports, studies, and statistical information emanating from public and private (monitoring) entities, often provided through third party interventions, has provided a wealth of opportunities for the Court in this regard.[246]

This type of information has been used alongside support the Court has found for its positions in international law sources, but the Court has also this type of information where international sources provided no clear answers on certain issues (or conflicted). In *S.M. v. Croatia*, the Grand Chamber, finding that the evidence suggests [emphasis added] that 'internal trafficking is currently the most common form of trafficking',[247] it declined to exclude from its trafficking concept cases without a cross-border element, in order to '(ensure) the wider relevance of Article 4'. The Grand Chamber emphasized in this regard that 'addressing human trafficking as a phenomenon that does not necessarily entail crossing a border may assist *in centring analysis upon victims' experiences, as opposed to immigration control* [emphasis added]'.[248] Finding that a more restrictive approach would 'would run counter to the object and purpose of the Convention as an instrument for the protection of individual human beings, which requires that its provisions be interpreted and applied so as to make its safeguards practical and effective', the Grand Chamber also relied expressly on information provided by one of the third party interveners to that effect.[249] In *S.M.*, the Grand Chamber also established that 'human trafficking may take place outside the parameters of 'organised crime'.[250] While it found basis to do so in international law sources, in doing so it again underscored the importance of approximating the real life experiences of witnesses, expressing the 'hope' that 'a conception of human trafficking that is not tied to border control and organised crime may assist in developing Article 4 *beyond*

244 *Rantsev* (n 74). In *S.M.* (n 74), as underlined by Hughes (n 206) 1049: 'Both (judgements) found that Croatia had violated the procedural obligation to investigate by neglecting to pursue various lines of enquiry, all of which was contrary to expert guidance as to how to investigate human trafficking.'

245 In *S.M.* [GC] (n 74) para 344, the Court relied on the expertise of specific bodies such as the GRETA, notably regarding the advice to not rely primarily on the victim's testimony which is impacted by psychological trauma..

246 In this regard, GRETA is identified as playing an important role as a contributor. See, among others, Vladislava Stoyanova, 'Sweet Taste with Bitter Roots: Forced Labour and Chowdury and Others v Greece' (2018) European Human Rights Law Review 67.

247 *S.M.* [GC] (n 74) para 295.

248 Hughes (n 206) 1051.

249 *S.M.* [GC] (n 74) paras 269-270 where the Research Centre *L'altro diritto onlus* (University of Florence) referred to the UNODC *Global reports on trafficking in persons*, which 'pointed out that victims who had been detected within their own borders represented the largest part of the victims detected worldwide'.

250 *S.M.* [GC] (n 74) paras 294-296 referring to sources mentioned in paras 11 and 120.

punishing 'perpetrators' of human trafficking (…) towards understanding the experiences of victims and addressing their substantive needs [emphasis added]'.[251]

The ECtHR can likewise source the real-life experiences and vulnerabilities of smuggled migrants as well as challenges in the effectuation of protection, using empirical insights to bolster its approach. Again, a fundamental first step which must be taken in that regard – which would trigger the whole chain of distinct positive obligations – is the recognition that there is a *sui generis* form of abuse associated with aggravated smuggling, notably in a transit context, which gives rise to an inherent vulnerability against which criminal justice protection must be available.

Returning then to the important use made by the Court of empirical information in the incorporation of trafficking as a distinct category in art. 4 ECHR, it is important to underscore that while lauded, the ECtHR's open approach to art. 4 ECHR has also been criticized.[252] The criticism touches upon the lack of clarity with respect to abuse categories it (legally and factually)[253] sorts under the scope of the provision and the manner in which they relate to each other.[254] Commentary has been that the Court has created a 'definitional quagmire' within the provision[255] and has particularly been ambiguous in its description of trafficking, creating 'doubt over the broader parameters of the right'.[256] Perhaps influenced by the diverging views, including those within the Court itself,[257] in *S.M. v. Croatia*, (the only Grand Chamber judgment with respect to trafficking), the ECtHR brought more clarity to the notion of trafficking under the Convention by binding itself to international law definition(s) of the phenomenon.[258] In keeping with the idea of deference, this may point to a strategy to check an overly progressive approach. Marking that the Grand Chamber did so in *S.M. v. Croatia*, Stoyanova argues that the chamber's judgment in that case was importantly corrected, in that an implication lay therein that 'the definitional scope of Article 4 was enlarged to such an extent as to cover 'exploitation', whatever 'exploitation' might mean'.[259]

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251 See Hughes (n 206) 1051.

252 Ibid 1046.

253 See Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) *Netherlands Quarterly of Human Rights* 163.

254 Hughes (n 206). See also Stoyanova (n 310). Vladislava Stoyanova, 'The Grand Chamber Judgment in SM v. Croatia: Human Trafficking, Prostitution and the Definitional Scope of Article 4 ECHR' (*Strasbourg Observers*, 3 July 2020) <https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/> accessed 10 June 2022.

255 Stoyanova (n 254).

256 Hughes (n 206) 1046-1048. See also the conclusion of Stoyanova, (n 253).

257 Hughes (n 206) 1046.

258 Hughes (n 206).

259 See Stoyanova (n 253) on the interpretative openness of the term prostitution; Hughes (n 206) 1053 on the ambit of art. 4 ECHR.

Nevertheless, at the same time, Hughes argues that, even after this Grand Chamber judgment, there are also indications that 'different future directions remain both possible and contested'.[260] She argues that there is a basis to hold that in *S.M. v. Croatia*, the Court has added, beyond trafficking, forced prostitution as a further category of distinct abuse.[261] Hughes offers an interesting analysis as to how the door may remain open. She identifies as a main cause for the definitional uncertainty, with respect to the definition of trafficking under art. 4 ECHR, the fact that the Court used two different approaches in framing the concept in *Rantsev v. Russia*.

Hughes coins these two approaches as follows: the 'ECtHR characteristics approach' and the 'international law definition'.[262] The international law definition approach relates to Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, both of which unpack the three core elements of trafficking, being the 'act, means and purpose' (see also Chapter 2). The 'characteristics approach', on the other hand, 'describes the nature of human trafficking, the intentions of traffickers, and the impact of human trafficking upon the victim'.[263] The two approaches give rise to ambiguity because, while overlapping to an extent, they are also significantly different. Particularly important is that the 'characteristics definition' does not require that the core elements in the international law elements are established, making it broader.[264] The Court exacerbated the lack of clarity according to Hughes, by, in case law following *Rantsev*, 'vacillating' between the two approaches, alternately relying on one over the other.[265]

One of two explanations Hughes provides for the persistence of ambiguity in case law is of particular importance here. She argues 'the Court did not pin down the concept earlier, due to 'difficulties (…) in explaining the relationship between human trafficking and Article 4, and thus in justifying reading the concept into the right', making it understandable that 'when implying a new concept (…) the Court would wish to explain how and why there was a role for it within Article 4 and would wish to resist being seen to be simply lifting concepts from other international frameworks'.

Therefore, the 'characteristics account' can be considered as having functioned to legitimize the inclusion of trafficking under art. 4 ECHR, by supporting the position that there is a real need to do so. It remains relevant however, in that in *S.M. v. Croatia*, the Grand Chamber did not remove it as a tool but gave it an alternate function, namely as a means to determine '*how* [emphasis added] the phenomenon of human trafficking falls within the scope of Ar-

260 Hughes (n 206) 1046.
261 Hughes (n 206).
262 Hughes (n 206) 1048.
263 Ibid.
264 Ibid.
265 Ibid.

ticle 4'.[266] Thus, the characteristics account 'is now presented as an attempt at explaining the nature of Article 4 and the rights that it encompasses by examining the ways in which an individual experiences a loss of those rights'.[267] As such, this approach can remain relevant in the ECtHR jurisprudence as the Court may '(return) to this account',[268] also where ambiguity may again arise with respect to particular types of treatment.[269]

Of great significance is that Hughes' characteristics approach paraphrases a description of trafficking first laid down by the Court in *Ranstev v. Cyprus and Russia*, which reads fully as follows:

> *'[t]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…) It implies close surveillance of the activities of victims, whose movements are often circumscribed (…) It involves the use of violence and threats against victims, who live and work under poor conditions (…) It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (…) The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place 'under a regime of modern slavery' (…)'.*[270]

The elements of this definition of characteristics is fully extracted from empirical information provided in reports, third party submissions in that case.[271] Reasoning why trafficking should be included within the scope of art. 4 ECHR, the Court, moreover, pointed to the increase in trafficking as a 'global phenomenon', referring in that regard to the *Ex Officio* report of the Cypriot Ombudsman on the regime regarding entry and employment of alien women as artistes in entertainment places in Cyprus, two follow-up reports made by the Council of Europe Commissioner for Human Rights and the third party submission of The AIRE Centre.[272] The Court's conclusion that '(t)here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention', is (as well as being mentioned in the preamble of the Anti-Trafficking Convention)[273] also sup-

266 Hughes (n 206) 1057.
267 Ibid.
268 Ibid.
269 See Hughes (n 206) with respect to forces prostitution.
270 Hughes (n 206) 1048.
271 Ibid para 281.
272 *Rantsev* (n 74) paras 278-279.
273 Ibid para 162.

ported in the included citations from the reports of the Cypriot Ombudsman.[274]

As such, the 'characteristics account' is in fact a summation of empirical evidence, which, having being utilized first to recognize that trafficking creates a type of vulnerability which brings it under the scope of art. 4 ECHR, now functions to sort and analyse concrete narratives, to determine not only whether they constitute trafficking (within the parameters of the international law definition), but also other forms of abusive exploitation rightly to be brought under the scope of art. 4 ECHR. The strong empirical evidence forming an own characteristics account of the real-life experiences and vulnerabilities of transiting smuggled migrants can likewise be used by the Court to draw this type of abuse under the scope of Convention, in accordance with the specific type and gravity at issue, positioning concrete cases within the matrix of protection arising from the combined bases of articles 2, 3, 4, and 8 ECHR as envisaged above.

5 Conclusion

Even in Belgium, where the legal protection of the smuggled migrant is stronger and better aligned with the empirically observed vulnerabilities of smuggled migrants, the implementation and effectuation of intended protection is impeded. In jurisdictions where the strict dichotomy between trafficking and smuggling is even more forcefully in place, given the blurred boundaries between human trafficking and migrant smuggling and the type of victimization and vulnerability associated with migrant smuggling, the persistence thereof is untenable. Differential treatment is particularly problematic given increasing empirical evidence of traces of abuse and exploitation in smuggling situations, *particularly* in a transit migration context.

Departing from a human rights perspective, we explored the extent to which, and if so how, the ECtHR, with its interpretative arsenal, could break through the protective disparities. We argued that diverse approaches can be reconciled if the Court takes into consideration the real-life experiences of smuggled migrants, viewing these from the lens of the context and *constructed nature* of their vulnerability and the role of institutional or societal environments in its deliberate creation. Unpacking growing theoretical and empirical insights, we built on the emerging awareness of the trafficking/smuggling nexus and the concept of 'migratory vulnerability', particularly in a transit context. We argued that *some* transiting smuggled migrants can and must be recognized as particularly vulnerable and as victims in the sense of the criminal law by the ECtHR. It is critical that the Court continues to use theoretical and

274 Ibid para 89.

empirical information and does so *systematically* and *structurally* in order to operate vulnerability paradigms (and transposition to criminal victimization) in clear and effective manners. The Court's management of such information (which sources it uses, when and how it will do so) could benefit from ordering, while the operationalization of theoretical and empirical insights is contingent on the availability of information,[275] meaning that there is also a responsibility of stakeholders to ensure that the Court is provided with appropriate information.

Being conscious of the ambitious nature of the argument put forward, one important limitation should be underlined. Even if the steps suggested above were to be taken by the Court, further issues would likely appear at the level of testing whether positive obligations were actually violated in concrete cases, given the specific criteria and thresholds which apply for each type. The Court may recognize that strong protective duties exist for transit jurisdictions such as Belgium, also considering the obligations to manage and implement migration in a particular manner as Schengen-participants and EU Member States. Internal transit jurisdictions present their own problematic, notably in relation to the clarity their own legal obligations with respect to both victims of migrant smuggling and human trafficking.[276] However, the fact that Belgium is a transit country and is therewith burdened with this particular problem linked to transit, may also provide grounds for the Court to reject the idea that it can be held to stringent account. As observed by Golini, 'transit countries feel exploited as a springboard towards 'El Dorado' and do not regard themselves as able to deal with the growing numbers of irregular migrants'.[277] With regards to the Schengen Area and the vulnerability and unsustainability of EU migration policy, Scipioni highlights that the conditions for the migration 'crisis' of 2015 are to be found in weak monitoring, low solidarity between Member States, the absence of central institution and the lack of policy harmonization, situational contexts *created by and driven by (conscious) incomplete agreements within the EU* [emphasis added].[278]

It is important to be mindful of the possibility that the Court might be reticent in establishing violation against transit jurisdictions, on the basis that it may be unfair to impose 'impossible or disproportionate burdens'.[279] A viable idea worth exploring in this regard is the notion of *shared* or *collective*

275 See Baumgärtel (n 72).

276 Benjamin Perrin, 'Just passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons' (2010) 7(1) European Journal of Criminology 11.

277 Antonio Golini, 'Facts and Problems of Migratory Policies' in Jospeh Chamie and Luca Dall'Oglio (eds) *International Migration and Development – Continuing the Dialogue: Legal and Policy Perspectives* (IOM, 2008) 96.

278 Marco Scipioni, 'Failing Forward in EU Migration Policy? EU Integration after the 2015 Asylum and Migration Crisis' (2018) 25(9) Journal of European Public Policy 1357.

279 Rantsev (n 74) para 219.

responsibility of multiple European jurisdictions already recognized in case law and scholarship.[280] Taking the necessary protection of vulnerable individuals within the European legal space at heart, such an approach would resonate with the 'not our problem' mentality and the blaming games between European jurisdictions which are salient and visible in light of dramatic incidents of migrants' fatal journeys.[281] Judge Turković's recent concurring opinion attached to *M.H. and Others. v. Croatia* underscores the need to examine shared responsibility. Opining that the judgment 'offers good guidance for the domestic authorities as to their future conduct', she marks out that the challenges involved in irregular transit migration 'concern the entire society', so that 'a common solution to the situation should be found within the European family'.[282] As underlined by Dembour, the Court has the ability to opt for a progressive approach when interpreting the Convention. Joining Dembour, to conclude, we argue that the ECtHR should deploy its historically well-displayed courage to ensure that smuggled migrants are protected against abuse as they move about in European legal spaces.[283]

280 See in particular the insightful work of Maarten Den Heijer, 'Shared Responsibility Before The European Court of Human Rights' (2013) 60(3) Netherlands International Law Review 411; Maarten Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4(2) Journal of International Dispute Settlement 361; Raquel Regueiro, 'Shared Responsibility and Human Rights Abuse: The 2022 World Cup in Qatar (2021) 25(1) Tilburg Law Review 27.

281 John Lichfield, 'The Channel Blame Game' *Politico* (27 November 2021): <https://www.politico.eu/article/migrants-english-channel-france-uk-refugees-drowned/> accessed 12 May 2021.

282 *M.H. and Others* (n 157), Concurring Opinion Judge Turković, para 1.

283 Dembour (n 75).