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BENCHMARKING LEGISLATION ON CRIME VICTIMS: THE UN VICTIMS DECLARATION OF 1985

Jan J.M. Van Dijk

I. Introduction

In 1985 the General Assembly of the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This document, although not a legally binding treaty, lays down the minimum standards for the treatment of crime victims and has been heralded as the magna charta of the international victims' movement. The UN Declaration provides a benchmark for victim-friendly legislation and policies. In many respects it resembles the Council of Europe Recommendation on the position of the victim in the framework of criminal law and procedure of the same year (Recommendation 85/11).

A comparative analysis of the practical implementation of Recommendation 85/11 in the various member countries of the Council of Europe showed relatively poor results for several Member States (Brienen and Hoegen, 2000). Laudable attempts have also been made to collect information from the UN member States about the use and application of the UN Victim Declaration. As Groenhuysen (1999) has rightly observed, this monitoring effort focused mainly at legislative implementation. Even from this limited perspective, implementation in many countries showed huge gaps.

In recent years several new international criminal law treaties have been adopted and it seems worthwhile to determine the extent to which these legally binding instruments respect the minimum standards set by the UN Declaration. In this paper we will look primarily at the concurrence of the UN Convention against Transnational Organized Crime (UNTOC) and its Protocol Against Trafficking in Persons, Especially Women and Children (both of which entered into force in 2003) with the 1985 UN standards. Many UN Member States have ratified these instruments or, like the US, are likely to do so in the course of 2005. The ratification and subsequent implementation of these legally binding instruments may provide additional impetus to victim-friendly practices in criminal justice practice in the years to come; this seems particularly pertinent with respect to the UN protocol against Trafficking in Persons.

In the following, reference will also sometimes be made to the 2001 Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/jHA), which is legally binding for the current 25 Member States of the EU.

II. Concurrence with the Ten Principles of Justice for Victims

The contents of the 1985 Declaration can be summarized in the following ten basic principles of justice:

1. Victims must be treated with compassion and respect;
2. Victims have a right to information on the proceedings;
3. Victims have a right to present their views to the judicial authorities;
4. Victims are entitled to (free) legal aid;
5. Victims have a right to see their privacy/identity protected;
6. Victims have a right to protection against retaliation/intimidation;
7. Victims have a right to be offered the opportunity to participate in mediation;
8. Victims have a right to receive compensation from the offender;
9. Victims have a right to receive compensation from the state in cases of violent crime;
10. Victims have the right to receive social support/assistance.

In Annex I, an overview is given of the provisions in the UNTOC Convention and its supplementary Protocol under scrutiny, which, can qualify as more or less adequate operationalizations of these ten basic principles. If the legal instruments use language such as "shall consider" or "may include" rather than "should", obligation can be regarded as optional. In case no articles concerning a principle could be identified, the instrument was found wanting in this respect. Table 1 gives the results of the analysis.

Table 1: Concurrence of UNTOC and its supplementary human trafficking protocol with the ten basic principles of justice for victims of the 1985 UN Declaration on Victims

Ten Basic Principles of Justice of the 1985 UN Declaration on Victims of Crime and Abuse of Power	2000 UNTOC Convention	2000 UN Trafficking Protocol
1. Compassion and respect	-	X
2. Information on proceedings	-	X
3. Presentation of views	X	X
4. Legal aid	-	Optional
5. Protection of privacy/identity	-	X
6. Protection against retaliation and intimidation	X	X
7. Informal dispute resolution	-	-
8. Compensation from offender	X	X

9. Compensation from State	.	Optional
10. Social assistance	X	Optional

The UNTOC Convention covers a wide range of issues concerning international cooperation in the fight against organized crime; but it does not have a focus on victims. In comparison, the Trafficking Protocol can be applauded because it specifically refers in several places, albeit somewhat indirectly, to the need to respect vulnerable victims. The first principle, possibly the most important of the ten from the perspective of victims, has found its place in the Protocol but not in the TOC Convention. In many countries, compassion and respect for crime victims from criminal justice personnel, let alone victims of sex trafficking, is wanting. In this regard the Trafficking Protocol bolsters the efforts of the 1985 UN Declaration to place the needs of vulnerable victims centre-stage in criminal justice. With the acknowledgement that criminal justice authorities are reliant on victims to inform them about crime and provide witness testimonies, the role of criminal justice agencies as 'service providers' to victims is increasing in profile and has lent itself to the promotion of service deliverables, such as compassion and respect.

With respect to the second principle, the operationalization of the right to notification/information is again absent in the UNTOC Convention. Considering that victims of transnational organized crime may well reside in countries other than where the criminal investigation is centred or where their victimisation occurred, and, therefore, tend to be reliant on information offered them by criminal justice agencies managing their case, this omission seems highly regrettable. The Protocol, in contrast, contains unambiguous language on this right and so does the EU framework decision.

The third principle, the right to present views and concerns in all relevant stages of the criminal proceedings, was the subject of lengthy discussions during the elaboration of the Declaration during the 1985 UN Congress in Milan, with North American experts strongly propagating its inclusion and European experts from the UK and The Netherlands expressing reservations. In the Council of Europe Recommendation of 1985, no mention is made of the right to express views. This basic principle of allocation for the victim is now honoured in the TOC convention and its Protocol and, somewhat surprisingly considering previous European reservations, also in the EU framework decision. Since no such right for the victim to speak up during the criminal trial is currently assured under national legislation in many European countries, these provisions in the UN Convention and EU model should be of special interest to European victimologists.

'Victim statements' provide victims with the opportunity to relate information to criminal justice authorities about the impact of crime on them. In so doing, they have raised a number of contentious points about their influence on criminal justice, due process and infringement of defendants' rights. At the same time, victim statements raise the spectre of offenders, who have access to information supplied by victims under Article 6 of the European Convention on Human Rights, wanting to avenge victims for the content of their victim statement. In this regard, the management, content control, and presentation of victim statements by specialized support agencies is to be welcomed as a safeguard against

offender retaliation, and as a means of giving victims 'a protected voice' in the criminal justice process. In our view, a particularly useful form of 'victim statement' in the case of organized crime, including human trafficking, is the testimony of representatives of specialized NGOs who can speak on behalf of victims.

In relation to the fourth principle, the EU framework decision obliges member states to make provisions for legal aid for victims. This right is not embodied in the TOC Convention and only mentioned as a desirable option in the Protocol ('State Parties shall consider'). Given that UN Conventions and Protocols are applicable across the developed and developing world, it is hardly surprising that any reference *to free* legal aid must be cautiously interpreted with regard to the financial limitations of most State budgets. For the same reasons, the ninth principle, compensation from the State, is not obligatory under any of the three instruments considered for comparison here against the UN Declaration.

Principle five, privacy/identity protection, is adequately covered in the Protocol and the framework decision but is not mentioned in the TOC Convention. This omission can be said to reflect the central remit of the TOC Convention to respond to the problem of transnational organised crime by focusing on the offence and the offender, while addressing the mainstay of 'victim issues' in the Protocol only.

The sixth principle, protection against retaliation/intimidation, is of obvious importance in trials against organized crime groups. Both the TOC Convention and the Protocol, along with the framework decision, make protection obligatory. However, the Protocol does not extend such protection to victims of trafficking after their repatriation to their home country; although safety considerations must be taken into account in decisions about repatriation (Article 8, p.2). The absence of obligatory safeguards for victims/witnesses returning to their home countries, particularly when they have testified against organised criminals is lamentable in the Convention. This omission sends out the wrong message about consideration for victims' welfare against the desire to convict criminals. Much of the work of victim protection and rehabilitation, on their return home, rests with under-funded NGOs. As yet, more concerted effort needs to be put into collaborative criminal justice efforts, in partnership with NGOs, to provide adequate victim protection across the world, in particular also in developing countries.

Informal dispute resolution, as the seventh principle, is understandably not mentioned as a standard option in the TOC convention and its trafficking Protocol, but has found its place in the EU framework decision. In this respect the framework decision takes up the forward looking standards set out in the 1985 UN Declaration, and is bolder than the Recommendation of the Council of Europe from 1985. The 2001 framework decision, unhindered by the Convention's focus on organised crime, is able to reflect the current emphasis, in some criminal justice circles, on restorative justice and informal dispute resolution as an alternative to established forms of justice.

The right to receive compensation from the offender (principle 8) is fully recognized in the three international legal instruments. Compensation for civil

damages is a common element in anti-mafia trials in Italy; where representatives of the municipalities successfully claim compensation for damages to the local community. State compensation (principle 9) is not mentioned as a treaty obligation in the TOC Convention and Protocol, nor is it obligatory under the terms of the framework decision. However, the Protocol can be interpreted as including State compensation as a desirable goal for States to pursue.

As mentioned earlier, it is perhaps unreasonable to expect developing countries to provide State funds for victims of violent crime, including victims of organised crime, given their limited budgets. However, a number of State compensation schemes, notably in the US, are financed in large part by offender fines. In this regard, there might be a place for State-managed compensation schemes, using offenders' money, in developing countries. Kosovo provides a case in point here, as victims of trafficking are soon to be eligible for compensation from a special fund financed through confiscation of traffickers' resources. At the same time, given the EU's relative wealth, we can query the framework decision's absence of an obligation on EU Member States to provide compensation to victims from State funds.

At present all EU Member States, with the exception of Greece, provide some form of State compensation for victims of violent crime that, by definition, can include victims of organised crime and terrorism; Italy's State compensation is specifically limited to victims of organised crime and terrorism. Some European States make these funds available to non-citizens, but there are a number of restrictions in place on eligibility. However, these funds do not guarantee that victims will receive compensation from the State as a right. Rather, State compensation exists in Europe as a reflection of welfare traditions and moral duty to victims. But, with the 2001 EU Green Paper 'Compensation to Crime Victims', in parallel to the 2001 Framework Decision, moves are afoot to further initiatives for binding legislation on State compensation across the EU.

Finally, with regard to the right to receive social support or assistance, the TOC Convention recognizes this right under Article 25. This treaty obligation will oblige State Parties - which are likely to include over one-hundred countries soon - to pay attention to their provision of assistance to victims. For many developing countries this will mean a first taste of victim support initiatives. Since the human trafficking Protocol has a clear focus on the interests of victims, it was to be expected that victim support or assistance would be given an even more prominent place here. In reality, the special measures required to adequately support victims of trafficking - such as shelters, counseling, medical care, and vocational training - are duly listed but only as desirable options. As with State compensation, the fear of cost implications meant that several key destination countries for trafficking victims opposed the adoption of social support and assistance using more generous language. Since countries can only adhere to the Protocol after accession to the TOC Convention, the obligation to provide a minimum of support to victims also applies to victims of trafficking. And finally, the absence of reference to victim support or assistance in the EU framework decision is particularly disappointing. In framing its approach to victim-centred justice in somewhat narrow legalistic terms, the framework decision has also succeeded in avoiding the costly implications of

making social and welfare benefits a victim 'right'.

III. Conclusion

In terms of concurrence with the UN's basic principles of justice for victims, the UNTOC Convention scores four out of ten and the Protocol six out of ten, plus three optional responses. It is a matter of opinion whether, as the saying goes, the glass can be considered as half full or half empty. The 1985 UN Declaration seems, at any rate, to have laid the groundwork for the codification of several basic principles of justice for victims in new international criminal law treaties. What was no more than a lofty ideal twenty years ago has become a legally binding norm for many countries worldwide at the beginning of the 21st century, for at least some categories of crime victims, including victims of human trafficking. The EU framework decision recognizes most of the ten basic principles as binding for domestic legislation in its Member States, and in some respects, goes beyond the Recommendation of the Council of Europe of 1985. Together, these new international legal instruments constitute significant and welcome developments towards victim-centred justice and, importantly, given that they are legally binding, victims' rights. Irene Melup, who as a UN staff member and volunteer has probably done more than anybody else for the adoption and promotion of the UN Victim Declaration, has every reason to take pride in the fortunate development of her 'brainchild' over the past twenty years.

During the negotiations of the Declaration at the Milan Congress in 1985, delegations decided to limit the basic principles to victims of crimes as defined in national legislation and to deal with victims of abuse of power in a supplementary paragraph. The present author, at the time a delegate of the Netherlands, was among those arguing for this radical revision of the draft text, much to the disappointment of Irene Melup. It is still my view that the Declaration could not have become as influential as it has - or in fact have been adopted by the GA - without this adjustment. Such a comprehensive victims declaration, covering the rights of victims of conventional crimes as well as of all forms of human rights abuses, would have been at least thirty years ahead of its time. It will no doubt be a special source of satisfaction for Irene Melup that in the meantime, progress has also been made with the implementation of the Declaration's recommendations concerning the treatment of victims of abuse of power as distinct from conventional crimes. The rights of such victims have now been elaborated in the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, adopted by the Commission on Human Rights of the UN Economic and Social Council (E/CN.4/2000/62). The Guidelines refer to the 1985 Declaration. Nearly all principles of the 1985 Declaration have been given a prominent place in these special guidelines. The Treaty establishing the International Criminal Court; the Rome Statute, which entered into force on 1 July, 2002, also contains important provisions concerning the protection of the victim and their participation in the proceedings, following the standards set by the ex-Yugoslavia Court I, The Hague. Article 68 of the Rome Statute grants victims or their representatives the right to express their views in relevant stages of the proceedings.

Annex I
Concurrence of the following legal instruments with the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

- 2000 UN Convention against Transnational Organized Crime (Palermo Convention)
- Protocol Against Trafficking in Persons, especially Women and Children, accompanying the 2000 UNTOC Convention
- 2001 Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA)

1985 UN Declaration on Justice for Victims Of Crime and Abuse of Power's Ten Basic Principles	2000 UNTOC Convention	2000 UN Trafficking Protocol	2001 Council of the EU Framework Decision
Compassion and respect		X Articles 7, p.2 ;10,p.2	X Article 2
Information on proceedings	—	X Article 6, p.2(a)	X Article 4
Presentation of views	- X Article 25, p.3	X Article 6, p.2(b)	X Article 3
Legal aid	—	Optional Article 6, p.3(b)	X Article 6
Protection of privacy/identity	—	X Article 6, p.1	X Article 8, p.2
Protection against retaliation/intimidatio	X Article 24, p.1	X Article 6, p. 5	X Article 8
Informal dispute resolution	—	—	X Article 10
Compensation from offender	X Article 25, p.2	X Article 6, p.6	X Article 9, p.1
Compensation from State	~	Optional Article 6, p.6	_ (but see art 9,1)
Social assistance	X Article 25, p.1	Optional Article 6, p.3	—