
From the Selected Works of Anne T Gallagher

October, 2016

Review of The International Law of Migrant Smuggling

Jaya Ramji-Nogales



Available at: https://works.bepress.com/anne_gallagher/64/

could make their way into a syllabus for diplomats in training. For international lawyers at large, Behrens raises a challenge to delve into an ever-growing body of practice and to situate it in relation to comity and the several domains of law that might apply.

THOMAS D. GRANT
Lauterpacht Center for International Law,
University of Cambridge

The International Law of Migrant Smuggling. By Anne T. Gallagher and Fiona David. Cambridge, New York: Cambridge University Press, 2014. Pp. lvi, 783. Index. \$155, cloth; \$49.99, paper.

International migration law is, as Vincent Chetail has described, “a giant unassembled juridical jigsaw puzzle.”¹ The field, which is still in its infancy, awaits comprehensive mapping and overarching theoretical design. *The International Law of Migrant Smuggling* represents one of the most thorough and thoughtful efforts to date to construct a corner of this jigsaw puzzle, particularly as it relates to the breadth of relevant legal sources and its connections with other areas of international law. The growth of the field of international migration law depends on projects such as this one that step away from a small-bore focus on one legal instrument or one tiny segment of the field, instead presenting the vast complex of international legal sources that bear on the movement of people across borders. In the words of lead author Anne T. Gallagher AO, “[T]he impetus behind this book lies in a rejection of efforts to corral the issue into a narrow, specialist regime that fails to fully reflect critical connections with other areas of the law, including human rights, refugee law, and the law of the sea” (p. lii). In this book and its companion volume, *The International Law of Human*

¹ Vincent Chetail, *The Transnational Movement of Persons Under General International Law—Mapping the Customary Law Foundations of International Migration Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 1 (Vincent Chetail & Céline Bauloz eds., 2014) (quoting RICHARD B. LILICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 122 (1984)).

Trafficking,² Gallagher offers the broad view of legal regimes, in all of their complexity, relevant to migrant smuggling and human trafficking, two of the most pressing human problems on the contemporary world stage.

Read in hindsight, Gallagher and coauthor Fiona David’s assertion that “[m]igration is a central and indispensable plank of our new, globalized world” (p. 737) seems an understatement. Published in 2014, the book was in the hands of the printers before the “surge” of Central American migrants sought protection at the southwest border of the United States in the summer of 2014, before more than one million migrants arrived at Europe’s sea borders in 2015, and before thousands of migrants seeking safety in Indonesia, Malaysia, and Thailand were left stranded at sea during the summer of 2015. These situations have captured the global stage in a way that the case studies presented in the book, though equally concerning, had not. Yet the authors’ deep expertise—Gallagher participated in the development of the Migrant Smuggling Protocol³ as special adviser to the United Nations High Commissioner for Human Rights Mary Robinson, and David was the principal drafter of the UN Office on Drugs and Crime’s Model Law Against the Smuggling of Migrants⁴—enabled them to anticipate the type, if not the scale, of current migration challenges.

Perhaps more importantly, the book’s cohesive and comprehensive approach will make it relevant to migration situations for years to come. Rather than a traditional specialist treatise that investigates one narrow area of the law, the book takes the contemporary legal issue of migrant smuggling and envisions the entire relevant legal framework,

² ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING (2010); see also Martina E. Vandenberg, Book Review, 106 AJIL 721 (2012) (reviewing *id.*).

³ Protocol Against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, GA Res. 55/25, Annex III, at 40 (Nov. 15, 2000).

⁴ UNITED NATIONS OFFICE ON DRUGS AND CRIME, MODEL LAW AGAINST THE SMUGGLING OF MIGRANTS (2010), available at https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf.

which it then meticulously catalogs. The book is “as much about the sources and subjects of international legal obligation, the formation of international law, and the doctrine of responsibility as it is about migrant smuggling” (p. lii). The authors’ approach is far more appropriate to address systemic migration issues than the siloed method of a traditional treatise.

One of the few places where I parted ways with Gallagher was her twinning of accuracy with neutrality.⁵ While understandable that she would be concerned with rigorous accuracy in her presentation of the law, particularly given the flights of fancy that are often espoused as law in her field, it bears reminding that accuracy and neutrality are separate animals. The book is, at least to some extent, an advocacy project, aimed at “expos[ing] those areas where law is deficient, inconsistent, or otherwise in need of reform” and at “strengthen[ing] the capacity of those who are in a position to use international law to hold States and others to account” (pp. lii–liii). Yet the authors seem reluctant to reveal their politics fully until the epilogue.⁶ This placement represents a missed opportunity; the book is an exemplar of rigor and accuracy, written by authors with deeply held political ideals. An explicit acknowledgment of those ideals up front would have provided an example both for advocates who are less than rigorous in their descriptions of the law and for those who espouse the view that the only route to rigor is through an illusory neutrality that simply disguises preexisting political preferences.⁷

⁵ Gallagher explicitly notes: “Unlike much scholarship in areas covered by the book, its authors do not take—or hide behind—a specific political stance” (p. liii).

⁶ For example, the authors explain that “current migration regimes reinforce discrimination and inequality and contribute to global suffering” and that “international law is ultimately a tool for change,” compatible with the “careful dismantling or reimagining of those regimes” (pp. 736–38).

⁷ See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379, 392 (1999) (expressing skepticism of “the possibility of objectivity” in the international legal system, and concern that “neutral and impartial standards” are often disguises that perpetuate the privilege of dominant groups and the further marginalization of those excluded from the international legal regime).

With that quibble to one side, the book does an extraordinary job describing the voluminous, complex, and at times vague law that governs migrant smuggling. The authors’ stated focus is to identify and assess relevant legal rules and to clarify obligations under these rules. This positivist approach, highlighting consent-based sources, was a wise choice in an area of the law that is too often characterized by wishful thinking. The work includes a vast amount of information, and it rises to the challenge of organizing relevant material. Indeed, the book presents a model for future works that pursue an integrated approach to international migration law. The authors put a great deal of thought into the common tools of a well-structured table of contents, a detailed introduction, useful section and page headers, frequent internal cross-references, and clear recaps. The latter at times rely on key questions, which are particularly helpful. The only area of the book that might have benefited from greater organization was the brief section on case studies, which were arranged in no apparent order, and clearer headers might have linked these case studies more effectively with the rest of the book. In the second half of the book, the authors delineate the “parameters and substantive content” of various legal principles (p. 670) and then apply them to the situation of smuggled migrants. This approach offers clarity and ensures that the book is relevant to broader questions in international migration law.

The book is divided into two parts: the first lays out the general legal framework, and the second sets forth specific rules and obligations. Part I (chapters 1–4) presents both primary rules (i.e., the content of state obligations) and secondary rules (i.e., the circumstances under which states will be held responsible for violations of primary rules). Chapters 1 and 2 describe relevant provisions of transnational criminal law, the law of the sea, migration control laws, human rights law, and refugee law. Chapter 3 explores the legal competence of states to address migrant smuggling, focusing on sovereignty and jurisdiction, and chapter 4 examines whether and under what circumstances states may be held responsible for smuggling-related harms. Part II (chapters 5–10) depicts the specific obligations that flow from

these primary and secondary rules. Chapter 5 discusses criminalization; chapter 6 explores smuggling by sea; chapter 7 examines obligations of prevention and international cooperation to combat migrant smuggling; chapter 8 interprets obligations of protection, assistance, and response; chapter 9 covers detention of smuggled migrants; and chapter 10 ends the book by considering the return of smuggled migrants. Each chapter alone is worthy of an independent review, which, unfortunately, space does not permit here.

Throughout these ten chapters, and over seven hundred pages, the book represents a treasure chest, compiling and analyzing primary sources of international migration law. Consistent with their positivist approach, the authors give priority to international treaties and regional human rights treaties, providing caveats for treaties with limited states parties. They also discuss and raise concerns about the bilateral agreements that often govern international migration law. In particular, the authors note that these agreements may create binding legal obligations without the “treaty” label, are often kept secret, and generally reflect an asymmetric distribution of costs and benefits. These shortcomings are exacerbated by the Migrant Smuggling Protocol, which encourages the creation of bilateral agreements.

The footnotes in each chapter should be the first stop for researchers seeking relevant case law from the International Court of Justice, regional human rights courts, and international treaty bodies. The soft law is appropriately delineated: “[T]hose materials are examined for the possible interpretative direction or weight they can provide to rules established through treaty or custom. The authors generally adopt a conservative approach with respect to such soft law sources, particularly in view of abundant contrary State practice” (p. 604). The authors consistently distinguish between hard and soft law, and they remind readers of the dangers of reading too much into minor developments in soft law. Indeed, the authors explicitly critique those who give too much credence to soft law, explaining quite accurately that, in the field of migrant smuggling, “discussion of the law as it stands too often morphs into discussion of the law as it could or perhaps should be” (p. 348).

Who is the audience for *The International Law of Migrant Smuggling*? The book has plenty to offer both the novice and the expert reader. It provides clear and thorough introductions for unfamiliar readers on topics ranging from how international law works to the basics of international migration law. The authors’ treatment of areas familiar to this reviewer included immense amounts of original research, thorough and precise historical overviews, and detailed yet concise introductions to specific areas of law. Experts in international migration law will find that the authors have thought through every possible dimension of migrant smuggling and have presented every relevant legal angle. From the use of force to move migrants from one vessel to another to the right to a remedy; from witness protection to the UN Convention Against Corruption;⁸ and from the risks of informal cooperation to the obligation to accept and facilitate the return of expelled nationals, the authors have covered all of the possible bases. This work is the epitome of an integrated approach to international migration law.

For the expert reader, the book raises and addresses all of the key cutting-edge issues in international migration law, pointing out numerous vague spots and lacunae. Some of these discussions will appeal beyond those specialized in international migration law to international legal experts more generally. For example, the question of state liability for private actors and its link with extra-territorial jurisdiction is a lively one in several fields of international law. Other international legal experts will be interested in the discussion of not only the conceptual shift from migrants to smugglers but also repeated concerns raised about the criminalization of international migration law. Specialists in the law of the sea will be particularly engaged by the discussion of the vague line between rescue and interdiction, as well as the prosecution of rescuers and the relationship between the concept of distress and sabotage. And international migration law experts will be delighted by the treatment of a feast of pressing questions. Notable examples include a detailed and nuanced discussion of whether a migrant

⁸ UN Convention Against Corruption, GA Res. 58/4 (Oct. 31, 2003).

smuggler can meet the legal definition of a refugee, the complicated and often overlooked relationship between the customary law of nonrefoulement to torture and the customary law of nonrefoulement to persecution,⁹ and the thorny question of how the International Covenant on Civil and Political Rights¹⁰ defines whether a migrant is lawfully present, a determination that substantially affects applicable rights. This reviewer wished only that a means existed through which the authors could continually update their tremendous work, though that, of course, is a shortcoming of the paper book as a medium.¹¹ Working within the limits of their medium, the authors set forth their predictions on legal changes on the horizon and describe the shape that currently vague legal obligations might one day take.

The authors' determination to present a realistic picture of the limits of international law is instructive for novices and refreshing for experts. In particular, the authors are very careful to explicitly demarcate the limits of protection and other human rights offerings, in contrast to many advocates and scholars in the field of migrant smuggling. It is not an exercise in fantastical thinking but a hardheaded examination of existing obligations and rights. The authors clearly delineate gaps in state responsibility and the specific dangers of those gaps, such as states using international organizations to shield themselves from legal responsibility. They also explicitly note spaces where law simply does not exist; for example, there is no duty to disembark persons rescued at sea, and the Migrant Smuggling Protocol presents a cooperation-based enforcement regime that does not in

any way alter the existing international law of the sea. There is no question that the authors tell it like it is; they (quite accurately) describe international refugee law as consisting of "inconsistent jurisprudence, doctrinal disagreements, and ambiguous State practice that both reflect and perpetuate an unhelpful division" (pp. 471–72). Yet they retain optimism about what international migration law might become: "An appreciation of political realities and concomitant limitations is not the same as giving up—or even accepting that international law can, at best, exercise only a moderating influence on the behavior of States" (p. 738).

The central theme of the book is an interrelated concern about narratives of victimhood and criminality. The authors are particularly concerned with the removal of the Trafficking Protocol's notion and language of "victims"¹² from the Migrant Smuggling Protocol (p. 63). This distinction plays out both in the form of circumscribed rights for smuggled persons as compared to entitlements for trafficked persons, as well as an expressive message that smuggled migrants are not worthy of protection (*id.*). The book also highlights the dangers of criminalization of the migration process. This concern manifests itself in two forms. First, "a singular focus on border control presents a particular and apparently unresolvable dilemma" (p. 504); to wit, the higher the fences, the greater the need for smugglers, and the migrant smuggling regime's failure to resolve or even address this problem. Second, the criminalization of core offenses related to trafficking risks criminalization "creep";¹³ while the Migrant Smuggling Protocol does not authorize criminalization of the act of being smuggled, migrants may be prosecuted for related offenses. Smuggled migrants are not eligible for special protections afforded to victims of crime and human rights violations because they are not considered crime victims—and the less they are viewed as victims, the closer they become to being perpetrators. While

⁹ It should be noted that these obligations, though often conflated, are grounded in different treaties and differ in scope and applicability.

¹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

¹¹ In one example, the authors provide a thorough description of the European Court of Human Rights' jurisprudence on collective expulsion (pp. 477–78), which has already developed since the book was published. See, e.g., Jaya Ramji-Nogales, *Prohibiting Collective Expulsion of Aliens at the European Court of Human Rights*, ASIL INSIGHTS (Jan. 4, 2016), at <https://www.asil.org/insights/volume/20/issue/1/prohibiting-collective-expulsion-aliens-european-court-human-rights>.

¹² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 2, 2000, UN Doc. A/55/383, at 53, 40 ILM 377 (2001).

¹³ The term *creep* is a reference to Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AJIL 609 (2014).

the “victim” concept is fraught,¹⁴ the critique of both the victim/criminal binary and the risks of criminalization is trenchant and goes straight to the heart of the international legal regime around migrant smuggling as well as other areas of transnational criminal law.

The book is a tour de force; each chapter could stand alone as an important contribution to the international legal literature. The integrated approach renders each chapter relevant well beyond the narrow issue of migrant smuggling to international migration law and, in many cases, international law more broadly. In the authors’ words,

[The] Migrant Smuggling Protocol is not the first (or last) word when it comes to determining the nature and scope of State obligations of protection and support to smuggled migrants. That instrument is explicitly made subject to a web of international rules that confirm the obligation on States to provide basic and immediate protection and assistance to smuggled migrants (P. 598)

Gallagher and David have ably performed the immense and valuable undertaking of untangling and describing that web of laws accurately, clearly, and comprehensively. The field of international migration law awaits others to follow their lead in assembling the rest of the puzzle.

JAYA RAMJI-NOGALES

Temple University Beasley School of Law

BOOKS RECEIVED

International Law—General

Goldman, Zachary K., and Samuel J. Rascoff (eds.). *Global Intelligence Oversight: Governing Security in the Twenty-First Century*. New York: Oxford University Press, 2016. Pp. xxxi, 357. Index.

¹⁴ See, e.g., Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS., nos. 3–4, 2013, at 235, available at <http://scholarship.law.duke.edu/lcp/vol76/iss3/7>.

Kulesza, Joanna. *Due Diligence in International Law*. Leiden: Brill Nijhoff, 2016. Pp. xvi, 315. Index.

Rajkovic, Nikolas M., Tanja Aalberts, and Thomas Gammeltoft-Hansen. *The Power of Legality: Practices of International Law and Their Politics*. New York: Cambridge University Press, 2016. Pp. xx, 386. Index.

International Economic Law & Relations

Lee, Yong-Shik. *Reclaiming Development in the World Trading System*. Cambridge, UK: Cambridge University Press, 2016. Pp. xxiii, 493. Index.

International Tribunals

Bělohávek, Alexander J., and Naděžda Rozehnalova (eds.). *Rights and Duties of Parties in Arbitration*. The Hague: LexLata, 2016. Pp. xiii, 323. Index.

Bělohávek, Alexander J., and Naděžda Rozehnalova (eds.). *International Dispute Resolution*. The Hague: LexLata, 2016. Pp. xv, 347. Index.

Use of Force & Humanitarian Law (Law of War)

Bellamy, Alex J., and Tim Dunne (eds.). *The Oxford Handbook of the Responsibility to Protect*. New York: Oxford University Press, 2016. Pp. xxiv, 1129. Index.

Bhuta, Nehal, Susanne Beck, Robin Geiß, Hin-Yan Liu, and Claus Kreß. *Autonomous Weapons Systems: Law, Ethics, Policy*. Cambridge, UK: Cambridge University Press, 2016. Pp. x, 410. Index.

Fitzpatrick, Georgina, Tim McCormack, and Narelle Morris. *Australia’s War Crimes Trials 1945–51*. Leiden: Brill Nijhoff, 2016. Pp. xlvi, 865. Index.

Law of the Sea & Maritime Law

Jakobsen, Ingvild Ulrikke. *Marine Protected Area in International Law: An Arctic Perspective*. Leiden: Brill Nijhoff, 2016. Pp. xvi, 435. Index.

Scharf, Michael P., Michael A. Newton, and Milena Sterio (eds.). *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes*.