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

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7 Conclusion

Connecting the Dots, Avenues for Further Research and Plausible Solutions

1 Introduction

Similarly to migration processes which, as underlined throughout the dissertation, are far from being linear, the research journey also followed a path filled with shifts and detours. Nonetheless, unlike migration journeys which are often mistakenly imagined as departing from a point A with an actual end in sight to point B, the time has finally come to draw general conclusions. To reach point B, it is necessary to connect concretely the distinct findings by retracing the dynamic path followed throughout the research to provide an answer to the main research question and to arrive, so to say, at the destination of this dissertation.

The central research question of this doctoral research asked how the alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking developed in Belgium affects the governance of transit migration. The dissertation scrutinized the unique Belgian legal framework allowing *victims* (as opposed to objects) of *aggravated forms* of migrant smuggling to have access to the protective legal status usually strictly reserved for victims of human trafficking. The Belgian 'third way' or alternative approach can be said, at least on paper, to provide an interesting correction to the recurrent criticism surrounding the legal dichotomy between the two phenomena. In this regard, the title of the dissertation, 'Beyond the Dichotomy Between Migrant Smuggling and Human Trafficking?' ends with a question mark. The question can be answered in the affirmative in the Belgian case. This unique approach, which recognizes an unjust disparity in terms of protection, is also in line with recent agreements reached internationally, such as the UN Global Compact for Safe, Orderly and Regular Migration, which seems to acknowledge the particular vulnerability and risk of victimization faced by migrants in the midst of their migration journeys as well as the organic links existing between migrant smuggling and human trafficking.

Whereas the research presents a combination of independent sub-studies, each having their own distinct conceptual and theoretical approach, logic, methodology and conclusions, they nevertheless complement one another and contribute to answering the central research question. The main goal of this conclusion is to bring together the findings of each chapter and to locate them within the context of scholarly literature focusing on migrant smuggling, but more broadly on mobility and (frontline) implementation and decision-making

research. This final chapter starts by answering the central research question and subsequently unpacks the main findings. This first section emphasises the implications of the research, notably by highlighting the crucial relevance of the transit element. The second section further contextualise the research findings and engage with a growing body of scholarship aiming to disentangle migration-related research from methodological nationalism. The third section outlines avenues for further scientific inquiry connected with the research limitations. The final section ends by bringing forward and discussing solutions designed to enhance the protection of vulnerable individuals transiting within the Schengen Area.

2 Answering the Central Research Question and Unpacking the Main Findings

2.1 Answer to the central research question

An essential aspect of the central research question highlighted above is the focus on the situation of migrants *in transit*, specifically within the Schengen Area. Because migrants transiting through or stranded in the Belgian territory can be or become victims of human trafficking and/or (aggravated forms of) migrant smuggling, the dissertation scrutinized the ways in which this alternative approach concretely affected their (legal) governance. Taking a socio-legal approach to answer the main research question, the dissertation demonstrated how and why this unique and promising framework is not effectively used in practice (Chapters 4-6). Whereas the answer to this overarching question will be further unpacked in the following sub-sections, the key elements can be summarized as follows.

First, the research considered the complex operationalisation and implementation of norms enshrined in a fragmented and multi-layered national and European institutional context. This context implicates that migrants transiting in Belgium or more generally within the Schengen Area find themselves at a crossroads where multiple actors and legal regimes intersect, and consequently, where the competencies to govern migrants in transit are inevitably scattered between these distinct actors. Therefore, oversimplistic explanations which solely underline the fact that even in the case where migrants could, from a strictly legal perspective, 'qualify' to be granted the protective status, only to end up unprotected due to their lack of interest in the status, need to be discarded. Describing the migrants as only wanting to reach the UK at all costs or emphasising the fact that the situation of migrants transiting in the territory is 'only a UK problem' would be reductive. The dissertation reveals the fact that the governance of onward mobility movements within the Schengen Area is situated at the juncture of multiple sensitive and politicized 'fights' having intrinsic links and tensions with one another, and which are not under

the sole competence of the Belgian authorities, namely the fight against migrant smuggling, the fight against human trafficking, the fight against irregular migration and the maintenance of security and public order. The findings underline how, by taking a jurisdictional lens, for instance, it can be observed that some policies are prioritized over others. This is notably the case when the administrative 'processing' of migrants in transit in the context of the fight against irregular migration and the maintenance of security and public order takes precedence over the protective dimension, which would require authorities to identify, inform and subsequently protect individuals who could be considered as potential victims of human trafficking and/or aggravated forms of migrant smuggling.

Second, the research identified six causes or elements than can shape the dynamic described above. To summarize, the findings pinpoint critical issues of institutional capacity (1) that are further complexified considering the intricate Belgian institutional framework (2), issues of sensibilization and training of frontline implementers or the lack thereof (3), a lack of harmonized application of the procedure by frontline implementers (4), as well as a visible tendency of relevant actors to evade their responsibility by passing it on to other actors at the local, national or European level (5) which is stimulated by the scattering of competences between numerous actors operating at these distinct levels (6). Notwithstanding the contrasting and at times clashing 'fights' mentioned above, the findings unveil the presence of human rights concerns, notably by outlining languages of care or humanitarian narratives displayed by respondents. Taken together, the findings allow to draw a 'Janus-faced' picture displaying both practices and policies of control and securitization, on the one hand, and discourse of empathy and care considering the recognized vulnerability of migrants to abuse and exploitation on the other. These findings also confirms that the role of the moral economy of government bureaucracies in which state agents operate should not be underestimated. Yet, and despite the knowledge of this human-rights and protective-oriented alternative approach, which is described by most respondents as a mitigator to the strict legal dichotomy, the findings also demonstrate that stepping out of the straight-jacked legal dichotomy can be a challenging task in practice.

A third and crucial component that the dissertation brought forward, which is essential to answer the research question, is the transit element which was examined both conceptually and empirically. The transit element is key to unpack as it plays an important role in the decision-making of respondents, which thenceforth affects the ways in which migrants in transit are governed (see in that regard sub-section 2.3). In the specific socio-political Belgian context, the transit element became apparent with the deployment of the politicized label of 'transmigration' which carries the assumption that migrants in transit are only passing through the Belgian territory. Consequently, the research highlights how this conceptualisation of the migrant's journey and more generally onwards mobility in the EU can lead to a shifting or responsibil-

ities on behalf of state authorities. Whereas the fact that migrants do not display the desire to establish themselves on the Belgian territory might hold true in some cases, the fact that migrants in transit intercepted by the authorities are not necessarily granted adequate information should not be underestimated. In direct connection to transit, the constant mobility of migrants is crucial to emphasise as it has consequences when state authorities make the first step in informing migrants about the procedure.

Lastly, by broadening the geographical lens, the dissertation demonstrates that there are many factors contributing to the constant mobility of migrants. In the Belgian case, the need to avoid temporary *ad hoc* settlements of migrants appeared to be central to the governance of onwards mobility in the Intra-Schengen context. In doing so, Belgium is not unique within Europe. If migrants only stay temporarily in Belgium to reach the North of France first or directly attempt to reach the UK, the shifting of responsibility dynamic is somewhat encouraged as the situation appears to not be a problem that concerns Belgium. The question as to 'why' a procedure that is known to be time and capacity-consuming in nature should be deployed considering the scarcity of both time and capacity takes on its full meaning and can be seen to create a potential unfair burden. This reveals how despite the fact that the dissertation focuses solely on Belgium, the case of Belgium lies at the core of the complex challenge of managing and policing borderlands at the EU level (see also section 4). Legal instruments and policies related to irregular migration, human trafficking and migrant smuggling are decided at the EU scale, yet, despite some degree of harmonization, they are nevertheless subject to substantially distinct outcomes when implemented at the national level. This observation not only holds true from a legal perspective where legal variation 'in the books' can be found but also considers the discretion left to practical implementers in their course of action. The fact that migration control, migrant smuggling and anti-trafficking policies are not thought through holistically and structurally despite the inherent linkage and tensions existing between them, impacts therefore the governance of potentially vulnerable migrants on the move towards and *within* the EU.

This condensed answer to the central research question is useful to bear in mind when looking at the fictional scenario of Osman introduced at the beginning of the dissertation. During his stay on the Belgian territory, Osman finds himself at the crossroads of a complex web of overlapping legislation adopted at distinct scales and legal regimes, which together involve various actors. As a result, and depending on the concrete scenario, the governance of Osman can take different turns. Osman can be treated and governed as an irregular migrant, as a potential victim of human trafficking, as a victim of aggravated forms of migrant smuggling, as an 'object' of 'simple' migrant smuggling, or as a presumed migrant smuggler.

2.2 A dichotomy under scrutiny: a multi-scalar overview of the legal and policy instruments to deal with migrant smuggling and human trafficking

The dichotomy between migrant smuggling and human trafficking and its implications lies at the core of this dissertation and, evidently, is central to its overarching research question. The dissertation henceforth started out by looking critically into the genesis of the creation of the 'legal fiction' between migrant smuggling and human trafficking at the UN level. The introduction placed the construction of the dichotomy within its socio-political context, where concerns of perceived erosion of sovereignty felt by nation-states are omnipresent in the current globalized era. The construction of migrant smuggling and to a lesser extent human trafficking, as border security issues relating to broader securitization of migration processes, was helpful in order to understand the demarcation between the two crimes as drawing bright lines between the two phenomena was deemed instrumental for member states to reach a consensus on the UNTOC and its additional protocols and, most importantly, to uphold the current state of affairs of migration law in place. By outlining past and current criticism of the dichotomy and the erroneous or approximative assumptions on which it is based, as well as highlighting the empirical research shedding light on the existence of a grey area between the two phenomena (see Introduction and Chapter 3), the findings underline the relevance of placing the Belgian legal framework under the scope of inquiry.

As legal and policy instruments dealing with both migrant smuggling and human trafficking were adopted at distinct scales, Chapter 2 elaborated on the legal and policy backbone adopted at the EU and national (Belgian) level. To grasp the alternative approach adopted by the Belgian legislature, the research sub-question aimed to identify the common approaches and narratives present in EU counter-smuggling and anti-trafficking legislation and policies and explored how they concretely translated within the Belgian legal framework. By so doing, Chapter 2 first outlined how the EU Facilitator's Package deviated from the UN Smuggling Protocol and not only from a terminological standpoint. In essence, the broad application of the facilitation offence and the general lack of provisions protecting migrants' individual rights illuminated how the EU response needs to be understood within the broader securitization of the migration process. Considering the intersections between migrant smuggling and human trafficking underlined in the dissertation as well as the widely recognized difficulties surrounding trafficking victims' identification, the findings make visible the coexistence of a dual approach in the EU anti-trafficking frameworks. Whilst the human rights or victim-centric approach is clearly visible in the EU legal instruments, the analysis reveals the dominance of the crime-control approach, which is combined at times with a focus on cross-border elements due to the linkage made with transnational organised crime.

Subsequently, the analysis of the narratives found in the EU 'policy package' adopted since 2015 indicate salient inconsistencies and incoherence between them and the EU legal instruments, notably with regard to the broad scope of the facilitation offence. The coexistence of multiple narratives describing the migrant smuggling phenomenon mirrors its multi-faceted nature. Whereas the policy documents demonstrated a growing awareness of victimisation risks to abuse, and exploitation faced by smuggled migrants during their migration journeys, the analysis nevertheless reveals the predominance of the crime-security-centric narrative. These findings need to be contextualised with the reflections brought forward in Chapter 3 on the prevailing stereotypes of human trafficking and migrant smuggling. This is important as dominant narratives are essential elements in the construction of reality and contribute to, among other things, having a better understanding of (frontline) actors' decision-making to the extent that decisions about who is to be considered as a 'real victim' and therefore is deemed worthy of protection are shaped by these dominant representations (e.g., Gregoriou & Ras 2018; O'Brien 2018). Henceforth, the prototypical narrow construction of the 'ideal' human trafficking victim highlighted in Chapter 3, based on gendered and troublesome assumptions about consent and agency, can be problematic as the threshold to reach the status of victim can easily become unreachable. The scenario of Osman developed in the Introduction (Chapter 1), who, to pay the next stretch of his journey might end up working (temporarily) in exploitative conditions, illustrates how fixed ideas about consent, agency, and gender might play against him to be perceived by relevant actors as a potential victim of human trafficking, while fulfilling *de facto*, at least in the Belgian legislation, all the legal conditions to be considered as such. Furthermore, as underlined in the Introduction and in Chapter 3, the omnipresence of the archetype of the 'evil migrant smuggler' figure closely connected to hyper-hierarchical organised-crime structures in policy narratives at odds with a more nuanced and complex empirical reality, keeps out of sight the role played by structural factors in these processes and conveniently legitimizes increasingly restrictive border policies which impact the migrant smuggling 'market'. This is important to underline in light of the recent and dangerous small boat crossings taking place in the English Channel (see section 4).

2.3 Transit migration and onward migration movements within the Schengen Area

As outlined in the answer to the central research question, the transit element is essential to the dissertation and, arguably, constitutes the most important theoretical and empirical contribution that the research can offer to the scholarship focusing on migrant smuggling, human trafficking but more broadly for scholarship looking at mobility and borders. As recently underlined by Barbero

and Blanco (2022), the field suffers from a paucity of research focusing on the specific case of transit migration or 'migration in transit', particularly when scrutinizing the mobility of individuals taking place within the Schengen Area, which is itself relatively scarce in comparison to the research focusing on the situation at the external EU borders.

From a *conceptual standpoint,* the dissertation reflected critically on the convoluted concept of 'transit migration' and demonstrated its inherent value, if the term is defined carefully. If prudently defined, this thesis asserts that the concept of transit is useful in four regards. First, the concept allows for a deconstruction of the common and problematic linear understanding of the migration journey as a straightforward path from a fixed point of departure to a fixed point of settlement. Paying attention to the transit dimension allows taking into consideration the multiple changes of plans and breaks that can take place during the migration journey. Second, by expanding its definition and by building on a scarce strand of scholarship focusing on the governance of Intra-Schengen mobility (e.g., Tazzioli 2020; Menghi 2021; Barbero 2021), the concept of transit migration helps to shine a light on the experience of (involuntary) immobility and, importantly, forced mobility lived by migrants, *not only* at the EU external borders but also, importantly, once migrants achieve to enter the Schengen space, which is often imagined as a space without internal borders (e.g., Van der Woude 2020; Klajn 2021). Third, and in direct relation to the critical examination of the legal dichotomy between migrant smuggling and human trafficking, particularly with regards to the grey area found between the two phenomena, the concept of transit migration is highly valuable to have in mind with regards to the enhanced vulnerability to abuse and exploitation which can be enhanced by the fragmentation of the migration journeys. As often underlined, when individuals end up stranded in transit zones, their quest for onward mobility may lead to an increase in the demand for (more professionalised, potentially dangerous, and henceforth expensive) smuggling services, which then reinforces their debt and can lead to (short-term) exploitation. In that regard, the role of increasingly restrictive border policies and bordering practices at times legitimized by the 'fight against migrant smugglers', also within the Schengen Area, should not be obscured. Therefore, the concept 1) gives the opportunity to not overlook the blurry empirical reality of the grey area between migrant smuggling and trafficking and 2) stimulates the questioning of the categorization and sorting of individuals within strict and seemingly straightforward legal and administrative boxes. 3) Finally, adopting a nuanced and careful definition of the concept of transit migration allows to problematize the usage of the term in political, policy and mediatic spheres which often equate 'transit' with the idea that individuals are only passing through and are therefore not to be treated with specific care. As written above, the concept then becomes helpful by underlining the consequences that transit can have in bolstering vulnerability.

Furthermore, and from an *empirical standpoint,* the transit element revealed itself to be equally central to the findings presented in the dissertation and needs therefore to be further expanded upon as it contributes to the development of empirical research focusing on migration in transit and its governance within the Schengen Area. The recurrent usage since 2015 of the term 'transit-migration' or 'transmigration' in the Belgian context (see Introduction/Chapter 1, sub-section 1.5) needs to be replaced in the context of the broader ongoing securitization of migration in the EU, which intensified since the start of the so-called migration 'crisis'. Beyond political and mediatic discourses, the fact that this term is employed in various policy documents, such as the National Security Plan, can be deemed particularly problematic as (policy) discourses impact the actions of frontline implementers. It needs to be taken into consideration that term is not a legal one as, from a legal stance, the word encompasses a vast array of migratory categories and should not absolve state authorities from their responsibility to protect vulnerable individuals on their territory. Yet, in its current usage, the word introduces a stark and potentially dehumanizing distinction between individuals aiming to stay on the Belgian territory by applying for asylum and those who are only passing through. The securitization approach deployed by the Belgian federal authorities towards migrants who did not aim to apply for international protection and gathered in the Maximilian Park and its surrounding area between 2015 and 2019 became visible with the organization of frequent police raids to disperse and at times arrest migrants with the overall aim to prevent long-lasting settlements (e.g., Mescoli & Roblain 2021).

These developments are critical when looking into the functioning in practice of the alternative approach and how the latter affects the governance of migrants in transit. Many respondents acknowledged that the protective system for victims of aggravated forms of migrant smuggling was insufficiently made use of in practice and, in their reflections, pointed toward the transitory nature of migrants stay on the territory. Respondents described the alternative approach as unattractive for migrants in transit in their quest for further mobility, notably in light of the obligations imposed by the latter such as turning against their smuggler by making relevant declarations. However, as succinctly explained in the central answer above (see 2.1), the reasons for migrants to not start the protective procedure are more complex and shine light on dynamics that are also inherently connected to the transit element. A *first factor* to emphasise is the lack or the inadequacy of information received by migrants on the alternative approach and its advantages. The absence of communication about the protective legal status from law enforcement officers in the context of large-scale administrative arrests was revealed in the Comité P report and, more generally, the absence or inadequacy of information was subsequently confirmed by respondents from the Citizen Platform (see also the empirical findings of Bracke 2021). The findings of the analysis underscore the lack of awareness and sensibilisation towards the specificities of the proced-

ure by frontline police officers. In direct connection to the temporary nature of the stay and sustained mobility of migrants in an Intra-Schengen mobility context, a distinction between victims of human trafficking versus victims of aggravated forms of migrant smuggling was signalled. The opportunity for relevant trained actors to 'convince' a presumed victim to start the procedure was described as more challenging with migrants in transit as there are only a few opportunities to do so in contrast with presumed victims of human trafficking who can be in a situation of exploitation for a longer period in the territory. The temporality element can further weigh in the balance with regard to the necessary trust-building between actors, especially law enforcement officers and the presumed victim, which is essential to the procedure.

A *second factor* which in fact precedes the sharing of information with the presumed victim is the ability of state authorities to identify migrants transiting through Belgium. This ability calls for a more general reflection on the common stereotyped representation of victimhood (see Chapter 3; Gregoriou & Ras 2018 for an overview). The preconceived idea of who can be considered a victim often boils down to notions of gender, agency, and consent. Put simply, the 'ideal' victim is often imagined as a pure, passive, and innocent female physically coerced to be in a situation of exploitation. One can then wonder if a male showing agency in shaping his migratory journey (as described by the respondents) and 'consenting' to work for a flexible period of time in exploitative conditions to finance the next stretch of the route fit the common representation and conceptualisation of a victim. Whereas this does not appear to be an issue for the expert respondents who are specialised and trained in the field, the specific profile of migrants in transit can be more problematic for frontline police officers unaware of the complex dynamics involved in human trafficking/aggravated forms of migrant smuggling.

Because migrants in transit can find themselves in short-term situations of (labour and/or sexual) exploitation, which was also confirmed by members of the Citizen Platform, a *third factor* related to prosecutorial pragmatism needs to be underlined. The gathering of evidence for short-term exploitation situations resulting from the abuse of a situation of vulnerability can be particularly challenging. Yet, in 'the books', the human trafficking offence does not refer to any temporality element and henceforth this legal qualification could and arguably should be chosen by the public prosecutor's office. Considering the crime/prosecutorial-centric nature of the procedure in place making the protection dimension also dependent on the opening of an investigation and/or the ongoing running of a judiciary procedure, the transit element can also explain why many migrants in transit who can *de facto* be considered potential victims of human trafficking are left unidentified and consequently unprotected.

Lastly, the transit element is particularly relevant when placed in the context of the governance of so-called 'secondary migration movements'. The perception of many of the expert respondents points to a clear lack of consensus

both at the national and European levels on the management of onwards migration movements within the Schengen Area. The striking lack of harmonised and structural solutions brought forward to deal with vulnerable individuals on the move within the EU is an important empirical finding to highlight. As the following sub-section will touch upon in further detail, the scattering of powers and competencies lead to a dynamic where blame and responsibilities are constantly and problematically shifted amongst relevant actors who then develop practices of 'looking the other way or 'sweeping in front of their own doors'. In that regard, it should be underlined that vulnerability seldom comes out of a vacuum and the (bordering) practice of making migrants in transit constantly move in order to prevent *ad hoc* settlements at all costs only reinforces and bolsters vulnerability to abuse and/or exploitation.

2.4 On decisions and jurisdictions

With its focus on the decision-making of actors within the Belgian criminal justice system and more broadly within the migration control apparatus, the dissertation contributes to the sub-field of border criminology and particularly to scholarship looking into intersections between criminal law and administrative law. In line with recent scholarly invitations to critically evaluate the use of the 'crimmigration lens' as the most adapted conceptual and analytical tool, the chosen socio-legal conceptual frameworks question whether the examination of the intersections and points of merger between these two legal regimes, is the most adapted concept to, among other things, have a comprehensive understanding of the (coercive) socio-legal regulations of immigrants (for an overview and a critique, see Brandariz 2021; Moffette 2021). Following the stream of scholars who have expanded the scope of understanding of the crimmigration concept, the dissertation examines the differentiation and separation of administrative and criminal law in terms of scope, procedure, guarantees, objects, etc., and its consequences for the governance of migrants in transit instead of focusing on points of convergence (e.g., Aas 2014, Chacon 2015). As argued by Moffette (2021), the legal pluralist approach, which examines *inter alia* jurisdictional games, insists on the differentiation of the legal regimes in order to discern how they are strategically utilised which enables the production of more robust empirical analysis (see also section 3). As the dissertation demonstrates, the ability to mobilize one set of laws over or in combination to another in concrete scenarios exists because such laws are separated in the first place. This divide between the realms of criminal and administrative law calls for a careful scrutiny on the decision-making processes of implementers. Combining decision-making scholarship with the socio-legal concept of jurisdictional games provides an original empirical contribution to the scholarship. The empirical findings show that decisions to act or, equally important, *not to act* and to approach an issue from a criminal justice lens or

from an immigration management (administrative) lens has crucial implications for the governance of migrants transiting through the territory. The specific example of local police officers effectuating their police missions within the context of the 'fight' against 'transmigration', who are processing migrants in an administrative manner and end up losing sight of, being unaware of or simply purposefully not considering the possibility to approach the issue from a judiciary perspective entailing guarantees and protection for migrants was striking in that regard (see Chapter 4 and 5). Describing this police practice as a form of '*ad hoc* instrumentalism', where frontline implementers perceive laws and procedures interchangeably and are henceforth able to 'cherry pick' the most efficient tool to deal with the issue at hand, will be misleading in this case (e.g., Slansky 2012; Van der Woude & Van der Leun 2017). The added value of examining these practices through the rich literature on street-level bureaucracy and decision-making, which underline the influence of complex and broader institutional, economic, and political factors on these decisions, is clear in that regard. Integrating this strand of scholarship contributed to the construction of a more nuanced understanding of the overlap between thematic and territorial jurisdictional games and its consequences for migrants in transit.

In spite of the recent debates surrounding the usefulness of the crimmigration lens as a tool for analysis, it can be argued that when conceptualised to include broader public discourses linking migration and crime and placing them in their social, political and cultural context in which they emerge has substantial interest (van der Woude, van der Leun & Nijland 2014; Brandariz 2021). Following this scholarship, the dissertation pays attention to the underlying discourses and narratives framing migrant smuggling and human trafficking as (border) security issues. These discourses and narratives construct migrant smugglers as a special kind of devil and generally depict migrants in transit as disruptive elements to public order (see Introduction to Chapter 3). In Chapter 5, the disagreement found at the prosecutorial level as to whether a migrant involved in low-level tasks of smuggling operations should be criminalized and punished as a smuggler or protected as a presumed victim of human trafficking illustrates the impact of these complex dynamics. From a general standpoint, taken together and against the background of increased securitization of migration in the EU, the findings presented in the dissertation demonstrate how the (political) pressure to develop swift solutions to manage the presence of irregular migrants can affect concretely institutional actors at the expense of criminal justice considerations (see also Brandariz 2021).

Finally, the combination of the literature on (discretionary) decision-making with the legal pluralist approach shedding light on the complex web of legal regimes intersecting with one another and the scattered competences shared between various actors involved in the governance of migrants in transit helped to reveal problematic 'passing the buck' dynamics at the national and European level. These findings firmly echo the conclusive remarks made by

Weissensteiner (2021) in her dissertation focusing on cross-border cooperation within the Schengen Area. More specifically, 'unauthorised secondary movements' were described by her respondents as a 'hot potato' that needs to be passed on and with which you are playing 'ping pong'. Interestingly, when the situation in Maximilian Park and the presence of migrants in transit were discussed in Chapter 4 (section 6), the findings show the use of the exact same metaphor of 'throwing the hot potato to someone else' (FO 1). The findings, moreover, indicate how some actors use their discretionary power to look the other way with a 'not our problem mentality', which is also only possible when competencies are so scattered between distinct actors. Tackling the larger, prominent issue of the governance of onwards mobility within the Schengen Area and observing that EU member states are keen on discharging themselves from the responsibility of care to 'unauthorized' migrants on their territory who are then going (or are pushed) to neighbouring EU countries, the call for a harmonised response decided at the EU level was voiced by respondents. The findings underline the problematic lack of consensus on the governance of individuals transiting within the EU felt by the respondents, who at the same time displayed pessimistic views on the ability to reach such agreement in light of the sensitive, political, and complex nature of the phenomenon. The findings also strongly resonate with the 'passing the buck' and 'blaming Brussels' dynamics presented in the study of Alagna (2020), focusing on policy-making in the counter-smuggling field which, as described by the author, are made possible by the complexity of the governance system.

3 Taking the Nation-State as the Default Scalar Setting?

The choice to narrow down the scope of the research underlying this thesis to only the Belgian case might, at first glance, indicate to the reader that the national state, as a frame of understanding, was uncritically privileged. In recent years, a growing strand of scholarship warned against the pitfalls of taking the methodological nationalism stance in the social sciences and particularly in migration-related research (e.g., Wimmer & Glick Schiller 2003; Glick Schiller 2012; Sager 2016; Franko 2017; Moffette 2021; Scheel & Tazzioli 2022). In essence, taking the methodological nationalism viewpoint obscures the fact that nation-states are situated, formed, and moulded by transnational, global and local forces (Glick Schiller 2012). While not contesting the continued significance and relevance of nation-states and their sovereign right to manage their borders, on the contrary, critics of methodological nationalism nevertheless invite us to move away from conceiving society and nations as 'nationally bounded containers' (Scheel & Tazzioli 2022: 6; Wimmer & Glick Shiller 2003; Franko 2017). The role and the nature of the state should therefore be carefully thought through by going beyond the 'Westphalian, sovereignty-based, pluralism of states' (Franko 2017: 368). Phrased differently, it would benefit

researchers to shy away from the presupposition that the world is constituted by disconnected sovereign nation-states and instead pay attention to trans and cross-border connections when examining contemporary issues of crime and migration governance (Sager 2016; Wimmer & Glick Shiller 2003). Because the dissertation touches upon issues that are transnational in nature and, as highlighted from the beginning, are intrinsically linked with matters of globalization and sovereignty, the developments on methodological nationalism are important to bear in mind. As Franko (2017) outlined, the choice to examine a single site, in this instance the case of Belgium, remains valuable and needed provided that, in line with the methodological stance outlined above, attention is paid to motion, global structures and the plurality of sovereignties. More concretely, the dissertation engages with this strand of scholarship in three specific ways.

The first way to avoid falling in the pitfall of methodological nationalism was to go back to the creation of the legal dichotomy between migrant smuggling and human trafficking and situating the latter within its global context and focusing on its implication and relation to sovereignty issues. The dissertation shows how the debate on migrant smuggling and human trafficking framed as transnational and at times cross-border crimes[1] is located within the broad nexus of securitization of migration and globalization (Miller & Baumeister 2012). The governance of the two crimes is substantially shaped by global forces as legislations and policies constructed to deal with the phenomena were adopted at the international (UN) level, the transnational (EU/ Council of Europe) level, implemented at the national level and finally enforced at the national, regional, and local level. By paying attention to these distinct scales and subsequently the multiplicity of actors involved, this research highlights how state power and particularly the power to first criminalise, investigate, prosecute, punish and, importantly, the duty to protect, is not solely entrusted to national state governing bodies (Franko 2017; Côter-Boucher, Infantino & Salter 2015). Besides, migrant smuggling is itself a phenomenon linked to illicit globalization, which is perceived as a source of insecurity and contributes to states' perception of 'losing control' and therefore the erosion of sovereignty (e.g., Andreas 2011; Shelley 2014). This observation links back to the creation of the legal dichotomy between migrant smuggling and human trafficking, which was problematized and critically examined throughout the dissertation (see in particular Introduction and Chapter 3). More broadly, this examination responds to the call made by Dauvergne (2008) and Franko (2017: 363) to investigate 'global processes of production of illegality' which, in this context, not only focus on how services or individuals are made illegal but how and why some people are deemed worthy of protection whereas others are not. This ability to sort between the deserving and underserving and to

1 As stated in the dissertation, whereas migrant smuggling always has a cross-border dimension, this is not necessarily the case nor a pre-condition for human trafficking.

decide on life and death, which Franko (2017) argues entails both protection and killing, lies at the cornerstone of sovereignty. Because the dissertation underlies the complexity of multi-scalar governance, the analysis shows that sovereignty is not only vested in the nation state. Beyond examining the adoption and diffusion of crime definitions and legislations (often drafted by wealthy countries located in the 'global North'), the research importantly focuses on predominant narratives and framing surrounding the phenomena at distinct levels, which have substantial impact on how the phenomena are subsequently understood and implemented. To that extent, the dissertation questions the recurrent and archetypical depiction of the 'evil smuggler' as the bad actor to blame, which obscures the need to address root causes that are fuelling the demands for smuggling services (see Franko 2017). Moreover, globalization processes are also significant when focusing on rights and legal protection and require the inclusion under the scope of scientific inquiry the burgeoning expansion of international and transnational human rights norms. Once more, this is required in order to conduct an examination going beyond boundaries of the nation state (Franko 2017). To that end, the argumentation provided in Chapter 6 explores how in a careful balancing act between respecting state sovereignty, on the one hand, and enhancing protection of vulnerable individuals on the move on the other hand, the ECtHR and its unique interpretative arsenal can (and arguably should) break through, in specific cases, the uneven protection granted to 'objects' of migrant smuggling versus victim of human trafficking (see also section 5).

A second way in which methodological nationalism was prevented, as recommended first by Valverde (2010: 240) and further developed in a migration governance context by Moffette and Pratt (2020) and Moffette (2021), was to adopt a legal pluralist approach. The aim is not to fully restate or enter the complex and contested debate on what exactly counts as legal pluralism but to briefly situate the dissertation within that strand of scholarship (see Merry 1988 or more recently Sani 2020 for a comprehensive overview). To summarize, at its origin, early or 'classic' legal pluralism studies examined the coexistence and relationship between formal 'state law' introduced in a colonial context and 'customary law'. Following a turn in the 1970s, 'new' legal pluralism scholarship scrutinized the relationship between official or formal and less official or informal forms of ordering (e.g., religious law) in 'advanced' post-colonial industrial societies (Merry 1988). Nonetheless, as indicated by von Benda-Beckmann and von Benda-Beckmann (2014), Benda-Beckmann & Turner (2018; 2020), these two noteworthy forms of legal pluralism study do not account for other pertinent constellations, particularly in a global context. For instance, the existence of transnational laws (which also includes human rights norms) *de facto* go beyond national confines and research needs to also take into consideration the ever-increasing complex webs of normative legal orders coexisting and overlapping with one another (von Benda-Beckmann and von Benda-Beckmann 2014). In a call to produce more vigorous theory of legal

pluralism, Sani (2020) discussed the necessity of including cases of pluralism within state law. Sani (2020) supports this claim in light of the thriving interest for legal pluralism which can be attributed to pragmatic requirements when focusing on areas of research such as migration, trafficking or smuggling, which involve 'legal issues whose jurisdictions challenge national state boundaries' (82). Taking this sociolegal perspective and 'thinking jurisdictionally' on the Belgian third-way approach requires that one looks at the constant interactions between distinct legal regimes operating at distinct scales yet coexisting in the same social space. This legal pluralist and jurisdictional approach is particularly emphasised in Chapter 5 (see also 2.3).

A third and final way to disentangle the research from the methodological nationalism stance was by drawing on the recent alternative conception of migration developed by Scheel and Tazzioli (2022). Without going into detail, their innovative conceptualisation of migration engages with and underlines the mobility perspective while paying attention to the concept of 'border struggles', which refrains from obscuring the prominent role of bordering practices enacted by nation-states and sheds light on how people are constituted as migrants. Among other things, Scheel and Tazzioli (2022) invited researchers to move away from conceiving migratory movements in a linear fashion going from nation A to nation B. This resonates with Kalir's developments (2013), who outlined that taking the national state as a frame of understanding or as a point of departure inevitably accentuates the conceptualisation of migration journeys as 'points of departure and arrival', which conceals the complexity of human mobility (312). This dissertation concretely answers these calls, considering the consistent attention given to 'transit migration' related to the fragmentation/non-linearity of the migration journey and the strategies of migration governance through both mobility and immobility within the Schengen Area. Scheel and Tazzioli (2022) urged migration scholars to ask the following question as a prerequisite: 'who is (not) enacted as a migrant in the situation under study and how and through what kind of practices of border and boundary-making is this migrantisation done?' (10). To do so, Scheel and Tazzioli (2022) encouraged scholars to question, among other things, situations in which the presence of individuals are constructed as problematic and by focusing on encounters between the 'mobile subjects and actors charged with controlling their mobility', to be able to critically scrutinize 'discourses, categorizations, taxonomies and knowledge regimes they rely on (…)' (11). Asking the first overarching question would go beyond the scope of the inquiry presented here, but in line with the sub-questions outlined, the present research engages in a critical manner with the discourses, narratives, knowledge, (legal) categorization and taxonomies used by law and policymakers as well as by (frontline) implementers in sorting the deserving from the undeserving.

4 Avenues for Further Research and Limitations

The choice to deliberately focus on state authorities, also considering the source of the research funding, concretely answers the call made by Côter-Boucher, Infantino and Salter (2015) on the pressing need to conduct empirical research paying attention to 'practices, beliefs and actions' of practitioners and particularly street-level decision-makers considered as 'policy translators' (197).

A consequence of the choice to focus exclusively on state actors entails that other and equally important perspectives are left unexplored. Following Kalir's (2013) invitation to examine regimes of mobility from the eyes of migrants themselves, follow-up studies could and arguably would benefit from gathering the accounts of those subjected to these regimes. As the findings seemed to indicate that state actors give weight to migrants' agency in the choice to not make use of the protection made available to them, their reasoning and motivations to do so would be important to examine. Expanding the scope of inquiry, future research should pay attention to migrants' perceptions on how they experience, navigate, survive, and potentially escape and resist acts of control over their (im)mobility within the Schengen Area. In direct connection to the migrant smuggling field and considering the monolithic and unnuanced representation of the migrant smuggler and the consequences of such representation, further empirical research looking into smuggler self-representation and motives for engaging in smuggling operations would be crucial for both researchers and law and policy makers (e.g., Sanchez 2017). These follow-up studies could shine light on the diverse profiles of the smuggler within the EU, by paying attention notably to the figures of the 'opportunity smuggler' and 'copycat smuggler' engaging in action of self-facilitation. Indeed, the findings outlined the frequent involvement of migrants themselves in the smuggling operations, or the fact that they themselves attempt to cross borders on their own by copying smugglers. Taken together, these accounts could be helpful to further deconstruct dominant policy narratives at odd with a more nuanced and complex reality.

Considering that migrant smuggling is a fast-changing and a highly topical field, the reader should keep in mind that the time period between the data collection that took place between 2018 and 2019 and the final writing phase which ended in June 2022 is significant to consider in light of the relevant events that took place which directly impact the field. Among other things, the Covid 19 pandemic and the restrictive measures adopted by EU members to contain it had a crucial impact on migrant smuggling and human trafficking, and more broadly on the mobility and governance of migrants in transit within the Schengen Area (see Sanchez & Achilli 2020). Ideally, the impact of the Covid 19 pandemic would have been interesting to include under the scope of inquiry. However, realistically, this would have required an endless process of data collection and updates, which makes the conduction of any scientific research unfeasible. Similarly, the recent and drastic increase of the English

Channel's crossings with the use of small boats departing from the French Northern coast to the UK has received significant attention, notably due to the increased use of this border crossing strategy (e.g., BBC 2022) and the tragic drowning taking place in the last two years (see Maggs 2020; Parker et al. 2022). Whilst going slightly beyond the geographic scope of the dissertation, it is important to signal to the reader that the French Minister of Interior Gerald Darmanin underlined that more than half of the individuals making these crossings came from Belgium (Le Vif 2021). Although not examined in the dissertation, these events provide new illustrations of dynamics that emerged from the analysis conducted in the research. In particular, the blaming games and shifting of responsibilities that occurred between French and British authorities echo strongly the findings presented in the dissertation (see Parker et al. 2022; Lichfield 2021). Resonating also with the analysis conducted at the policy-making level, the discourses rationalising and legitimizing the militarized responses of state authorities to these perilous crossings are interesting to allude to. The discursive construction of the smuggler as the main figure to blame for the situation obscuring both the role of restrictive border policies and more generally structural factors for these dangerous crossings resonates with the dynamics outlined in the dissertation. Coinciding with the research findings, the simultaneous presence of humanitarian narratives, which emphasise the need to protect vulnerable individuals engaging in these crossings, is also clear. Interestingly, vulnerable migrants are concurrently depicted as desperate and reckless, and henceforth also to blame for their risky and irresponsible endeavours (see Parker et al. 2022). Moreover, the current deployment of a plane patrolling the French and Belgian coastline by the agency Frontex, to assist authorities in 'dismantl[ing] criminal activities such as migrant smuggling and [to] prevent people from putting their lives at risk', offers unprecedented developments to further explore in this geographic area of importance (Frontex 2022).

Further research in the field could examine the increased presence of state and non-state humanitarian actors and its consequences in the socio-legal governance of individuals engaging in onwards mobility within the EU. In particular, the rise in participation of NGOs in the provision of service within criminal justice systems and borderwork, often referred to as 'penal humanitarianism', has remained underexplored (e.g., Pallister-Wilkins 2015, 2022; Tomczak & Thompson 2017; Bosworth 2017; Gerard & Weber 2019; Franko 2021). In the Belgian context, several authors have researched the involvement of civil society organisations and grassroots citizen initiatives in the governance of migration and integration policies. These recent studies analysed how this increased involvement, which can become institutionalised, emerged as a pragmatic response to problematic States' delegation of responsibility in migration-related matters which has notably been described as resulting from an intentional adoption by the Belgian State of the 'indifference-as-policy' approach (e.g., Depraetere & Oosterlynck 2017; Mescoli & Robain 2021; Lafaut

& Coen 2019; Vandevoordt 2019). Focusing specifically on the Belgian alternative or 'third-way' approach and the multi-disciplinary nature of the procedure, the interviews conducted revealed the constant exchange taking place between traditional criminal justice actors and the workers of the specialised reception centres. The well-functioning of the national referral mechanism was described as dependent on the unique expertise and mutual trust existing between each actor. Based on the interviews, this trust appeared particularly prominent between the reference prosecutors, the workers of the specialised reception centre as well as the trained federal police investigators. Yet, the fact that the director of the specialised reception centre seemed to be aware of what could constitute sufficient evidence for the judicial authorities requires to inquire further about the possibility or the need for workers specialised reception centre to engage in some sort of pragmatic 'sorting' between presumed victims to maintain trust and credibility for the working relationships. The empirical data collected was too limited to draw such conclusions, but was sufficient to identify a research gap to further explore which would contribute to the limited research on the involvement of NGOs in the delivery of criminal justice services (see Gerard & Weber 2019).

Lastly, and from an external validity standpoint, it is important to delve into the question as to whether the findings presented in the dissertation can be generalised, or more specifically to determine if some general inferences can be drawn from the data collected in the Belgian case (see Mayring 2007). When conducting qualitative research and particularly in this case, the overarching aim of the inquiry is not necessarily to engender general conclusions which can be applied in distinct contexts but to delve in-depth into a case study, which can be viewed as an important limitation. Nonetheless, despite the unique nature of the Belgian third-way approach and the distinctive specificities of the Belgian context highlighted throughout the thesis, some of the findings might be of a value in other settings and cases which share some legal and social attributes. In light of the arguments produced in this final chapter, the findings connected to the (legal) governance of onwards migration movements within the EU and the challenges faced by state authorities related to victims' identification might not be 'exceptional' to the Belgian case and could prove themselves valuable in other (European) settings. Further empirical studies focusing on similar issues and on state actors which look into other countries (also from a comparative perspective) can build on the dynamics and findings presented in the dissertation and expand the understanding of the governance of migrants in transit as well as the blurry area found between migrant smuggling and human trafficking.

5 Looking into the Future: Finding Solutions to Enhance Protection?

The findings presented in the dissertation makes it crystal clear that the legal dichotomy established between migrant smuggling and human trafficking has a concrete impact on the protection of individuals on the move who often find themselves in vulnerable situations and who *can* experience abuse and exploitation during their journeys, also within the EU. Because migrant smuggling finds itself at the juncture between equally complex phenomena, namely irregular migration and human trafficking and as other scholars have argued before, the relationship between policies tackling migrant smuggling, irregular migration and human trafficking needs to be thoroughly re-examined (e.g., van der Leun & van Schijndel 2016). Henceforth, these matters need to be rethought in a holistic and structural manner and preferably at the EU level in light of the 'passing the buck' behaviours observed regarding onwards mobility within the Schengen Area. Considering the findings presented above, and more generally the visible disagreements between EU member states on politically sensitive topics such as asylum and solidarity, the task of reaching a consensus appears to be Dantean (see for instance Scipioni 2018; de Bruycker 2021; Carrera 2021). Whilst these accounts might appear pessimistic, this research is also intended for current or future national and European politicians and policymakers who may not be aware of these complex dynamics and the inherent links existing between the phenomena.

On a distinct scale and focusing on practitioners, three concrete solutions need to be developed in this section. The two first solutions concentrate on sensibilisation and training regarding victims' identification and are based on the discussions with the respondents. Both solutions touching upon human trafficking and (aggravated) forms of migrant smuggling draw attention to less conventional methods used for sensitising (frontline) authorities. Respondents frequently emphasised the need to have frontline implementers sensitised with regard to their crucial role in instigating investigations and contacting directly specialised actors when facing presumed victims. Whereas concrete and relatively frequent specialised training of one to two days on these topics and their evolution can always be beneficial, this solution is not always realistically feasible considering the specialisation and competences of local police and federal units, financial and capacity issues, and the distinct priorities established at each level. A specialised prosecutor shed light on an informal solution previously developed which entails the organisation of monthly lunches with local police officers during which one concrete case or a recent case law was discussed in detail. This practice could be considered as a useful 'best practice'. The discussions held during these informal lunches allowed police officers to be sensitised to the phenomena by having a concrete example of indicators or 'red flags' to have in mind as well as the important reflexes to adopt, which were described as less abstract than information

received during a training, or a list of indicators written on a newsletter on the police intranet. The informal lunches were also recounted as beneficial to 'break the barrier' which can exist between the police and the prosecutorial level. Because the chosen approach involves a multiplicity of actors, local police officers would not be afraid to pick up the phone to directly reach out to other levels to discuss a specific situation. Still focusing on practitioners, the second solution focuses on the interaction between practitioners. Because criminal justice actors are working in a chain (see van der Woude 2016), the effectiveness of judicial proceedings depends de facto on the interactions taking place between the police and the prosecution levels as public prosecutors rely on both prior notifications made, among others, by police officers and the evidence collected by them under their supervision (see Callens, Bouckaert & Parmentier 2016 in the Belgian context). These necessary interactions taking place between relevant actors shed light on the potential need to organise organic follow-ups on investigations and case-law instigated at the local level which moved to other levels. This automatic feedback was indeed deemed crucial by another specialised prosecutor. As mentioned in the dissertation, police officers can experience the feeling of 'time waste' or 'discouragement' when initiating distinct procedures, which can only be reinforced if they are not made aware of the concrete impact of their actions and henceforth can be detrimental to their motivation to keep (or start) such procedures in the future.

The third solution addresses the topic of cooperation in the investigation and prosecution of transnational organised crime as many respondents stressed the need for and the importance of raising awareness and making more use of the mechanisms existing at the European level, notably via Europol and Eurojust agencies. This call is in line with the recent diagnosis drawn by Dandurand and Jahn (2022) on international criminal justice cooperation remaining to this day 'disjointed, insufficient and reactive' as challenges triggered by (increasing) global and cross-border crimes tend to call for solutions which are developed at the national level (210). The necessity to collaborate at the EU level does not stop at the police level as respondents mentioned that particularly prosecutors are not necessarily informed about the possibility and added value that comes with cooperation mechanisms. The lack of awareness is however not the sole hindrance to conduct more complex and long-lasting investigation at both the national and international levels. The research of Boels and Ponsaers (2011) on Belgian smuggling and trafficking judicial cases already revealed that in some events prosecutors deliberately decided to not further investigate links with other existing cases and potential suspects. This reluctancy to dig deeper was explained by the inclination of prosecutors to avoid 'mammoth' cases. On the one hand, avoiding big cases is a pragmatic decision related to the length of the investigation which could lead to a lifting of a pre-trial detention and ultimately result in impunity for the perpetrator. On the other hand, Boels and Ponsaers (2011) also explained that this reluctance was linked to the managerial style of prosecutors and their willingness

to choose 'speed' instead of 'thoroughness'. In a recent press interview, Le Cocq, who is the expert of Myria on smuggling and trafficking, confirmed this tendency when signalling that large criminal files became scarcer in the last years, which she explained as being due to a cruel lack of investigation capacity and a reshuffling of priorities (Guillaume 2022). Considering the severe capacity and financial issues faced by the Belgian federal (judiciary) police in the last years, the urge to conduct large-scale and complex investigations, also at the international levels, appears unlikely (see for instance the interview of the general commissioner of the federal police De Mesmaecker in Eeckhaut & Vanhecke 2022; and for the specific case of the judiciary federal police, see the intervention of the president of the college of public prosecutors de la Serna in Benayad 2022). In spite of what preceded, and even though European joint investigation teams can be time consuming and- and require a lot of capacity, the importance of conducting more large-scale investigations to 'go after' the 'masterminds' as opposed to targeting low-level perpetrators was described as crucial. Considering the developments highlighted throughout the dissertation, this strategy also seems more aligned with the *rationes legis* found in the Palermo Protocols and the Belgian legislation. Hence, as prosecutors find themselves in a position where they need to manage scarce criminal justice resources (see Wade 2008), incentives for using the existing cooperation mechanisms in place at the European level instead of rewarding a drop in the numbers of files on one's desk might be a plausible (short-term) solution to envision at the national or European level.

Taking now a broader approach considering that many individuals can transit throughout national jurisdictions that are not only part of the EU but also the Council of Europe and attempting to find some silver lining, the creative and original argumentation built in Chapter 6 requires some developments. By addressing the argument *inter alia* to strategic litigators, the chapter offers concrete plausible solutions to enhance, in the criminal justice sense, the protection for (aggravated) smuggling experiences involving migrants with a specific vulnerability profile. At odds with common pre-conceptions that migrant smuggling is a victimless crime and underlying the possibility that smuggling may lead to human rights abuses, Chapter 6 engages in a thought-experiment which reconceptualises the position of the smuggled migrant and places the latter at the nexus between criminal justice and human rights. Building on the empirical findings presented in the research and more generally, valuing the tendency of the ECtHR to provide evidence-based adjudication, the chapter brings forward the argument that the ECtHR has the potential to identify similar protective needs for smuggled migrants as for victims of human trafficking and therefore can trigger obligations on behalf of member states to address them. Nonetheless, and realistically avoiding the deployment of overbroad group vulnerability categories which can be detrimental, the claim that the ECtHR should use case-specific and exact reasoning was made, which can only happen if the Court remains committed to its methodology to rely

upon rigorous scientific and empirical information presented by researchers, civil society organisations as well as international organisations.

Reaching the end of this research journey, it appears important to emphasise once again the real and concrete consequences that fixed legal categories and taxonomies can have on the lives of migrants engaged in mobility processes. Whereas these categories can seem to be pragmatic and necessary evils to provide rights and protection for individuals who need them, they can nevertheless lag behind or be at odds with the lived, current mobility practices. Considering that legal categories are not only intended to give rights but also to deny them and have the ability to create an artificial distinction between 'object' and 'victim' of crimes, they should be carefully and critically questioned and regularly re-examined if the necessary protection of vulnerable individuals in transit within the European legal space is taken to heart.