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

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Summary

More than twenty years ago, the United Nations Convention against Transnational Organised Crime and its two additional protocols were adopted in Palermo resulting in the creation of the legal dichotomy between migrant smuggling and human trafficking. Amongst other things, the distinction created between these two crimes entails stark differentiation in terms of protection granted to either 'object' of smuggling and 'victims' of human trafficking. In the current day and age, the regulation of migrant smuggling remains a politically salient issue on the agendas of the European Union, for its institutions, agencies as well as for its Member States. This dissertation takes this contested dichotomy as its point of departure and answers the following central research question:

> *How does the alternative approach to the strict legal dichotomy established between migrant smuggling and human trafficking developed in Belgium affect the governance of transit migration?*

This question is answered by taking Belgium, a member of the Schengen Area, as a case study. The recurrent (scholarly) criticism surrounding the strict legal dichotomy and the operational links or, what is often referred to as 'the grey area' between the two complex crimes of migrant smuggling and human trafficking grossly boils down to three elements: the presence/absence of exploitation, the presence/absence of (partial or full) consent, and the debt bondage dimension making smuggled migrants potentially more vulnerable to exploitation. The dissertation places the genesis of the legal dichotomy in its historic-socio-political context where concerns of perceived erosion of sovereignty felt by Nation States in the current globalized era are omnipresent. The thesis further underlines how the inception of the legal dichotomy and the conceptualization of the migrant smuggling phenomenon as a border security issue relates to broader processes of securitization of migration. Indeed, the sheer differentiation in terms of protection granted to (undeserving) smuggled migrants versus (worthy) trafficked victims can be explained by the inclination of Nation States to maintain the status quo of migrant law in place. In that regard, the Belgian legislature seems to have recognized an unjust disparity in the treatment and the protection of smuggling victims versus trafficking victims by developing an alternative protective approach (referred to in the dissertation as the 'third-way' approach). By introducing

the category of aggravated forms of migrant smuggling, the Belgian legislature allows, under several conditions, victims of *aggravated forms* of migrant smuggling to have access to the protective legal status usually strictly reserved to victims of human trafficking.

This sociolegal dissertation specifically focuses on two central elements of the Belgian case which are involved in the implementation of migrant smuggling and human trafficking policies and regulations. The first element is the functioning in practice of the unique Belgian legal framework which, when looking purely at the law 'in the books' goes beyond the strict legal dichotomy established between migrant smuggling and human trafficking. The second element is the concept of transit understood within the context of Intra-Schengen border mobility context in light of Belgium's position as a jurisdiction of both destination and transit for migrants. The concept of transit which is scarcely used when describing migration movements taking place within the often-imagined borderless Schengen Area is both examined from a conceptual and an empirical perspective. The dissertation presents findings based on a mixed-method research design combining legal, policy and document analysis as well semi-structured qualitative expert's interviews with key actors in charge of dealing with both migrant smuggling and human trafficking in Belgium.

To provide an answer to the central research question, *Chapter 2* underlines the multi-scalar nature of the applicable Belgian legal framework and starts by examining the approaches and narratives commonly identified in European Union (EU) counter-smuggling and anti-trafficking legislations and policies and identify how they concretely translate in the domestic legal framework. The analysis of the normative foundations underlying the criminal offence of migrant smuggling first show a clear demarcation of the EU Facilitator's package from the United Nation (UN) Smuggling Protocol which boils down to the broad scope of the facilitation offence as well as a general lack of safeguards of migrant's individual rights found in EU legal instruments. Notably considering the broad scope of the facilitation offence, the narrative analysis of the EU policy instruments adopted to deal with migrant smuggling since 2015 moreover show visible incoherence and inconsistencies between the multiple policy narratives deployed to describe migrant smuggling. This mirror the multi-faceted nature of the phenomenon adopted within EU legal instruments adopted. The analysis furthermore illustrates the continued dominance of the crime-security-centric narratives deployed by EU policy makers to describe the phenomenon despite, at the same time, an also seemingly growing realization from EU policymakers to risks of victimization faced by smuggled migrants during their migration journeys. Taken together, the findings underline that the response to migrant smuggling necessitates to be understood within broader securitization of migration processes taking place in the EU. Considering the intersections between human trafficking and migrant smuggling, and in view of the widely recognized challenges to adequately identify

victims of human trafficking, the results of the analysis of EU anti-trafficking legal framework reveal the coexistence of a dual approach to deal with human trafficking: the human rights/victim centric approach and the crime-control approach. The analysis highlights the dominance of the latter over the former and sheds light on the combination of the crime-control approach with a focus on cross-border elements which arise from the recurrent linkage made between human trafficking and transnational organised crime.

Besides an analysis focused on the commonly identified approaches and narratives at both the UN and EU level, *Chapter 2* also looks at how they translate concretely into the Belgian legal framework. The findings reveal that at first glance, the Belgian legal framework appears to be more in line with the UN Smuggling Protocol than with the EU facilitators Package. The results show that the Belgian legislation aligns itself with the UN Smuggling Protocol considering *inter alia* the general scope and rational behind the migrant smuggling offence, the terminological choice made by the Belgian legislature (*trafic des êtres humains* and not facilitation) and the creation of a distinct facilitation offence which specifically exclude humanitarian assistance from the scope of the offence. Besides, the creation of the unique legal framework allowing victims of aggravated forms of migrant smuggling to benefit from the protective status underlines the acknowledgement of risks of victimization faced by smuggling victims in the domestic legal framework which goes beyond regional and international instruments in terms of protection. Nonetheless, the analysis also indicates that the crime (and border) control approaches prevalent in the EU legal framework also translate at the Belgian level, notably with regards to the predominance given to prosecutorial interests in the procedure, the creation of a facilitation offence *stricto sensu* and the fact that the illegal crossing of Belgian borders as well as the illegal (over)stay in the territory as subject to criminal sanction and imprisonment. The thorough and critical examination of the 'law in the books' at the UN, EU and domestic scales presented in this chapter reveal a complex picture where both human rights-victim centric approach coexists with a crime-border control approach to deal with the multi-faceted phenomenon of migrant smuggling.

As Belgium can be seen as being *inter alia* a jurisdiction of transit for migrants, *Chapter 3* raises the question whether the contested concept of transit migration can be considered useful in untangling and better understanding the blurred/grey area found at the nexus between migrant smuggling and human trafficking. The inspection of the current use of the concept of transit migration in contemporary scholarly literature and policy documents highlights how transit migration typically refers to situations located outside or at the outskirts of the EU. *Chapter 3* provides an analysis of the critical and empirical scholarship which uncovers the grey or in-between area where it becomes hard to make clear-cut distinctions that can be found at the nexus between migrant smuggling and human trafficking. The findings highlight the real-life vulnerabilities faced by smuggled migrants and dynamics that do not fit constructed

legal categories/taxonomies of either human trafficking or migrant smuggling. In doing so, the analysis also identifies and deconstructs prevailing stereotypical representations of both migrant smuggling and human trafficking, *inter alia* with regards to 'ideal' victimhood and villainhood, as well as assumptions about gender, agency, and consent contributing to the creation of approximative or at times false realities/truths underlying the dichotomy between both phenomena. The chapter also underscores the dangers of the instrumental conflation by media, law/ policymakers between the two phenomena. The results further show how migrants' vulnerabilities to abuse and/or exploitation uncovered in the legal and empirical scholarship are likely to be further enhanced in transit zones where stranded individuals within the EU aim to continue their (increasingly) fragmented/non-linear migration journeys. Therefore, *Chapter 3* which relies on two thorough literature reviews including growing yet relatively scarce empirical scholarship focusing on intra-Schengen border mobility, proposes to consider the scholarly/policy usage of the notion of transit migration in the Intra-Schengen context and not just when discussing border mobility at the external borders of the EU but also when referring to similar processes within the Schengen Area. However, the use of the term is only desirable if the latter is carefully defined and understood from the migrant's subjective perspective as a phase of experienced involuntary (im)-mobility in the 'process of movement in a specific migratory direction' (Schapendonk 2012: 579). From a conceptual standpoint, this specific definition to which brackets were added within the word (im)mobility is argued to be useful for three main reasons. First, the definition is broad enough to encompass processes of mobility within the EU. Second, by using the word 'involuntary', the definition does not obscure the active role of governmental bordering practices which have consequences on the experience of (im)mobility faced by migrants amidst their journey and can reinforce their vulnerability. Third and finally, far from simplifying the complex concepts of both migrant smuggling and human trafficking, the term transit migration can stimulate both scholars and practitioners to take into consideration the particularly vulnerable position of individuals stranded or force to move in transit spaces. Henceforth, based on the findings that shed light on the blurry empirical reality of the grey zone at the nexus of both phenomena, it is argued that the term transit migration can serve as a helpful lens that can prevent falling into the trap of conceiving migrant smuggling and human trafficking as strictly separate phenomena and to question the strict categorisation of individuals in one or another legal/administrative box.

Chapter 2 and *Chapter 3* focus on the normative foundations, the dominant narratives/approach as well as the preconceptions underlying both migrant smuggling and human trafficking. Taken together, these elements are essential in the construction of reality of individuals in charge with dealing with both phenomena 'in action'. In *Chapter 4* and *Chapter 5*, the dissertation examines, from an empirical perspective, how the unique Belgian legal framework dealing

with aggravated forms of migrant smuggling operate in practice. The chapters consider the complex operationalisation and implementation of norms enshrined in a fragmented and multi-layered national and European institutional context. Migrants in transit in Belgium (but also generally within the Schengen Area) find themselves at a crossroads where multiple actors and legal regimes intersect and therefore, where the competencies or jurisdictions to govern migrants in transit are inevitably scattered between distinct actors. The findings in both chapters show that the scattering of competences is notably due to the fact that the governance of onwards mobility movements within the Schengen Area is situated at the juncture of multiple and politized 'fights' having intrinsic links and tensions with one another, namely the fight against migrant smuggling and human trafficking, the fight against irregular migration (including 'transmigration' in the Belgian context) and the maintenance of security and public order. This specific *locus* is therefore at the intersection of distinct realms of law, in particular criminal law with the judiciary dimension necessarily involved when the protective dimension is initiated and administrative law when smuggled migrants find themselves administratively 'processed' by authorities either in the context of the fight against 'transmigration' or amid tasks aimed at the maintenance of security and public order.

Adopting distinct conceptual lenses, both chapters shed light on the fact that the promising unique and alternative Belgian approach allowing victims of aggravated forms of migrant smuggling to access the protective status is in fact scarcely used in practice. Whereas at first glance the underuse of the protective approach could be explained by a lack of interest on behalf of migrants transiting through Belgium to reach the United Kingdom to start the procedure, the results of both chapters paint a more complex picture and identify six main causes helping to understand the limited use of the 'third-way' approach which can be summarized as follow. The findings underline critical issues of institutional capacity which are complexified by the intricate Belgian institutional framework in which the various responsible actors have to find their way. The findings further show a lack of sensibilization and training of frontline implementers and furthermore how frontline implementers fail to apply the procedure in a harmonized manner, notably with regards to the crucial information on the procedure needed to be delivered to migrants smuggled in aggravated circumstances. Moreover, a key finding element in both chapters is a visible tendency of actors to evade their responsibility (referred to as 'passing the buck') by passing it on to other actors at the local, national or at the European level. This tendency is stimulated or bolstered by the scattering of competences between numerous actors operating at distinct levels.

Chapter 4 critically examines the (discretionary) decision-making of key actors responsible for the enforcement of the protective framework. In doing so, the findings also underline the growing presence of human rights concerns,

notably considering visible narratives of care voiced by the respondents. The concept of 'humanitarian borderlands' describing conflicting environments where objectives of protecting the needs of vulnerable individuals in precarious life situations such as migrants smuggled in aggravating circumstances clash with objectives of protecting state security is helpful to show these contradictions. The findings confirm the crucial role of moral economy in shaping bureaucrats' decision unpacking the tension between coexisting languages of repression and compassion. Nonetheless, the scarcity of use of the procedure and the findings show that on the ground, stepping out of the straight-jacked legal distinction between migrant smuggling and human trafficking is a challenging task for relevant actors. This is the case despite the awareness displayed by numerous respondents on the protective-oriented approach which is based on human-rights concerns, and which is often described by the respondents as a 'mitigator' to the strict legal dichotomy.

Still focusing on decision-making and combining this strand of scholarship with a legal pluralist approach, and more specifically, on games of jurisdictions, *Chapter 5* examines the functioning of the third-way approach in Belgium by focusing on the complex web of legal regimes (mainly administrative and criminal law) intersecting with one another and the scattered competences shared between various actors involved in the (socio-legal) governance of migrants in transit in Belgium. *Chapter 5* shows the value of expanding the scope of the 'crimmigration lens' by not only looking for points of convergence between these two legal regimes but by highlighting and insisting *instead* on their differentiation and separation to discern how the jurisdictional separation allow relevant actors to (strategically) mobilised and/or combined one set of law over or in combination to another. The empirical findings show that in practice, the administrative 'processing' of migrants in transit in the context of the fight against irregular (transit)migration and the maintenance of security and public order often takes precedence over the protective third-way approach which has a judiciary nature. By combining both strands of scholarship, the analysis of the findings presented in *Chapter 5* reveal that decisions to act or, importantly, not to act, and to approach an issue with a criminal justice (judiciary) lens or with an immigration management lens has critical consequences for the governance of migrants in transit, who can end up being either unnoticed, ignored, protected, or in worse case scenarios criminalized and punished.

From an empirical standpoint, both *Chapter 4* and *Chapter* 5 address the centrality of the transit element to make sense of the scarcity of the use in practice of the alternative approach. Focusing on the national scale, the transitory nature of the stay of the smuggled migrants on the territory and the prioritization at times of the fight against irregular migration is helpful to make sense of the lack or inadequacy of information received by smuggled migrants in aggravating circumstances about the procedure, its advantages, and its conditions. The transitory nature of migrant's stay can furthermore hinder

the ability of state authorities to adequately identify migrants as presumed trafficking and/or aggravated smuggling victims. The stereotyped and common representation of 'ideal' victimhood (notably with regards to notions of consent, agency, and exploitation) can indeed be at odds with the specific profile of migrants in transit and play a role in this lack of identification, especially when frontline police officers are not sensitized to the complex dynamics involved in both phenomena. Moreover, as migrants transiting through Belgium can find themselves in conditions of short-term exploitation to finance the next stretch of their journey, prosecutorial pragmatism notably with regards to evidence gathering can help to explain why potential victims of human trafficking are left unidentified and unprotected. Focusing on the European scale, the transit element is also essential to consider with regards to the governance of unauthorised onwards mobility or 'secondary migration movements' within the Schengen Area. Due to the lack of consensus and hence, structural, and harmonised solutions on this matter at the EU level, the findings reveal a tendency to shift the blame and to discharge oneself of their responsibility to other actors, and in this case, to other member states.

The findings presented throughout the dissertation demonstrate in a clear manner that the strict legal dichotomy established between migrant smuggling and human trafficking rests upon approximative and at times erroneous assumptions that do not match with the empirical reality. Moreover, the results of the Belgian case study show that the artificial distinction between both phenomena has a concrete impact on the protection or the lack thereof of (smuggled) individuals on the move who often find themselves in vulnerable situations and who can experience abuse and exploitation during their migratory journey, also within the Schengen Area. Taking the necessary protection of vulnerable individuals to heart, *Chapter 6* approaches the issue from a human rights perspective and broadens the geographical scope to the jurisdiction of the Council of Europe. The chapter offers a thought-experiment which explores how human rights can concretely be mobilized to mitigate the vulnerabilities experienced by smuggled migrants in transit within Europe. The argument is *inter alia* addressed to strategic litigators and argues that a differentiated protection can be crafted for particular smuggling experiences involving migrants with a specific vulnerability profile. *Chapter 6* builds on the previous chapters and deconstructs the pre-conception of migrant smuggling as a victimless crime by emphasising that smuggling can give rise to human rights abuses which need to be addressed. The chapter reconceptualises the position of the smuggled migrant and replaces it at the nexus between criminal justice and human rights and suggests therefore that a differentiated protection can be crafted for this profile within criminal justice related positive obligations ensuing from the European Convention of Human Rights. In so doing, *Chapter 6* recourses on the European Court of Human Rights (ECtHR) framework in light of the prolific nature of its positive obligations case law, its interpretative arsenal, its responsiveness to social scientific information that

fosters evidence-based adjudication which places the Court in a unique position to disrupt protective disparities in the trafficking/smuggling dichotomy. Even though (inter)national law sources do not compel towards similar protective duties towards (aggravated) smuggling victims, the chapter brings forward the argument that the ECtHR, in a similar manner to what has been developed in the trafficking context, has the potential to identify similar protective needs and can trigger obligations on behalf of member states to address them. Building notably on vulnerability theory and promoting the concept of the 'responsive state' which, alike to the transit definition, insists on the role and responsibility of the State in creating or contributing to vulnerability, *Chapter 6* argues that the ECtHR can legitimately find an alternate basis for protection by basing itself on empirical evidence pointing to similar human rights needs than for trafficking victims. The argument nonetheless aims to be realistic and avoids the pitfall of deploying overboard vulnerability categories which can be detrimental and claims that the Court should use case-specific and exact reasoning by committing to its methodology to relying more upon meticulous empirical and scientific information.

The final chapter of the dissertation connects the dots between the distinct chapters and, to summarise, brings forward the argument that the Belgian 'third way' approach does provide an interesting corrective to the well-founded criticism surrounding the legal dichotomy between migrant smuggling and human trafficking. In this regard, the unique Belgian alternative approach goes beyond the dichotomy by recognizing the unjust disparity in terms of protection between the two phenomena. Nonetheless, the case study makes clear that the protective approach is currently underused and unpacks the complex dynamics at play behind the scarce deployment of the procedure and the consequences for smuggled migrants transiting through the Belgian jurisdiction. The last chapter addresses the importance of considering the element of transit which arguably, constitutes the most crucial theoretical (developed in Chapter 3) and empirical (developed in Chapters 4 to 6) contribution that the dissertations can offer to scholarship focusing on migrant smuggling, human trafficking and more broadly to scholarship looking at borders and mobility. Besides highlighting the limitations of the dissertation, the areas for further research as well as practical solutions to enhance protection, the conclusion emphasises the concrete consequences of fixed legal taxonomies on migrant's lives and experiences amid their journeys. Legal categories are indeed considered as necessary evils to provide rights and protection for individuals in need, yet, the research stresses that legal categories should be carefully questioned and thoroughly re-examined in light of lived mobility practices. On a similar vein and considering the *locus* of migrant smuggling which finds itself at a juncture between irregular migration and human trafficking, policies on these three complex phenomena should be thought through in a holistic and structural manner instead of following their own and relatively independent course of action.