

Human Traffickers' Fair Trial Rights and Transnational Criminal Law

Thomas Harré

Abstract

The right to a fair trial is enshrined in international and domestic law around the world. This article makes the simple argument that the focus on the rights of victims of human trafficking and efforts to increase the rate of prosecutions of human traffickers should not come at the cost of alleged traffickers' rights to a fair trial, as a failure to uphold fair trial rights places them at risk of unfair prosecution. I consider the extent to which the transnational criminal legal regime regulating human trafficking at the international level provides for these fair trial rights, suggest that the fundamental purposes of transnational criminal law exist in a state of tension against the aims of the international human rights regime, and conclude that further empirical research on the legal experiences of human traffickers is necessary.

Keywords: transnational criminal law, fair trial rights, human traffickers, rule of law

Please cite this article as: T Harré, 'Human Traffickers' Fair Trial Rights and Transnational Criminal Law', *Anti-Trafficking Review*, issue 18, 2022, pp. 159-173, <https://doi.org/10.14197/atr.2012221810>

Introduction

There is a division in the international law of human trafficking known as the '3Ps': protection of trafficked persons; prevention of human trafficking; and prosecution of traffickers. This trisection is not equal: it privileges the interests of the state over the interests of victims¹ of trafficking, and the fair trial rights of traffickers.

¹ Throughout this paper, I use the terms 'victim' and 'defendant' (as opposed to terms such as 'survivor' or 'perpetrator') as they carry specific legal connotations.

This may be seen as a sleight of hand. With public attention squarely on victims of trafficking, we must not lose sight of the traffickers, who are rights holders too. Like any person facing a criminal charge, alleged traffickers are entitled to a fair trial. What then is a fair trial? Put simply, ‘a fair trial is one where the rights a defendant possesses can be effectively deployed.’² Without the confidence that a conviction is ‘safe’,³ it is not possible to be sure that justice is being served—both to traffickers and to victims of trafficking. In this paper, I draw traffickers squarely into the frame and argue that it is through actively upholding and prioritising alleged traffickers’ fair trial rights that we can be confident that justice is served.

Blackstone’s ratio—that it is better for ten guilty people to walk free than one innocent person be found guilty—dates back centuries.⁴ The principle relates to an accused person’s basic and irreducible right to a fair trial,⁵ and more broadly, the rule of law. This right must not be overridden by other concerns, for example, victim protection. Here, I argue for what I hope is an uncontroversial point: upholding the rule of law is a core tenet of a functioning democracy, and an important feature of the core human rights treaties which states have agreed upon.⁶ It protects the integrity of the criminal justice system as a whole and the rights of individuals specifically.

² P Morrissey, ‘Applied Rights in International Criminal Law: Defence counsel and the right to disclosure’, in G Boas, W A Schabas, and M P Scharf (eds.), *International Criminal Justice: Legitimacy and coherence*, Edward Elgar Publishing, Cheltenham and Northampton, 2012, <https://doi.org/10.4337/9781781005606.00010>, pp. 68–104, p. 69.

³ This is a way of describing a conviction, which has been entered following a fair investigation and trial. A useful analysis of the connection between ‘fairness’ and ‘safeness’ in the context of the United Kingdom’s criminal law is found in: I Dennis, ‘Fair Trials and Safe Convictions’, *Current Legal Problems*, vol. 56, issue 1, 2003, pp. 211–237, p. 211, <https://doi.org/10.1093/clp/56.1.211>.

⁴ W Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field’s Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In two volumes*, J.B. Lippincott Co., Philadelphia, 1893, p. 359.

⁵ Recognised by the Judicial Committee of the Privy Council in *R v Howse* [2005] UKPC 30, at [43].

⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 7, Art. 10, Art 11; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

Human trafficking is a ‘crime of international concern’,⁷ often involving multiple states. In cases where each state implicated has sufficient capacity to fairly investigate and prosecute alleged traffickers, the issues I raise in this paper may fall aside. However, if a state’s capacity to respond to human trafficking is compromised, or if the rule of law is weak; or if rights are not adequately applied; or if there is some other incentive on a state to prosecute, then—as Gallagher has noted—there is an increased risk of unfair prosecution.⁸

Defendants are often glossed over in analyses of human trafficking, but they should not be overlooked, for they are a fundamental component of the factual matrix.⁹ This paper presents an alternative framing of the human trafficking narrative, one which centres on the rights of an alleged trafficker. In the remainder of the paper, I first refocus attention on alleged traffickers through a discussion of the relationship between complainant and defendant in criminal law. Second, I situate the international normative framework of human trafficking within the context of transnational criminal law. Third, I explore the tension between transnational criminal law and a defendant’s fair trial rights in human rights law. Lastly, I sketch a blueprint outline of basic fair trial rights that apply to alleged human traffickers.

At the outset, I make some preliminary observations: I am writing from the perspective of defence counsel, trained and practicing in the New Zealand common law legal system, where prosecutions take place within an adversarial structure. In the context of New Zealand’s limited experience of prosecuting human traffickers, I have not defended alleged traffickers in court. However, I have seen first-hand the disastrous consequences of officials’ failures to properly identify and respond to instances of human trafficking. My views and analysis are undoubtedly influenced by this background. This discussion on fair trial rights of those charged with trafficking offences is not intended to diminish the harm done to victims of human trafficking. I acknowledge that victimhood is a layered and nuanced concept; I am focused here on the aspects of victimhood which relate specifically to criminal legal proceedings. The criminal justice process involves the balancing of competing bundles of rights belonging to defendants and complainants. Justice can only be achieved when convictions are fairly entered.

⁷ MC Bassiouni, ‘The Source and Content of International Criminal Law: A theoretical framework’, in MC Bassiouni (ed.), *International Criminal Law Vol. 1: Crimes* (2nd ed.), Transnational Publishers, Ardsley on Hudson, New York, 1999, p. 4.

⁸ A T Gallagher, ‘Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice’, *Anti-Trafficking Review*, issue 6, 2016, pp. 1–11, <https://doi.org/10.14197/atr.20121661>.

⁹ See A Choi-Fitzpatrick, ‘The Good, the Bad, the Ugly: Human rights violators in comparative perspective’, *Journal of Human Trafficking*, vol. 2, issue 1, 2016, pp. 1–14, <https://doi.org/10.1080/23322705.2016.1136166>.

Finally, I note that while some jurisdictions (such as the United Kingdom and Australia) have tended toward the subsumption of the offence of human trafficking within the broader rhetoric of modern slavery, I have maintained a conceptual distinction between the two. I focus solely on human trafficking as defined by the UN Trafficking Protocol.¹⁰

To date, it seems little direct attention has been given to this topic.¹¹ I see this paper as a starting point in a broader discussion of the role played by traffickers in the criminal justice process, and future empirical work should refine these arguments. Through these reflections, I hope to contribute toward a wider discussion on the relationship between the individual and the state in transnational criminal law.

Drawing the Defendant Back into Focus

Much has been written about the importance of victim identification in cases of human trafficking. An identified victim is a person who may be summonsed to court and who may have their evidence tested through cross-examination by the defendant. Effective, accurate, and rapid identification protects victims, but also assists in the maintenance of fair trial rights.

In law, there is a relationship between offender and victim; the commission of an offence against a person creates a bond between the two. In the context of a prosecution for human trafficking, the formal identification of a trafficked person implies the existence of a trafficker. However, the process of identification can also carry risk to the victim. A misidentification places them at risk of being unfairly prosecuted and punished for offences they may have committed as a result of their trafficking.¹² The rule of law must provide a safeguard to both

¹⁰ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000 (Trafficking Protocol).

¹¹ I acknowledge the work of others who have made reference to the rights of defendants under transnational criminal law. See, for instance: N Boister, 'Human Rights Protections in the Suppression Conventions', *Human Rights Law Review*, vol. 2, issue 2, 2002, pp. 199–227, <https://doi.org/10.1093/hrlr/2.2.199>; A T Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, Cambridge, 2010; T Ward and S Fouladvand, 'Human Trafficking, Victims' Rights and Fair Trials', *Journal of Criminal Law*, vol. 82, issue 2, 2018, pp. 138–155, <https://doi.org/10.1177/0022018318761680>.

¹² J Elliott, '(Mis)Identification of Victims of Human Trafficking: The case of R v O', *International Journal of Refugee Law*, vol. 21, issue 4, 2009, pp. 727–741, <https://doi.org/10.1093/ijrl/eep023>.

traffickers and trafficked persons alike. Advancing victim protection requires—by necessity—the protection of fair trial rights of defendants.

The distinction between offender and victim is not always clear.¹³ Cases of human trafficking may be obscured by offending by victims themselves,¹⁴ or through officials taking alternative routes to prosecution.¹⁵ The principle of non-punishment of victims is now recognised in international law,¹⁶ as well as in the domestic law of some states. However, at its heart, application of this principle relies on the rapid, accurate, and effective identification by law enforcement and other agencies of a person as a victim, as well as prosecutorial discretion, applied fairly by experienced prosecutors. As a matter of legal procedure, the proper identification of victims of trafficking helps to bring the defendant into focus.

It is a simple observation that actors responsible for victim identification are (in many countries) unelected and unaccountable; their decisions are not easily amenable to oversight or review. This is a weakness in a system which is focused on prosecuting. It is a crack through which victims of trafficking may slip, and a fault line that may lead to unfair prosecutions of people as traffickers where there is no evident victim. Upholding fair trial rights of those accused of trafficking is a safeguard against unfair prosecution and unsafe or wrongful conviction. Consider the implications of an individual's status as a defendant: in criminal law, the person who makes a complaint is a complainant. They are not

¹³ A point recognised by the former United Nations Special Rapporteur on trafficking in persons; see *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo*, A/HRC/20/18, 6 June 2012, para. 24.

¹⁴ It is now well recognised that victims of trafficking may be compelled to commit criminal offences by their traffickers. See, for example: V Brotherton *et al.*, *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory study and good practice examples*, Anti-Slavery International, London, 2014; Interpol, 'Types of Human Trafficking', n.d., retrieved 11 January 2022, <https://www.interpol.int/en/Crimes/Human-trafficking/Types-of-human-trafficking>.

¹⁵ For examples of this in a New Zealand context, see: C Stringer, *Worker Exploitation in New Zealand: A troubling landscape*, Human Trafficking Research Coalition, Auckland, 2016; C Stringer, D H Whittaker, and G Simmons, 'New Zealand's Turbulent Waters: The use of forced labour in the fishing industry', *Global Networks*, vol. 16, issue 1, 2016, pp. 3–24, <https://doi.org/10.1111/glob.12077>.

¹⁶ See Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 'Implementation of the Non-Punishment Principle', A/HRC/47/34, 17 May 2021; R Piotrowicz and L Sorrentino, *Policy and Legislative Recommendations Towards the Effective Implementation of the Non-punishment Provision with Regard to Victims of Trafficking*, OSCE, Vienna, 2013.

necessarily a victim.¹⁷ In terms of the criminal justice process, that person becomes a ‘victim’ (and the defendant becomes an ‘offender’) once the charges against the defendant are proven.¹⁸ In other words, on one level, the status of victimhood is obtained upon conviction, following the testing of evidence through a fair trial process.¹⁹ Put another way: a victim may be a complainant, but a complainant is not necessarily a victim (in respect of a defendant) until the offence is proven. I acknowledge that this is a particularly legalistic approach that is unlikely to fully account for the harm suffered by a victim, but it has important implications for the fair trial rights of a person charged with human trafficking—particularly with respect to the presumption of innocence. This is because it cannot be fairly said that a person is a *victim* of specific offending, without by necessity implicating an offender.

In a prosecution for trafficking in common law jurisdictions, the role of the victim is set aside to a certain extent.²⁰ In effect, it is the State which decides whether to commence or continue a prosecution. The State appropriates what is originally a dispute between individuals. As the Secret Barrister has put it:

The victim is no longer a victim; she is, in the properly neutral language of the court, a complainant. The existence and extent of her suffering will be doubted, the subject of debate and analysis by strangers; her agonies reduced to writing and legally pasteurized into admissible, artificial evidence. Her involvement is both peripheral and central; she is not represented—the prosecution barrister is not ‘her barrister’; ... Yet she will personally carry the success or failure of the proceedings. Her evidence will usually

¹⁷ This is the approach generally adopted in New Zealand law. In *R v McDonald* [2015] NZHC 511, Whata J held (in the context of sexual violence offending): ‘I am satisfied that Parliament’s intended meaning of complainant is: Persons upon whom or with whom [a specified sexual offence] has been, or is alleged to have been, committed.’ (at [48]). This reasoning was referred to with approval by the Supreme Court of New Zealand in *Ellis v R* [2020] NZSC 137. See also Black’s Law Dictionary (Thomson Reuters 10th ed.), p. 1798: Victim: ‘a person harmed by a crime, tort, or other wrong’.

¹⁸ See for discussion: M Conklin, ‘Victim or Complaining Witness: The Difference Between Guilty and Not Guilty’, *San Diego Law Review*, vol. 57, issue 2, 2020, pp. 423–432.

¹⁹ The *Victims Rights Act 2002* (NZ) defines victim as ‘a person against whom an offence is committed by another person’. Offence is defined as ‘an offence against an enactment’. It includes an alleged offence.

²⁰ K D’Adamo, ‘Prioritising Prosecutions is the Wrong Approach’, *Anti-Trafficking Review*, issue 6, 2016, pp. 111–113, <https://doi.org/10.14197/atr.20121668>.

be crucial; she will be compelled under pain of imprisonment to attend court to deliver it. And, if the verdict is not guilty, she will feel responsible.²¹

Casting victims of trafficking in this light demonstrates the role that they play in supporting a prosecution,²² and the prosecutorial goals of the state—goals which are focused on crime suppression and border control.²³ In the next section, I consider these goals in greater detail.

Human Trafficking as a Crime of Transnational Criminal Law

I approach the issue of human trafficking through the lens of transnational criminal law, i.e. ‘the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects’.²⁴ I suggest that in respect of the international legal regime regulating state responses to human trafficking, the issue is best understood in terms of transnational criminal law (as opposed to, for example, a human rights issue²⁵). This particular analysis is founded on the normative standards created by two main legal instruments that set out the core international obligations incumbent on states: The *United Nations Convention against Transnational Organised Crime* (UNTOC) and the Trafficking Protocol supplementing it.

Analysis of these broadly ratified treaties shows four central classes of obligation which are imposed on States Parties. These are to:

²¹ The Secret Barrister, *Stories of the Law and How It's Broken*, Pan Macmillan, London, 2018, p 158.

²² For an interesting discussion on the tension between victims’ rights and the interests of the prosecution, see B L Gershman, ‘Prosecutorial Ethics and Victims’ Rights: The prosecutor’s duty of neutrality’, *Levins & Clark Law Review*, vol. 9, issue 3, 2005, pp. 559–579.

²³ J C Hathaway ‘The Human Rights Quagmire of “Human Trafficking”’, *Virginia Journal of International Law*, vol. 49, no. 1, 2008, pp. 1–59. See also M Jovanovic, ‘International Law and Regional Norm Smuggling: How the EU and ASEAN redefined the global regime on human trafficking’, *American Journal of Comparative Law*, vol. 68, issue 4, 2020, pp. 801–835, <https://doi.org/10.1093/ajcl/avaa030>.

²⁴ N Boister ‘Transnational Criminal Law?’, *European Journal of International Law*, vol. 14, no. 5, 2003, pp. 953–976, p. 955, <https://doi.org/10.1093/ejil/14.5.953>.

²⁵ As to the distinction, see F Tulkens ‘The Paradoxical Relationship between Criminal Law and Human Rights’, *Journal of International Criminal Justice*, vol. 9, issue 3, 2011, pp. 577–595, <https://doi.org/10.1093/jicj/mqr028>. Tulkens elaborates on the observation that human rights are both a sword and shield in respect of the application of the criminal law.

1. Cooperate with other States Parties to investigate and prosecute human trafficking;
2. Criminalise the offence of human trafficking as defined by the Trafficking Protocol;
3. Establish jurisdiction over offenders on a range of bases; and
4. Implement the rule to extradite or prosecute alleged traffickers.

These central pillars of the transnational criminal law of human trafficking require positive action by states parties. With the ultimate aim being suppression of cross-border criminality²⁶ via the facilitation of successful prosecutions, states must meet their primary obligations to criminalise, prosecute, punish, cooperate, and strengthen border controls.²⁷ Throughout the text of these instruments, the protection of victims is a secondary purpose, and the rights of defendants feature only on the sidelines. This is consistent with other areas of transnational criminal law. As Robert Currie has argued, transnational criminal law operates to the exclusion of the ‘provision of basic procedural protections for the individuals being investigated and prosecuted’.²⁸ In this respect, UNTOC (and, I would add, the Trafficking Protocol) marginalises the rights to privacy, liberty, property, and fair trial of individuals charged with trafficking.²⁹ This point is also made by Steven Koh, who has argued that the benefits of promoting criminal accountability come at the cost of potentially undermining the rights of defendants through the possibility for misuse of extradition processes and

²⁶ D Ireland-Piper, ‘Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine’, *Utrecht Law Review*, vol. 9, no. 4, 2013, pp. 68–89, <https://doi.org/10.18352/ulr.243>.

²⁷ As to which, see: A T Gallagher and P Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the front line’, *International Criminal Justice Review*, vol. 18, issue 3, 2008, pp. 318–343, p. 320, <http://doi.org/10.1177/1057567708320746>. Neil Boister has suggested the core purposes of transnational criminal law are substantive criminalisation and procedural cooperation. See: N Boister, ‘Further Reflections on the Concept of Transnational Criminal Law’, *Transnational Legal Theory*, vol. 6, issue 1, 2015, pp. 9–30, p. 17, <https://doi.org/10.1080/20414005.2015.1042232>.

²⁸ R Currie, ‘The Protection of Human Rights in the Suppression of Transnational Crime’, in N Boister and R Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, Routledge, Abington, 2015, pp. 27–40. See further: M C Bassiouni, ‘An Appraisal of the Growth and Developing Trends of International Criminal Law’, *Revue Internationale de Droit Penal*, vol. 46, issue 1–2, 1975, pp. 3–31.

²⁹ Boister, 2002, p. 211.

disclosure regimes.³⁰

The privileging of state interests in the Protocol emerges because the instruments are not themselves rights-focused. Transnational criminal law focuses, in broad-brush terms, on the ‘mechanics of investigation and extradition’.³¹ Thus, the net result—when applied in a prosecution against a person accused of human trafficking—is not a rights-protective system, but rather one that focuses on facilitating successful prosecutions of traffickers.³²

This is hardly a novel conclusion: there is a well-documented set of narratives underpinning the global anti-trafficking regime which privileges States’ intolerance for irregular migration and prioritises securitisation.³³ The consequence is that rights of individuals are marginalised in favour of the foreign and domestic policy aims of States.³⁴ In the next section, I consider the scope of fair trial rights applying to a defendant facing charges of human trafficking.

³⁰ S A Koh, ‘Foreign Affairs Prosecutions’, *New York University Law Review*, vol. 94, no. 3, 2019, pp. 340–401, <https://doi.org/10.2139/ssrn.3398955>.

³¹ *Ibid.* p. 345. I acknowledge that the Protocol also makes recommendations to states parties about protection of victims, including facilitation of the return of victims to their home country; consideration of the physical safety of trafficked persons; protection of the privacy and identity of victims of trafficking; and provision of housing, counselling, and material assistance.

³² I acknowledge the argument that globally, there is a low rate of convictions for trafficking. This is understandable, given the well-known difficulty in quantifying cases of human trafficking. As to quantity of prosecutions, see the critique provided in: M McAdam, ‘Not All Prosecutions Are Created Equal: Less counting prosecutions, more making prosecutions count’, *Anti-Trafficking Review*, issue 6, 2016, pp. 123–125, <https://doi.org/10.14197/atr.201216611>.

³³ On dominant discourses in human trafficking, see: S Kneebone and J Debeljak, *Transnational Crime and Human Rights: Responses to human trafficking in the Greater Mekong Subregion*, Routledge, Abington, 2012; Gallagher, 2010.

³⁴ It is telling that in 2000, fewer than 10 per cent of states had criminalised human trafficking. By 2015, approximately 75 per cent had criminalised the offence. (See: B A Simmons, P Lloyd, and B M Stewart, ‘The Global Diffusion of Law: Transnational crime and the case of human trafficking’, *International Organization*, vol. 72, issue 2, 2018, pp. 249–281, <https://doi.org/10.1017/S0020818318000036>.) As of August 2020, 169 out of the 181 states parties to the Trafficking Protocol had criminalised human trafficking through domestic legislation. (See: K Kangaspunta, *et al.*, *Global Report on Trafficking in Persons 2020*, United Nations Office on Drugs and Crime (UNODC), New York, 2020, p. 61.)

The Rights of a Defendant Facing Charges of Human Trafficking

As Amal Clooney and Philippa Webb observe: ‘the right to a fair trial is at the heart of human rights protection because without this one right, all others are at risk’.³⁵ However, as noted above, the transnational criminal law of human trafficking does not explicitly prescribe a suite of rights for defendants, those rights being cognate to the core aims of the transnational criminal legal regime. Consequently, as Tom Obokata notes,

[Fair trial rights] must be supplemented by international human rights law. In addition to widely debated and scrutinised human rights such as the right to liberty and security, and prohibition against torture, inhuman, or degrading treatment, an important issue in the context of law enforcement against transnational organised crime is the use of special investigative techniques such as controlled delivery, surveillance, interception of communications, and undercover operations, and their impact on one’s right to privacy.³⁶

To make the point again: the transnational criminal law of human trafficking is a crime suppression regime, not a human rights one.³⁷ It is a regime in tension with the goals of the international human rights regime, which exists as a ‘sword and shield’ against excesses of state power.³⁸ To the limited extent that the rights of defendants are referenced in transnational criminal law, they fall as a corollary to the fundamental goal of suppressing organised crime and human trafficking globally. For example, while UNTOC provides that legal defences remain available,³⁹ and that a person subject to extradition is to be treated fairly,⁴⁰ it steps back in other regards: disclosure of exculpatory material

³⁵ A Clooney and P Webb, *The Right to a Fair Trial in International Law*, Oxford University Press, Oxford, 2020, p. 1.

³⁶ T Obokata, ‘The Value of International Law in Combating Transnational Organised Crime in the Asia-Pacific’, *Asian Journal of International Law*, vol. 7, issue 1, 2017, pp. 39–60, p. 53, <https://doi.org/10.1017/S2044251315000193>.

³⁷ A T Gallagher, ‘Trafficking in Transnational Criminal Law’, in R W Piotrowicz, C Rijken and B H Uhl (eds.), *Routledge Handbook of Human Trafficking*, Routledge, Abington, 2017.

³⁸ Tulkens.

³⁹ Art 11(6).

⁴⁰ Art 16(3).

may be made to a defendant.⁴¹ Through the savings clause of the Trafficking Protocol, a nod is given to the applicability of the wider human rights regime, albeit this is framed in terms of the protection of victims of trafficking, with particular emphasis placed on the principle of non-refoulement.⁴²

It is only in the non-binding commentary on UNTOC and the Trafficking Protocol, produced by the United Nations Office on Drugs and Crime (UNODC), that stronger statements on defendants' rights are set out in the context of human trafficking. For example, in the 2009 'Model Law' on human trafficking, it was said (in relation to the issue of victim consent to exploitation) that:

The above does not remove the right to a defence. ... [T]he irrelevance of consent if one of the means is used should not be interpreted as imposing any restriction on the right of the accused to a full defence and to the presumption of innocence. It should also not be interpreted as imposing on the defendant the burden of proof. As in any criminal case, the burden of proof is always on the prosecution, in accordance with domestic law, except where the national law provides for specific exceptions to this rule.⁴³

Somewhat curiously, the revised 'Model Law', published in 2020, removes this reference.⁴⁴ Given the interpretive value of the 'Model Law' (which originally synthesised the text of the instruments, the Travaux Préparatoires, and the UNODC's Guide for the Implementation of UNTOC and its Protocols⁴⁵), my view is that this may represent a consolidation of the aims of the transnational criminal regime, away from international human rights law.

⁴¹ Arts 18(5) and 19. This is a significant drawback. On the importance of the right to full disclosure, see: S Zappalà, 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice*, vol. 8, issue 1, 2010, pp. 137–164, <https://doi.org/10.1093/jicj/mqq001>.

⁴² Art 14.

⁴³ United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons*, UNODC, Vienna, 2009 ('Model Law'), p. 27. This language draws on the text of the travaux préparatoires to the Convention. See: Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, A/55/383/Add.1, 3 December 2000, at [68].

⁴⁴ See United Nations Office on Drugs and Crime, *Model Legislative Provisions against Trafficking in Persons*, United Nations, Vienna, 2020.

⁴⁵ United Nations Office on Drugs and Crime, *Legislative Guide for the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, UNODC, Vienna, 2004.

The UNODC position is contrasted by that taken by the Office of the High Commissioner for Human Rights. While the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* makes only a single reference to a defendant's rights (suggesting that the identity and privacy of trafficked persons 'should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial'⁴⁶), the Commentary to those guidelines goes further.⁴⁷ Nonetheless, it is the UNODC which carries the mandate for implementation of the Protocol, and states parties will be primarily guided in their efforts to ratification by the work of that agency. As an addendum to this, it is important to acknowledge that recent UNODC work has engaged more deeply with the human rights implications of human trafficking issues.⁴⁸

To reiterate a core point of this paper, the legal provisions for the rights of defendants in transnational criminal law come secondary to the interests of states (and victims). I acknowledge there are counter-arguments to this proposition: for example, that transnational criminal law is simply a blueprint to guide domestic penal legislation and policy. However, in the context of transnational criminal law (which has been described as a 'creature of a loosely aligned pluralist Vattelien society of states where sovereignty and self-interest [are] the dominant values'⁴⁹), it might be thought that these loose provisions are insufficient to protect an individual defendant from the application of the overwhelming mass of the coercive machinery of not just one State, but potentially several operating cooperatively to secure a conviction. The context, content, and detail of the rights referred to are not contained within the transnational criminal law of human trafficking; but rather are found in domestic, regional, and international human rights law.⁵⁰

Against the provisions in UNTOC and the Trafficking Protocol, I ask, what then are the component elements of the right to a fair trial? Tom Bingham, writing extrajudicially, has made the point that the concept of fairness is not static, but evolves over time.⁵¹ The Universal Declaration of Human Rights provides a useful departure point for identifying the salient features of the right to fair

⁴⁶ United Nations, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, at 6.6.

⁴⁷ United Nations, *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, November 2010, HR/PUB/10/2.

⁴⁸ M McAdam, *UNODC Toolkit for Mainstreaming Human Rights and Gender Equality into Criminal Justice Interventions to Address Trafficking in Persons and Smuggling of Migrants*, UNODC, Vienna, 2021, pp. 68–73.

⁴⁹ Boister, 2015, p. 10.

⁵⁰ Boister, 2002, p. 214.

⁵¹ Tom Bingham, *The Rule of Law*, Penguin, London, 2010, p. 90.

trial. Article 7 provides for equality before the law; article 10 mandates a fair and public hearing by an independent and impartial tribunal; and article 11 provides for the presumption of innocence.⁵²

Article 9 of the International Covenant on Civil and Political Rights⁵³ provides for freedom from arbitrary arrest and detention; the right to be promptly informed of charges laid; the right to be promptly brought before a judicial officer; the right to a trial without undue delay; the right to apply for bail; the right to test the lawfulness of detention; and the right to compensation for unlawful arrest or detention. Article 14 elaborates further: everyone is to be equal before the law, and entitled to ‘a fair and public hearing by a competent, independent and impartial tribunal’. Everyone is to be afforded the presumption of innocence. Article 14 refers to certain minimum standards of criminal procedure, including the right to be told the nature of the charges against one; to have adequate time and resources to prepare a defence; to be tried without undue delay; to have access to counsel; and to cross-examine prosecution witnesses.

This is by no means the only statement of these rights; the general principles are found in regional instruments and in the domestic law of many states. But in our focus on fair trial rights in the context of human trafficking, where does this take us?

I return to the point made earlier. In any jurisdiction with a strong rule of law, prosecuting a defendant on the basis of a straightforward factual matrix, there can be a high degree of confidence in the fairness of proceedings. However, transnational crime generally, and human trafficking specifically, is not necessarily simple. Take a hypothetical case where an alleged trafficker (operating in country A) attempts to traffic a person (living in country B) into a different country (country C).⁵⁴ The implication for defendants is they are liable to be caught in a jurisprudential grey area: while a court in country C may well have the ability to exercise jurisdiction over the alleged offending, there may be limited constitutional guarantees available to that defendant.⁵⁵

⁵² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 7, Art. 10, Art 11.

⁵³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

⁵⁴ This is not beyond the realms of possibility. See this analysis in relation to the exploitation of Indonesian workers by Korean fishing companies in New Zealand’s exclusive economic zone: C Stringer, G Simmons and D Coulston, ‘Not in New Zealand’s Waters, Surely? Labour and human rights abuses aboard foreign fishing vessels’, New Zealand Asia Institute Working Paper Series (No 11-01), 2011.

⁵⁵ In terms of this point in the Canadian context, see R J Currie, ‘Charter without Borders: The Supreme Court of Canada, transnational crime and constitutional rights

This has important implications for a person who may be charged with human trafficking. In any prosecution brought by a state, there is a general inequality of arms between defendant and prosecutor. For example, a defendant may be restricted in their ability to access disclosure under varying criminal procedure regimes; and the rules of evidence may vary—as may the ability to compel attendance of witnesses. Whereas the State has access to the diplomatic and law enforcement machinery necessary to build and prosecute its case, the defence is not so endowed. In some jurisdictions, actions of state officials acting abroad may not be subject to the same constitutional guarantees as would apply to actions taken domestically.⁵⁶

Conclusion

Human rights organisations have enthusiastically adopted the issue of human trafficking. Efforts to protect victims have led to the development of principles such as the principle of non-punishment of victims and an expansion of the forms of exploitation recognised by courts.⁵⁷ There is now recognition that ‘victims have a right to a fair opportunity to participate in a fair trial of anyone whom they and/or the state accuse of violating their rights.’⁵⁸ However, the trite point to be made is that the right to a fair trial incorporates fairness to victims as well as defendants, fairness to the prosecution and fairness to the defence. As I have suggested, this is an issue that would benefit from further empirical research.

UNTOC and the Trafficking Protocol are instruments which privilege state interests above the interests of individuals. To the extent that individuals feature, it is as objects to be offered a degree of protection by the subjects of international law, and, to put a cynical gloss on it, as a means to the end of ensuring successful prosecutions.

Despite the tension between transnational criminal law and human rights law, the two regimes must work together: the success of the suppression regime requires promotion of fair trial rights; prosecutions are effective when they result in safe

and freedoms’, *Dalhousie Law Journal*, issue 27, 2004, pp. 235–264.

⁵⁶ In the New Zealand context, see: *Smith v R* [2020] NZCA 499, [91] (noting the open question as to the extraterritorial applicability of the New Zealand Bill of Rights Act 1990).

⁵⁷ See *V.C.L. and A.N. v The United Kingdom* (Applications nos. 77587/12 and 74603/12), 16 February 2021.

⁵⁸ Ward and Fouladvand, p. 143.

verdicts; safe verdicts are returned when a trial is fair.⁵⁹ It has been said that ‘a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all’.⁶⁰ In broad-brush terms, this is not a radical proposition. The trial process is a crucible in which evidence is tested against the fundamental presumption of innocence, and weighed against the standard of ‘beyond reasonable doubt’. Fairness throughout is critical to ensure the safeness of a resulting verdict.

Thomas Harré is a barrister currently practising at the defence bar in New Zealand. He is an associate member of the Centre for Research on Modern Slavery, University of Auckland, and is involved in a number of national law reform projects. He holds a PhD in Law from Melbourne University. His research interests centre on issues of transnational criminal law, human trafficking, and forced labour. Email: thomas@thomasharre.com.

⁵⁹ A T Gallagher and R Surtees, ‘Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?’, *Anti Trafficking Review*, issue 1, 2012, pp. 10–30, <https://doi.org/10.14197/atr.201211>.

⁶⁰ *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42, p. 68.