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## Aggravated Migrant Smuggling in a Transit Migration Context, Criminal Victimization under ECtHR Positive Obligations Case Law

Roxane de Massol de Rebetz\* , Pınar Ölçer\*\*

### Abstract

The legal dichotomy established between migrant smuggling and human trafficking has often been criticized, including from the perspective of associated distinctions arising in human rights protection. This contribution focuses on the specific profile of transiting smuggled migrants in the Intra-Schengen mobility context. Building on empirical research conducted by the first author on the Belgian legal framework and its functioning in practice, it is argued that differentiated protection can be crafted for this profile within criminal justice related positive obligations ensuing from the ECHR in a manner similar to that which has been developed by the ECtHR for trafficking victims. As other (inter)national law sources do not drive towards protective duties in this sense for migrant smuggling, the ECtHR cannot feed from them in the manner it has done in the trafficking context. It is argued that the Court however can legitimately find an alternate basis in empirical evidence pointing to similar human rights needs, meaning that the ECtHR can craft protection through evidence-based decision-making, including through the deployment of (particular) vulnerability paradigms.

### Keywords

ECHR, Criminal Justice Related Positive Obligations, Migrant Smuggling, Migrants in Transit, Human trafficking, Evidence-based Adjudication, Vulnerability

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## 1. Introduction

In recent years, particularly since 2015, migrant smuggling has solidified as a salient policy issue for Europe. At the European Union (EU) level, in accordance with the renewed EU Action Plan against Migrant Smuggling contributing to the implementation of the New Pact on Migration and Asylum, the current position is that the phenomenon requires a ‘strong European response’.<sup>1</sup> Since the mid-1990s, that response has primarily been conceptualised as a need to combat cross-border (organised) crime.<sup>2</sup> The underlying rationale is that, on the one hand, migrant smuggling ‘puts the migrant’s lives at risk, showing disrespect for human life and dignity in the pursuit of profit,’ and ‘(undermines (...) the fundamental rights of the people concerned’.<sup>3</sup> On the other, the offence, entailing the ‘facilitation of irregular entry, transit and stay’, disrupts ‘the migration management objectives of the EU’.<sup>4</sup> Whereas the detrimental impact of smuggling on life, dignity and rights resonates in policy narratives and smuggling is clearly circumscribed as a crime, an oddity arises in the framing of the smuggled migrant. Arguably, the second rationale, centred on migration management, dominates the legal and policy responses, rendering them perpetrator-centric in nature.<sup>5</sup> Policy actions are primarily oriented on breaking the ‘business model of the smugglers,’ and, under the primary aim of the Facilitator’s package, effectively criminalizing and sanctioning them.<sup>6</sup> The criminal profile of the perpetrator being unequivocal,<sup>7</sup> the conceptualisation of the smuggled migrant is however less clear.

This approach resonates with the legal frameworks adopted at the United Nations (UN) level, wherein the smuggled migrant also resides in somewhat of a limbo in terms of victimization, notably in a criminal justice sense. A focal point of consideration relates to the legal distinction between migrant smuggling and human trafficking embedded in the 2000 United Nations Convention against Transnational

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

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

3 Renewed EU Action Plan (n 1).

4 Renewed EU Action Plan (n 1).

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

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

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

Crime (UNTOC) and its two additional protocols.<sup>8</sup> Sometimes referred to as a ‘strange legal fiction’,<sup>9</sup> this distinction resolves into significant differences in the legal and practical treatment of trafficked versus smuggled persons. This is underscored by the nomenclature used in the two Protocols. The Trafficking Protocol refers structurally to ‘victims’ (also in a criminal justice sense), while the Smuggling Protocol refers to persons who have been the ‘object’ of criminal conduct.<sup>10</sup> At the European level, the disparity plays out even more strongly. Both the Council of Europe (CoE) and the EU have established own regulatory frameworks with respect to trafficking, securely recognizing criminal victimization of the trafficked person and prescribing significant duties of protection in that regard.<sup>11</sup> The same has not occurred for smuggled migrants however.<sup>12</sup>

Importantly, despite a visible ambivalence in the conceptualisation of smuggled migrants in all three legal frameworks, recent developments at the UN<sup>13</sup> and CoE<sup>14</sup> levels do demonstrate a growing awareness of the inherent risks faced by smuggled migrants to abuse and exploitation, underscoring, amongst other things the operational links between human trafficking and migrant smuggling, and acknowledging the need to take action.<sup>15</sup> With potential shifts in thinking on the horizon, it is a propitious time

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- 8 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2241 UNTS 507; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319. On the history of these protocols and the legal dichotomy see Yvon Dandurand and Jessica Jahn, ‘The Failing International Legal Framework on Migrant Smuggling and Human Trafficking’ in John Winterdyk and Jackie Jones (eds.), *The Palgrave International Handbook of Human Trafficking* (Springer International Publishing 2020) 783; James Hathaway, ‘The Human Rights Quagmire of Human Trafficking’ (2008) 49 Va. J. Int’l L. 1.
- 9 Anne Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway’ (2008) 49 Va. J. Int’l L. 792; Dandurand and Jahn (n 8).
- 10 On the notion of victims, see the notes made by the Secretariat in UNTOC ‘Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime’ (2006), < [https://www.unodc.org/pdf/ctoccp\\_2006/04-60074\\_ebook-e.pdf](https://www.unodc.org/pdf/ctoccp_2006/04-60074_ebook-e.pdf)>, 461, 483.
- 11 Council Directive 2002/90/EC (n 6).
- 12 See for instance Joanne Van der Leun and Anet van Schijndel, ‘Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat against Trafficking in Human Beings and Migration Control’ (2016) 44 International Journal of Law, Crime and Justice 26.
- 13 New York Declaration for Refugees and Migrants (adopted 19 September 2016) UNGA Res 71/1; Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) 5 February UN Doc A/Res/73/195.
- 14 European Committee on Crime Problems (CDPC). Council of Europe Roadmap on Fighting the Smuggling of Migrants (adopted 3 February 2020). The document mentions the possibility of creating a legally binding instrument on migrant smuggling considering the ‘grave’ legal discrepancies found in the legislations of its Member States. Despite its dominant perpetrator/crime-centric orientation, the document emphasises the necessity of the adoption of a multi-disciplinary approach which includes the safeguard of migrant’s human rights, considering the life-threatening risks and exploitation to which they are exposed (point III).
- 15 Whereas the Global Compact (n 13) underlines the necessity of securing the human rights of smuggled migrants, the emphasis on the dichotomy between smuggling and human trafficking remains omnipresent (see objective 9). However, the New York Declaration (n 13) concretely highlights the interconnections between migrant smuggling and human trafficking (see objectives 5-6). Besides, the text operates a terminological turn from the Smuggling Protocol in referring to ‘people in vulnerable situation’ and more importantly ‘to victims (emphasis added) of exploitation and abuse in the context of the smuggling of migrants’ (objective 23). See also Jean-Pierre Gauci and Vladislava Stoyanova, ‘The Human Rights of Smuggled Migrants and Trafficked Persons in the UN Global Compacts on Migrants and Refugees’ (2018) 4(3) International Journal of Migration and Border Studies 222.

to contemplate how any momentum in this regard can be fortified through recourse to human rights law. This contribution argues that an important locale for the (re-) conceptualisation of the smuggled migrant is at the crossroads of criminal justice and human rights, with a focus not only on the perpetrator but the smuggled migrant as a *victim* therein.

Holding that a differentiated approach is critical to the development of protection within the European Convention of Human Rights (ECHR) framework, two important demarcations are maintained here. Firstly, the multiple issues and consequences surrounding the framing of the complex and multi-faceted smuggling phenomenon increasingly have captured the attention of scholarship.<sup>16</sup> The implications of insights in that regard for the human rights needs of smuggled migrants extend well beyond the domain of criminal justice.<sup>17</sup> An isolated approach, focusing only on protective duties in a criminal justice sense, would indeed itself be reductive, even detrimental, if that would mean a lack of regard for other types of needs.<sup>18</sup> While it is important to emphasize that a holistic understanding and strategy are required to address the full gamut and intersectionality thereof,<sup>19</sup> this contribution does focus solely on the criminal justice domain, examining if and how *certain smuggling experiences of migrants with a (particular) (vulnerability) profile*, can be positioned within the *criminal justice related positive obligations* framework developed in the case law of the European Court of Human Rights (ECtHR), under the European Convention on Human Rights (ECHR). The choice to seek recourse to this particular framework lies in the prolific nature of the Court's positive obligations case law, its unique interpretative arsenal and its responsiveness to social scientific information,<sup>20</sup> all making it uniquely positioned to disrupt protective disparities in the trafficking/smuggling dichotomy.

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16 Marika McAdam, 'What's in a Name? Victim Naming and Blaming in Rights-Based Distinctions between Human Trafficking and Migrant Smuggling' (2015) 4(1) *International Human Rights Law Review* 1. Anna Triandafyllidou, 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' (2018) 676(1) *The Annals of the American Academy of Political and Social Science* 212; Gabriella Sanchez, 'Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research' (2017) 5(1) *Journal on Migration and Human Security* 9; Alagna, (n 7); Enrico Fassi, 'The EU, Migration and Global Justice. Policy Narratives of Human Smuggling and their normative implications' (2020) 1 *Rivista Trimestrale di Scienza dell'Amministrazione* 1.

17 See Marie-Bénédicte Dembour, 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in Başak Çalı, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

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

19 See also Stoyanova (n 18) (i), arguing for an approach extending beyond criminal justice needs.

20 All EU Member States being CoE members, ECtHR case law is moreover pertinent to all.

Feeding off the ECHR framework, notably as developed in relation to trafficking victimization, we argue that *categorically* approaching migrant smuggling as a victimless crime or downplaying the criminal victimization of the smuggled migrants - envisaging them as ‘willing’ participants, at worst as co-perpetrators<sup>21</sup> - would be iniquitous. That also holds because *it is* recognized that smuggling leads to human rights abuses, potentially *also* in the form of criminal victimization.<sup>22</sup> That should create a responsibility of clarity with respect to the type of victimization which can be at issue and to provide appropriate protection. While restricting discussion here to the interface between human rights and criminal justice related obligations, the argument may however also be made that crafting an evidence-based (vulnerability) profile under the framework of criminal justice related positive obligations resonating better with the experience of smuggled migrants, can function as an important pivot to improve the conceptualisation of smuggled (transiting) migrants in relation to other types of human right’s needs.

Secondly, considering the need for differentiation and care in the construct of a legitimate, evidence-based needs profile, this contribution focuses particularly on cases where smuggled migrants take on the feature of being *migrants in transit*. Holding that this characteristic especially contributes to the (particular) vulnerability of smuggled migrants, the argument is made here that the Court, as it has been inclined to do so, *inter alia* in trafficking cases, can operationalize empirical evidence to enhance protection, with an emphasis on the transit element.<sup>23</sup> In light of the focus on the implications of a transit context, this contribution turns to the Belgian jurisdiction as a concrete illustration. Based on empirical research conducted by the first author, the practical functioning of the legal model developed in this jurisdiction to deal with aggravated forms of migrant smuggling is reviewed. Focusing on Belgium is of particular interest for two reasons. From a legal perspective, going beyond international obligations, Belgian legislation seems to respond well to operational links, or the grey area found at the nexus between migrant smuggling and human trafficking,<sup>24</sup> through the recognition of an unjust disparity in the treatment of trafficking and smuggling victims. Taking as a point of departure that the circumstances of such persons are similar where *aggravated forms of migrant smuggling* are at issue,

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

22 See also McAdam (n 16) on the issues around notions of exploitation and consent, the attempt to draw a strict distinction between smuggling and trafficking being described by the scholar as a heavily politicized exercise and a ‘fraught process’, generally and 3 and 30.

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

24 Van der Leun and van Schijndel (n 12); Anette Brunovskis and Rebecca Surtees, ‘Identifying Trafficked Migrants and Refugees along the Balkan Route. Exploring the Boundaries of Exploitation, Vulnerability and Risk’ (2019) 72(1) *Crime, Law and Social Change* 73.

Belgium law accords smuggled individuals the protective status exclusively reserved for trafficking victims in other jurisdictions. From an empirical perspective, Belgium is of particular interest as it, as an EU and Schengen member, is a *transit* country and, as such, faces significant challenges arising from the presence of large numbers of irregular migrants *en route* to other destinations on its territory.

In order to build in different steps a realistic argument as to how the ECtHR can extend a protective umbrella through recognition of criminal victimisation requiring criminal justice action, the first section provides an overview of the Belgian legal and policy framework. Section 1 also outlines, based on empirical insights, how and why that framework is not fully effectuated in practice. Drawing on the problematic as demonstrated in the Belgian case study, Section 2 discusses how the ECtHR, as it has done in other contexts, can turn robust empirical information and scholarly insights into human rights currency. Specific attention is devoted in this regard to the concept of vulnerability, both from a theoretical and empirical perspective. To that end, the real-life profiles and experiences of smuggled migrants as they transit throughout European jurisdictions are discussed, with an eye on stressing the need to securely recognize victimization under the intersection of human rights and criminal law in light of the evidence presented. Subsequently, Section 3 concretely outlines the potential for the development of criminal justice related positive obligations protection for smuggled migrants, utilizing the Court's human trafficking case law as a model. This Section also focuses on *how* the ECtHR has also relied on empirical information in that context, advancing that, with an even commitment to this methodology, it can identify similar protective needs and requirements for certain categories of smuggled migrants. Section 5 concludes the contribution with some over-arching reflections.

## 1. The Belgian Case: Context, Legal Framework & Limitations

In examining the potential for the positioning of smuggled migrants with a particular (vulnerability) profile within the ECtHR's criminal justice related positive obligations framework, it is useful to explore a real-life scenario showcasing relevant legal and factual issues and illustrating needs and difficulties in this regard. Again, Belgium provides a particularly apt case study, not only because of its legal framework, but also because it is an important transit jurisdiction within the Schengen area. This allows for examination of the under-researched situation of migrants in transit and 'secondary' or 'unauthorized' migration movements.<sup>25</sup> To understand the Belgian

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

context, this jurisdiction must first be envisaged as an EU Member State and as a Schengen member. Looking specifically at the distinct issues within the Schengen Area with regard to secondary migration movements and the potential links between migrant smuggling and human trafficking in a transit migration context, recent EU initiatives to tackle these phenomena and EU agency reports on the situation at the internal borders of the Schengen Area, should be highlighted as part of the contextual architecture.

### *1.1. Migrant Smuggling within the Schengen Area*

Taking together the adoption of the renewed Action Plan against Migrant Smuggling (2021-2025) and the incorporation of the fight against migrant smuggling as priorities in both the new Pact on Migration and Asylum<sup>26</sup> and the European Agenda on Security,<sup>27</sup> the EU message is clear: anti-smuggling efforts should be intensified in order to ‘prevent the exploitation of migrants by criminal networks and reduce incentives for irregular migration’.<sup>28</sup> The dual rationales underpinning the fight against migrant smuggling at the EU level outlined in the introduction are clearly maintained. However, an evolving sophistication can be identified in the understanding of smuggling *within* the Schengen Area. Looking at counter-smuggling policies and the ways in which the phenomenon is framed, it is interesting to examine the connections created between secondary migration/unauthorized movements, migrant smuggling and human trafficking. Following EU narratives, secondary migration movements are deemed to ‘feed human smuggling and trafficking networks’.<sup>29</sup> Also connecting these phenomena and demonstrating awareness of the victimisation risks faced by smuggled migrants, the EU agency Europol signalled in 2011 an intersection between transit migration, migrant smuggling and human trafficking in that ‘transiting migrants are frequently exploited in illicit labour’.<sup>30</sup> Distinct annual reports of the European Migrant Smuggling Centre (EMSC) recently established within Europol contain references to ‘bottleneck’ areas or ‘migrant hubs’, also within the Schengen Area, where a high concentration of migrants gather in order to circumvent obstacles (whether physical barriers or permanent/temporary border controls), to continue their

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

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

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

29 European Parliament, ‘EU Parliament Briefing on EU Secondary Movements of Asylum Seekers in the EU Asylum System (October 2017)’, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS\\_BRI\(2017\)608728\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608728/EPRS_BRI(2017)608728_EN.pdf) accessed 10 June 2022 ; see also New Pact on Migration and Asylum (n 25).

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



journeys onwards.<sup>31</sup> These areas, where the presence of organized crime groups is particularly visible, are ‘increasingly targeted by law enforcement authorities’ which in turn drives migrant smugglers to further displace their activities, such as around the English Channel, where facilitation activities increasingly take place inland (such as in Belgium and the Netherlands).<sup>32</sup>

Interestingly, while the phenomena of migrant smuggling and human trafficking are commonly described in official reports as clearly distinct in light of the absence of exploitation in the migrant smuggling context, the fourth annual EMSC report uses confusing phrasing in this regard, referring to the particular vulnerability to *exploitation* of ‘potential irregular migrants in remote locations and so-called bottlenecks’.<sup>33</sup> In the same report, specific attention is paid to secondary migration movements, with respect to which an increase in migrant smuggling services has been observed.<sup>34</sup> As for the impact of Covid-19 measures on the phenomenon, notably vis-à-vis the stranding conditions faced by migrants, Europol signals a general shift in facilitation activities. The agency describes crossings as becoming riskier and dangerous, also for migrants already present in European territories. This shift is explained by restrictive border controls and travel restrictions, *inter alia* leading to an increase in the use of small rubber boats to cross the English Channel and a boost in the practice of hiding migrants in (refrigerated) concealed compartments of trucks.<sup>35</sup> Regarding sea crossings, this dangerous technique often involves migrant smugglers overcharging their fees and making migrants steer the boats, who in turn are sometimes arrested as co-perpetrators of smuggling.<sup>36</sup> Developing narratives outlining the difficulties faced by migrants in transit zones therewith show how vulnerability can be exacerbated *because of* restrictive border policies and actions, including by attracting organised crime groups.

Without discussing extensively relevant EU legal instruments for the governance of smuggled migrants, it is important to highlight that ambiguity with respect to the smuggled migrant extends thereto. Notable in that regard is the adoption of the EU Directive on Short-Term Residence Permits in 2004, which makes visible that the blurry area between smuggling and trafficking is formally acknowledged at the EU level.<sup>37</sup> Besides trafficking victims, the Directive leaves Member States the option of

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31 European Migrant Smuggling Centre, 3<sup>rd</sup> Annual Activity Report 2018 (2019) 12; European Migrant Smuggling Centre, 4<sup>th</sup> Annual Activity Report 2019 (2020); European Migrant Smuggling Centre, 5<sup>th</sup> Annual Activity Report 2020 (2021).

32 Ibid.

33 European Migrant Smuggling Centre, 4<sup>th</sup> Annual Activity Report (n 31) 12.

34 Ibid.

35 European Migrant Smuggling Centre, 4<sup>th</sup> and 5<sup>th</sup> Annual Activity Reports (n 31).

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

37 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/10.

extending the scope of protection foreseen therein to smuggled individuals. Even if that protection is contingent upon a willingness to cooperate with authorities in the prosecution of perpetrators (and therewith retains a perpetrator-centric character), it represents a step in the direction of the reconceptualization of smuggled migrants in terms of victimization. Belgium is one of the nine Member States who have made use of the facultative option, going even further than required (see below 1.3).<sup>38</sup>

The ambiguous position of the EU and its agencies on the migrant smuggling phenomenon and its intersection with human trafficking, exploitation and abuse in any event becomes increasingly complex. While the position is maintained that it is necessary to distinguish between migrant smuggling and human trafficking, at the same time, crucially, it is also recognized both that there is fluidity between the phenomena and that smuggled (transiting) migrants face (increased) intersectional hazards of an own nature. This state of affairs at the EU level is important to emphasize in that it has implications throughout the EU jurisdiction as a whole, the absence of clarity not being conducive to consistent management by Member States. From the Belgian perspective, this has two implications. From a legal standpoint, the EU legal instruments related to migration, asylum, migrant smuggling, and human trafficking of course also govern the Belgian legal framework, even if there is room to manoeuvre in implementation.<sup>39</sup> Ambiguity at the EU level thus also travels to Belgium. Secondly, with different Member States all acting on the basis of their own understanding of the approach and actions to be taken, their mode of governance can lead to practical consequences for Belgium, such as surges of unauthorised movements (eventually) moving onward or backwards to Belgium.

### ***1.2. Combatting ‘Transmigration’ and Migrant Smuggling in Belgium***

Focusing further on the factual situation in Belgium, the historical role of this country as a jurisdiction of transit has been securely documented in scholarship.<sup>40</sup> As of 2015, and particularly since the dismantling of the infamous ‘Jungle of Calais’ by the French authorities in 2016, migratory pressure due to so-called ‘transmigration’ has increased substantially in the country.<sup>41</sup> As of 2016/2017, 800-1300 migrants

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

39 We can *inter alia* refer to the Facilitator’s Package (n 6), Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 ; Directive 2004/81/EC (n 37); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

40 See Ilse Derluyn and Eric Broekaert, ‘On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors’ (2005) 43(4) International Migration 31.

41 European Migration Network, ‘Annual Report on Asylum and Migration Policy in Belgium 2016’ (2017) <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a\\_belgium\\_annual\\_policy\\_report\\_2016\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/02a_belgium_annual_policy_report_2016_en.pdf)> accessed 17 May 2022; European Migration Network, ‘Annual Report on Asylum and Migration Policy in Belgium 2019’ (2020): <<https://emnbelgium.be/publication/annual-report-migration-and-asylum-belgium-and-eu-2019-enn>> accessed 17 May 2022.

regularly gather in the neighbourhood of the North railway station of Brussels and its Maximilian Park.<sup>42</sup> The zone has become transformed into a humanitarian hub where NGOs and citizens' organizations provide assistance and support for migrants.<sup>43</sup> Many of them do not aspire to remain and become regularized in Belgium but aim to reach the UK. The strategic position of Brussels incentivises the use of its land routes to the UK, to be reached by embarking in lorries in the parking areas along Belgian highways.<sup>44</sup>

In response to rising numbers, since 2015, at the initiative of the then Secretary of State and Asylum and Migration, a 'transmigration' task force has been put in place to combat illegal migration.<sup>45</sup> This was followed in 2018, the issue now seen as a federal priority, with the creation of a special Action Plan on Transmigration in 2018, the primary objective thereof being to prevent the creation of a 'minis-Calais' or other forms of migrant settlements on Belgian soil.<sup>46</sup> The plan included the evacuation of Maximilian Park, considered to represent a pull-factor for so-called 'transmigrants',<sup>47</sup> the intensification of police controls, the creation of an administrative detention centre for transmigrants (subsequently closed in December 2019) and the high securitization of parking areas along the highways. Due to the Covid 19 pandemic, Maximilian Park was evacuated by the authorities in 2020. Since then, migrants in transit are more dispersed, but many remain in the North Station neighbourhood. The humanitarian hub established in that region moved to another building and currently shelters hundreds of migrants in transit providing direct humanitarian assistance such as through the provision of food, clothes, and medical care.<sup>48</sup>

As highlighted in the former National Action Plan against Migrant Smuggling (2015-2019), and reiterated in the new one (2021-2025),<sup>49</sup> actions undertaken on Belgian territory to push back transmigration often focus exclusively on that objective, without necessarily considering the human rights position of the migrants from a

42 See Tom Guillaume, 'Immersion dans un Centre de la Croix-Rouge' *La Libre Belgique* (1 February 2021).

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

44 Robin Vandevordt, 'Resisting Bare Life: Civil Solidarity and the Hunt for Illegalized Migrants' (2021) 59(3) *International Migration* 47; Myria, 'Myriadoc 10: Belgium, on the Road to the United Kingdom' (2020) <<https://www.myria.be/en/publications/myriadoc-10-belgium-on-the-road-to-the-united-kingdom>> accessed 24 January 2021.

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

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

47 The neologism 'transmigrant/transit migrant' which appeared in 2015 refers to a migrant which only passes through or reside temporarily in the territory and aims to reach the United Kingdom. This term which doesn't refer to any formal legal category creates a distinction between migrants who are applying for asylum in the country and those who are not. See Vandevordt (n 44).

48 Mescoli and Roblain (n 43) ; Guillaume (n 42).

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

(criminal) victimization perspective. Thus, in active policy and implementation, legally prescribed protection, which is available not only for potential victims of human trafficking, but also for ‘victims’ of aggravated forms of migrant smuggling, remains under administered.<sup>50</sup>

The problematic being recognized, there are calls in Belgium to rectify the situation. In 2020, the National Rapporteur on human trafficking and migrant smuggling (Myria), clearly underlined the links between migrant smuggling and transit migration, in a report specifically dedicated to the matter.<sup>51</sup> The National Action Plan (2015-2019) invites relevant actors (e.g. federal and local police) to approach migrant smuggling and human trafficking in their globality and emphasizes the need to check, during (migration) control operations, not only for potential signs of human trafficking, but also aggravated forms of migrant smuggling, so that protective mechanisms available by law can be operationalized. Calls are made for the continuation of training efforts for police officers in this regard.<sup>52</sup> Moreover, there is an observable growing awareness of various actors, including some regional Governments,<sup>53</sup> of the vulnerability of migrants in transit, in association with the potential for exploitation and human rights abuses.

In recent years, attention has also been devoted to the treatment of migrants in transit by the police. Findings indicate that the latter are not incentivized to regard them as potential victims, in a human rights or criminal justice sense. In 2018, the NGOs ‘Médecins du Monde’ and ‘Humain’ issued a report based on quantitative and qualitative research establishing the existence of physical and psychological police violence towards migrants stranded in Maximilian Park and its area.<sup>54</sup> The Permanent Oversight Committee of the Police Service (Comité P) also launched an investigation into police control and detention of migrants taking place during large-scale administrative arrest operations (often in parking areas along the highways).<sup>55</sup> Whereas the focus of these two reports is not completely aligned, another ad hoc report of the Myria on the topic underlines important commonalities, emphasizing that in briefings, police forces took little to no account of the guidelines on human

50 Ibid.

51 Myria 2020 (n 44).

52 National Action Plan (2021-2025) (n 49). See also Myria 2020 (n 44).

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

54 Médecins du Monde, ‘Violence Policières envers les Migrants et les Réfugiés en Transit en Belgique’ (October 2018) <<https://medecinsdumonde.be/actualites-publications/publications/violences-policieres-envers-les-migrants-et-les-refugiés-en>> accessed 5 January 2021; See also Mescoli and Roblain (n 43) on the securitization approach adopted at the Federal level to organise frequent police raids to disperse and at times arrest irregular migrants.

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

trafficking, migrant smuggling or the protective status reserved for victims of trafficking and aggravated forms of smuggling,<sup>56</sup> pointing to a discrepancy between the law and practice as far as (vulnerable) migrants in transit spaces using smuggling services are concerned.

### ***1.3. Legal Framework: A Protective Approach Towards Victims of Aggravated Forms of Migrant Smuggling...***

That discrepancy arises from the legislative change brought about in 2005, through which the aggravating circumstances for trafficking and smuggling were harmonized. Recognizing the ‘dramatic consequences’ of both offences, with an eye on maintaining coherence and consistency,<sup>57</sup> article 77*quater* of the Foreigner’s Act of 15 December 1980 was amended to provide that, if aggravated circumstances are found in migrant smuggling cases, the smuggled person should be able to access the protective status normally reserved for human trafficking victims.

On the basis of the insights gathered through interviews with Belgian experts,<sup>58</sup> the following aggravating circumstances<sup>59</sup> can often be found in smuggling situations: abuse of a situation of vulnerability of an individual (which includes his/her irregular or precarious administrative situation) in a way that the individual has no real and acceptable alternative to submit her/himself to the abuse; the endangerment of the victim’s life either deliberately or through gross negligence; the (direct or indirect) use of fraud, violence, the use of threats or other forms of coercion (e.g., debt bondage), abduction, deception and abuse of power.

The design of the Belgian approach to both migrant smuggling and human trafficking is multi-disciplinary in nature,<sup>60</sup> all actors in accordance with their own expertise having a specific role within established procedures. Particularly important are the prosecutors specialised in human trafficking and migrant smuggling, the reception centres for victims present in each of the 3 Regions of the country, the

56 Ibid; Myria, ‘Police et Migrants de Transit’ (2019) <[https://www.myria.be/files/Note\\_Police\\_et\\_migrants\\_de\\_transit.pdf](https://www.myria.be/files/Note_Police_et_migrants_de_transit.pdf)> accessed 27 January 2021.

57 Belgian House of Representative, ‘Explanatory Statement’ (10 August 2005) 11. <<https://www.lachambre.be/doc/flwb/pdf/51/1560/51k1560001.pdf>> accessed 9 July 2021.

58 Semi-structured interviews were conducted with 17 experts’ respondents specialized in the migrant smuggling and human trafficking field between 2018 and 2020 (e.g., specialised prosecutors, Federal Police Investigators, attachés from the Ministry of Justice, Foreigner’s Office). See also following sub-sections.

59 For the complete list of aggravating circumstances see, article 77*quater* of the Law on Foreigner of 15 December 1980. See Loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers. See also further at 3.2.

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

federal police, the local police, the Foreigner's Office and the Labour Inspectorate. The protective status comes with rights (e.g., a reflection period of 45 days, the allocation of temporary then potentially permanent residence permits), but also with conditions and obligations. Amongst other things, individuals who are referred to as potential victims are required to cooperate with authorities by making relevant declarations, be accompanied by one of the three reception centres for victims (NGOs) and cut ties with presumed perpetrators, while provisory status can only be granted if an investigation or judicial proceedings are still ongoing.

To an extent, this system has an impact on the situation of the smuggled migrant. Belgian case law provides at least two indications that national courts regard smuggled migrants as victims from a criminal law perspective. Firstly, they are referred to as such in verdicts against perpetrators. In a 2017 judgment, the Brussels Court of Appeal<sup>61</sup> found that the offence had been committed through abuse of the vulnerable situation of the migrant victims, leaving them with no other choice than to undergo the smuggling, adding that the fact that they had perhaps in part contributed to their own vulnerability, did not take away from that. The Court of Appeal explicitly held that the offences were serious and especially morally objectionable, not only because of the impact on public order and security, but also because of the effect on the individuals, being vulnerable persons from whom money had been obtained.<sup>62</sup> Secondly, Belgian Courts allow third parties, notably Myria, to join criminal proceedings against smugglers as civil parties on behalf of smuggled migrants, a procedural position reserved for criminal victims or those acting on their behalf.<sup>63</sup>

The recognition of victimization is weaker however where aggravating circumstances are not at issue. In 2015, the Correctional Court of Louvain<sup>64</sup> also dealt with the claim of an individual smuggled migrant who had joined the criminal proceedings, as a victim of both trafficking and aggravated smuggling. Not finding trafficking or the *aggravated form* of smuggling to have been proven in that case, the Court rejected the claim, because it had not been proven that the suspect had abused the particularly vulnerable position of the 'foreigners', or had directly or indirectly made use of trickery, violence, or any other form of coercion.

Nonetheless, Belgian Courts seem to have developed a sensitivity to the trafficking/smuggling nexus, particularly induced to do so via the special legislation creating a

61 Bruxelles (13e ch. corr.), 17 May 2017.

62 See also the judgment Corr. Anvers (8e ch.), 8 December 2016 in which the Court shed light on the abuse of the precarious administrative, social, and financial situation of the smuggled victim. For an overview of the jurisprudence see the website of the National Rapporteur Myria gathering key court cases on migrant smuggling <<https://www.myria.be/fr/jurisprudence/eyJyZXN1bHRfcGFnZSI6ImZyXC9qdXJpc3BydWRlbnNlIiwieY2F0ZWdvenkiOiIzMzEiLCJyZXF1aXJlX2Fsb-CI6ImNhdGVnb3J5In0>> accessed 12 January 2022.

63 Ibid.

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

bridge between the phenomena in the event of aggravated circumstances.<sup>65</sup> Where cases involving those do come to criminal courts, the special system does therewith seem to have important effect.

#### 1.4. ...Scarcely Used in Practice

The protective status for aggravated smuggling is scarcely used in practice however. Based on the national rapporteur's statistics, between 2017 and 2019, 48 victims used the protective procedure, while respectively, 476, 535 and 531 migrant smuggling cases were introduced by the Public Prosecution Office in the same years.<sup>66</sup> In 2019, only ten victims used the procedure, the lowest figure seen in the last ten years.<sup>67</sup> In line with national jurisprudence<sup>68</sup> and to underscore that migrants intercepted in lorries in parking areas qualify as victims of aggravated forms of migrant smuggling, expert respondents explained that they can establish the aggravated circumstances automatically in the case of irregular migrants being transported to England and that it would be inconceivable for them to not be considered as vulnerable. The fact that migrants often significantly overpay for their journeys was also considered by respondents as sufficient proof of abuse.<sup>69</sup> These views emphasize the discrepancy between the law and reality,<sup>70</sup> showing, as summarized by one specialised Prosecutor, that '*the system is not working*'.<sup>71</sup>

Semi-structured interviews with Belgian experts conducted by the first author<sup>72</sup> provide insights as to the distinct causes of the shortcomings. Firstly, many respondents explained that smuggled migrants have no interest in entering the protective status, as their goal is to stay 'off the grid'<sup>73</sup> and reach the UK at all costs. The threshold to enter the status was also considered 'too high',<sup>74</sup> particularly because of the condition of turning against one's smuggler.<sup>75</sup> A further impediment identified was the fear

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

66 Myria, 'Rapport Annuel Traite et Trafic des Êtres Humains 2018 : Mineurs en Danger Majeur' (2018) <<https://www.myria.be/fr/publications/rapport-annuel-traite-et-traffic-des-etres-humains-2018-mineurs-en-danger-majeur>> accessed 12 January 2021. Myria, 'Annual Evaluation Report 2019. Trafficking and Smuggling of Human Beings. Empowering Victims' (2019) < <https://www.myria.be/en/publications/2019-annual-report-trafficking-and-smuggling-of-human-beings>> accessed 12 January 2021; Myria, 'Annual Evaluation Report 2020. Trafficking and Smuggling of Human Beings. Behind Closed Doors'. (2020) <<https://www.myria.be/en/publications/2020-annual-report-trafficking-and-smuggling-of-human-beings>> accessed 12 January 2021.

67 Myria, 2020 (n 44).

68 Charles-Eric Clesse, *La Traite des Êtres Humains. Droit Belge Eclairé des Législations Française, Luxembourgeoise et Suisse* (Larcier 2013).

69 Interview, Federal Police Investigator in Migrant Smuggling.

70 Interview, Specialised Prosecutor 1.

71 Interview, Specialised Prosecutor 2.

72 See explanations in footnote 56.

73 Interview, Director NGO.

74 Interview, Respondent 3 Foreigner's Office.

75 Interview, Specialised Prosecutor 2 and 3.

of being sent back to another EU country via the Dublin III regulation.<sup>76</sup> Secondly, informational deficiencies with respect to the option of the special status became apparent,<sup>77</sup> the lack of authorities' awareness of legal procedures, due to insufficient training and/or sensibilization of first line officers, being acknowledged by several respondents.<sup>78</sup> Thirdly, time and operational capacity issues were pointed out in relation to the administrative and judicial formalities involved.<sup>79</sup> Shortages in this sense were identified by the majority of respondents at all levels, from police officers to the prosecutors, as important concerns. Fourthly, dealing with migrant smuggling is located at the crossroads of distinct fights, namely against illegal migration, against human trafficking and for the maintenance of safety and public order. This entails a problematic scattering of powers between different actors, whose respective agendas and priorities do necessarily align. Finally, the absence of unicity, structural and harmonized solutions, also at the European level, were recognized by most respondents as key challenges.

## 2. Turning empirical evidence into human rights currency

### 2.1. Deference practices in the migration field

Registering empirical realities in aid of legal reform is always useful but becomes critical where advocated change is likely to conflict with policy goals. The Belgian case clearly reveals an under-addressed problematic with respect to transiting smuggled migrants. The fact remains, however that, even if fortified in this jurisdiction, the weaker position of the smuggled migrant and the endurance of the legal trafficking/smuggling dichotomy follow from a conscious choice. Ultimately this can be related to the strong juncture between migrant smuggling and robustly guarded (national and regional) (im)migration and asylum policies. Challenges presented in that regard extend to any room the ECtHR may see to manoeuvre in bringing about paradigm shifts in the conceptualisation of the transiting smuggled migrant.

As highlighted by Baumgärtel, 'the politicized question of migration has been a persistent headache for the ECtHR', with criticism of the Court's handling of the theme generally coming from 'diametrically opposed perspectives',<sup>80</sup> the ECtHR being charged simultaneously with judicial activism and under-intervention in this terrain.<sup>81</sup> Where trafficking is concerned, the Court has been able to enhance protection *inter*

76 Interview, Respondents 1, 2 and 3 Foreigner's Office.

77 Interview, Investigative Journalist; Interview, Volunteer Citizen's Platform.

78 Interview, Respondents 1 and 2 Ministry of Justice.

79 Also emphasised in the recent National Action Plan 2021-2025 (n 49) section 2.2.3.

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

81 Ibid. 12-13.



*alia* by relying on the broad and strong legal recognition that criminal victimization associating with that phenomenon requires rigorous protection. While trafficking victims are not always irregular migrants (although, in ECtHR trafficking case law, they often are),<sup>82</sup> all smuggled migrants are always irregular. This potentially lands the plight of the smuggled migrant in the centre of a difficult deference problematic, within the forcefields of what Dembour has dubbed the ‘Strasbourg reversal.’ In this approach, notwithstanding important successes which have been achieved by the Court,<sup>83</sup> the ECtHR ‘generally privileges state sovereignty over migrants’ rights,’ meaning that in the totality of case law, it ‘rarely’ finds for migrant applicants.<sup>84</sup>

Dembour’s ‘reversal’ refers to a particular formula used by the Court, in which it declares Member States to be ‘entitled, as a matter of international law and subject to (...) treaty obligations, to control the entry of aliens into its territory and their residence there [...]’.<sup>85</sup> This principle has more than abstract or symbolic impact. Rather, it is ‘just one particularly striking pointer that indicates that the Strasbourg case law is not resolutely on the side of migrants’ human rights.’<sup>86</sup> Concrete strategies give the principle actual effect. These include ‘an interpretation of substantive rights that makes it difficult for violations to be declared and processual choices that tend to leave states off the hook.’<sup>87</sup> Over time, the principle has gained importance. While when it first ‘appeared’ in case law, ‘(i)t was simply presented as one important consideration to bear in mind amongst others,’<sup>88</sup> the Court subsequently opted to prelude its assessments with it as an opening consideration, ‘(reaffirming) at the outset the ‘entitlement’.’<sup>89</sup>

In the broader European context, the prerogative becomes stronger still through consideration of the joint interests of Member States in this respect. The Court namely not only holds that ‘Contracting States have the right to control the entry, residence and removal of aliens’ and to ‘establish their own immigration policies’ as a self-standing national entitlement, but also ‘*potentially in the context of bilateral cooperation or in accordance with their obligations stemming from membership of the*

82 See *Siliadin v. France* 73316/01 (ECtHR, 26 October 2005); *C.N. v. United Kingdom* 4239/08 (ECtHR, 13 February 2013); *Chowdury and Others v. Greece* 21884/15 (ECtHR, 30 March 2017); *Rantsev v. Cyprus and Russia*, 25965/04 (ECtHR, 7 January 2010); *J. and Others v. Austria* 58216/12 (ECtHR, 17 January 2017); *S.M. v. Croatia* [GC] 60561/14 (ECtHR, 25 June 2020); *V.C. L. and A.N. v. United Kingdom* 77587/12 and 74603/12 (ECtHR, 5 July 2021); *Zolotic and Others v. Azerbaijan* (n 23). In *C.N. and V. v. France*, the applicants were French nationals who were born in Burundi. However, facing threats to be sent back to Burundi by their aunt, the victims believed that her residence in France was irregular. See *C.N. and V. v. France* 67724/09 (ECtHR January 2013).

83 Dembour (n 17) 19 and 22. With respect to the protection provided for asylum seekers, see also Juan Ruiz Ramos, ‘The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis’ (2019) 39 REEI 45.

84 Dembour (n 17) 19.

85 Ibid 29-30, citing *Üner v the Netherlands* [GC] 47410/ 99 (ECtHR, 18 October 2006), para 54,

86 Dembour (n 17) 32.

87 Ibid.

88 Ibid 30.

89 Ibid 29-30.

*European Union*’ [emphasis added].<sup>90</sup> Underlining ‘the importance of managing and protecting borders for distinct purposes such as preventing threat to internal security, public policy and public health’,<sup>91</sup> the Court also has regard for the joint ‘challenges facing *European States* [emphasis added] in terms of immigration control as a result of the economic crisis and recent social and political changes (...)’.<sup>92</sup> Deference to policy in this respect thus plays out in two manners, not only with respect to *national* immigration policies, but also with respect to the right of States to fulfil international obligations and, in that light, implement common policies and mindfulness of the disparate (burdens) which may rest on different States.

The ‘reversal’ takes effect, in some shape or form, even for (irregular) migrants who, under various international law sources as well as on the basis of standing ECtHR case law, qualify for greater protection because of a special status (e.g., asylum seekers).<sup>93</sup> Nevertheless, even if criticized for not intervening more because international law sources prescribe further protection for them, the Court is able to feed off those to significantly restrict discretion where such rights bearers are concerned.<sup>94</sup> For the smuggled migrant, the absence of such a springboard means that the prerogative enjoyed by Member States in the determination and effectuation of their (national and common European) asylum and migration policies may be conceived as presenting greater challenges for the Court in prescribing the same or similar positive criminal justice protective duties with respect to smuggled migrants as it does for trafficking victims.

## 2.2. (Non-)deference in the Context of Criminal Justice Related Positive Obligations

Nevertheless, impediments may exist in the general development of rights of ‘particular benefit to migrants’,<sup>95</sup> but there is ‘nothing in international human rights law (which) would inherently prevent the ECtHR from adopting more progressive interpretations of the ECHR’.<sup>96</sup> Taking as a point of departure that deference in migration is a reality - and to an extent is legitimate - there are however ways to manage it. The Strasbourg reversal connects to the principle of subsidiarity and the margin of appreciation doctrine.<sup>97</sup> Recently fortified by the entry into force of the 15th Protocol to the Convention (through which *inter alia* a new recital has been added to

90 *N.D. and N.T. v. Spain* [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 167.

91 *Ibid* para 168.

92 *Ibid* para 169.

93 See Ruiz Ramos (n 83) in the context of administrative detention of asylum seekers under articles 5 and 3 ECHR.

94 Trafficking victims need not be migrants, the ECtHR also recognizing internal trafficking of nationals as a typology also requiring positive obligations protection (see Section 4).

95 Dembour (n 17) 21.

96 *Ibid* 19.

97 See discussing this relationship, Ruiz Ramos (n 83).

the Preamble, with an explicit reference to them),<sup>98</sup> these foundational interpretative principles are used to generally navigate the role of the ECtHR vis-à-vis national discretion.<sup>99</sup>

Importantly, they are not applied in a set manner. Firstly, ECtHR adjudicative technologies include an array of devices which intrinsically direct *towards* ECtHR engagement. The principle of autonomous interpretation, the maxims that the Convention is a living instrument, which must be interpreted ‘evolutively and dynamically,’ in accordance with the ‘object and purpose’ of the Convention and that protection cannot be ‘theoretical and illusory’ but must be ‘practical and effective’,<sup>100</sup> all present powerful tools which can reduce national discretion. Notably, these devices have played an important role in the development of criminal justice related positive obligations case law relating to trafficking.<sup>101</sup> Again, the interpretative principle that the ECHR must, as an instrument of international law itself, be read in harmony with other such sources,<sup>102</sup> does not currently push towards enhanced protection in the context of smuggling. The same holds with respect to the consensus method,<sup>103</sup> in as far as the Court cannot gauge common ground amongst Member States in that respect. Nevertheless, harmony and consensus considerations can also work in favour of the smuggled migrant. Even if they are only slight, any shifts in (softer) international law sources, or emerging standards at national levels,<sup>104</sup> can be picked up through early signalling and operationalized by the ECtHR.<sup>105</sup>

Secondly, deference determination also occurs through a complex algorithm in which different variables and interests are weighed against each other. The nature of a (policy) domain is certainly amongst those. There are clearly identifiable terrains with respect to which the Court by default adopts a position of more than standard deference, because it finds the subject matter to fall under a hard-core public law

98 Council of Europe, Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, No.: 213 (31 October 2021). See also Ruiz Ramos (n 83).

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

100 See amongst many other sources, *M.A. v. Denmark* 6697/1 (ECtHR, 9 July 2021) para 162.

101 See inter alia *Rantsev* (n 82) para 273-277 and the Grand Chamber confirming, *S.M.* (n 82) para 286-292.

102 See amongst other judgments, *Correia de Matos v. Portugal* 56402/12 (ECtHR, 4 April 2018) para 134. See also with respect to obligations deriving from international law, the Separate Opinion of Judge Pinto de Albuquerque in *Söderman v. Sweden* [GC] 5786/08 (ECtHR, 12 November 2013).

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

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

105 See also Ruiz Ramos (n 83), on the importance of interpretation of asylum-seekers rights in light of broad international standards. See also with respect to the Court’s reliance on various sources, including hard and soft instruments and consensus, Ksenija Turković, ‘Challenges to the Application of the Concept of Vulnerability and the Principle of Best Interests of the Child in the Case Law of the ECtHR Related to Detention of Migrant Children’, in Başak Çalı, Ledi Biancu, Iulia Motoc (eds) *Migration and the European Convention on Human Rights* (Oxford University Press 2021).

prerogative. Thematically, the domain of (im)migration and asylum indeed squarely falls under those (although it is certainly not the only one).<sup>106</sup> However, in case law at large, but *also* in such ‘deference by default’ areas, whether or not the Court will opt to intervene is also determined on the basis of the facts and circumstances of the case, the (vulnerability) profile of the rights bearer and the nature and the aspect of the rights at stake, which are variably more or less susceptible to deference considerations.

As for the nature of rights at stake and the contexts in which they are invoked, Dembour analyses deference in relation to particular types of issues, attaching to different (aspects and types of) rights. These are issues relating to residence, family reunification, access to social services, deportation and removal in the context of rights guaranteed mainly under art. 8 and 6 (although sometimes also under art. 3 ECHR),<sup>107</sup> all inherently attaching closely to national policy prerogatives in migration management. National prerogative has (or should have) greater competition however where other issues and rights are concerned. Ruiz Ramos’ examination of the ECtHR’s management of margins in the context of administrative detention of asylum-seekers, under art. 5 par. 1 (f) and 3 ECHR<sup>108</sup> is of particular interest in this regard. Analyzing what the impact of the 2015 refugee crisis has been on the ECtHR’s approach, he signals that, while deference was already strong, rather than the crisis leading to amplified protection, it has ‘in some cases’ become both ‘clearer’ and ‘expanded’.<sup>109</sup> Associating that with ‘political tensions,’ he concludes ‘that European State’s renewed preoccupation with strengthening their borders after 2015 has led the Court to widen the scope of the margin of appreciation,’<sup>110</sup> *inter alia* on the basis of its ‘consideration (...) of States’ difficulties in managing a migration crisis’.<sup>111</sup> Critical in his approach is that his review is oriented on specific rights, in the context of a specific theme (detention), meaning that his examination also extends to distinctions which can be made with respect to the detrimental impact the Strasbourg reversal can have on different rights. Finding that the reversal has also taken hold in the context of art. 5 ECHR (with the Court ‘(t)aking into account the context of the European refugee crisis as a way to justify a lower human rights protection’), he emphasizes that it is has ‘more worryingly’, also done so where art. 3 ECHR is concerned, in light of the fundamental nature of this provision.<sup>112</sup>

106 For an overview of such domains see separate opinion of Judge Pinto de Albuquerque in *Correia de Matos* (n 102).

107 Dembour (n 17). See more extensively in this respect and on the ‘Strasbourg reversal’, Marie-Bénédicte Dembour, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

108 Ruiz Ramos (n 83).

109 Ibid 43.

110 Ibid.

111 Ibid 38.

112 Ibid, generally and 37-38.

The latter consideration would hold *a fortiori* in the context of the rights issues of concern here, being positive obligations in relation to (i) critical rights, invoked in (ii) a criminal justice context. Criminal justice related positive obligations case law with respect to trafficking confirms that logic. Not only is the ‘Strasbourg reversal formula’ not invoked therein by the ECtHR, but mention of the margin of appreciation doctrine (or related devices) is scarce. Deference is thus not part of the mainframe of principles and standards governing this typology of obligations. The Court does cap different types of positive obligations, but, endeavoring to not impose ‘impossible or disproportionate burdens,’ does so via testing against proportionality(-type) considerations.<sup>113</sup> In this context, testing does not focus on national prerogatives with respect to policy choices, but rather constitutes mindfulness of the limits of the ability of states to protect against crime through positive action.

In criminal justice related positive obligations case law, there is one (important) context where the Court leaves room for national (policy) choices. As discussed below, that is where (horizontal) rights abuses are not found to be sufficiently grave to necessarily require State intervention through *criminal justice means*. In such cases, other remedies, such as civil ones, may be sufficient.<sup>114</sup> However, where the Court itself determines with respect to more serious abuses that they can only be dealt with via criminal law enforcement, a threshold is crossed. All criminal justice related obligations then come into effect, with no room for national preferences for a different approach. If the Court were to determine, as it has done with respect to trafficking, that particular types of smuggling of migrants with a particular profile entails such a type and gravity of abuse, the fact that the victim is a migrant and that stringent protective standards would undermine European or national migration policies, should not be a concern.<sup>115</sup>

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113 See *inter alia*, *Rantsev* (n 82) and para 287, *Zoletic* (n 23), para 188.

114 See further, Section 3.

115 See *M.S.S. v. Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011). In the context of the assessment of the complaint in the case of a violation of art. 3 ECHR because of detention conditions, *M.S.S. v. Greece and Belgium*, paras 223-224, the Court, demonstrated understanding for the ‘difficulties’, ‘burden’ and ‘pressure’ experienced by EU external border states ‘in coping with the increasing influx of migrants and asylum-seekers’, a situation ‘exacerbated by the transfers of asylum-seekers by other member States in application of the Dublin Regulation’, made ‘all the greater in the (...) context of economic crisis’, also in light of ‘the capacities of some of those States’. Nevertheless, it also held that ‘having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision’ so that it did not ‘accept the argument of the Greek Government that it should take these difficult circumstances into account when examining the applicant’s complaints under Article 3’. See also *Ilias and Ahmed v. Hungary* [GC] 47287/15 (ECtHR, 21 November 2019), para 162. In the context of a violation of art. 3 ECHR due to the expulsion of the applicants in that case to Serbia, in light of the Hungarian government’s argument that ‘all parties to the Convention, including Serbia, North Macedonia and Greece, have the same obligations and that Hungary should not bear an additional burden to compensate for their deficient asylum systems’, where the Court held that ‘this is not a sufficient argument to justify a failure by Hungary, which opted for not examining the merits of the applicants’ asylum claims, to discharge its own procedural obligation, stemming from the absolute nature of the prohibition of ill-treatment under Article 3 of the Convention.’

### 2.3. Evidence-based adjudication and recognition of (particular) vulnerability

Taking the step to underscore deficiencies in the framing of the smuggled migrant as a victim in a criminal law sense would however still require a forceful stand on the part of the Court and a legitimizing basis to counter resistance which may arise, in light of the greater burden which would be created for Member States, with respect to a large group of rights bearers. It is held here that the ECtHR can justifiably expand protection for transiting smuggled migrants by doing so in a *differentiated and evidence-based manner*, bolstering enhanced protection through reliance on empirical evidence pointing to particular needs. Differentiation is key because the rights needs and profiles of the migrant - ‘anybody outside their country of origin’<sup>116</sup> - are highly variable, meaning that the ‘smuggled migrant’ also does not constitute a homogenous category. Not all smuggled migrants or smuggling experiences should therewith qualify for this type of protection. As for evidence-based appraisal, while empirical information is used in a myriad of ways, in different types of decisions by the ECtHR, notably also in trafficking case law, discussion in this section will focus on its potential for deployment in the concept of (particular) vulnerability. In framing the needs of the transiting smuggled migrant, this notion holds great potential as an ordering device and can function as a channel to convert real-life issues into protection. Used as an exploratory device in scholarship, the vulnerability concept also has important practical application as a sorting mechanism in ECtHR case law.<sup>117</sup> Reviewing the Court’s application of the concept, vulnerability theorists examine its capabilities with respect to the reduction of protective deficiencies, including through sounder theoretical grounding, enabling its ordered deployment in litigation, with an eye on better approximation of the lived realities of (distinct types of) rights bearers.<sup>118</sup>

Two main queries of vulnerability scholarship are of import here, namely how (particular) vulnerability can be identified and, once recognized, what legal effect that should have.<sup>119</sup> While the first question will be dealt with here, the second will be discussed in the next section, as it is more appropriately embedded in arguments

116 Dembour (n 17) 19. See also Baumgärtel (n 80) 22, holding that ‘(...) vulnerabilities take various degrees and expressions’, so that ‘in that sense, ‘migrants’ (and even ‘asylum seekers’ more narrowly speaking) truly are not a homogenous group’.

117 For an overview on the potential and pitfalls of the vulnerability concept for human rights see (i) Martha Fineman, ‘Vulnerability and Inevitable Inequality’ (2017) 4 Oslo Law Review 133; (ii) Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 Yale Journal of Law & Feminism, 10; Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) International Journal of Constitutional Law 1056; Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé, and Lieneke Slingenberg, ‘The Potential and Pitfalls of the Vulnerability Concept for Human Rights’, (2021) 39(3) Netherlands Quarterly of Human Rights; So Yeon Kim, ‘Les Vulnérables: Evaluating the Vulnerability Criterion in Article 14 Cases by the European Court of Human Rights’ (2021) 41(4) Legal Studies 617; Baumgärtel (n 80); Ruiz Ramos (83). See also, with respect to the vulnerability of migrant children, Turković (n 105).

118 See for her proposed alternate (‘autonomy’) approach to protection of the vulnerable in the context of art. 14 ECHR (as well as a critical discussion of the Court’s strategies with respect to art. 14 ECHR, including through its use of the vulnerability notion), Kim (n 117).

119 Baumgärtel (n 80) 13, 17-18, 23-27, including with respect to positive obligations (ibid 25), also in relation to human trafficking (ibid 24), referring in that last regard to (risks) of harm and in relation thereto, ‘factors that change with the degree of migratory vulnerability’ (ibid 25).

relating to the scope and locale of protection under the ECHR. Briefly discussing the vulnerability concept at a theoretical level (2.4), some remarks are made with respect to the Court's ability to register new forms of (particular) vulnerability (2.5). Building thereupon, utilizing insights to be extracted from recent scholarly and NGO research and enriching those with concrete empirical markers gathered through own research, a basis is laid for a particular (legal) vulnerability construct for the smuggled transiting migrant, based on own traits (2.6) as well as other external factors (2.7). Critical to signal is that (empirical and scholarly insights) increasingly point to strong conceptual similarities in smuggling and trafficking phenomena. While it may not be necessary to (fully) equate smuggling and trafficking experiences, on the basis of empirical evidence, the Court can break through protective disparities in the trafficking/smuggling dichotomy, or at least provide some form of similar protection for the smuggled migrant where necessary, engaging in that regard also with the feature of being in transit.

#### ***2.4. Theoretical Reflections on the Vulnerability Concept***

In reviewing the manner in which the vulnerability notion is and should be enacted in human rights law, including in ECtHR litigation, a critical question is what the meaning of vulnerability is and who thus is to be seen as vulnerable.<sup>120</sup> For the purpose of developing 'a workable legal principle of *migratory vulnerability*', Baumgärtel, drawing 'primarily' on Fineman's 'seminal conception of vulnerability' - posited by her as 'a substantive critique of the limitations of legal and especially formal equality' - depicts her argument as holding that 'much of legal theory has been centred around an illusory 'universal human subject' defined by 'autonomy, self-sufficiency, and personal responsibility'.<sup>121</sup> Fineman elaborates that this subject, around whom '(...) dominant political and legal theories are built' is 'presumed' to be 'a competent social actor capable of playing multiple and concurrent societal roles' and has 'the capacity to manipulate and manage (...) independently acquired and overlapping resources'.<sup>122</sup> Where human rights are 'calculated' departing from this archetype, this corresponds to the use of 'group vulnerabilities', whereby certain groups of persons are designated such a status, through comparison with this competent actor, thus on the basis of 'identity categories,'

120 Peroni and Timmer (n 117). See also further sources in (n 117).

121 Baumgärtel (n 80) 14, referring to Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law & Feminism*, 10. See also Baumgärtel (n 80) 13, for his reference to his book, Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (CUP 2019) 5.

122 Fineman (n 117) (ii) 10. See also Peroni and Timmer (n 117) 1061-1062 and 1085 and Timmer et al. (n 117) 194-195. This resonates well with the particular ideal profile of a 'male, heterosexual, white, able-bodied Christian (...) ' used in 'comparator approach' used in the Court's 'classic' testing model for art. 14 ECHR complaints (as an alternate to its later use of the notion of vulnerability, Kim (n 117) 620-621 and 623-624, referring with respect to that depiction to Rory O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Legal Studies* 228. From the viewpoint of the transiting smuggling victim, an added characteristic would be that the rights bearer is a person regularly and stably residing in Europe, living with a level of socio-economic welfare associated with that status. See also in this respect Stoyanova (n 18) (i) 207, where she holds that 'often migrant victims of crime do not have secure status in the country', for which reason 'they are in need of a specific form of protection'.

the shortcomings of this ‘equality’ approach travelling to the use of ‘group vulnerability’ by the ECtHR, for which reasons the Court’s ‘usage’ thereof ‘can (...) be questioned.’<sup>123</sup>

Summarily stated, Fineman’s argument is for recognition of ‘universal’ vulnerability, meaning that there is an ‘ever-present possibility of harm, injury, and misfortune’,<sup>124</sup> which is ‘inherent in the human condition’, but impacts persons differently.<sup>125</sup> Using (set) ‘identity categories’ *inter alia* creates a hazard that individual vulnerabilities not aligning therewith will be excluded, or, conversely, that categories will be drawn too broadly.<sup>126</sup> Discarding them allows for a more fine-tuned approach, with a focus on ‘vulnerability as a ‘socially embedded’ process that will affect persons differently (...)’.<sup>127</sup> This brings with it recognition of vulnerability as ‘a socially induced condition’ and ‘provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place’.<sup>128</sup> Crucially, this ‘promotes’ the concept of the ‘responsive state’ as an important part of the apparatus creating vulnerability and resolves into state responsibility to redeem and build (back) resilience.<sup>129</sup>

Scholars point out that the hazard to such an individualized universal approach is that vulnerability becomes ‘so broad as to obscure the needs of specific groups and individuals’.<sup>130</sup> In litigation, where the use of taxonomies is a practical necessity, the universal notion moreover does not provide a workable legal concept.<sup>131</sup> Peroni and Timmer point out however that the ECtHR’s use of ‘group vulnerability’ is not irreconcilable with the universal notion.<sup>132</sup> Referring to an ECtHR judge’s depiction that the Court sees ‘all applicants (as) vulnerable’, but some as ‘more vulnerable than others’,<sup>133</sup> these authors see a merger between the two approaches,<sup>134</sup> while further alignment is to be found in the fact that the Court’s group vulnerability notion itself

123 Baumgärtel (n 80) 14 and 15.

124 Fineman (n 117) (ii) 9. See also Baumgärtel (n 80) 14. Thus, according to Fineman, ‘(v)ulnerability analysis questions the idea of a liberal subject, suggesting that the vulnerable subject is a more accurate and complete universal figure to place at the heart of social policy’. Ibid Fineman (n 117) 10.

125 Baumgärtel (n 80) 14.

126 Fineman (n 117) 4. See also in this regard, Baumgärtel (n 80) 15.

127 Baumgärtel (n 80) 15, respectively citing Judith Butler, ‘Rethinking Vulnerability and Resistance’ in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 12, 19 and 25 and Fineman (n 117) (ii) 16. For Fineman, ‘(b)ecause we are positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level. Undeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command’, Fineman (n 117) (ii) 10.

128 Ibid.

129 Baumgärtel (n 80) 15.

130 Baumgärtel (n 80) 15, see his references at this place. See also Alyson Cole, ‘All of Us Are Vulnerable, But Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique’ (2016) 17 *Critical Horizons* 260. Kim (n 117) 625-626.

131 Baumgärtel (n 80) 15.

132 Peroni and Timmer (n 117) 1060 and 1073-1074.

133 Ibid 1060-1061.

134 Ibid 1061.



is 'relational', in that 'the Court links the individual applicant's vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of'.<sup>135</sup> The context-based and situational construct of universal vulnerability theory therewith does not necessarily exclude the use of group vulnerability.<sup>136</sup> Thus, vulnerability can be 'existential'<sup>137</sup> but also accommodate broader group or individual recognition through a context-sensitive approach,<sup>138</sup> one in which the Court can recognize 'that people are differently vulnerable' and that 'vulnerability is partially constructed depending on economic, political and social processes of inclusion and exclusion'.<sup>139</sup> For Baumgärtel, vulnerability theory providing 'several potentially important insights for developing a notion of migratory vulnerability within the context of the ECHR', important in that regard is that '(t)he fact that both State and societal institutions are critical to enhancing resilience in the face of vulnerability comes as an important reminder when we look at the situation of vulnerable migrants', in that '(e)ven where migration control is the priority, it mostly falls upon those same institutions to respond to the most detrimental difficulties that policies may create,' 'Fineman's theory' in that regard '(particularly) (coming out) in favour of a strong and responsive State that equips individuals with the assets and capacities to compensate for this vulnerability, and thus address vulnerability so conceived'.<sup>140</sup>

<sup>135</sup> Ibid 1064.

<sup>136</sup> Ibid, 1074, the authors holding that 'it is not problematic that the Court pays increased attention to group vulnerability, provided that the Court ensures that (i) it is specific about why it considers that group particularly vulnerable and (ii) it demonstrates why that makes the particular applicant more prone to certain types of harm or why the applicant should be considered and treated as a vulnerable member of that group in the instant case. The test should therefore entail two interrelated levels of inquiry: collective and individual. Otherwise, the Court may end up essentializing vulnerable groups and stereotyping the individuals from these groups, thereby reinforcing their vulnerability rather than lessening it. Besides, our suggestion has the advantage that the Court does not lay itself open to the charge that it delivers judgments on the situation of particular groups in general, rather than on the facts of the case'.

<sup>137</sup> Baumgärtel (n 80) 15.

<sup>138</sup> Peroni and Timmer (n 117) 1081-1082. See also Baumgärtel (n 80) 13, '(i)n short, migratory vulnerability (as presented by him) describes a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and forms. It therefore should be conceptualized neither as group membership nor as a purely individual characteristic, but rather determined on a case-by-case basis and in reference to identifiable social processes. Depending on its specific expression, it will give rise to distinct legal effects such as enlarged scopes of protection, shifts in the burden of proof, procedural and positive obligations and a narrower margin of appreciation, possibly even 'triggering' proceedings under Article 14 ECHR'.

<sup>139</sup> Peroni and Timmer (n 117) 1061. See also Baumgärtel (n 80) 18, where he states that the 'obvious argument' that 'the difficulties experienced by many migrants are the result of political and social processes', has however, besides not being 'universally shared', also 'not yet informed the approach taken by the ECtHR'. See for his discussion of literature, to 'clarify and underline the extent to which migration control acts as a 'producer' of vulnerability', including how 'migration frequently elicits responses from receiving States that try to control the process, for example by closing and securitising borders', resulting in 'human costs' also 'in the form of border deaths', *ibid* 18-20.

<sup>140</sup> Baumgärtel (n 80) 16. Practically (in outcome), the positions of Peroni and Timmer 'versus' that of Baumgärtel are not essentially divergent, in that they both call for a context-sensitive approach. Baumgärtel argues against group vulnerability in relation to 'migrants' - in that they are 'truly are not a homogenous group'. Also rejecting vulnerability as an 'purely individual characteristic' (see n 138), his proposal for the notion of 'migratory vulnerability' brings with it recognition that such vulnerabilities are 'linked to the fact that a person once crossed or tried to cross State borders', which is a 'characteristic, which all vulnerable migrants share to a varying extent temporarily' and is 'socially induced rather than innate but nonetheless real'. Amongst the advantages of this notion is that used as 'a transitory and situational adjective, it does not conclusively define a person, making it less likely to reproduce stigmatisation and prejudice', removes the necessity to identify groups and allows for better circumscription of the actual vulnerabilities themselves: '(i)n short, migratory vulnerability draws attention to social processes as much as to the individual person. It therefore is a principle whose application is complex as it cannot be reduced to a predefined set of factors. Furthermore, there may be intersections with other kinds of vulnerabilities (such as an applicant being a child), which also needs to be taken into account in the assessment'. See also Timmer et al. (n 117) 196.

## 2.5. *The ECtHR's Ability to Deploy (New) Vulnerability Markers*

As underscored in scholarship, theoretical and empirical grounding of vulnerability offers critical opportunities and could aid in the resolution of gaps and inconsistencies in the ECtHR's vulnerability catalogue.<sup>141</sup> Even with an open approach to vulnerability, its practical deployment can be difficult however and requires identifying markers. The ECtHR's assessments in this regard lead to differing appraisals. Baumgärtel, as well as Peroni and Timmer, commend the fact that the ECtHR in *M.S.S. v. Belgium and Greece*<sup>142</sup> worked from a 'more textured and complex formulations', basing itself on various reports issued by international organizations on the situation of asylum seekers in Greece to evaluate the applicant's vulnerability.<sup>143</sup> At the same time, the Court is not always as mindful as it could be. Examining its deference in the context of administrative detention of asylum-seekers, Ruiz Ramos points out that 'blurring the significance of the vulnerability of asylum-seekers under Article 3 may also be a form of granting more power to States as it weakens their responsibility to adapt detention conditions to their needs'.<sup>144</sup> It is therefore fundamental that the ECtHR is aided in vulnerability identification and appraisal, the availability of empirical information and a willingness on the part of the Court to use it being important factors in that regard. It is further important then that the Court provides (more) clarity as to when and how it gives (particular) vulnerability effect in its assessments of compliance with rights.<sup>145</sup>

## 2.6. *The (Particular) Vulnerability of the Transiting Smuggling Victim*

The position adopted in this contribution is that whether through designation under group vulnerability, or through its own 'merged' model, the ECtHR can and should circumscribe with sensitivity to context actual vulnerability profiles of (some) smuggled migrants. Under hard positive law, trafficking victims are as a group (rightly) clearly recognized as so (particularly, inherently) vulnerable that a certain type and degree of protection is required, while smuggled migrants are not (to the same extent). The (particular) vulnerability of trafficked persons also vividly plays

141 Ibid 13. See also Peroni and Timmer (n 117) 1070. See for these latter authors' discussion of the use of the notion of group vulnerability in ECtHR case law, also with respect to legal effects, *ibid* 1063-1082.

142 *M.S.S. v. Belgium and Greece* (n 115).

143 Peroni and Timmer (n 117) 1070. See Baumgärtel (n 80) 21 and 23.

144 Ruiz Ramos (n 83) 43.

145 See in this regard also Ilias and Ahmed (n 115) para 5 and 185 in which five Italian scholars submitted third-party comments, in a joint intervention discussing 'the concept of vulnerability with emphasis on international and human rights law', '(demonstrating) that variants of this concept had been used in different contexts without a definition of vulnerability' and (urging) the Court to develop relevant principles in this regard'. See also Baumgärtel (n 80) 13, 23, 27-28 on the importance of the use of empirical information by the Court, as well as academic research. See also Peroni and Timmer (n 117) 1084-1085, arguing, in relation to the 'open-endedness of the vulnerable-group concept', that the Court can also 'navigate' the issue of being overbroad, *inter alia* 'by taking the human rights corpus as its reference point for determining group vulnerability: when the activities of international organizations and human rights reports confirm that there is a structural failure to protect the human rights of a particular group, this should be the Court's cue', this also allowing 'the vulnerable-group concept to remain flexible', in that 'if the Court continues to base its judgments on recent international human rights reports and other authoritative materials, it can carefully follow developments on the ground'.

out as an important factor in criminal justice related positive obligations case law relating to this type of victimization. The question is then if a better calibration of the actual profile of the smuggled migrant can be achieved by looking more deeply at contextual, situational factors impacting his vulnerability, as well as the ‘constructing’ role played therein by the policies and actions of state authorities.

Again, given that ‘smuggled migrants’ constitute a too broad group (in that not all will qualify as (sufficiently) vulnerable), differentiation is necessary. To narrow scope here, smuggled migrants who already fall under another group already designated as particularly vulnerable (such as trafficking victims, asylum seekers and minors), for whom heightened protective duties arise on that basis, particularly if such features are present in aggregate form, are excluded from the following discussion. As for the remaining group of smuggled migrants, this section will explore a vulnerability profile arising out of the intersectional aggregation of the two features at the focus of this analysis, arguing that both qualify for at least presumptive identification under (particular) vulnerability and that this is particularly the case when they are both at issue. These are that the migrant is an *irregular migrant in transit* within Council of Europe territories and, inspired by the distinction incorporated in Belgian legislation, is also a migrant who has been smuggled (or stands to be smuggled further) *under aggravated circumstances*.

### 2.6.1. The Profile of the *Transiting Migrant*

Deconstructing both profiles, the ECtHR’s stance with respect to *irregularity* seems to be that this feature does not give rise to particular vulnerability in and of itself. In *Khlaifia and Others. v. Italy*,<sup>146</sup> reversing the violation established by the chamber of art. 3 ECHR due to the detention conditions of the applicants, the Grand Chamber, while holding that the chamber had been right to point out their weakened state following a sea-crossing,<sup>147</sup> found however that they ‘were not asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin’.<sup>148</sup>

Such a categorical rejection points to a too broad strokes approach where transiting migrants, living in situations such as those depicted above with respect to Belgium are concerned. Diverse vulnerability markers flagged in scholarship and case law already provide useful anchoring points in this regard, such as power differentials and dependency on State support, institutional and social structures which ‘originate, sustain and reinforce vulnerabilities’ social disadvantages, and absence of resources.<sup>149</sup>

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<sup>146</sup> *Khlaifia and Others. v. Italy* [GC] 16483/12 (ECtHR, 15 December 2016) para 194.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid* para 194; see also Ruiz Ramos (n 83) 33.

<sup>149</sup> See Kim (n 117) 626 and 621 and Peroni and Timmer (n 117) 1059 and 1065. See also for different typologies and meanings of vulnerability, in literature and as used by the ECtHR, Kim (n 117) 625-626. See also generally the resources at (n 117).

As mentioned above, Baumgärtel moreover specifically argues for the recognition of the notion of ‘migratory vulnerability’, in a manner accommodating differentiation.<sup>150</sup> Because migratory vulnerabilities affect migrants differently depending on distinct factors (such as age, socioeconomic status, gender, and race), Timmer et al. state that with a ‘context-sensitive approach’, a better alignment with lived realities is possible ‘to analyse what specific disadvantages are being created, whether these are indeed conducive to immigration control (or merely based on an unproven assumption based on deterrence), and what the State and courts can and should do to offset them’.<sup>151</sup> Both systematic reviews of reports from NGOs and international organizations attesting to such vulnerabilities and growing (empirically grounded) sociolegal and migration scholarship could be utilized by the Court to investigate the relationship between vulnerability and migration.<sup>152</sup>

Departing from the perspective that migratory vulnerability is underrecognized, overreach in group vulnerability designation can be avoided through further (group) distinctions.<sup>153</sup> (Sub-)categories could be organised in the following manner: beyond asylum seekers and migrant trafficking victims, who are already specially protected, distinctions can be made between (1) migrants already present in a Council of Europe Jurisdiction, with at least a provisionally regular status; (2) irregular migrants who are factually (relatively) stably present in one European jurisdiction; (3) irregular migrants actively attempting (irregular) entry via external borders under (potentially) hazardous circumstances, further to be divided into (a) those who are self-smuggled and (b) those who have been smuggled by third parties, (i) with or (ii) without aggravating circumstances and (4) *transiting* irregular migrants who have entered and continue to irregularly move (under hazards) about European soil, again with a further distinction to be made between those who are (a) self-smuggled and (b) those who have been or stand to be smuggled, (i) with or (ii) without aggravating circumstances.

Such categorisations should not transpose into a set scale of exponentially increasing vulnerability, as the problematic and needs of each group will be divergent in different contexts. While a concrete rights bearer may fall under a taxonomy which may generally be considered as giving rise to lesser vulnerability as compared to another group, the distinct facts and circumstances of his particular situation and his

150 Baumgärtel (n 80). See also Stoyanova (n 18) (i) 205, where she holds that ‘migrants are more vulnerable’, also to ‘some specific crimes’ (such as ‘human trafficking and severe forms of labour exploitation’, while ‘(t)his vulnerability is linked to their migration status’.

151 Timmer et al. (n 117) 196.

152 See for instance Theodore Baird and Ilse Van Liempt, ‘Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling’ (2016) 42(3) JEMS 400; Martina Tazzioli, ‘Governing Migrant Mobility through Mobility: Containment and Dispersal at the Internal Frontiers of Europe’ (2020) 38(1) Environment and Planning C: Politics and Space 3.

153 See in that regard Baumgärtel (n 117) 15, ‘(v)ulnerability as a situational experience bespeaks a world where the act of moving across national borders can, depending on the context, be an exercise in ‘migration’ or in ‘mobility’, result in an ‘alien’ or in an ‘expat’ life, and give rise to deportation or to protection’.

personal features, may make his vulnerability more acute. That consideration also applies in the comparison between smuggled migrants and groups of persons whose particular vulnerability is by default recognized. Thus, while generally considered particularly vulnerable, a concrete trafficking victim may be less vulnerable than a specific smuggled migrant, amongst other reasons, in that there are no life-threatening circumstances in the case of the former, while there may be for the latter.<sup>154</sup>

Working with sub-distinctions does have utility for the purpose of isolated consideration of distinct factors however, the focus here indeed being on the potential criminal justice needs of group (4)(b)(ii), as they may arise through the features of being in irregular transit and smuggled under aggravating circumstances.

While not corresponding to the scenario of group (4)(b)(ii) (in that it does not involve abusive treatment by third parties but state authorities), the ECtHR's recent judgment in *M.H. and Others. v. Croatia*<sup>155</sup> lends credence to the idea that transit migration requires own conceptualisation under the ECHR and for that reason merits some extensive discussion. As an ECtHR response to border pushbacks (in this case at the Croatian-Serbian border), the judgment is already hailed as important in light of different aspects thereof.<sup>156</sup> The public interest involved in the case emphasized in the Court's considerations,<sup>157</sup> its pertinence here arises from indications in the judgment that the Court is receptive to the notion of transitory vulnerability, notably also as that may arise from enhanced approaches to control of irregular migration. This aspect is strongly underscored in Judge Turković's attached concurring opinion.<sup>158</sup> Therein, she proclaims irregular migration to be 'one of the biggest challenges of today's society' and underlines that 'Croatia, together with several other countries, is at the front line' thereof, given its 'geographical position in the European Union'.<sup>159</sup> Referring to research indicating that 'Croatia is a transit State', this 'meaning that most migrants do not wish to stay there, but clandestinely cross through that country in order to reach western Europe', Judge Turković points out that '(t)his leads to a situation where numerous attempts are made to irregularly enter and cross Croatia, which understandably creates a range of difficulties for its authorities'.<sup>160</sup> Nevertheless, 'duly taking into account Croatia's difficult position', she holds that 'it is possible to meet these challenges while at the same time complying with the Convention requirements'.<sup>161</sup>

154 See McAdam (n 16) 23.

155 *M.H. and Others* (n 104).

156 See Hanaa Hakiki and Delphine Rodrik, 'M.H. v. Croatia: Shedding Light on the Pushback Blind Spot' (*VerfBlog*, 29 November 2021) <<https://verfassungsblog.de/m-h-v-croatia-shedding-light-on-the-pushback-blind-spot>> accessed 10 July 2022; Joyce de Coninck, 'MH and Others v. Croatia: Resolving the Jurisdictional and Evidentiary Black Hole for Expulsion cases?' (*Strasbourg Observer Blog*, 14 January 2022) <<https://strasbourgobservers.com/2022/01/14/mh-and-others-v-croatia-resolving-the-jurisdictional-and-evidentiary-black-hole-for-expulsion-cases/>> accessed 25 August 2022.

157 Ibid para 123.

158 See also Hakiki and Rodrik (n 156).

159 *M.H. and Others* (n 104), concurring Opinion of Judge Turković, para 1.

160 Ibid.

161 Ibid.

The complaints in *M.H. and Others. v. Croatia* regard two different ‘episodes’ of irregular entry. The first of those relates to a pushback of the applicants - an Afghan family of three adults and eleven children - to Serbia, in November 2017, following the irregular border crossing by some members of the family. In relation to this episode, the applicants first complained of violation of art. 2 ECHR, alleging that the actions of Croatian police officers, in sending the family members back to Serbia, ordering them to walk the final distance following train tracks, had caused the death of a six-year-old daughter of the family, who was fatally hit by a train, while this had not led to an effective criminal investigation. Secondly, they complained that this pushback was unlawful and violated the prohibition of collective expulsion under art. 4 Protocol 4 ECHR. The second set of complaints relate to a subsequent irregular crossing by the applicants in 2018, this time leading to their placement in an immigration detention centre. In relation to this episode, they complained of violation of art. 3 ECHR because of their detention conditions and of art. 5 ECHR due to the unlawfulness of their detention. Finally, the applicants complained of hindrance of their right to individual application at the ECtHR, *inter alia* because of restriction of their contacts with their chosen lawyer, in violation of art. 34 ECHR.<sup>162</sup>

The judgment is of interest here for two distinct reasons. Firstly, the blurriness surrounding the profile of the applicants, at least in the representation thereof by the government and the Court’s management thereof, is of import. The government denying that they had entered Croatia before the accident or requested asylum during the first episode in 2017, following their request to that effect in the course of the second episode in 2018, the applicants themselves had stated that they considered Serbia to be a safe country, but, in the absence of job opportunities, did not wish to stay there, wanting ‘to live in Europe so that the children could go to school and have a good life’.<sup>163</sup> The government claimed that they had also divulged that their ‘final destination’ was the United Kingdom.<sup>164</sup> While they had moreover stated to Croatian authorities that they had not sought asylum in other countries, it later became apparent that they had, both in Bulgaria and Serbia.<sup>165</sup> Following the denial of their asylum request (on the basis that Serbia was a safe third country),<sup>166</sup> even while the ECtHR had ordered interim measures blocking their removal, the applicants, ‘(h)aving tried to leave Croatia for Slovenia clandestinely on several occasions, (...) ultimately managed to do so’, their whereabouts at the time of adjudication by the ECtHR being unknown.<sup>167</sup>

162 See the facts and circumstances of the case, paras. 5-76 and the complaints with respect to the various provisions invoked by the applicants, paras. 124 (art. 2 ECHR); 262 (art. 4 Protocol 4 ECHR); 167 (art. 3 ECHR); 214 (art. 5 ECHR) and 305 (art. 34 ECHR).

163 *Ibid* paras 266 and 49.

164 *Ibid* para 226.

165 *Ibid* para. 36.

166 *Ibid* para 50.

167 *Ibid* paras 67-76 and 47.

A central aspect of the Croatian government's arguments was that the applicants were in actual fact not to be considered asylum seekers in Croatia. Rather, they were to be regarded as being 'just like (...) 77% of the illegal migrants who entered Croatia, who claimed to intend to seek asylum there, but left the Country before actually lodging an application or without awaiting the outcome of proceedings',<sup>168</sup> statistics showing that (mainly economic) migrants 'used Croatia as a country of transit on their way to western and northern Europe'.<sup>169</sup> Interestingly therewith confirming the deliberately deterrent nature of national policies and actions, the government also submitted that 'as a European Union Member State with the prospect of joining the Schengen Area in the near future, Croatia had the right to control the entry of aliens to its territory and had the obligation to protect the State borders from illegal crossings,' explaining that '(s)ince mid-2017, the human and technical capacities of the border police had been increased and deterrents had been implemented more intensively than before because of increased migratory movements along the so-called Western Balkans migratory route', in that '(d)eterrence, which was regulated by the Schengen Borders Code, involved measures and action to prevent illegal entries at the external border'.<sup>170</sup> Submitting statistics with respect to successful applications for international protection in Croatia<sup>171</sup> and disputing that NGO and international reports provided a sufficient basis to 'trigger criminal investigations', the government moreover put forward that deterred migrants made false accusations of violence against Croatian police officers, hoping that this would 'help them to re-enter Croatia and continue their journey towards their countries of final destination'.<sup>172</sup>

As demonstrated in its assessment of the art. 5 ECHR complaint, the Court was not insensitive to such arguments. In that regard, the Court namely held that it, in light of the actions and statements of the applicants, had 'no cause to call into question' the authorities' conclusion that they presented a flight risk, so that detention could have been justified on that basis.<sup>173</sup> A violation was established of art. 5 ECHR, but on the basis of a lack of vigilance and expedition in decision-making and an absence of procedural safeguards.<sup>174</sup> Taking as a point of departure then that the Court was at least to an extent prepared to accept that the applicants were not truly seeking asylum in Croatia, but rather were transiting irregular migrants, it could have been envisaged that it, notably in its assessment of the applicants' complaint under art. 3 ECHR, could have found that that they were not to be regarded as particularly vulnerable, in line with the Grand Chamber's consideration in this respect in its *Khlaifia and Others v. Italy*.

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168 Ibid para. 290.

169 Ibid para 47.

170 Ibid para. 291.

171 Ibid para 289.

172 Ibid para 292.

173 Ibid paras 252-253.

174 Ibid paras 245-259.

The Croatian government's arguments in this case touch upon conceptual difficulties which also exist in distinguishing between (the vulnerability of) 'true' asylum seekers and irregular 'economic' migrants. Creating even more complexity in this regard, a distinct category of persons can be identified as those who may have arguable claims as asylum seekers, but wish to stake that claim in a particular jurisdiction, transiting through others to reach that destination, sometimes claiming asylum in countries on the way, but not following through, with the intent of moving onwards. For such transiting persons, the question arises if a change occurs in their vulnerability profile for that reason. Do those with arguable claims to being asylum seekers lose a vulnerability status on that basis because they are not truly seeking asylum in jurisdictions through which they are transiting? If so, does that occur because the plausibility of their asylum claims becomes impacted by their preference for a particular jurisdiction?<sup>175</sup>

The manner in which the Court depicts the vulnerability of asylum seekers is important in this respect. Returning to its assessment of the applicants in *Khlaifia and Others v. Italy*, mentioned above, the Court there held that the applicant 'did not have *the specific vulnerability inherent in that status*, [emphasis added] and did not claim to have endured traumatic experiences in their country of origin'.<sup>176</sup> That would indicate that being an asylum seeker automatically equates to a particular vulnerability, while experiences in the jurisdiction of origin can separately give rise to vulnerability qualification. Having discounted in *Khlaifia and Others v. Italy* the hazardous sea journey as an experience creating vulnerability, the Court in other cases seems however also to accept that experiences *after* leaving the country of origin (and the circumstances giving rise to flight), can contribute to such a state.

In *M.S.S. v. Greece and Belgium*, rejecting the Greek government's 'suggestion' in that respect, the Court found that 'the applicant did not, on the face of it, have the profile of an "illegal immigrant"' and held that 'he was a potential asylum-seeker'.<sup>177</sup> In line with that qualification, in its appraisal of the applicant's complaint of violation of art. 3 ECHR because of the conditions of his detention, the Court established a violation because of the objective conditions, adding that 'the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker'.<sup>178</sup> The

175 See *Ilias* (n 115) paras 108-110. See in this respect the Hungarian government's arguments with respect to 'the importance of the distinction between the right to seek asylum, recognised in international law, and a purported right to be admitted to a preferred country for the purpose of seeking asylum', and the need 'to adopt a careful and realistic interpretation of any alleged risk of refoulement and of the threshold of severity triggering the application of Article 3' in order to 'avoid feeding the false perception that there was a right to asylum in the country offering the best protection'.

176 *M.H. and Others* (n 104) para 194; see also Ruiz Ramos (n 83) 33.

177 *M.S.S.* (n 115) para 225. See also Baumgärtel (n 80) 20-23 discussing this case, demonstrating his argument against the use of *group* vulnerability, *inter alia* in that regard emphasizing that '(...)designating asylum seekers as a vulnerable group did not add to the reasoning in this judgment; the analysis of applicant's situation already provided sufficient reasons to consider him vulnerable', *ibid* 22.

178 *Ibid* para 233-234.



Court also established a separate violation of art. 3 ECHR in this case with respect to the applicant's complaint of inhuman and degrading treatment in Greece because of 'the state of extreme poverty in which he had lived since he arrived in Greece',<sup>179</sup> in that with no accommodation or 'means of subsistence', he 'like many other Afghan asylum-seekers, had lived in a park in the middle of Athens for many months', had been forced to look for food, occasionally receiving aid from locals and the Church, without 'access to any sanitary facilities' and '(a)t night (living) in permanent fear of being attacked and robbed', this according to the applicant resulting in a 'situation of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3', while 'his state of need, anxiety and uncertainty was such that he had no option but to leave Greece and seek refuge elsewhere'.<sup>180</sup> The Greek government in this context argued that the applicant's situation was a consequence of 'his own choices and omissions', in that he had 'chosen to invest his resources in fleeing the country rather than in accommodation',<sup>181</sup> while to find for the applicant 'would open the doors to countless similar applications from homeless persons and place an undue positive obligation on the States in terms of welfare policy'.<sup>182</sup> In this context also, the Court attached 'considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection', noting in this regard 'the existence of a broad consensus at the international and European level concerning this need for special protection',<sup>183</sup> establishing a violation in that respect because the Greek authorities did not have 'due regard to the applicant's vulnerability as an asylum-seeker'.<sup>184</sup>

Importantly, in the context of the applicant's complaint with respect to detention conditions, the Court however depicted the applicant's vulnerability more broadly, holding that it had to 'take into account that the applicant, being an asylum-seeker, was particularly vulnerable *because of everything he had been through during his migration* and the traumatic experiences he was likely to have endured previously'.<sup>185</sup>

As for the latter experiences, that would seem to refer to the circumstances causing him to flee Afghanistan, which he claimed to have done 'after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul' (in which respect he provided documentation

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179 Ibid para 235.

180 Ibid para 237-239.

181 Ibid para 240.

182 Ibid para 243.

183 Ibid para 251.

184 Ibid paras 263-264.

185 Ibid, para 232. See also with respect to the Court's approach to the applicant's vulnerability in this case, Baumgärtel (n 80) 33.

showing that he had been employed as such).<sup>186</sup> The reference to his experiences *during his migration* demonstrates however a sensitivity to difficulties in the course of his transiting journey. That could include anything starting from his departure from Kabul in 2008, continuing onwards through Iran and Turkey, followed by his arrival in Greece, where he was fingerprinted, but not having claimed asylum there, moved on via France to Belgium, where he did claim asylum (stating there that he had selected Belgium on the basis of his experiences meeting some Belgian NATO soldiers whom he had found to be friendly). The applicant was sent back to Greece under the Dublin regulation however, where he, pending his asylum request (still unresolved at the time of the judgment), '(h)aving no means of subsistence (...) went to live in a park in central Athens where other Afghan asylum-seekers had assembled'.<sup>187</sup> The applicant not wishing to remain in Greece because of his circumstances there, made multiple further attempts to leave that jurisdiction, to Bulgaria and Italy, in that regard once also being arrested and convicted for trying to leave the country with false papers.<sup>188</sup> His experiences during his transit also include a smuggling trajectory, whereby he had used the aid of a smuggler to leave Afghanistan, paying 12,000 United States dollars, while the smuggler 'had taken his identity papers'.<sup>189</sup>

In *M.H. e.a. v. Croatia*, in adjudicating the applicants' complaint of violation of art. 3 ECHR because of their detention conditions, expressly examining vulnerability, the Court, (while establishing a violation of art. 3 ECHR as far as the minor applicants were concerned on the basis of the inherent particular vulnerability attaching to that feature),<sup>190</sup> declined to do so in relation to the adult applicants. However, this did not entail a categorical rejection of their vulnerability. Emphasizing that 'the adult applicants were not persons suspected or convicted of a criminal offence' and depicting them as 'migrants detained pending the verification of their identity and application for international protection',<sup>191</sup> some of the Court's considerations rather point towards recognition of heightened vulnerability on the part of the adults also. Here again, the Court held that 'asylum-seekers may be considered vulnerable because of everything they might have been through *during their migration* [emphasis added] and the traumatic experiences they are likely to have endured previously,' observing 'in this connection', that the applicants had 'left Afghanistan in 2016'.<sup>192</sup>

Taking as a point of departure that the Court did to an extent follow the Croatian government's arguments with respect to blurriness surrounding the applicants'

<sup>186</sup> Ibid para 31.

<sup>187</sup> Ibid para 37.

<sup>188</sup> Ibid para 45. See the full facts and circumstances of the case as summarised here, paras 9-53.

<sup>189</sup> Ibid, para 15.

<sup>190</sup> For the examination of the art. 3 ECHR complaints with respect to the minor applicants see, *M.H. and Others* (n 102) paras 191-204.

<sup>191</sup> Ibid para 205.

<sup>192</sup> Ibid para 207.

asylum-seeking profile, this observation may be read as follows. Notwithstanding their status as asylum seekers and the veracity of their claims in that regard (the judgment containing no information as to previous traumatic experiences they may have had in their country of origin), the applicants may, including in the course of a difficult and fragmented migration, have undergone experiences rendering them (particularly) vulnerable.<sup>193</sup> Indeed, at an individual level, the Court was notably ‘mindful’ of the fact that the applicants were mourning the death of their daughter MAD. H.,<sup>194</sup> but the consideration could also be understood as extending to other aspects of the undoubtedly difficult migratory path taken by the applicants, including their (according to them, multiple)<sup>195</sup> attempts to clandestinely enter Croatia, in light of the circumstances at the border. The Court also recognized that the applicants ‘must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied’,<sup>196</sup> therewith underscoring the complexity and indeterminate nature of their legal status as a vulnerability indicator in that regard.

Building a vulnerability profile in this manner, the Court found no violation of art. 3 ECHR,<sup>197</sup> however not because the applicants were not found to be sufficiently vulnerable, but because of the way issues were offset. The negative effects of legal uncertainty must according to the Court have been allayed through the support of their legal aid lawyer and visits paid to them by the Croatian Ombudswoman and the Croatian Children’s Ombudswoman.<sup>198</sup> With respect to the death of MAD. H., the Court found that they had been provided with appropriate psychological support.<sup>199</sup> Importantly however, in the absence of such ameliorating circumstances, the aggregated situational vulnerability of the applicants, importantly determined by the full gamut of their experiences preceding their detention as well the situational unclarity of their status, could have swayed the balance, even though their detention conditions were found not to be materially unsatisfactory.<sup>200</sup>

In establishing a violation of art. 34 ECHR, the Court likewise again explicitly deployed vulnerability as an assessment tool. In the context of the complaint under this provision that the applicants were hindered in their access to a lawyer they had previously chosen, the government had argued that they had been provided with a list of legal aid lawyers, including the name of that lawyer, but had not chosen her,

<sup>193</sup> See also in that regard *M.S.S. (139)* para 232 and *Z.A. and Others v. Russia* [GC] 61411/15; 61420/15 and 61427/15 (ECtHR, 21 November 2019) para 193.

<sup>194</sup> *M.H. and Others* (n 102) para 208.

<sup>195</sup> *Ibid* para 263.

<sup>196</sup> *Ibid* para 212.

<sup>197</sup> *Ibid* para 213.

<sup>198</sup> *Ibid* paras 211-212.

<sup>199</sup> *Ibid* paras 208-209.

<sup>200</sup> *Ibid* para 193.

showing ‘that they did not have any real connection to her as they did not even recognize her name’.<sup>201</sup> The Court noted ‘that the applicants are Afghan nationals, with no knowledge of the Croatian language’, who had not met the lawyer in question ‘in person’ but ‘had appointed her on a recommendation from the NGOs’.<sup>202</sup> Moreover, the Court found the applicants in this respect to be ‘in a vulnerable situation, having lost their daughter and wanting that matter to be investigated,’ not blaming them ‘(i) n those circumstances’, for not recognizing the name of the lawyer.<sup>203</sup> Here again, vulnerability is not predicated on the applicants being asylum seekers, but is rather based on situational factors, in this context, the added circumstance of stress in relation to the death of MAD. H. and the investigation thereof.

In any event, even where persons belong to groups securely recognized as (particularly) vulnerable, the Court has regard for their particular circumstances in vulnerability assessments. In *Ilias and Ahmed v. Hungary*, the government in that case also arguing against the veracity of the applicants’ status as asylum seekers,<sup>204</sup> in assessing ‘the applicants’ vulnerability argument’ (again in the context of detention conditions under art. 3 ECHR), the Court, held that it had to ‘examine the available evidence to establish whether, as alleged by them, they could be considered particularly vulnerable and, if so, whether the conditions in which they stayed at the Röske transit zone in September and October 2015 were incompatible with any such vulnerability to the extent that these conditions constituted inhuman and degrading treatment with specific regard to the applicants’.<sup>205</sup> Here also using the formula that ‘it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously’, in this case, the Court however found ‘no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röske transit zone in September 2015’.<sup>206</sup> Moreover, the Court did not attach any special vulnerability effect in light of ‘their allegations about hardship and ill-treatment endured in Pakistan, Afghanistan, Iran, Dubai and Turkey’, in that these regarded ‘a period of time which ended in 2010 or 2011 for the first applicant and in 2013 for the second applicant’.<sup>207</sup> The Court also found that a psychiatric opinion rendered with respect to them was not decisive, given its ‘context and content’ and the relatively short period of time during which the applicants remained at the transit zone.<sup>208</sup> Likewise, while they also ‘must have

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201 Ibid para 316.

202 Ibid para 331.

203 Ibid.

204 *Ilias and Ahmed* (n 115) para 111.

205 Ibid para 191.

206 Ibid para 192.

207 Ibid.

208 Ibid.

been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied', the shortness of the period and the fact that they 'were aware of the procedural developments in the asylum procedure, which unfolded without delays', meant that 'the negative effect of any such uncertainty on them must have been limited',<sup>209</sup> the Court establishing no violation of art. 3 ECHR in this case.<sup>210</sup>

Secondly, *M.H. and Others v. Croatia* is important to arguments here, in that the Court, greatly aiding the applicants by doing so, extensively deployed in diverse considerations empirical information (as it did in *M.S.S. v. Greece and Belgium*)<sup>211</sup> describing generally 'the situation of *migrants* arriving in Croatia'.<sup>212</sup> Provided in reports and letters of EU, CoE and UN public (monitoring) bodies, the Croatian (children's) Ombudsman, Amnesty International and third-party interveners, this information was oriented not only on the personal features or status of persons attempting to enter Croatia, but regardless of who they were, the experiences they were subjected to in the context of pushbacks.<sup>213</sup> While the Court did not consistently and explicitly operationalize that information through the vehicle of vulnerability, the content of the material clearly contains what may be regarded as vulnerability indicators, along the lines of vulnerability theory discussed above.

The material revealed that (excessively) violent, unlawful pushbacks had been systematically occurring at (and deep within) Croatian borders, national border control policies being 'characterised by a deterrent approach to the admission of migrants and refugees in the country' and tactics being aimed at 'physically exhausting' migrants and preventing further entry attempts. These actions exacerbated the situation of migrants, as they 'in reality did not deter people on the move from advancing towards the European Union territory, but instead led to a flourishing network of smugglers and organised criminal activities', leading to a grave situation, 'which required immediate attention and action by all countries in the region'. As for the State's response, this was characterized by inaction, law enforcement officers enjoying impunity, with the government being dismissive of 'reports published by NGOs or resulting from investigative journalism'.<sup>214</sup> Third-party interveners added that migrants were forced to 'swim through rivers and pass-through mountains' and were 'exposed to other dangerous situations,' including, as also happened in the *M.H. and*

209 Ibid para 193.

210 Ibid para 194. See also in this respect *RR. and Others v. Hungary* 36037/17 (ECtHR, 2 March 2021), where the Hungarian authorities were 'in principle allowed to decide to reduce or even withdraw material reception conditions from the first applicant as a *repeat asylum seeker*', [emphasis added], (para 54), yet the Court still established a violation of art. 3 ECHR, because the authorities 'without duly assessing his circumstances and giving a reasoned decision in that regard', 'failed to have due regard to the state of dependency' during his stay in a transit zone (para 57).

211 See note 143.

212 See *M.H. and Others* (n 102) under 'Relevant Legal Framework', heading V.

213 *M.H. and Others* (n 102) paras 103-116.

214 Ibid paras 103-115.

*Others. v. Croatia* case, by being ordered to return to Serbia following roads or train tracks to do so, ‘as a result of which many of them had sustained accidents and died’. Fieldwork confirmed that ‘Croatian officials were systematically putting migrants’ lives in danger’ and that ‘despite the availability of ‘numerous reports and evidence’ the Croatian authorities displayed ‘a systemic lack of an adequate response’.<sup>215</sup>

As for the concrete applications of this information, in relation to the first episode, in the context of the art. 2 ECHR complaint, the Court understood the government’s submission that domestic remedies had not been exhausted as an argument that the applicants could have (also) pursued civil remedies, therewith relying on the rule that where deaths are unintentional, resolution through criminal prosecution can be necessary but only under ‘exceptional circumstances’.<sup>216</sup> The government denying that the applicants had crossed into Croatia before the accident (which occurred on Serbian territory), without requiring the applicants to show that such circumstances were at issue in their case, the Court determined that there were, basing that finding on the material depicting the general situation at the border, pointing to systematic unlawfulness and the ‘obvious risks’ at issue.<sup>217</sup> Secondly, precluding its assessment by generally referring to the same information, in the context of the complaint of violation of the procedural positive obligation to conduct an effective criminal investigation, the Court found significant flaws in the investigation which had taken place, in that regard also connecting specifically to one concrete third party intervener’s submission that ‘(w)hen it came to deaths and severe injuries, the investigating authorities should not predominantly rely on statements of officials implicated in the incidents, and testimonies of migrants should not be easily discredited on account of the linguistic challenges and their limited opportunities to gather and provide evidence’.<sup>218</sup> Applying this insight, the Court underscored that inconsistencies in the applicant’s statements (potentially arising from language issues), were emphasized by national authorities, while discrepancies in those of police officers were not, investigative authorities also having neglected to verify that important material evidence (thermographic camera images, telephone and GPS signals) was, as claimed by police, not available.<sup>219</sup>

In the context of the complaint of collective expulsion in violation of art. 4 Protocol 4 ECHR, the Court greatly alleviated the applicants’ evidentiary burden (to demonstrate *prima facie* evidence of the veracity of their version of events) by acknowledging the ‘large number of reports by civil society organisations, national human rights structures and international organisations’, confirming general summary

215 Ibid paras 144-147.

216 Ibid paras 132-152.

217 Ibid paras 132-141.

218 Ibid paras 144-147.

219 Ibid paras 152-148.

returns as described by the applicants.<sup>220</sup> In the examination of the merits of this complaint, the issues became (i) whether or not ‘the lack of an individual expulsion decision could be attributed to the applicant’s own conduct’, and, in that light, (ii) ‘whether the respondent State provided genuine and effective access to means of legal entry’.<sup>221</sup> Finding that the government ‘did not supply, despite being expressly invited to do so, any specific information regarding the asylum procedures at the border with Serbia in 2017 or 2018’, therewith not rebutting the narrative emerging from reports, the Court also established a violation of this provision.<sup>222</sup>

In relation to the complaint of violation of art. 5 par. 1 ECHR, not finding it necessary to rule on the lawfulness of the detention, the Court again established a violation, questioning the good faith of national authorities.<sup>223</sup> In this context, the Court again connected to specific information concerning errors frequently occurring in the recording of Afghan names in dismissing the government’s claim that detention was necessary for identification purposes and that the exact names of the applicants were not contained Eurodac (the Court finding that they were, under alternate spellings).<sup>224</sup> Moreover, in finding a lack of procedural vigilance, the Court again referred to empirical information indicating a pattern with respect to an absence of procedural safeguards.<sup>225</sup>

Given that the information used in this manner, in essence, points to vulnerability markers by operationalizing them, even without explicitly transposing them into a vulnerability assessment, the Court can be said to have utilized them as such. That is in line with the vulnerability conceptualization discussed above, again, because the sourced information is not oriented on innate characteristics of the migrants attempting border crossing. Rather than advancing their membership of a particularly vulnerable group on such grounds, the sources reveal deliberately constructed, situational factors, impacting any migrant experiencing them. As such, the information, used in an open plan manner by the Court in diverse concrete findings, may also be regarded as potential precursors of set vulnerability indicators, which may evolve into a more general recognition of transiting vulnerability, given the evidence with respect to border circumstances more generally. The use of such markers, concretely or in a more generic form, in any event contributes to a richer perception of the real situation of rights bearers and therewith better appraisal of their needs.

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220 Ibid paras 268-275.

221 Ibid paras 293-294.

222 Ibid paras 295-304.

223 Ibid paras 250-251.

224 Ibid para 116.

225 Ibid paras 248-259.

## 2.6.2. The Profile of the *Aggravated Smuggling Victim*

### (i) *Object versus Victim of Migrant Smuggling?*

Reviewing further what (add-on) effect being smuggled under aggravating circumstances could have in a vulnerability profile, it is important to first pinpoint an important aspect of the problematic relating to the discrepancy between the real-life situations of smuggled migrants and their legal circumscription. As underscored in the introduction, an important feature of the smuggled migrant is that, in international and national frameworks, his legal position is weaker than that of the trafficking victim, creating a sharp divide. At the same time, there is an ambiguity to his conceptualisation, both in law and policy. That ambivalence is attended by an inescapable - and growing - awareness of real-life harm and endangerment associated with smuggling.

The format of smuggling offences may be identified as a critical issue in this regard. Belgian law again provides an apt illustration. Human trafficking is regulated as an offence in the Belgian Criminal Code under Title VIII, regulating offences against persons. Migrant smuggling is however regulated, albeit in a section designated for ‘criminal offences,’ outside the Criminal Code, in the hybrid Foreigner’s Act. Regulation in this manner is likely to reinforce perception of the smuggled migrant as an object, as opposed to a victim of crime. That follows from a common trait of special, hybrid laws, namely that criminal offences contained therein usually aim to protect collective, as opposed to individual, legal goods and interests. Thus, teleologically, communal offences (subsumed in criminal codes), will protect the life, (physical) integrity, dignity, property and so forth of individuals, therewith concretely circumscribing their victimization. Contrarily, the objective of offences in special laws will mainly be to protect collective interests, such as the public purse, public health, and economic and monetary stability. Seen from this perspective, the facilitation of illegal entry is criminalized because it is at odds with immigration and asylum rules and policies. Even if that is not intended to be the sole aim of smuggling offences, if the main orientation is on protection of that policy, this will direct away from perceiving smuggled migrants as victims of individualized engenderment or harm.

Belgian legislation clearly is not solely focused on policy interests. That is firstly apparent from the fact that the smuggling/trafficking dichotomy is to an extent disrupted under Belgian law, through recognition of the special situation of migrants smuggled under aggravated circumstances. Chapter IV of the Foreigner’s Act, containing provisions with respect to the special status available for such migrants moreover contains multiple references to ‘foreigners who are *victims*’ (of aggravated forms of smuggling). As discussed above, in as far as cases lead to prosecution of



smugglers, Belgian courts also regard smuggled migrants as victims of the offences, if aggravated circumstances are at issue. As such, an important distinction may be said to exist under Belgian law between migrants who are and who are not smuggled under aggravated circumstances. Those who do not experience harm or endangerment arising from such circumstances remain 'objects' of smuggling, the focus of criminal law enforcement in such cases being on the protection of policy interests. Those who do suffer them however become victims in a criminal law sense, and the object of enforcement therewith also must be the protection of their interests.

Again, as discussed above, this system however does not seem to be taking effect as intended in practice. While diverse causes were identified above for that, arguably, the manner of regulation constitutes a fundamental weak spot, also driving other concrete issues signalled in that regard, or at least not being conducive to resolving them. Fieldwork indicates that both the legal format of the system, compounded by ambivalence in law and policy, has real impact on the implementation of the law in practice. In the course of an interview with a Belgian specialised prosecutor, a proposal to move the migrant smuggling offence to the Criminal Code was discussed. As the respondent explained, having been initiated around elections, that project was subsequently discontinued, when no government coalition could be formed, and the interim government lacked legitimacy to undertake substantial reform of the Criminal Code. Interestingly, the specialised prosecutor expressed a firm preference to maintain the *status quo*, arguing that human trafficking is 'an offence against the dignity of a person' whereas 'smuggling is an offence against public order and the State, as it's about migration law'.<sup>226</sup> Reiterating that it is necessary to retain a sharp distinction between the two offences, she also pointed out that the 'aims' of the offences are also different, being 'exploitation' for human trafficking and 'making money' for human smuggling. Nevertheless, this prosecutor also pointed out that the two phenomena can 'converge' and that even if migrant smuggling at first glance does not represent an infringement of human dignity, it can also take such a form, also acknowledging the difficult circumstances which migrants can face during their journeys.<sup>227</sup>

The scarce use of the special status may thus hinge on the fact that it is not *clear enough* to important stakeholders that when aggravated circumstances are at issue, the profile of the smuggled migrant 'changes' into that of a victim whose individual interests are to be protected via criminal justice<sup>228</sup>. As to be developed below, an inadequacy arising from the format of criminalization, which can follow from ambiguity thereof,<sup>229</sup> can lead to violation of positive obligations, namely the concrete obligation

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226 Interview, Specialised Prosecutor 1

227 Ibid.

228 See also McAdams (n 16) 4 where she refers to 'conceptual challenges' which have been 'inherited' by 'practitioners', leaving then 'interpretative leeway'.

229 See further below, at Section 3.

to have an effective legal framework in place. For Belgium then, an issue may be that while the criminal law intends to properly embed the individual interests of victims of smuggling under aggravated circumstances, it still fails to do so, because the law is not sufficiently clear in this respect. Coupled with ambiguity in broader policy (with dual, competing interests engaged therein), that may be an important factor impeding successful implementation of the intended protection, public actors not being clearly and sufficiently galvanized to give it full effect. For other jurisdictions, where no distinction is made between different types of smuggling and the offence is designed only with an eye on the protection of collective interests, issues could be greater still, in that there is no recognition at all that certain types of smuggling (aggravated forms) create individual endangerment of and harm to the smuggled migrant.

Such deficiencies could be established if the ECtHR were to find that some forms of migrant smuggling entail horizontal abuse which can only be addressed through criminal justice means. In determining which types of migrant smuggling would qualify as such, the Court could elect to follow the distinction incorporated in Belgian law between smuggling with and without aggravating circumstances, in doing so prescribing that approach as a common standard for all Member States.

For the Court to set such a common standard however, it is important it be able to draw on broader (empirical) evidence. As argued directly below, such evidence does exist, supporting the proposition that there is *sui generis* vulnerability inherent to certain forms of migrant smuggling, notably where transit migration is concerned. This should convert to an obligation to appropriately address that vulnerability, notably also by appraising under which circumstances it can also transpose into a necessity to recognize individualized criminal victimization.

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

An important baseline consideration in that regard is that empirically supported opinion increasingly points to resemblance between the profiles of smuggled migrants and victims of human trafficking, notably where transit conditions and fragmentation of the migration journey can bolster the migrant's vulnerability to abuse and/or exploitation,<sup>230</sup> the fieldwork depicted in Section 1 of the Belgian scenario confirming the similarities. The dichotomy between the two phenomena is considered particularly problematic because of the complex notions of consent,<sup>231</sup> debt bondage,<sup>232</sup> as well as the increased vulnerability to exploitation in a mixed

230 See, Brunovskis and Surtees (n 24); Dandurand and Jahn (n 8); McAdam (n 16) 12-13, in the context of the circumscription of the notion of exploitation.

231 See for example, Christian Kemp, 'In Search of Solace and Finding Servitude: Human Trafficking and the Human Trafficking Vulnerability of African Asylum Seekers in Malta' (2017) 18(2) Global Crime 140; see also McAdam (n 16).

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

migration context.<sup>233</sup> Again, the framing used in EU policy documents on these issues also indicates the growing recognition of a nexus, such as where the New Pact on Migration and Asylum underscores that '(s)muggling involves the organised *exploitation* of migrants, showing scant respect for human life in the pursuit of profit'.<sup>234</sup>

The (empirical) findings of two recent reports, also focusing on transit zones within the EU and mapping the vulnerabilities of individuals on the move, verify the impact of both the problematic attaching to the trafficking/smuggling dichotomy, as well as the cumulation of different types of vulnerabilities.<sup>235</sup> The ECPAT report, gathering research conducted by NGOs and co-funded by the UK Home Office, focuses precisely on precarious transit journeys undertaken by Vietnamese nationals designated therein as human trafficking victims. Likewise, the France Terre d'Asile report reveals identification and protection issues of victims of human trafficking, particularly in a transit migration context. A crucial observation in both reports is that migrant smuggling and human trafficking can rarely be differentiated in a transit migration context, in that being 'on the move' enhances the vulnerability of migrants. Both reports indicate that migrants in transit are, also within the EU, in or outside transit camps, subjected to labour and/or sexual exploitation.<sup>236</sup> The France Terre d'Asile report underlines the superficiality of the legal dichotomy, pointing out that smuggling also entails advantage being taken of vulnerable individuals because of their desire to migrate, this creating a vulnerability to exploitation and/or abuse through diverse non-static factors. Amongst these are the precarious legal status of transiting migrants, *de facto* limiting their access to protection, strict border control policies which push to higher-risk border-crossing alternatives (also on their own when they lack financial resources and resort to acts of 'self-facilitation')<sup>237</sup> or towards more 'professionalized' smuggling networks demanding higher fees.<sup>238</sup>

233 See in particular the argument and the hazy scenarios depicted in Chapter 6 of Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2009); McAdam (n 16) discussing exploitation and consent as not providing adequate distinction between the two phenomena, respectively pp.4-14 and pp. 14-20; Brunovskis and Surtees, (n 24); Dandurand and Jahn, (n 8) for an overview of the criticism.

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

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

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

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

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

Smuggling fees and debt bondage are cited in scholarship as key elements placing migrants in transit at risk of (future) exploitation.<sup>239</sup> Facing long and perilous migration journeys, migrants often face no alternative but to work in exploitative conditions to finance their journeys. Abuse and/or exploitation of migrants in transit susceptible to smuggling is *not* automatic, but the *risk* thereof is systemically present to such an extent as to warrant presumptive flagging as a particularly vulnerable group.<sup>240</sup>

Two important general vulnerability markers may further be adduced, namely the interrelated (i) fluidity of factual profiles and (ii) the complexity of legal position. The transit migrant has a kaleidoscopic and changeable profile, making, as illustrated in *M.H. and Others v. Croatia*, factual and legal sorting difficult, including through normative distinctions which may arise with movements between jurisdictions. The factual inability to do so becomes aggravated by a conscious policy to remove ambivalence. Taken together, access to and effectuation of rights is impeded by unclear legal standing. This issue becomes practically evident through the challenges identified in Belgium with respect to *victim identification and protection* as well as provision of *information* as depicted in section 1. In other jurisdictions, where legislation does not even prescribe such duties with respect to smuggled migrants, sensitivity to and identification of abuse can be even more difficult. The presence of migrants in different jurisdictions can vary between days, weeks and months, exacerbating difficulties in this respect, including in necessary follow-up, both by governmental and non-governmental entities.<sup>241</sup> The ambiguity of factual and legal profiles moreover fosters opportunities to look away, driven, as observed in Belgium, by a ‘not our problem’ mentality in transit countries, relegating responsibility to destination countries.<sup>242</sup> Thus, ‘(m)ember states are happy when an illegal leaves the territory. How or what, when? Preferably as soon as possible and it’s not our responsibility anymore, period’.<sup>243</sup>

This idea has registered in ECtHR case law, in the specific context of distinct rights. As discussed above, in *M.H. and Others v. Croatia*, the applicants’ uncertainty as to legal status was marked by the ECtHR as a vulnerability indicator. In *Khlaifia and Others v. Italy*, in the context of the applicants’ complaint of violation of art. 5 ECHR because of the unlawfulness of their deprivation of liberty following a sea-crossing, as a third-party intervener, the Centre for Human Rights and Legal Pluralism of McGill University put forward that an inherent vulnerability should be recognized in the context of this provision for the applicants. Arguing that ‘the law and legal theory were lacking when it came to the status and protection applicable to irregular migrants who did not apply for asylum’ and that ‘this legal void made

239 Carling (n 238); Triandafyllidou (n 16). See also France Terre d’Asile (n 235) 39 and ECPAT (n 235) 16.

240 See, France Terre d’Asile (n 235).

241 See, France Terre d’Asile (n 235).

242 ECPAT (n 235); Interview, Respondent 1, Federal Belgian Police.

243 Interview, Respondent 3 Foreigner’s Office.

them particularly vulnerable',<sup>244</sup> this intervener argued for the transposition of that consideration into proportionality requirements. The Grand Chamber established a violation of art. 5 ECHR in that case,<sup>245</sup> holding that 'the provisions applying to the detention of irregular migrants were lacking in precision' and that there was thus a 'legislative ambiguity'. Although it did not explicitly incorporate the (legal) vulnerability aspect argued for by the intervener in its judgment, the idea that irregular migrants not applying for asylum are notably confronted with a precarious legal position, remains upright in the outcome.

What emerges then is that different types of harm or endangerment risks exist for the smuggled migrant. Following the empirical narratives discussed above with respect to operational links between smuggling, trafficking, and the circumstances of being in migratory transit, a first is that smuggled migrants are susceptible to becoming trafficking victims. Beyond that, further types of *sui generis* abuse can also attach to the experience of being smuggled (multiple times). While that abuse is not identical to that associated with trafficking, there are strong similarities, particularly in terms of exploitation and the assault on human dignity incurred therewith.<sup>246</sup> Exploitation can take many forms, the commodification of desperation and vulnerability as a business model may rightly be considered as an egregious variant thereof. The problem is exacerbated because the own typology of abuse attaching to smuggling is not adequately conceptualised, let alone legally defined *in abstracto*, while the fluidity and changeability of smuggled migrants' factual and legal profiles render it challenging to capture a full (vulnerability) conceptualisation *in concreto*.

### 2.7. *Constructed vulnerability*

Going back to Fineman's vulnerability concept (see 2.1), the *constructed* nature of the circumstances experienced by transiting smuggled migrants points further to vulnerability, attracting even more strongly State responsibility, because it is in part caused by institutional or societal environments and the (in)action of public stakeholders therein. Thus, factual and legal vulnerability becomes aggravated because of the intentional stratagems underlying it.

Discussing migration governance in the EU, observing that the migrant can be 'trapped in legal ambiguity', Stel charts how migrants experience continuous dispersal and displacement between distinct national jurisdictions, underlining deficiencies in the provision of information in that process.<sup>247</sup> With other scholars, Stel links the

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<sup>244</sup> *Khlaifia and Others* (n 146) para 86.

<sup>245</sup> *Ibid* paras 93-108.

<sup>246</sup> See also generally McAdam (n 16), including her discussion on human dignity.

<sup>247</sup> Nora Stel, 'Uncertainty, Exhaustion, and Abandonment Beyond South/North Divides: Governing Forced Migration Through Strategic Ambiguity' (2021) 88 *Political Geography* 102391.

‘constructed’ uncertainty to the policies managing migration.<sup>248</sup> The production of continuous uncertainty and ambiguity arising from the lack of regulatory precision is even described as a key governance strategy within the EU, its aim being to deter and generate disillusionment, a sense of abandonment and exhaustion.<sup>249</sup> Accounts of Davies et al. with respect to Calais also depict a strategic approach, concentrating on non-governance rather than governance, made visible by the ‘violent inaction’ of authorities as well as by the ‘turning a blind eye’ behaviours to the living conditions in the camps.<sup>250</sup>

With regards to the legal governance of the mobility of ‘illegalized migrants’ stranded in transit spaces within the Schengen Area, scholars also highlight other distinct governance strategies than inaction. Based on her ethnographic work conducted at the EU internal borders, Tazzioli, coining the term ‘governing through mobility,’ describe techniques going beyond detention, surveillance and forced immobility.<sup>251</sup> Examining administrative measures and local decrees, she observes techniques aimed at disrupting migrant’s journeys by dividing, scattering, and forcing migrants to be continuously on the move. These techniques are depicted as instruments to evacuate sensitive border zones, as a strategy of deterrence, and as a ‘frantic attempt rather than a planned strategy’ to take back control over so-called ‘unruly movements’.<sup>252</sup> Fontana’s findings echo these arguments, with her research focusing on vulnerabilities and insecurities faced by migrants at the external *and* internal EU borders. Fontana outlines how bordering practices of EU Member States ‘cast migrants into spaces of containment and vulnerability’.<sup>253</sup> Touching upon both smuggling practices and the constructed nature of vulnerability, Fontana provides an overview of the causes of death in secondary onward movements across the EU between 2014 and 2020. She concludes that when migrants find themselves contained into transit spaces without legal channels available to move onwards, they have no other possibilities but to resort to dangerous alternatives to cross borders which enhances significantly the risk of injuries and death.<sup>254</sup>

Importantly, the causes of these dynamics are located *inter alia* in the (mis) management of migrant and asylum seeker streams by Member States and the legal barriers erected by them, which cast migrants on the move into a ‘bureaucratic

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

249 Sciarba (n 248).

250 Davies, Isakjee and Dhesi (n 248).

251 Tazzioli (n 152).

252 Ibid 11.

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

254 Ibid.

limbo'.<sup>255</sup> Similarly, Menghi, focusing on the Roya Camp (Italy), describes an 'economy of containment beyond detention'.<sup>256</sup> Ansems de Vries and Welander use the concept of the 'politics of exhaustion' to refer to a technology of governance used in places of transit which is aimed at 'pushing people to the edge, directly or indirectly'.<sup>257</sup> The authors depict a feeling of exhaustion experienced by migrants in settlements in Calais, Brussels and the nearby UK border regions, due to 'repeated evictions, detention, push-backs, deportations, sub-standard living conditions, fundamental uncertainty, the continuous threat and reality of violence, etc'.<sup>258</sup> These practices are regarded by these scholars as a deterrent strategy, the objective being to discourage migrants in attempts to access the UK or another EU country to lodge asylum requests. In his recent empirical research focusing on migrants in Brussels, Vandevordt frames policing practices as games of 'cat and mouse' where migrants are 'hunted down', arrested and subsequently released.<sup>259</sup> Also using the concept of the politics of exhaustion, Vandevordt signals that these police actions are aimed at deterring migrants who do not wish to apply for asylum from staying in Belgium.<sup>260</sup>

### 3. Legal Effects: Application of Criminal Justice Related Positive Obligations Framework

Empirical insights such as those discussed above can be used in different manners by the ECtHR. It is held here that its operationalization through specially calibrated (particular) vulnerability profiles would represent a fundamental step. Vulnerability recognition is not 'mere rhetorical flourish', but actually '*does something*' in ECtHR case law,<sup>261</sup> its strongest impact perhaps being where it transposes into a right to not fall into or be kept in a particular type of vulnerability, this engendering obligations on the part of the State to prevent that from occurring, cease its continuation and provides redress for it. This route arguably is also the one taken in the recognition of positive obligations in art. 4 ECHR with respect to forms of victimization not referred to in the text of the provision, namely human trafficking and other forms of exploitation not (clearly) qualifying as slavery, servitude or forced labour.<sup>262</sup>

<sup>255</sup> Ibid.

<sup>256</sup> Marta Menghi, 'The Moral Economy of a Transit Camp: Life and Control on the Italian-French Border', in Amigoni, Aru, Bonnin, Proglia and Vergnano (n 238) 94.

<sup>257</sup> Ansems de Vries and Welander (n 248). See also, Leonie Ansem De Vries and Elspeth Guild, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2018) 45(12) JEMS 2156; Anja Edmond-Pettitt, 'Territorial Policing and the 'Hostile Environment' in Calais: From Policy to Practice' (2018) 2(2) Justice, Power and Resistance 31.

<sup>258</sup> Ansem de Vries and Welander (n 248).

<sup>259</sup> Vandevordt (n 44) 53. See also Mescoli and Robain (n 43) reporting the frequent police raids in transit spaces in Brussels.

<sup>260</sup> Ibid.

<sup>261</sup> Peroni and Timmer (n 117) 1057 and 1074.

<sup>262</sup> Likewise, this provision makes no mention of positive obligations ensuing from it, while the Court holds that it is in this format that obligations particularly arise under art. 4 ECHR. See *S.M.* [GC] (n 82).

Via an overview of human trafficking case law in relation to criminal justice related positive obligations, this section first explores the feasibility of expansive interpretation of art. 4 ECHR, entailing the prohibition of slavery, servitude and forced or compulsory labour, to include aggravated smuggling in a transit context under its protective umbrella (3.1). Subsequently, the second sub-section develops a fluid and flexible approach including other protective bases other than art. 4 ECHR, which could also provide a basis for criminal justice related positive obligations protection vis-à-vis horizontal abuse experienced by transiting migrants smuggled under aggravating circumstances (3.2).<sup>263</sup> The final sub-section discusses how the Court has relied consistently on empirical information to develop its human trafficking case law (3.3) and how the same approach can be taken to circumscribe and operationalize the vulnerability of aggravated smuggling of transit migrants.

### ***3.1. Applicability of the Convention to Transiting Migrants? Trafficking Case Law as a Model***

Given the nexus between trafficking and smuggling vulnerability and victimization, art. 4 ECHR, the central locale of ECtHR positive obligations case law with respect to trafficking, arguably is an interesting option to explore as a basis for protection against transiting smuggling victimization. In its 13 judgments regarding criminal justice related positive obligations with respect to trafficking,<sup>264</sup> mainly (and through an explicit preference therefore),<sup>265</sup> positioning that protection in this provision, the Court has demonstrated a willingness to expansively interpret the ‘restrictive wording’<sup>266</sup> of this provision, ‘in such a way as to allow it to cover rights unthought of when it was conceived,’<sup>267</sup> modernizing it in line with contemporary protective needs in ‘modern European democracies.’<sup>268</sup> Relying on own ‘general principles’ applying in this context,<sup>269</sup> the Court has responded to those in two important manners.

Not only taking a broad approach to its understanding of the forms of abuse explicitly prohibited in this provision (slavery, servitude and forced or compulsory labour), the Court has critically added to its scope by adding human trafficking as a further autonomous category of prohibited horizontal abuse.<sup>270</sup> The Court’s open

263 See also McAdam (n 16) 21-30 exploring which human rights abuses may be at issue in the context of smuggling, notably examining possibilities under the prohibition of inhuman or degrading treatment, also in the sense of art. 3 ECHR.

264 The result of 13 judgments is obtained through search of HUDOC using art. 4 ECHR, English language and the exact term ‘human trafficking’ as filters. Adjudicated both at the chamber and Grand Chamber level, *S.M.* (n 80) counts twice.

265 *S.M.* [GC] (n 82) paras 242-243.

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

267 *Ibid.*

268 *Ibid.*

269 *J. and Others* (n 82) para 103.

270 The Court did so first in *Rantsev* (n 82).



approach to this provision - visible between its first (*Siliadin v. France* in 2005), up to the most recent (*Zoletic and Others v. Azerbaijan* in 2021) judgment in the catalogue of pertinent case law - is moreover facilitated by the fact that it does not see the need for exact classifications, holding not only that pertinent typologies of harm or endangerment can overlap within the categories in art. 4 ECHR,<sup>271</sup> but that they can also be covered by other Convention provisions, notably articles 2, 3, and 8 ECHR.<sup>272</sup> Protection in one instance has also been innovatively extended to art. 6 ECHR.<sup>273</sup> The Court has been lenient with unclearly formulated applications (either with respect to the Convention provision(s) on which complaints were based, or the format of alleged positive failings on the part of the State).<sup>274</sup> Where necessary, it has characterized complaints in the most suitable construct itself, demonstrating therewith awareness of difficulties involved in capturing the complex phenomena it in terms of human rights' deficiencies. As such, diverse (sub-)categories of abuse have been drawn under Convention protection (being trafficking (of minors) in association with domestic servitude, labour or sexual exploitation and forced prostitution).<sup>275</sup>

With one - perhaps two - exception(s),<sup>276</sup> in none of the pertinent judgments has the Court ever determined that the scenarios presented therein, legally or factually could not fall within the scope of Convention protection, even though all cases arguably presented hazy narratives.<sup>277</sup> Even where the Court does not (or cannot) engage with the substantive question as to whether or not treatment alleged by applicants amounted to behaviour prohibited under art. 4 ECHR, it can find procedural violations where *national authorities* did not do enough to determine (or exclude) that in domestic investigations and proceedings.<sup>278</sup> Generally, the Court has not been sparing in its assessments of compliance, at least one (type of) violation having been established in nearly all cases.<sup>279</sup>

271 See the discussion and clarification in this respect, also in relation to exploitation for the purpose of prostitution in *S.M.* (n 80).

272 *S.M.* [GC] (n 82) paras 297; See also *M. and Others. v. Italy and Bulgaria* 40020/03 (ECtHR, 31 July 2012) paras 106-107.

273 That occurred in *V.C.L. and A.N.* (n 82) in which the minor applicants complained of their criminal prosecutions despite their (recognized) status as trafficking victims. The Court established a violation of art. 6 ECHR, *inter alia* because the national court had not 'consider(ed) their cases through the prism of the State's positive obligations under (art. 4 ECHR)' para. 208.

274 *S.M.* [GC] (n 82) paras 240 and 335. See with respect to *S.M.* (n 82) in Hughes (n 266) 1049-1051; See also *Zoletic* (n 23) paras 121-133.

275 In *V.C.L. and A.N.* (n 82) the second applicant put forward a further typology of trafficking abuse, holding that 'as a victim of trafficking exploited for the purposes of producing illegal drugs, he was treated differently from victims of trafficking exploited for other criminal purposes'. This complaint was found to inadmissible by the Court, but only did so because of non-exhaustion of domestic remedies. See paras 211-213.

276 See the case of the second applicant in *C.N. and V.* (n 82) para 94. In the case of *M. and Others* (n 272), it is difficult to say whether or not the Court found that the first applicant could potentially have been trafficked. The case is an outlier in that the Court, establishing a violation of the procedural obligation under art. 3 ECHR to investigate the treatment to which the first applicant had been subjected, considered in that regard that she was potentially also a trafficking victim. In its examination of the art. 4 ECHR complaint relating specifically to trafficking in that case, the Court seems however to have backtracked this finding to a certain extent, in the context of other obligations than the procedural one. See in this judgment, with respect to the art. 3 ECHR complaint, para. 106 and, in contrast, in relation to the art. 4 complaint, paras 154-155.

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

278 *Zoletic* (n 23), paras 193-210; *S.M.* [GC] (n 80) paras 336-347.

279 *J. and Others* (n 82) and with respect to the second applicant in that case, *C.N. and V.* (n 82) paras 93-94 form the exceptions.

While the concrete criminal justice positive obligations in art. 4 ECHR in their base form follow the same format as those which apply in relation to other types of horizontal abuse,<sup>280</sup> in trafficking case law, the Court reads these in line with specific protective needs associating with this type of abuse, in some instances prescribing specific further obligations in that regard.<sup>281</sup> As such, the Court has established obligations to (*inter alia*) ensure: (i) *effective* criminalizations, interpretations and classifications<sup>282</sup> which adequately capture the full gamut of abuse; (ii) that the overall legal and practical apparatus is effectuated in practice, in this context emphasizing the importance of victim identification and the training of officials;<sup>283</sup> (iii) that impediments thereto do not arise through the existence of conflicting criminal justice and (immigration) policies, the latter undermining the former<sup>284</sup> and (iv) that shortcomings in investigations in association with the features of the crime phenomenon are addressed,<sup>285</sup> *inter alia* by emphasizing that the often cross-border aspect of trafficking gives rise to robust duties of international cooperation.<sup>286</sup> In so doing, the ECtHR has incorporated special features of trafficking victimization in its appraisals to the advantage of applicants. These include, the Court strongly relying in this regard on empirical evidence extracted from diverse sources, difficulties attaching to (over-reliance on) victims' statements, which may be problematic in light of (i) psychological pressure and burdens felt by them before and in the course of proceedings, (ii) prejudice and insensitivity to victim's problems on the part of officials taking testimony, (iii) the credibility of statements, in light of changes therein over time and (iv) fear and reluctance on the part of victims because of threats of reprisals or a lack of trust in 'the effectiveness of the criminal justice system'.<sup>287</sup> The Court has alleviated the burdens of victims by lowering thresholds in terms of (*prima facie*) evidence which they must show to trigger (the applicability of) positive obligations (to

280 From a criminal justice perspective, these are: (i) the (first) substantive obligation to have in place an adequate protective legal and administrative framework and the means to effectively operate it; (ii) the (second) substantive obligation to prevent or stop harm from occurring and (iii) the procedural obligation to provide effective (criminal law) redress, including via adequate investigation, adjudication, and sanctioning. See *inter alia*, *S.M.*[GC] (n 82) para 306; *Zoletic* (n 23) para 182.

281 In that 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking', the Court also prescribes non-criminal measures specifically important in the trafficking context, such as 'adequate measures regulating businesses often used as a cover for human trafficking', while 'a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'. *Rantsev* (n 82) para 284.

282 See *Siliadin* (n 82), paras 147-148; *C.N. and V.* (n 82) paras 105-108; *C.N.* (n 82), para 80; *Chowdury* (n 82) para 123.

283 *J. and Others* (n 82) para 110-113 and, distinctly in terms of criminal victimization, para 115.

284 *Rantsev* (n 82) paras 291-293.

285 See *S.M.* [GC] (n 80), para 337, where the Court emphasized the importance of investigating contacts on social media, in that 'such contacts represent one of the recognised ways used by traffickers to recruit their victims'.

286 *Zoletic* (n 23) para 191; *Rantsev* (n 82) para 289; See also *J. and Others* (n 82) para 105.

287 *S.M.* (n 82), para 344, referring to empirical evidence cited in paras 138, 171, 206 and 260. See also in *Chowdury* (n 82) para 121, the reference to the recovery and reflection period in art. 13 of the Council of Europe Convention on Action against Trafficking in Human Beings, with the aim allowing a potential victim time to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.

protect and provide criminal procedural remedies) at the national level.<sup>288</sup> Critical for the context of aggravated smuggling is that the Court also recognizes the complexities of the notion of consent, through sensitivity to the possibility that this can dissolve or be diluted.<sup>289</sup> Overarchingly, the ECtHR emphasizes the particular vulnerability arising from this type of victimization. Importantly, with most applicants falling under that category, the vulnerability of trafficking victims is often (in part) related to the fact that they are also *irregular migrants*.<sup>290</sup>

Registering the transiting migrant smuggled under aggravated circumstances under art. 4 ECHR would not only mean that the same obligations apply, inclusion of his profile in this provision would moreover have important symbolic and norm-transferring impact, emphasizing the conceptual proximity between trafficking and smuggling and underscoring that potentially serious forms of victimization can also take place under the latter. That is not to say that the Court can or should equate aggravated smuggling victimization (notably in a transit context) with trafficking. As discussed below, the current position of the ECtHR is that abuse can only qualify as trafficking if it meets the constituent aspects of that phenomenon as it is circumscribed in pertinent international law definitions.<sup>291</sup> While there may be strong similarities between smuggling and trafficking experiences, and there may be concrete instances in which the Court could interpret horizontal abuse as falling under those definitions, it is unlikely that the Court would create full identity between the two groups. That would not be necessary however, in that the Court, on the basis of evidence, recognizing *sui generis* harm and endangerment and vulnerability associating with certain types of smuggling, could understand those as falling under the scope of art. 4 ECHR, under an own category.<sup>292</sup>

### 3.2. A Consolidated and Fluid Approach Under Articles 2, 3, 4 and 8 ECHR

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

288 *Zoletic* (n 23) paras 139-142; paras 156-170 and paras 193-200. See also in this regard, John Trajer, 'Hidden in Plain Sight: Failure to Investigate Allegation of Abuse on Public Construction Projects in *Zoletic and Others v. Azerbaijan*' (Strasbourg Observers, 18 November 2021) <<https://strasbourgobservers.com/2021/11/18/hidden-in-plain-sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/>> accessed 19 June 2022.

289 *Chowdury* (n 82) paras 96-97; *Zoletic* (n 23) para 167.

290 See footnote 82.

291 *S.M.* [GC] (n 82) para 303.

292 See in that regard, *S.M.* (n 82) para 307, where the Court considered that 'the relevant principles relating to trafficking' are also applicable to cases of forced prostitution, 'given the conceptual proximity of human trafficking and forced prostitution under Article 4 (...)', also referring in that regard to *C.N. v. the United Kingdom* (n 82), paras 65-69, with respect to domestic servitude.

Again taking Belgian law as an illustration, implementing the EU Facilitator's Package, article 77*bis* of the Foreigner's Act criminalizes the preparing, facilitating, or effectuating (attempted) of the irregular entry, residence, and transit by a non-EU subject, for direct or indirect financial gain. Again, a reading of the proposal leading up to this legislation makes it clear that the legal provision, which is purposefully placed in the Foreigner's Act as opposed to the Criminal Code, has the protection of the interests of the State as its main orientation. Indeed, when modifying former article 77*bis*, which previously did not differentiate between migrant smuggling from human trafficking (as they were conflated prior to a legal reform of 2005), the reason for positioning of the trafficking offence in the Criminal Code under the title 'Crimes and Offences against Persons' was precisely to 'make a stark distinction between migrant smuggling and human trafficking' in line with international instruments.<sup>293</sup> Regulated in this manner, difficulties may obtain in the qualification of the offence criminalized in article 77*bis* as a horizontal human rights abuse under any Convention provision. Moreover, articles 75 and 76 of the Foreigner's Act criminalize the illegal entry and residence and the non-compliance with removal orders by an alien himself, the provisions taken together rather framing this migrant as a consensual participant within the smuggling narrative.

The dynamics change however where aggravated circumstances meant in articles 77*quater* and 77*quinquies* are at issue. Some of those may (even without a smuggling context), attract the applicability of articles 2 and 3 ECHR. Thus, positive obligations under art. 2 ECHR could become engaged under aggravated circumstance (iv) of art. 77*quater*, where the life of the victim is endangered, intentionally or through gross negligence, or art. 77*quinquies* (i), if the crime causes the (unintentional) death of the victim.<sup>294</sup> Aggravated circumstance (v) under art. 77*quater*, where the crime causes a seemingly incurable disease, an inability to perform personal labour for more than four months, full loss of an organ or the use thereof or serious mutilation, could correspond with the requisite level of severity of ill-treatment in art. 3 ECHR.<sup>295</sup> The same may hold true, although less categorically, for the aggravated circumstances of art. 77*quater* under (iii), where smuggling is committed through direct or indirect use of cunning trickery, violence, threat or any form of coercion, or by kidnapping, abuse of power or deceit, particularly if violence is involved.<sup>296</sup> Where art. 3 ECHR would not apply (because the requisite level of severity is not attained), an alternate basis may be found in art. 8 ECHR which is broad enough to cover a great variety of horizontal abuse. That would also be an option for the aggravated circumstances meant under art. 77*quater*, where the crime is committed (i) in relation to a minor;

293 Belgian House of Representatives, Legislative Proposal (10 August 2005), 9-10.

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

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

296 Similarly, see McAdam (n 16) 23-30.

(ii) through abuse of the vulnerable situation of a person as a result of his irregular or precarious administrative situation, his age, pregnancy, illness or physical or mental deficiency, to such an extent that that person in fact has no other real and acceptable choice than to allow themselves to be abused or by offering or accepting payments or other advantages from a person holding authority over the victim.

Diverse issues arise however with these locales. Concrete horizontal abuses experienced by migrants smuggled under aggravating circumstances may be grave enough to trigger criminal justice positive obligations under articles 2 and 3 ECHR, but there is no guarantee of that. It would moreover be problematic if appraisal were to focus in isolation on the impact on life or physical or psychological integrity, thus only the aggravated circumstances itself, without consideration of the smuggling backdrop. In such a sealed-off approach, aspects of abuse associated with the aggravated *smuggling* - the own type of exploitation and assault on human dignity involved - would not (necessarily) come to the fore, meaning that any protection provided would be disengaged therefrom. While the same issues could arise with art. 8 ECHR, a further problematic attaching to this provision is that this is the location where the Court does administer a margin of appreciation, in that national authorities can be left a choice of means of redress for lesser abused, criminal remedies (and therewith criminalization) not necessarily being required.<sup>297</sup> The hazard is then that in the blurry environment of art. 8 ECHR, where 'lesser' aggravated circumstances are involved, that the Court will not recognize a deficiency in recognition of criminal victimization.

Such concerns again render the mechanics of art. 4 ECHR as it is applied to trafficking attractive, if not (in all cases) as a basis for protection, at least as an inspiration, to be applied in other provisions also. While the ECtHR has on numerous occasions made clear that prohibited forms of treatment under this provision, including trafficking, can overlap with abuse in the sense of articles 2, 3 and 8 ECHR, it is critical that it *prefers* to examine trafficking complaints under art. 4 ECHR. This is precisely in order to capture all aspects of the complex phenomenon. Underscoring that 'in its case-law it has tended to apply Article 4 to issues related to human trafficking',<sup>298</sup> the Court explains 'that this approach allows it to put the possible issues of ill-treatment (under Article 3) and abuse of the applicant's physical and psychological integrity (under Article 8) into their general context, namely that of trafficking in human beings (...),' holding further that 'allegations of ill-treatment

<sup>297</sup> In the framework of art. 8 ECHR, the 'nature of the State's obligation' depends on 'the particular aspect of private life that is in issue,' the margin becoming 'correspondingly narrower' if 'a particularly important facet of an individual's existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life.' That will be the case where 'physical and psychological integrity' are involved. Particular vulnerability can also reduce margins, such as is the case for minors, notably where 'serious acts such as rape and sexual abuse' - which also engage 'fundamental values' - are concerned.' See *Söderman* (n 102) paras 78-82.

<sup>298</sup> *S.M.* [GC] (n 82) para 241 referring to *Rantsev* (n 82) paras 252 and 336; *C.N. and V.* (n 82) para 55; *C.N.* (n 82) para 84; and *J. and Others* (n 82) para 123.

and abuse are inherently linked to trafficking and exploitation, whenever that is the alleged purpose for which the ill-treatment or abuse was inflicted'.<sup>299</sup>

(Aggravated) smuggling can be as complex a phenomenon as trafficking. It is paramount then that harms associated with it are in any event adequately identified and addressed, under whichever of the provisions mentioned above. It is also only in this manner that concrete obligations which may arise specifically in relation to this phenomenon can be developed, as they have been for trafficking. Understanding that not all smuggling experiences will be the same, a resolution would lie in envisaging articles 4, 2, 3 and 8 ECHR as points on a variegated scale of ill-treatment, the (greater) relevance of one or the other provision depending on the type and gravity of abuse. Taking all bases together, a broad matrix of potential protection would then be established, allowing for optimal approximation of the concrete situation of the smuggled migrant. Art. 4 ECHR could then be reserved for cases in which the abuse undergone by the smuggled migrant is found to have the closest conceptual proximity to the types of treatment prohibited in that provision, with the other provisions serving as fallback bases. Using them as alternates would not be problematic, as long as specific types of obligations associating with the type of abuse (corresponding to the needs and problematic arising from the crime phenomenon) are also read into those provisions.<sup>300</sup>

### 3.3. *Sorting through reliance on empirical information and insights*

In positioning the transiting migrant smuggled under aggravated circumstances within such a matrix, the Court can importantly rely on empirical evidence and the insights of expert bodies and scholars interpreting such information. Again, this is an approach also taken in trafficking case law, the Court having utilized empirical evidence in different manners therein. Importantly, as to be discussed below, the Court arguably also operationalized such evidence in its decision to recognize trafficking as a separate category of prohibited treatment under art. 4 ECHR,<sup>301</sup> of a kind necessitating recognition of criminal victimization and therewith requiring a criminal justice response. The Court has moreover used empirical information in assessing the applicability of art. 4 ECHR to concrete scenarios; to establish whether

299 *S.M.* [GC] (n 82) para 242.

300 See in this respect, *M. and Others* (n 272) paras 156 and 157 where the Court determined in its assessment of the art. 4 ECHR complaint that 'irrespective of whether or not there existed a credible suspicion that there was a real or immediate risk that the first applicant was being trafficked or exploited', the complaint of violation of the procedural obligation to effectively investigate established under art. 3 ECHR (see para 103), also covered any problematic which may have existed in that regard in the context of art. 4 ECHR.

301 In *Siladin* (n 82) in which the Court did not establish trafficking, but servitude and forced or compulsory labour, the Court relied in part on empirical information with respect to its findings that positive obligations are to be read into art. 4 ECHR and that the type of abuse at issue can only be addressed via criminal justice protection (paras 88 and 111). In *Rantsev* (n 80), as will be discussed further below, the Court relied in part on empirical information in finding that trafficking is to be considered an autonomous form of abuse within art. 4 ECHR.

or not a *prima facie* case of victimization was at issue;<sup>302</sup> in support of its findings with respect to the existence of specific types of obligations<sup>303</sup> and in the assessment of compliance in concrete cases.<sup>304</sup> A broad capital of information in the form of opinions, reports, studies, and statistical information emanating from public and private (monitoring) entities, often provided through third-party interventions, has provided a wealth of opportunities for the Court in this regard.<sup>305</sup>

This type of information has been used alongside support the Court has found for its positions in international law sources, but the Court has also availed itself of it where international sources provided no clear answers on certain issues (or where conflicts existed between sources). In *S.M. v. Croatia*, the Grand Chamber, finding that ‘internal trafficking is currently the most common form of trafficking’,<sup>306</sup> declined to exclude from its trafficking concept cases without a cross-border element, therewith, according to Hughes ‘(ensuring) the wider relevance of Article 4’, and potentially ‘(assisting) centring analysis upon victims’ experiences, as opposed to immigration control’.<sup>307</sup> Finding that a more restrictive approach would ‘run counter to the object and purpose of the Convention as an instrument for the protection of individual human beings, which requires that its provisions be interpreted and applied so as to make its safeguards practical and effective,’ the Grand Chamber also relied expressly on information provided by one of the third party interveners to that effect.<sup>308</sup> For Hughes, the Grand Chamber’s holding in *S.M.* that ‘human trafficking may take place outside the parameters of ‘organised crime’,<sup>309</sup> likewise gives rise to ‘hope’ that ‘a conception of human trafficking that is not tied to border control and organised crime may assist in developing Article 4 beyond punishing ‘perpetrators’ of human trafficking (...) towards understanding the experiences of victims and addressing their substantive needs’.<sup>310</sup>

302 See with respect to the use of empirical evidence in aid of rights bearer’s burden of presenting *prima facie* evidence of victimization, *Zoletic* (n 23), paras 156-170 and 193-200. See also in this regard, Trajer (n 288).

303 See with respect to the identification duty in *J. and Others* (n 82), paras 110-113 and 115, in light of Stoyanova’s blog (n 18). See also *S.M.* (n 80) paras 295-296, where the Grand Chamber found that internal trafficking of nationals also falls under the concept of trafficking in art. 4 ECHR, *inter alia* relying on the information provided by one of the third-party interveners ‘that internal trafficking is currently the most common form of trafficking’.

304 *Rantsev* (n 82). In *S.M.* (n 82), as underlined by Hughes (n 266) 1049: ‘Both (judgements) found that Croatia had violated the procedural obligation to investigate by neglecting to pursue various lines of enquiry, all of which was contrary to expert guidance as to how to investigate human trafficking.’

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

306 *S.M.* [GC] (n 82) para 295.

307 Hughes (n 266) 1051.

308 *S.M.* [GC] (n 82) paras 269-270, where the Research Centre *L’altro diritto onlus* (University of Florence) referred to the UNODC *Global reports on trafficking in persons*, which ‘pointed out that victims who had been detected within their own borders represented the largest part of the victims detected worldwide’.

309 *S.M.* [GC] (n 82) paras 294-296 referring to sources mentioned in paras 11 and 120.

310 See Hughes (n 266) 1051.

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

Returning then to the made by the Court of empirical information in the incorporation of trafficking as a distinct category in art. 4 ECHR, it is important to underscore that while lauded, the ECtHR's open approach to art. 4 ECHR has also been criticized.<sup>311</sup> Such criticism touches upon the lack of clarity with respect to abuse categories it (legally and factually)<sup>312</sup> sorts under the scope of the provision and the manner in which they relate to each other.<sup>313</sup> Commentary has been that the Court has created a 'definitional quagmire' within the provision<sup>314</sup> and has particularly been ambiguous in its description of trafficking, creating 'doubt about the broader parameters of the right'.<sup>315</sup> Perhaps influenced by the diverging views, including those within the Court itself,<sup>316</sup> in *S.M. v. Croatia* (the only Grand Chamber judgment with respect to trafficking), the ECtHR brought more clarity to the notion of trafficking under the Convention by binding itself to international law definition(s) of the phenomenon.<sup>317</sup> In keeping with the idea of deference, this may point to a strategy to check an overly progressive approach. Marking that the Grand Chamber did so in *S.M. v. Croatia*, Stoyanova argues that the chamber judgment in that case as well as confusion arising from the *Ranstev* judgment was importantly corrected, in that an implication lay therein that 'the definitional scope of Article 4 was enlarged to such an extent as to cover 'exploitation', whatever 'exploitation' might mean'.<sup>318</sup>

Nevertheless, at the same time, Hughes argues that, even after this Grand Chamber judgment, there are also indications that 'different future directions remain both possible and contested'.<sup>319</sup> Indeed, she argues that there is a basis to hold that in

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311 Ibid 1046.

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

313 Hughes (n 266) 1046 See also Stoyanova (n 312).

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

315 Hughes (n 266) 1046.

316 Hughes (n 266) 1055-1056.

317 Hughes (n 266).

318 See Stoyanova (n 312).

319 Hughes (n 266) 1046.



*S.M. v. Croatia*, the Court added, beyond trafficking, forced prostitution as a further category of distinct abuse covered by art. 4 ECHR.<sup>320</sup> Hughes offers an interesting analysis as to how the door may remain open for more. She identifies as a main cause for the definitional uncertainty with respect to the definition of trafficking under art. 4 ECHR the fact that the Court used two different approaches in framing the concept in *Rantsev v. Cyprus and Russia*.

Hughes coins these two approaches as follows: the 'ECtHR characteristics approach' and the 'international law definition'.<sup>321</sup> The latter attaches to Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, both of which unpack the three 'core elements' of trafficking, being the requisites of 'act, means and purpose'.<sup>322</sup> The 'characteristics approach' on the other hand 'describes the nature of human trafficking, the intentions of traffickers, and the impact of human trafficking upon the victim'.<sup>323</sup> The two approaches give rise to ambiguity because, while overlapping to an extent, they are also significantly different, particularly important being that the 'characteristics approach' does not require that the core elements in the international law elements are established, making it broader.<sup>324</sup> The Court exacerbated the lack of clarity according to Hughes, by, in case law following *Rantsev v. Cyprus and Russia*, 'vacillating' between the two approaches, alternately relying on one over the other.<sup>325</sup>

One of two explanations Hughes provides for the persistence of ambiguity in case law is of particular importance here. This lies in her suggestion that 'the Court did not pin down the concept earlier', because of 'difficulties (it) faced in explaining the relationship between human trafficking and Article 4, and thus in justifying reading the concept into the right', making it understandable that 'when implying a new concept into Art. 4 the Court would wish to explain how and why there was a role for it within Article 4 and would wish to resist being seen to be simply lifting concepts from other international frameworks'.<sup>326</sup>

As such, the 'characteristics account' can be considered as having functioned to legitimize the inclusion of trafficking under art. 4 ECHR, by supporting the position that there is a real need to do so. It remains relevant however, in that in *S.M. v. Croatia*, the Grand Chamber did not remove this account as a tool, but gave it an alternate function, namely as a means to determine 'how [emphasis added] the phenomenon of human trafficking falls within the scope of Article 4'.<sup>327</sup> Thus, the characteristics account 'is

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320 Hughes (n 266).

321 Hughes (n 266) 1048.

322 Ibid.

323 Ibid.

324 Ibid.

325 Ibid.

326 Ibid 1056.

327 Ibid 1057, citing to *S.M. [GC]* (n 82) para 291.

now presented as an attempt at explaining the nature of Article 4 and the rights that it encompasses by examining the ways in which an individual experiences a loss of those rights'.<sup>328</sup> In this manner, the characteristics approach retains importance, in that the Court may '(return) to this account',<sup>329</sup> notably also where ambiguity may again arise with respect to (new) types of treatment not (yet clearly) housed within the provision.<sup>330</sup>

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

'(t)rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (...). It implies close surveillance of the activities of victims, whose movements are often circumscribed (...). It involves the use of violence and threats against victims, who live and work under poor conditions (...). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (...). The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place under a regime of modern slavery (...)'.<sup>331</sup>

Importantly, the elements of this definition are fully extracted from empirical information provided in reports third-party submissions in that case.<sup>332</sup> Reasoning why trafficking should be included within the scope of art. 4 ECHR, the Court moreover pointed in that judgment to the increase in trafficking as a 'global phenomenon', referring in that regard to the *Ex Officio* report of the Cypriot Ombudsman on the regime regarding entry and employment of alien women as artistes in entertainment places in Cyprus, two follow-up reports made by the Council of Europe Commissioner for Human Rights and the third party submission of The AIRE Centre.<sup>333</sup> The Court's conclusion that '(t)here can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention' is (as well as being mentioned in the preamble of the Anti-Trafficking Convention),<sup>334</sup> likewise supported in citations from the reports of the Cypriot Ombudsman.<sup>335</sup> As such, the 'characteristics account' may, in fact, be considered a summation of empirical

328 Ibid 1057.

329 Ibid.

330 See Hughes (n 266) *ibid* and 1056-1057 (with respect to forced prostitution).

331 *Rantsev* (n 82) para 281. See Hughes (n 266) citing from this paragraph 1048.

332 *Rantsev* (n 82) para 281.

333 *Ibid* paras 278.

334 *Ibid* para 162.

335 *Ibid* paras 282 and 89.

evidence, which, having been utilized first to recognize that trafficking represents a type of abuse falling under the scope of art. 4 ECHR, now functions to sort and analyse concrete narratives, to determine not only whether they constitute trafficking (within the parameters of the international law definition), but also to examine other forms of abuse which may also require positioning under the scope of this provision.

Strong empirical evidence likewise can be transposed into an own ‘characteristics account’ framing the real-life experiences and vulnerabilities of transiting smuggled migrants and can also be used by the Court to draw pertinent types of abuse under the scope of Convention protection. Again, in accordance with the specific type and gravity at issue, concrete cases can be positioned in the most appropriate manner, within the matrix of protection arising from the combined bases of articles 2, 3, 4, and 8 ECHR as envisaged above.

### Conclusion

Even in Belgium, where the legal protection of the smuggled migrant may be said to be strong and well aligned with the empirically observed vulnerabilities of smuggled migrants, implementation and effectuation of intended protection are impeded. In jurisdictions where the strict dichotomy between trafficking and smuggling is even more forcefully in place, given the blurred boundaries between human trafficking and migrant smuggling and the own type of victimization and vulnerability associated with the latter, the persistence thereof is untenable. As also outlined by McAdam, departing from a broader international human rights law perspective, there must be a ‘response (...) capable of adapting to the complicated realities of both phenomena in practice, which means rising to the challenge of the human rights violations and abuses that can occur as a cause or consequence of either’.<sup>336</sup> Differential treatment is particularly problematic given increasing empirical evidence of traces of abuse and exploitation in smuggling situations, *particularly* in a transit migration context.

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

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<sup>336</sup> McAdam (n 16) 31.

*systematically* and *structurally* to operate vulnerability paradigms (and transpose those to recognition of criminal victimization), in clear and effective manners. The Court's management of such information (which sources it uses, when and how it will do so) could benefit from ordering, while the operationalization of theoretical and empirical insights is contingent on the availability of information,<sup>337</sup> meaning that there is also a responsibility of stakeholders to ensure that the Court is provided with appropriate information.

Being conscious of the ambitious nature of the argument put forward, one important limitation should be underlined. Even if the steps suggested above were to be taken by the Court, further issues would likely appear at the level of testing of compliance with positive obligations, given the specific criteria and thresholds which apply for each type. The Court may recognize that protective duties exist in this sense for transit jurisdictions such as Belgium, also considering the obligations to manage and implement migration in a particular manner as Schengen-participants and EU Member States. Nevertheless, internal transit jurisdictions present an own problematic, notably in relation to the clarity of their own legal obligations with respect to both victims of migrant smuggling and human trafficking.<sup>338</sup> The fact that Belgium is a transit country and is therewith burdened with a greater problematic, in part on behalf of other states, may in that light also provide grounds for the Court to reject the idea that it can be held to stringent account. As observed by Golini, 'transit countries feel exploited as a springboard towards 'Eldorado' and do not regard themselves as able to deal with the growing numbers of irregular migrants'.<sup>339</sup> With regards to the Schengen Area and the vulnerability and unsustainability of EU migration policy, Scipioni highlights that the conditions for the migration 'crisis' of 2015 are to be found in weak monitoring, low solidarity between Member States, the absence of central institution and the lack of policy harmonization and situational contexts *created by and driven by (conscious) incomplete agreements within the EU* (emphasis added).<sup>340</sup> It is important to be mindful in this regard of the possibility that the Court may be reticent in establishing violations against transit jurisdictions, on the basis that it may be unfair to impose 'impossible or disproportionate burdens'<sup>341</sup> on them, placing with them greater responsibility for joint issues. A viable idea worth exploring in this regard is the notion of *shared* or *collective responsibility* of multiple

337 See, Baumgärtel, (n 80).

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

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

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

341 *Rantsev* (n 82) para 219.

European jurisdictions already recognized in case law and scholarship.<sup>342</sup> Taking the protection of vulnerable individuals within the European legal space to heart, such an approach could diffuse the ‘not our problem’ mentality and bring an end to blaming games played out between European jurisdictions, which become salient in the event of dramatic incidents involving migrants’ fatal journeys.<sup>343</sup> Judge Turković’s concurring opinion attached to *M.H. and Others. v. Croatia* indeed underscores the need to examine shared responsibility. Opining that this judgment ‘offers good guidance for the domestic authorities as to their future conduct’, she marks out that the challenges involved in irregular transit migration ‘concern the entire society’, so that ‘a common solution to the situation should be found within the European family’.<sup>344</sup> In this respect also, the Court can pioneer a progressive approach. In any event, with *Dembour*, we argue that the ECtHR should deploy ‘courage to veer in a direction that is more protective of (...) migrant applicant(s)’,<sup>345</sup> crafting appropriate protection with sensitivity to their particular circumstances, including with respect to vulnerabilities arising, as they transit through European legal space, through (aggravated) smuggling victimization.

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

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

344 *M.H. and Others* (n 102), Concurring Opinion Judge Turković, para 1.

345 See also Baumgärtel (n 80) 27, also with respect to the impact this may have at the domestic level (ibid 28). See also Peroni and Timmer (n 117) 1083-1084, in relation to concerns which may exist that the Court’s use of the group vulnerability notion may present a ‘threat’ in light of the ‘general tendency on the Court’s part to read too many positive obligations into the text of the Convention-thereby putting too great of a burden on the Convention states’, these authors arguing that the use of the concept ‘might actually be a useful guiding principle’, facilitating the ‘prioritization of scarce resources’, both on the part of states and the Court, meaning that ‘(vulnerability can thus be viewed as a limiting rather than a limitless principle’.

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