

The International Law of
Migrant Smuggling

ANNE T. GALLAGHER AO

FIONA DAVID

SARCHI CHAIR LAW



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York, NY 10013-2473, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107015920

© Anne T. Gallagher and Fiona David 2014

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2014

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Gallagher, Anne T., author.

The international law of migrant smuggling / Anne T. Gallagher, Fiona David.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-107-01592-0 (hardback)

1. Human trafficking. 2. Human trafficking – Prevention – International cooperation. 3. Human smuggling. 4. Emigration and immigration law. 5. Refugees – Legal status, laws, etc. 6. Human rights. I. David, Fiona, author. II. Title.

KZ7155.G357 2014

345'.0237–dc23 2013040596

ISBN 978-1-107-01592-0 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Contents

<i>Detailed Contents</i>	<i>page</i> ix
<i>Table of Cases</i>	xvii
<i>Table of Treaties and Other International Instruments</i>	xxxi
<i>Preface</i>	li
<i>Table of Common Abbreviations</i>	lv
Introduction	1
PART I: GENERAL LEGAL FRAMEWORK	
1. The Legal Framework: Transnational Criminal Law, Law of the Sea, and Migration Control	23
2. The Legal Framework: Human Rights and Refugee Law	125
3. Acting against Migrant Smuggling: Capacities and Limitations	202
4. State Responsibility and Migrant Smuggling	276
PART II: SPECIFIC RULES AND OBLIGATIONS	
5. Criminalization of Migrant Smuggling	355
6. Migrant Smuggling by Sea: Interdiction and Rescue	403
7. Prevention and International Cooperation to Combat Migrant Smuggling	490
8. Obligations of Protection, Assistance, and Response	552

2. The Legal Framework: Human Rights and Refugee Law	125
2.1. Applicability of Human Rights Law	128
2.1.1. Smuggled Migrants as Noncitizens	128
2.1.2. Migrant Smuggling, Statelessness, and Human Rights	149
2.2. Right to Leave and Return	151
2.2.1. The Right to Leave	151
2.2.2. The Right to Return	157
2.3. Right to Seek and Enjoy Asylum from Persecution	158
2.3.1. The Obligation of <i>Non-refoulement</i> under Refugee Law	160
2.3.2. Obligation Not to Impose Penalties for Unlawful Entry	163
2.3.3. Exclusion from Protection on the Basis of Involvement in Migrant Smuggling	169
2.4. Additional Restrictions on Expulsion and Return of Smuggled Migrants	174
2.4.1. <i>Non-refoulement</i> in Relation to Torture and Other Serious Violations of Human Rights	175
2.4.2. Restrictions on Expulsion of Stateless Persons	179
2.4.3. Restrictions on Collective Expulsion	180
2.4.4. Protection of Expelled and Returned Persons	182
2.5. Prohibition on Arbitrary Detention and Inhumane Conditions of Detention	192
2.5.1. No Arbitrary Detention	193
2.5.2. Conditions of Detention	197
2.5.3. Detention of Smuggled Children	199
3. Acting against Migrant Smuggling: Capacities and Limitations	202
Part 1: Capacity to Act	204
3.1. Basic Principles of State Sovereignty	204
3.1.1. Sovereign Equality and Noninterference	206
3.1.2. Territorial Sovereignty	207
3.1.3. The Reserved Domain of Domestic Jurisdiction	208
3.2. Principles of Jurisdiction in General International Law	210
3.2.1. Understanding Jurisdiction	211
3.2.2. Prescriptive Jurisdiction over the Crime of Migrant Smuggling	212
3.2.3. Enforcement Jurisdiction	222
3.2.4. Expanding Capacity to Act through Consent	223
3.2.5. Concurrent or Overlapping Jurisdiction	226
3.3. Principles of Jurisdiction at Sea	227
3.3.1. Key Treaties	228
3.3.2. Zones of Maritime Jurisdiction	230

3.3.3. The Principle of Exclusive Flag State Jurisdiction on the High Seas and Its Exceptions	243
Part 2: Extraterritorial Jurisdiction and Limitations on Capacity to Act	249
3.4. Extraterritorial Application of Human Rights Obligations	250
3.4.1. International Instruments and Jurisprudence	250
3.4.2. Regional Instruments and Jurisprudence	257
3.4.3. Preliminary Conclusions about Extraterritorial Application of Human Rights Law	262
3.4.4. Extraterritorial Application of the Obligation of <i>Non-refoulement</i>	264
3.5. Summary of the Key Principles of Sovereignty and Jurisdiction Relevant to Migrant Smuggling	272
4. State Responsibility and Migrant Smuggling	276
4.1. International Law and Responsibility	278
4.2. Responsibility for Violations of International Law Associated with Migrant Smuggling	281
4.2.1. Requirement of Attribution	282
4.2.2. Requirement of a Breach of Obligation	292
4.3. State Responsibility for Breach of Obligations Originating in the Conduct of Private Persons or Entities	297
4.3.1. Implications of the General Rule of Non-attribution of Private Conduct	298
4.3.2. Moving Beyond the General Rule: State Responsibility to Prevent, Protect, and Respond in Relation to Migrant Smuggling	299
4.3.3. Identifying Violations Giving Rise to Responsibility: The Due Diligence Standard	302
4.3.4. Conclusion: The Primacy of the Primary Rules	307
4.4. State Responsibility in the Context of Joint Operations or Other Forms of Interstate Cooperation	309
4.4.1. The Principle of Independent Responsibility	310
4.4.2. Placing an Organ at the Disposal of Another State	311
4.4.3. Joint Conduct and the Implication of One State in the Act of Another State	313
4.4.4. Operations Associated with International Organizations	318
4.5. Consequences of a Finding of State Responsibility	322
4.5.1. The Obligations of Cessation and Reparation	322
4.5.2. Consequences Attached to Serious Breaches of Peremptory Norms	328
4.6. Invocation of Responsibility	331

4.6.1.	General Rules Governing Invocation of Responsibility	332
4.6.2.	Rules Governing Invocation of Responsibility for Violations of Human Rights Norms	336
4.6.3.	Countermeasures	339
4.7.	Responsibilities of Other Entities	341
4.7.1.	International Organizations	342
4.7.2.	Legal Responsibilities of Private Persons and Private Entities	348
4.8.	Summary of Key Principles of State Responsibility Relevant to Migrant Smuggling	349
 PART II: SPECIFIC RULES AND OBLIGATIONS		
5.	Criminalization of Migrant Smuggling	355
5.1.	Criminalization Obligations under the Migrant Smuggling Protocol	356
5.1.1.	Conduct to be Criminalized and Key Aspects of the Criminalization Obligation	358
5.1.2.	Elements of the Offense of Migrant Smuggling	363
5.1.3.	Criminalization of Offenses Related to Migrant Smuggling	367
5.1.4.	Circumstances of Aggravation	374
5.1.5.	Criminalization and Related Obligations under the Organized Crime Convention	384
5.2.	Criminalization Obligations: The European Union	392
5.2.1.	2002 EU Directive on Facilitation of Unauthorized Entry, Transit, and Residence	393
5.2.2.	2002 EU Framework Decision on Facilitation of Unauthorized Entry, Transit, and Residence	396
5.3.	A Note on the Rights of Suspects and the Right to a Fair Trial	398
5.4.	Conclusions on Obligations Related to Criminalization	401
6.	Migrant Smuggling by Sea: Interdiction and Rescue	403
6.1.	Interdiction at Sea	407
6.1.1.	Power to Interdict under the Law of the Sea	409
6.1.2.	Impact of the Migrant Smuggling Protocol	430
6.1.3.	A Note on Regional and Bilateral Arrangements for Interdiction	439
6.2.	Search, Rescue, and Disembarkation	443
6.2.1.	Obligations regarding Persons or Vessels in Distress	445

6.3.	Human Rights and Refugee Law during Interdiction and Rescue	464
6.3.1.	Application of Human Rights Law at Sea	466
6.3.2.	Application of Refugee Law at Sea	471
6.3.3.	Specific Human Rights Issues	473
6.3.4.	Obligation of <i>Non-refoulement</i> at Sea	478
6.4.	A Note on Attribution of Responsibility for Unlawful Acts in Responding to Smuggling by Sea	484
6.5.	Conclusions on Obligations Related to Interdiction and Rescue	487
7.	Prevention and International Cooperation to Combat Migrant Smuggling	
7.1.	Prevention in Relation to Migrant Smuggling	490
7.1.1.	General Prevention Obligations in Transnational Criminal Law	492
7.1.2.	Migrant Smuggling: Specific Obligations of Prevention	493
7.1.3.	Corruption and Prevention of Migrant Smuggling	498
7.2.	International Cooperation	519
7.2.1.	Obligations Related to Extradition	528
7.2.2.	Mutual Legal Assistance in Relation to Migrant Smuggling	530
7.2.3.	Informal Cooperation and Information Exchange	537
7.2.4.	Joint Investigations / Joint Operations	544
7.2.5.	Transfer of Proceedings and of Sentenced Persons	545
7.3.	Conclusions on Obligations of Prevention and Cooperation	548
8.	Obligations of Protection, Assistance, and Response	550
8.1.	An Obligation to Protect and Assist Smuggled Migrants?	552
8.1.1.	Relevant Provisions of the Specialist Instruments	554
8.1.2.	Protection from Smuggling-Related Violence and Exploitation	561
8.1.3.	Obligation to Assist Smuggled Migrants in Danger	565
8.2.	Status-Related Protection and Assistance	568
8.2.1.	Smuggled Children	569
8.2.2.	Smuggled Victims of Trafficking	574
8.3.	Additional Obligations with Respect to Smuggled Migrants Who Are Victims of Crime or Human Rights Abuses	586
8.3.1.	Obligations of an Effective Criminal Justice Response	587
8.3.2.	Violence and Exploitation: The Right to a Remedy	590
8.4.	Conclusions on Obligations of Protection, Assistance, and Response	597