

ARTICLE 1 - Definitions

(1.2) "A person is a victim regardless of whether the crime is reported to the police ...

PANEL CRITIQUE

Marc Groenhuijsen:

... It is obvious that when you have not reported a crime, you are entitled to material, medical, psychological and social assistance. There is no doubt about it. So, the only argument that Professor Chockalingam put forward in favor of deleting this particular reference was in connection with compensation, but that is easy to be solved in another way because in virtually every system we have studied, reporting the offense to the police is an eligibility criterion for getting state compensation, so that solves the problem.

Gerd Kirchhoff:

This reporting criterion was formerly a criterion in the German compensation law. They have abolished it because there are quite good reasons, as you said, behind not reporting, and the law has to recognize that. So, the deciders have to make a decision now as to whether to hinder this formerly, which is *dame desu* or, whether to look at it materially whether there are good, understandable reasons not to report.

Marc Groenhuijsen:

The obvious thing is that you should never delete it in the definition of victim. It is a question of deciding how to organize a state compensation scheme.

Kumaravelu Chockalingam:

... my question is that instead of making a blanket permission, to say that regardless of whether the crime is reported, we can allow the genuine exceptions or justifications where the reporting is really difficult instead of saying that regardless of whether the crime is reported to the police or not ...

Xin Ren:

... Sometimes, even when they have the official status of a victim of a crime, they may not qualify for the victim services. ... That is also an area that needs to be considered and even though those victims are recognized officially, certain types of government funds for victim service programs may not automatically include them.

Sam Garkawe:

I am personally very reluctant to change this provision. It is a very similar provision to that which is in the Declaration; it has been around for many, many years. I think it is not only the question of reporting, but generally speaking, a State would not have to accept that there has been a crime unless at least a civil proof has been satisfied. I think the problem of false claims, as Marc said, can be addressed in other ways. ... I think there is enough flexibility in what we have got here that the State could make their services subject to them being satisfied that a crime has actually been committed, or that the victim has reported the crime to the police. So, I do not feel that this should be changed, personally.

ARTICLE 2 - Scope

**“This convention covers natural persons who are victimized by acts or omissions that:
(a) are violations of criminal laws of States Parties or abuse of power”**

PANEL CRITIQUE

Sam Garkawe:

“Abuse of power” is not defined in the Draft Convention, where it was defined in the Declaration. I think, personally, that we need a definition of “abuse of power”; what it is exactly. I feel that a lot of States that will not sign on to this thing because of the vagueness of that term.

Marc Groenhuijsen:

Sam, of course, is absolutely right but the definition of ‘victims of abuse of power’ in the Declaration reads as follows, “acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.” And you know, Sam, that we included exactly that definition in our article on *Scope* and then we agreed that it would be too wide and all the human rights lawyers argued that this is a definition which is highly inappropriate. That is the reason we could not solve it and we left out the definition. So, I do agree in principle that we would need a definition, the definition of the Declaration is unsuitable, and we also agreed that if we leave out ‘victims of abuse of power’ all together then that would be a serious step back when you compare it to the Declaration. So, there is no ideal solution, I see your problem but I cannot solve it.

Sam Garkawe:

I accept that the references to human rights standards in the definition of ‘abuse of power of victims’ in the Declaration might now be too broad if it were simply to be replicated in the Draft Convention, but surely the answer lies in tightening the definition rather than having no definition at all.

ARTICLE 3 - General application

(3.2) “States Parties shall undertake to implement these provisions to the maximum extent of their available resources. For planning purposes, States Parties shall set priorities for implementing the provisions and seek to provide them over time through progressive realization of goals.”

PANEL CRITIQUE

Sam Garkawe:

... in my personal opinion I think it is important that we draft a document that would be acceptable to as many States as possible, even if we have to compromise, perhaps, and not put everything we want in there. I think it is going to be hard enough to get this thing up and running without it being the ideal document for us. If we made it the ideal document for us, I think States would look at it and simply reject it.

Arthur Wint:

I concur with that. I think that in order to get this thing through, there are certain kinds of compromises that need to be made, but if you can make compromises without compromising overall principles and the overall focus, I mean what we are looking at is having a document that addresses dignity and respect, that addresses no re-victimization, that addresses the right to information with regard to the process or to the offender, that looks at safety and equitable process and adequate, in

my words, compensation. To a large extent, what we have in front of us does that. There might be some ways in which we might want to tweak it, but in terms of getting a document through, we have to look at what will it take to get an optimum number, whatever that is, to sign on and to implement it. It is easy to declare things and to declare positions, but what we are looking at is not making any mere declarations, but having a Convention that is enforceable and that has some binding quality. ... in the process of negotiation and compromise, what we attempt to do is to get the best product we can get within the confines of the reality of a negotiation and compromise.

Chockalingam:

I share the concerns expressed by our other members, but I also stated in my explanations in my presentation that if the implementation makes it mandatory, then at least the developing nations may find it difficult to observe it and they may oppose it and therefore, in order to make the Convention reality, this may be an obstacle; therefore, the clause that, "to the extent possible on the resources available," is a reasonable compromise.

TRAVAUX PREPARATOIRES/EXPLANATORY MEMORANDUM

John Dussich:

In conclusion, as we are talking I am recognizing that there is some very valuable information here that could very well not be captured, information that we need to keep, although not in the language of the Convention but as discussion information, as for example, Chockalingam has written comments here. I am just wondering if there might be a way to develop a companion document to the Convention that references, similar to what he has written here, background information tied in with each article so that, in the future, when we have to promote the document or discuss with other people, if you are not here and Sam is not there, the information is available.

Marc Groenhuijsen:

I just could not agree more and the intention of our group was to produce an explanatory memorandum explaining all the backgrounds of all the parts of every article, so we fully agree on that and that need will be served.

Sam Garkawe:

I might use this occasion to show off the only French phrase that I know. Most Conventions have a document that accompanies them called the 'travail préparatoire,' which is sort of the background behind the document and the background behind each article, and when it goes through the UN system you can find documents. They can sometimes be referred to when a court or later tribunal needs to interpret what the actual words mean, so they can be important from a practical point of view.

(3.3) "States Parties shall ensure that the provisions contained herein shall be applicable to all, without discrimination of any kind, such as race, color, gender, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. This will be without prejudice to providing special justice and support best suited to victims who are particularly vulnerable because of age, gender, disability or other characteristics."

PANEL CRITIQUE

Chico Gaskow:

... it might be very helpful for advocates on the ground to also look at model law, so another possible area of work is, aside from the Convention, perhaps looking at what is already out there in terms of best practices in some countries. Perhaps prepare a model law that States can then begin to look at as they think about signing on and ratifying in terms of what they have to do in terms of passing local legislation when it is a law. That might be very helpful in overcoming some doubts or concerns that some may have when they look at general provisions like progressive realization. What does that actually mean?

Sam Garkawe:

Article 3, sub-section 3 is what I call the non-discrimination clause. As Marc said, this has been supplemented by that second sentence which is a very important one and a very nice development, I think. "This will be without prejudice to providing special justice and support best suited to victims who are particularly vulnerable" because of the various characteristics. Again, I do not see this as controversial, I see this as very much an improvement on the Declaration. So, the first sentence actually is an indication of formal equality, but formal equality can often lead to injustice and in order to have substantive equality, sometimes you need special measures. That is what the second sentence is about.

(3.4) "States Parties shall ensure that all officials and other persons dealing with victims treat them with courtesy, compassion, cultural sensitivity, and respect for their rights and dignity."

PANEL CRITIQUE

Sam Garkawe:

We debated a little bit the term 'cultural sensitivity' and the majority view was that it is an important innovation from the Declaration. The Declaration doesn't mention cultural sensitivity. I guess that is the only, I mean, for many people this would be the key provision in the whole Convention; how you treat victims. Are there any comments on this, can this be improved? Are you all happy with the term, 'cultural sensitivity'?

Arthur Wint:

I wouldn't change anything. One of the things we are attempting to do as advocates, as individuals who are concerned about victims, is to restore the sense of dignity, restore a sense of worth and you need to have that in there.

ARTICLE 4 - Commitment to reduce victimization

"States Parties shall commit to provide both justice and support for victims and to reduce victimization consistent with international guidelines by, *inter alia*, developing:

- (a) more effective detection, prosecution, sentencing and corrections of perpetrators, consistent with internationally recognized norms;**
- (b) measures to reduce the risk of occurrence of crimes by tackling their multiple causes;**
- (c) strategies to reduce the opportunity for crime by improving protection for property and persons;**
- (d) collaboration between civil society and relevant governmental institutions, in areas such as schooling, social services, family, public health and economic sectors;**
- (e) institutional frameworks to improve the planning, cost effectiveness and sustainability of strategies;**

- (f) greater public participation in, and engagement with, strategies in both the short and the long term;**
- (g) international cooperation to exchange proven and promising practices and seek trans-national solutions.”**

PANEL CRITIQUE

Marc Groenhuijsen:

I don't want to reopen the initial debate, but I'd just like to hear your views because it is my firm conviction that this entire article should be deleted because it is about crime prevention. Crime prevention concerns all citizens of the world and crime prevention has got nothing to do with providing services or rights to victims of crime. It applies to everybody regardless of whether or not he or she has ever fallen victim to crime. So, crime prevention is completely different from any issue connected to victims' rights, with the exception of preventing repeat victimization. So, I think what we need is a specific article dedicated to the major, major problem of repeat victimization. General crime prevention is completely outside the scope of this Convention.

John Dussich:

I agree totally, in principle. I would add one more thing. I think there is a place for identifying and empowering vulnerable groups which is not focused on controlling criminals or preventing criminals, which is a traditional crime prevention area, but when you talk about what is very close to the issue of what is now being called hot re-victimization or hot victimization or repeat victimization, all of that area is extremely important. I want to be first sure that that is in here someplace. If we are going to take this out, and I am happy with taking this out, I would like to see language that addresses repeat victimization, but also in the same article, language that addresses the issue of identifying and empowering vulnerable groups so as to somehow reduce their vulnerabilities.

Karen McLaughlin:

I think I am leaning substantively towards taking it out, but I just want all of us to think about who are our audiences are for this and whether we need them in this process and I don't want to get too terribly political because we are going to talk about strategies tomorrow, but the people who would want this in could be a major constituency to help us. The other group of people who would want this in are the people who deal with chronic victimization issues, the repeat victimization and the chronic. ... I agree on the larger principle that it is not appropriate, it is off our scope so to speak, but at the drafting committee meeting I felt we should keep it in mostly to have those constituencies with us. I think also, if we look at the UN institutes as another audience, we will get into audience segmentation tomorrow, but they are a big audience. We need the UN structure, as Gerd said earlier, they are a club and we need them very much and I think there are quite a few of those organizations that have crime prevention as a mission. So, I think although it is off our scope, politically, and in what you were saying earlier, we make some decisions that we don't completely agree with.

Chockalingam:

In principle I fully agree with the views of Marc and also John that these provisions relating to crime prevention are not directly related to the victim Convention, though these will definitely be related indirectly to reduce victimization and future victimization and future victims. As far as crime prevention is a concern, there are other places and other areas in the UN instruments to do that, which have been ultimately taken care of and it is in the interest of all of the State Parties of the United Nations to make provisions for crime prevention in other kinds of instruments. Therefore, this is not very important in a victim convention.

John Dussich:

I wonder if we might find the mid-road by the insertion of the word 'support reduced victimization' instead of directly becoming involved in recommending the reduction, simply say as a matter of principle and to support the reduction of victimization.

Sam Garkawe:

To me there are three ways we can go. One is to leave it as it is. The second one is to delete it completely. The third one is to replace it with a provision that merely actually combines what the two of you are saying, both repeat victimization and the problems of vulnerable groups. I would go with the third option, personally.

Marc Groenhuijsen:

It is obvious that we cannot resolve this issue this afternoon and I am very grateful for Karen's remarks. It is true that there is a constituency that we have to take into account. I also appreciate John's middle solution, which may also be translated in giving a consideration to crime prevention issues in the preamble. That could also be another way. So, it is obvious that we are not happy with Article 4, as it stands. Nobody is happy with absolutely deleting it. We will have to find a creative solution for this one way or the other and I think this meeting has produced some very valuable insights.

ARTICLE 5 - Access to justice and fair treatment

(5.1) "States Parties shall provide victims with access to the mechanisms of justice and redress which is expeditious, fair, inexpensive and accessible, as provided for by domestic legislation, through:

- (a) judicial and administrative mechanisms which will enable victims to obtain redress;**
- (b) informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice processes or indigenous practices, where appropriate, to facilitate conciliation and redress for victims;**
- (c) information about their rights in seeking redress through all these mechanisms.**

PANEL CRITIQUE

Arthur Wint:

... it talks about redress and redress is broad. I wondered, was it subsumed in that or did we specifically want to mention it. And if it is subsumed, why did you choose to make it be subsumed rather than explicit?

Sam Garkawe:

First of all, the word civil remedies may not be the same terminology in different cultures. When we said 'judicial and administrative mechanisms,' we definitely included what we would see as criminal and civil proceedings. So, hopefully that alleviates your concern. You notice what we had done was, A is sort of the formal court or tribunal proceedings and then if you go to B, you'll notice that then we talk about informal mechanisms. We are inclusive here because we say including mediation, arbitration, etc., etc. So, we are not leaving out other mechanisms, of say restorative justice, that are around the world, things like charter tribunals and family conferencing that are very popular in Australia and New Zealand. So, although they are not mentioned, because we used the word 'including,' they would be included there.

Karen McLaughlin:

Sam, what are you articulating in terms of are there other synonyms that we can just capture for right now about civil processes, civil remedies being different in different cultures and countries? I myself had a concern about us being more elaborative in this section.

Sam Garkawe:

I guess we did have the advice of a group of experts including Adokum from Africa who is very aware of the different terminology used in many developing countries around his region and he was quite, I worked with him on this actually, he was quite satisfied that judicial and administrative mechanisms and then informal mechanisms, that type of terminology, did cover all the possible types of mechanisms that he felt needed to be covered.

Karen McLaughlin:

I wanted to see something in the civil and regulatory for this area. Having just been involved in American Bar Association work on what we are doing on victims, there is an incredible percentage of victims who will be going through civil processes in the United States and elsewhere, the Bar Association kind of has a broader reach. I was just astounded to learn how many victims are falling through the cracks because our advocacy programs are really not doing a lot of work in that arena. But I like Marc's idea and John's urging us to back to our language where we would have a second document that would elaborate on this, but just for the sake of our note taking this afternoon, I think we really need to highlight that.

(5.2) States Parties shall ensure that the judicial, administrative and informal processes are responsive to the needs of victims. This should be facilitated by: ...

PANEL CRITIQUE

John Dussich:

Has anyone gone through this to see how it is viewed by Sharia Law?

Sam Garkawe:

Actually, Sharia Law, the little I know about it, gives victims far more rights than this. So, that is why we said that this is not prejudicial to those States that give victims more rights. Remember, this is just a minimalist document.

Sam Garkawe:

... it would be good to have somebody who is an expert on Sharia Law to look at this because the Muslim states are 60 or 70 out there. So, they would be critical to get enough support for this to go through.

(5.2)(e) "providing to victims, where appropriate, the right of appeal against decisions of the prosecutorial authority not to prosecute in cases where they were victimized;"

PANEL CRITIQUE

Sam Garkawe:

My comment here, I'm not opposed to this, but I just know, and again I think this goes back to the general issue, are we going to have a Convention that we want as victimologists or should the Convention reflect what States are prepared to sign onto? In the common law tradition, I guess I'm speaking from Australia's point of view but I'm pretty sure the laws are similar in America and in

England, at the moment victims do not have this right; there is not a right of a victim to appeal a prosecution's decision not to go ahead with the case. So, in order for a State like mine to sign up to this, they could either do one of two things: put a reservation in that they are signing the Convention but they don't agree with this provision, or they simply wouldn't sign it because this would potentially, A: cost money, and B: change the procedures that are already existing. That is my difficulty with this.

Arthur Wint:

Wouldn't the clause, after the comma, 'where appropriate' cover that?

Sam Garkawe:

Yes, I'm not sure whether that is sufficient for a lot of States, 'where appropriate.'

John Dussich:

As a victimologist my personal feeling is that in those jurisdictions where the victims do have the right of appeal, it is a better system. Germanic Law and Roman law have those provisions; just because common-law countries don't, that is not a good reason for us to reduce our objectives.

Sam Garkawe:

Sure, but it comes back to that original overall question. Are we trying to get a Convention that we want or should we compromise and have a Convention that we know a lot of countries would sign onto? I think, in all practical reality, it is very important to get the common-law countries onside because they have always been very supportive. They are the leaders, the United States, Canada, my country, in victim support and we need to get them onside. Part of it is a political question.

Marc Groenhuijsen:

There is a difference with the article we discussed previously, which was about the developing countries. We just do not have the resources to comply with too many sophisticated provisions. In this case, the example you are referring to, it is the common-law systems, you are absolutely right, but they have a wrong system, in this respect. They have plenty of money and the wrong provisions because they would refuse to accept this because they argue, well, we have private prosecution. That is the wrong reason, as I tried to explain this morning.

Karen McLaughlin:

... an increasing number of jurisdictions are putting that within a new framework under bills of rights. We are seeing some big jurisdictions on this provision and also on not accepting a plea bargain without a victim's consultation. So, every step in the process is getting more and more articulating those rights.

John Dussich:

I think it is important to maintain a balance, but I think it is also important to open to all different systems and a final analysis. The Convention does have a kind of common-law bias.

Sam Garkawe:

But this particular clause would not be a common-law bias, it would actually be a bias towards the continental system. It is trying to push the common-law, I guess, in a certain direction and that may be a good thing. ... we have to recognize that that is sort of an aspiration thing we are doing here and I just have a concern that it may affect some of the common-law countries ability to be happy with the Convention.

PANEL CRITIQUE

Arthur Wint:

There is, “evidentially rules to permit victims, witnesses and experts to give testimony to ensure the safety of such persons,” that is being done and might be another common-law bias, but under certain circumstances that might create a challenge in terms of being able to confront witnesses and cross-examine. That is a challenge that we might have to look at.

Chico Gaskow:

... I just want to jump quickly to Article 10, Section C, which speaks of restitution, the obligation of States to provide restitution when officials or agents are responsible for harms inflicted. I look at that because there seems to be an obligation to provide restitution when officials add to the harm, but I don't see parallel provisions in Article 5 or in Article 6 to create systems or mechanisms to prevent that harm from actually happening in the first place. I wonder if there should be some thinking about creating mechanisms to improve obligations or responsibilities of law offices, either in the notion of access to justice or at least protection of victims.

... The problem is we have this notion or concept of preventing victimization or re-victimization and, at least from the developing world, you often have corrupt police officials or corrupt judge. The problems of victims are often at the beginning; it doesn't even go to the point of the judicial process. Many cases are dropped at the point of the complaint and I just was quickly looking at Article 5 and it appears to me that the focus, particularly of number 2, is the prosecution process. I wonder if there should be some work about raising standards and obligations on States at the complaint process when the victim goes to the precinct, before a prosecutor even assesses it.

Arthur Wint:

Interesting enough, I do not want to go back and stir up the pot that has already been stirred and simmered down, but my initial response is that would probably fall into Article 4, B, or somewhere in Article 4. There is the idea of reducing re-victimization, the idea of reducing the criminality of those individuals who are charged with prosecuting.

Sam Garkawe:

I think also the point is that if the prosecution doesn't go forward, if a victim reports and nothing is done about it, under Article 1 they are still a victim, so they are entitled to all the services that are mentioned in later articles. You are right that Article 5 does focus on the judicial process, but some articles have to do that. So, if a victim is not within that process, and maybe that is what you are saying and that is a very good argument to make to back up Marc's point that the victim should have a right of appeal when the prosecution process doesn't want to go ahead with it for some reason.

Marc Groenhuijsen:

I think this is a very important and valid point. I have just looked through some of the more recent international protocols on victims' rights and in some of them there is a specific provision for police behavior during the taking of the report and how to transfer the report to the prosecutor's services. So, I take this point and I would suggest that we take a look at the issue and see if there is the need for some specific provisions on police conduct because I do agree that in a large majority of cases, the only official a victim will face is a police officer and not the prosecutor or a judge.

ARTICLE 7 - Information

PANEL CRITIQUE

Arthur Wint:

... it talks about ensuring an enforceable right to information and this morning you talked about what does that mean. How would you enforce that right? What are the consequences if they don't get the information? How much information has to be given in order to reach a threshold and how much has not to be given in order to trigger whatever the enforcement mechanism is? That is not clear.

Sam Garkawe:

I think the key issue is the question of the word 'enforceable right' and whether or not that should be there. It is a little bit vague for the reasons you suggested, but again, it is another sort of area where, do we draft a Convention that ideally we would like. Because information is so critical, I think we as victimologists would like there to be an enforceable right to information because we know the problems that result when victims don't get information, despite legislative guidelines and all that kind of thing. So, an enforceable right for us as victimologists would be a very good thing, but again, would States be prepared to sign something like this?

Marc Groenhuijsen:

There are so many victims' rights included in this Draft Convention and this is the only one that is enforceable. Can you remember any reason why we included the word 'enforceable'? Then, there is another reason for asking this question because I know from the empirical studies we did, that over half of the victims just do not receive the information they are entitled to even though the police and other agencies do their utmost to provide the information. So, do we really seriously argue for negative sanctions in those 50 percent of cases where the authorities do their utmost, but still fail because of reasons they are not guilty of, because of relocation of the victim? There are a thousand reasons. So, the question is, what does 'enforceable' mean and do we feel that this is the only right where we want to use the word 'enforceable'?

Sam Garkawe:

If I could make a very simple suggestion, I just think we should leave the word 'enforceable' out. I know that is more vague than 'enforceable', but I just think in all practical reality we need to do that.

Karen McLaughlin:

I'm wondering if because we keep elaborating new rights as this Convention goes forward, we are seeing domestic law really change a lot, especially in certain countries. I don't know if it would be helpful to review for you anything we are adding into various state laws in the United States.

John Dussich:

You know I keep finding myself looking for the middle position. I wonder if we can use words or language that suggest that a reasonable intention is followed up and information is provided. I am sensitive to this perhaps too strong word 'enforceable', so my suggestion would be that we create a language that says simply that all reasonable efforts are made to provide information. I would like to change the subject a little bit, perhaps also in Article 7 there might be a place to address a similar and related issue in which at least we in California are finding it more and more important and it also goes along with the provision of information and that is what I call outreach services. I would like to see that word somewhere in the language of this article or some similar article. But I think the provision of services is generally thought of as being in a traditional office, you come in and you get the services and there are so many of these people among the 60 percent that are out there in the rural areas that can't come in or won't come in, and those are the ones we lose, either by virtue of

handicap or by virtue of being undocumented aliens or by virtue of not knowing the language, but they need outreach and they don't get it. They don't get the services or the information.

Xin Ren:

I have another suggestion. Instead of a defining whether victims have an enforceable right, perhaps we should change the beginning language and the 'State Parties should have a legal obligation to provide the information.' So it places the burden on the state government instead of defining the victims' right, whether it is enforceable or not enforceable. I do have the same concern and with an enforceable right put into this Convention that may make many countries reluctant to accept this.

(7.1) "... Specific information should be given person to person. ..."

PANEL CRITIQUE

Arthur Wint:

Which goes to the second to last sentence of 7.1, "specific information should be given," not must be but "should be" given "person to person." Is that a challenge? If someone is in the Outback or someone is up in Jamaica, are you going to send somebody up there? I mean, how do we implement that one?

Sam Garkawe:

Maybe it should be changed to 'specific information should be given where practical, person to person.'

(7.3) States Parties shall take the necessary measures to ensure that the victim is notified, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released.

PANEL CRITIQUE

Xin Ren:

I wish to speak of Article 7, section 3, I wonder if "necessary measures" is serious enough. I know in the process of notifying victims of sexual assault or sex crime in California you need a legislature to take action in passing law in order to provide funding and an institutionalized victim notification in the judicial process and without legislation. If we only require the States to take the necessary measures and we don't allocate funding, it is difficult to realize that. When the legislation is passed by the lawmakers, that becomes the legal mandate; so that will ensure the victim is definitely notified. This is very critical to protect victims' safety, especially when the offender is released from prison.

Sam Garkawe:

I personally think the language is okay, 'shall take the necessary measures to ensure.' I think that is pretty strong, personally. Some states may not be able to afford it, so that is where the general provision before about to the extent of the State's resources comes in. But I think that is pretty strong language, personally.

Xin Ren:

When you deal with a sex offender, without a state mandate, no administrative agency will take on that obligation, especially if each victim requires a lot of resources. Without a state mandate, it is just not doable.

Sam Garkawe:

Then they would be breaching this section if they didn't take it on. That would simply be breaching this section.

Xin Ren:

That is reality, it is not done because there is no legal mandate, there is no money and there is not any state agency taking on the responsibility. That is the reality.

Sam Garkawe:

I understand, but there are many of these provisions that require the State to invest some money and if we made the language stronger, I'm afraid that would really put off States. I think the language is strong enough.

Marc Groenhuijsen:

I agree, we don't have to solve every issue. We take your point, there is also the consideration, and I think Sam was implicitly referring to, that there is also the question of standard Convention language and standard UN vocabulary and as it is stated here, 'shall take the necessary measures,' that is standard UN language. If you would change that into the legal mandate, all the UN people would start asking questions, 'what does that mean?' because it is not a normal standard part of UN Conventions. But we will take a closer look at the issue again and see if the text can be improved.

Karen McLaughlin:

Just one last point on that, I think that it may be necessary for us to look and see if there are other areas where post-conviction rights might be more elaborated or in our document that we do later.

Sam Garkawe:

I should say that the language here says 'when the person prosecuted or sentenced,' so even when a person is prosecuted and being held on bail and if they are going to be released from bail, this actually requires the authorities to inform the victim. So, it is not even when you sentence, you're not even found guilty. This is actually very strong language in favor of the victim and a lot of states might protest that.

DEFINITIONS SECTION IN THE CONVENTION

John Dussich:

You know, along those same lines, it occurred to me as Marc was talking, that in addition to companion comments, I would really like to see a Convention glossary that would also accompany this document. Not an explanation, just a glossary of words that are unique to this instrument.

Sam Garkawe:

Well, you've raised another point, John, and that is that there are certain, probably later on in the Convention particularly when we talk about restorative justice and restitution including reparation, those terms are not defined in this Convention. A lot of Conventions do actually have a 'definitions' section and I wonder whether that is something lacking in this Convention because terms like 'reparation, restitution,' they are understood differently in different cultures and we may need to put in a 'definitions' section.

ARTICLE 8 – Assistance

PANEL CRITIQUE

Arthur Wint:

There were six areas where States shall engage in what is listed and 5 where they are encouraged, besides that, the graduated approach is something that we want to encourage. We want to make sure that the individuals recognize that a one-time effort on the part of the State will not be enough and that we need to look at immediate, medium and long-term.

ARTICLE 9 – Restorative justice

(9.1) States Parties shall endeavor, where appropriate, to establish or enhance systems of restorative justice, that seek to represent victims’ interests as a priority. States shall emphasize the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim.

(9.2) States Parties shall ensure that victims shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims’ dignity, compassion and similar rights and services to those described in this Convention.

PANEL CRITIQUE

Arthur Wint:

One of the first things that jumped out at me is in the basic principles and the use of restorative justice programs of criminal matters, ECOSOC 2000, there is an annex and in the annex are definitions of ‘what is restorative justice,’ ‘What is a restorative outcome,’ and I was just wondering is there a reason why we didn’t put that here, because that kind of clarification, people are mushy about or confused about what we mean by restorative justice. Sometimes it is beneficial to add that and I’m thinking I would like to see that. ‘States shall endeavor, where appropriate, to establish’ these systems and then I would just like to see a section in there that would explain what do we mean by, whether it is lifting the definitions from one of these already pre-existing documents or creating our own. If I had a marker board I was going to get up and do some things, but I changed my mind. We already have it here in another UN instrument, so my recommendation is that we duplicate it.

Xin Ren:

I think one speaker already mentioned that traditionally restorative justice was established to serve the need of the offender. In the process, victims may also benefit, but the program in general is very much offender oriented. So, if we include this article in the Convention, we need to address the victims’ need and right, and they need to be equally served when we encourage the system to use restorative justice. So, that is something that is very important and restorative justice does not automatically help victims.

Arthur Wint:

In Article 9, 1, it specifically states that to ‘seek to represent victims’ interests as a priority.’ That is the genesis of my concern about putting the definitions in because many of us have a definition about restorative justice that is one that looks at balancing the equities between both offender and victim. I recognize that the restorative justice processes might have begun with offenders who wanted to make things right, but the way it has developed/evolved over time is one in which it has become more and more victim centered. That is why I would want to see that in here, because I would want to make sure that we are clear that what we are talking about, as victims’ advocates, a process that would make the victim whole, that would provide an opportunity for those kinds of questions, those kinds of interactions which do not come through the judicial process. In fact, if they

are tempted, the judge is going to hit his gavel and say the jury will disregard that emotional outburst. So, those are some of the kinds of things that we are looking at that a restorative processes can facilitate. So, it is really important to identify what we mean, how do we see it being implemented and with some clarity put it in here.

Marc Groenhuijsen:

I can see that point and I would strongly advise against turning the Convention into a victimology handbook, which is a real danger here. If you look at all the international protocols on victims' rights, you will find that the definitional section is always limited for a very good reason, because we do not agree on terminology and it would be, in my humble opinion, it would not be an enrichment to give a textbook analysis of the word 'restorative justice.' We all know what restorative justice is, we all have a different conception of restorative justice, and the only reason why we include a reference to restorative justice in this Draft Convention is that whatever it is that we call restorative justice, it can only be acceptable if it seeks to represent victims' interests as a priority.

That is the bottom line of what we are trying to convey, we are not trying to regulate restorative justice as such, we have the ECOSOC resolution, by the way, the 2000 was never adopted, but there was a subsequent resolution in 2002, which was adopted. It starts off with a full page of definitions that are completely redundant because they don't express a thing. 'Restorative justice programs' means any program that uses restorative processes.

I think what is important is that States, promote informal mechanisms to provide justice. If States revert to restorative justice practices then they should seek to represent victims' interests as a priority. And, the second one in the Article 9, victims must 'have the opportunity to choose or not to choose' and restorative justice 'must accord with victims' dignity, compassion and similar rights and services.' Restorative justice practices were not started because offenders wanted to make good to victims, no, they were started because they wanted to escape punishment. That was the point and that is what we victimologists have argued against and that is exactly what is reflected in Article 9.

Arthur Wint:

I had no problems with section 2 because it does what I believe restorative justice is intended to do; that is what I practice and that is what I am a proponent of. My question simply had to do with, do we want to make clearer as to what we mean?

Karen McLaughlin:

I really believe we could dodge a little bit of a problem here and also be more consistent. I think it is the same thing, we are going to have people very divided on this, it is like mediation because the domestic violence community looks at that as a very negative, dangerous thing because the victim is not put as a priority and it is not victim centered in some places and it shouldn't be being used in a lot of circumstances for domestic violence. The same with this people already have an existing opinion about whether or not it can be appropriately used because they may think it is just a giveaway to the offender. So, I think we can think a little further about this, but I think that the definitional section might do more harm than good in a way.

Sam Garkawe:

Okay, we have got to move forward here. I'm not sure what we've resolved but it seems there is quite a bit of opposition to having a definition of restorative justice. We may just leave this section as it is.

ARTICLE 10 – Restitution including reparation

PANEL CRITIQUE

Sam Garkawe:

... we have one question from the audience regarding Article 10. It says, 'If environmental victimization is acknowledged in the Convention,' as we have done in Article 10, part B, 'shouldn't victims of natural disasters be included in the definition of victims?' Okay, this is a big issue.

Arthur Wint:

... it the purpose of this Convention to address that subset of victims or is it to look at victims in the sense of individuals who have been harmed by offenders and by abuse of power? Again, the nature and definition of what we are doing sets the parameters for this. I am not saying we shouldn't maybe look at something like that, but it would appear to me that yes, these are victims, but they are not within the scope of what we are trying to address here.

... maybe I misunderstood the question. If there is another Exxon spill, then there should be compensation for those victims of that crime. That was the distinction I was trying to make.

Marc Groenhuijsen:

The traditional victimological terminology is restitution or reparation is a payment by the offender to the victim and compensation is a financial transfer by the State to the victim. This traditional victimological knowledge has been changed since the United Nations adopted the basic principles and guidelines on the rights to a remedy and reparation for victims of gross violations of international humans rights law. That is the famous Van Boven/Bassiouni Principles formerly adopted by the United Nations and what is more, this contains a completely different terminology on reparation and restitution and the bad thing is that the Bassiouni and Van Boven terminology has also been included in the Rome Statute on the international criminal court. So, the obvious global trend now is to go away from the traditional conveniently simple vocabulary as restitution and reparation is from the offender and state compensation. So, the question I would like to raise and I don't have a definitive opinion on this, but the question I feel we need to reflect on is, do we stick with traditional victimological terminology or do we go the modern way and try to expand the concept of reparation in the way it was dealt with in the Van Boven/Bassiouni Principles? Again, I don't have a solution. Would it be the feeling of this audience that we should take a further look at this question? Because it is impossible to explain the Van Boven/Bassiouni terminology in this meeting, let alone discuss it properly and decide on it. But do you feel comfortable with the traditional terminology, which is a very simple separation of reparation and compensation or do you want to see us explore the more modern approach?

John Dussich:

I think we've got to try to recognize the legitimacy of the Van Boven/Bassiouni document because it already has been passed as a set of principles that is a fairly thick document by the United Nations General Assembly, but on the other hand, we are victimologists and the majority of the text and considerations and the decisions are being made by victimologists. So, I guess the answer is yes and no.

Arthur Wint:

But even in that document though, it says that reparations should be proportional to the gravity of violation of harm in accordance with its domestic laws and obligations. The State shall provide reparations to victims for acts or omissions. So, if it is in accordance with their laws, and there is the

bifurcated approach, am I mistaken in saying that this is saying that you will follow your State law in providing reparation?

Marc Groenhuijsen:

That is the basic change that they have proposed, that compensation in that terminology is part of reparation. In our system, or in our vocabulary, it is two different things.

Karen McLaughlin:

I think we need to look it over again and it is getting more complicated even with the protocol on human trafficking because now we have a debate among countries about who is the responsible party to compensate the victim. Is it the country of destination, is the country of transit, or is it the country of the origin of the victim? And it gets more complicated because the victim may ask to be repatriated and a lot of the problems that the victim may encounter that may be ongoing and what they need to be compensated for may be in their country of origin. So, the language just is going on and on and I think we need to take a look at that.

Arthur Wint:

Marc, are you saying that we should lift the language from the previously approved documents and substitute it for what we have?

Marc Groenhuijsen:

So, to echo John, the answer is yes and no. I think what I am taking home from this discussion is that, as John suggests, we are still victimologists, so the starting point should probably remain reparation is from the offender, compensation is state compensation, but maybe we can add some touches from the other documents and enrich our own vocabulary. Does that make sense to you?

Sam Garkawe:

I think that also accords with my idea to have a small definitions section. I mean we've already got some definitions in Article 1, 'witness' and 'expert.' It wouldn't be a huge problem just to have a one-liner about what we mean by compensation, what we mean by reparation, for the purposes of this Convention. I think that is the way we should go. It is a little bit unfortunate that we are not in accordance with the modern terminology; that worries me because the idea of the Convention is to move the Declaration forward into the 21st century. I'm a bit torn, actually.

John Dussich:

Two things, I think I like the idea of my concept of a glossary for the Convention. The other is that I think if we try to recognize that there is an evolving process, this is not a static process. I think every time we have these kinds of meetings we recognize different perspectives that we want represented.

ARTICLE 11 – Compensation

(11.6) Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

(11.7) In cases of cross border victimization, the State where the crime has occurred should pay compensation to the foreign national, subject to the principle of reciprocity.

PANEL CRITIQUE

Xin Ren:

I just want to make a comment on the compensation article. As we all know, in many countries when the State establishes a compensation program, that program itself has a lot of legal restrictions. Individuals use a status, social or personal status, and that makes them qualified to receive the state sponsored compensation, such as marital status and individual nationality may not qualify that individual to receive compensation. I wonder if that issue needed to be addressed here. I also wanted to point out that Article 11, section 6 in the translation of human trafficking cases sometimes when the victim is intercepted or rescued by the police in a foreign country they are recognized as a victim of crime, however, when the victim is repatriated back to their home country, the law enforcement authority in the home country would consider that individual as the criminal because that individual has illegally crossed the international border. They will not qualify for any type of victim assistance.

Sam Garkawe:

What are the problems with the wording and how would you like to change the wording?

Xin Ren:

I don't have a problem with the current wording; I just wanted to raise the issue, that there is discrimination that exists in state compensation programs in some countries. Some victims, even those officially recognized as victims because they have marital status, or a unique nationality, may become disqualified to receive state sponsored compensation. Whether that issue needed to be addressed here or whether in the previous clause, I don't know; however, we do have a non-discrimination clause. I wonder if this article is sufficient enough to cover that discrimination issue?

Sam Garkawe:

Yes, I believe it is the discrimination clause that covers the rest of the Convention, which includes compensation provisions. But I do agree with you Xin, that there are examples of discrimination, particularly with the marital status. Some States won't even recognize that you can be a victim of your spouse. But that would go against Article 1.

Marc Groenhuijsen:

I think I can explain it. But I have to admit that it is very clumsily drafted. The way I remember it is as follows: the usual system is that the State on whose territory the crime is committed is the one to pay state compensation and they have to pay, in principle, to their own nationals. Do they also have to pay to foreign nationals? Yes, but subject to the principle of reciprocity that is in 7. So, in case there is no reciprocity, then number 6 applies because it is a situation where the State of which the foreign victim is a national does not qualify for compensation in his or her own State and will not receive compensation from the State where the crime has been committed because the principle of reciprocity doesn't apply. So, in those cases number 6 makes sense.

Sam Garkawe:

Okay, well...one obvious problem here is maybe 7 should have gone before 6.

Gerd Kirchhoff:

I think the term of cross-border victimization doesn't make sense at all. But it is a long-term discussion and whether this term is necessary or not or whether we introduce another term, which does not add to clarity.

Marc Groenhuijsen:

I do not agree, because in cases of cross-border victimization, that is fairly standard terminology. The definition is extremely clear; it is the situation where the crime takes place in another country other than the country of residence of the victim. That is the definition that is being used all the time, it is

being used in the European Union framework decision, it is being used in the Council of Europe Recommendation 2006, it is being used in all the modern international protocols on victims' rights. Cross-border victimization is standard terminology in victims' rights nowadays.

Gerd Kirchhoff:

And what does it say which is new compared to 6? If the term cross-border victimization means the old principle, then I have no problems with it.

Sam Garkawe:

Perhaps I could talk about this issue of compensation where I believe there is a system in Australia is far superior to other systems where it is very simple. If you are victimized by a crime in a certain jurisdiction, it is that jurisdiction that pays and doesn't matter whether you are a resident of that system or whether you are a tourist that has visited the country for one hour, you are entitled to the payment. Now, that would simplify all of this is if we simply had a clause saying that the jurisdiction in which the crime occurred is the jurisdiction who has the obligation to pay, would make it very simple.

Karen McLaughlin:

The only exception to that would be, we are trying to promote States having reciprocity and considering putting together compensation laws so, you know, we are going to cross this issue all the time when there are States that never pass compensation laws and the States that do are feeling obliged to compensate them. Now, I also raised the issue of transnational human trafficking and I think that is another problem.

Xin Ren:

I do have a problem on the subject of the principle of reciprocity. If you talk about a first-world country, that is okay between European countries, but for transnational crime, when a victim is often from developing country, if you hold those poor developing countries up to the same justice standard and they don't have money to compensate their own victims and then you ask them to provide the same compensation to the foreign victim, that is impossible, that may also cause a lot of countries to not adopt this.

ARTICLE 12 – Implementation

PANEL CRITIQUE

Janice Joseph:

One of the things I am concerned with is the whole notion that we did not include that this protocol should be victim-friendly. I'm not sure if we can include language and the whole notion that the services may be there and many times victims are actually victimized by the people who are there to serve them and the whole idea is that this should be victim-friendly, or we can use what we call a victim-centric approach to the services that are available to victims. ... Also, I noticed something that might have been missing and maybe it is somewhere buried somewhere in the document about foreign victims, victims in countries, they are foreign victims in countries that are not their country and they don't understand the language, they don't understand the culture and so forth. I somehow feel that they should be highlighted as being a separate category of victims because of their kind of alienation and kind of experiences they may encounter being in a foreign country and not even being able to speak or use the language.

Sam Garkawe:

There is one question on the question sheet here about what agreements currently exist to relocate victims to other countries for their own safety, either permanently or temporarily. I think that a small

amount of that does happen, particularly for international crimes. The international tribunals do have those arrangements.

Karen McLaughlin:

I know people working with Interpol have reciprocity, MOUs (Memorandum of Understanding) and other things to relocate other people to countries. I don't know if Janice wanted to add anything about international cooperation, but there is beginning to be a greater level of international cooperation in that area.

Janice Joseph:

Well, I think with the increase in transnational crimes that more and more foreign international governments are beginning to realize the importance of making these kinds of agreements. So more and more, even in the Caribbean countries, they have these regional agreements so they can have extradition, treaty and all other kinds of agreements so it is easy to prosecute the perpetrator as well as provide justice to the victim. It is not quite common, but more and more in transnational crime it is becoming more significant and important to these governments.

ARTICLE 13 – Monitoring

PANEL CRITIQUE

Janice Joseph:

This is, of course the issue of how is effectiveness measured, and I'm not sure if it should be given a definition; but one which mentions different countries would have differences with measured effectiveness and how do you make that comparison from one country to the other about being effective? The same thing with evaluation of the legislation.

Gerd Kirchhoff:

Janice, the difficulties you have with effectiveness, I have with efficiency. How do you measure that? I think it sounds so nice to talk about efficiency and effectiveness, but if you look at the definitions, you come into big problems. Maybe it is too late to discuss the details here, but I have this problem.

Janice Joseph:

The point I was trying to make was that if we don't have a common way of measuring effectiveness and evaluation then we can't make an international comparison in terms of saying one country has been more successful than the other in terms of implementing the Convention.

ARTICLE 14 – Committee on Justice and Support for Victims of Crime and Abuse of Power

PANEL CRITIQUE

Janice Joseph:

Some countries may find it difficult in establishing the committee as designated in the Convention. It may become costly for some countries, poor countries, if they have to go through this process over a short period of time in terms of election and terms of service and regular meetings.

Sam Garkawe:

The budget for this committee would come out of the UN's budget, not the budget of the State Parties. In fact, there is an encouragement of States to ratify the Convention because it is not going

to effect them financially if they do or don't. So, the budget comes out of the UN, so individual States don't have to worry about paying for the committee.

Gerd Kirchhoff:

I have a problem with the 'persons of high moral standards. ... I think it is absolutely clear we can assume that Member Parties will elect only those people. Of course I don't want immoral people, I think is clear.

Sam Garkawe:

Can I just make a comment that that is common UN language for a lot of elections of committee members and even judges? So again, we've copied this from the rights of the child Convention.

Marc Groenhuijsen:

This is nothing that we have invented because we only know people of good high moral standing, so we never included it in the draft, so I can see an objection, no problem there. The question I wanted to raise is just to get the feeling in this audience, this committee is just about the strongest possible instrument to assess compliance in a different state and we've been discussing feasibility all afternoon and I'm afraid, really, even since last year the crime commission rejected the idea of voluntary inspections between two countries, so I couldn't possibly see any UN organ agreeing to a committee like this with the power to go on inspection missions and Gerd is absolutely right when he commented this morning that you need such a power in order to be effective. If you create such a power, I'm sure the committee will be rejected and the Convention will be rejected, so is this like the provisions on compensation, a potential time bomb under the Convention? Is it too much to ask for such a committee? Would the institution of a special reporter be less threatening to some Member States? That is the question I'd like to ask you and the other colleagues.

Janice Joseph:

I don't have a definite answer, but again you have to look at the cultural climate in each country and how to really respond to the UN. Again, the United States probably might not even like that, other countries may not like that, others probably would be willing to work along with that. So, it has to do with the political and cultural climate in the various countries that we are trying to serve in this Convention.

Chico Gaskow:

I welcome the idea of a committee and I see that it seems to be parallel the other international Conventions, although Marc has just raised an important point to consider about whether or not that strategy will in fact influence more to sign on or not. I guess I leave that up to those who are involved in the process. I just want to comment on the powers. It seems clear that it focuses on the evaluation of reports and that State Parties will be reporting every 5 years, but the human rights committee, for example, has developed the practice of general comments and issuing recommendations. I wonder if a phrase, assuming that this strategy of a committee remains other than a special rapporteur, would there be a possibility of including a phrase that at least allows for the possibility of the committee to either make general comments and specific recommendations to State Parties?

Sam Garkawe:

I don't think that we should put in any more powers than we've got there. I think the other committees that deal with the other human rights treaties, such as the human rights committee, simply took it upon themselves to start issuing general comments as a means of helping states to comply with the articles of the relevant convention. There wasn't a specific power in there. So, I don't think we need a specific power in there. If, in our ideal world we get a committee up there, I'm sure that committee will take it upon themselves to have that power anyway.

Karen McLaughlin:

I was going to suggest, as opposed to monitoring, that we put something on the positive side of it that won't be threatening by saying we could, for example, review model practices, introduce model, come up with examples of countries introducing model legislation to deal with the Convention. Something that would direct them to do something, but not in such an evaluation monitoring capacity.

Xin Ren:

Within the UN DOC, maybe they should establish an office for victim of crime and maybe they should take on the responsibility to monitor, to implement, this Convention and if they can set up that mechanism, other individual Party countries can model that and also establish that office within their ministry of justice or department of justice.

ARTICLE 15 – Committee on Justice and Support for Victims of Crime and Abuse of Power

PANEL CRITIQUE

Janice Joseph:

Is 2 years enough for States to comply to adopt any of those measures; is that enough time for them to adopt any of the measures as outlined in the Convention?

Sam Garkawe:

A State shouldn't actually ratify the Convention until such a time as they are in a position to comply, so they have 2 years to report, so I, and again, that is very common language in UN Conventions, so I have no problem with that.

Next, Sub-section 7, which gives the committee the power to make on-site visits, is too powerful and a lot of States will have difficulty with it if we are going to retain mention of the committee. So, my simple suggestion is that we drop sub-section 7 from Article 15 for the reasons that that might scare States too much. I agree with Marc, having a committee in and of itself could be a disincentive for States to agree, but I guess in the negotiations maybe they'll take out this committee. This is something that we wanted as victimologists, so my suggestion would be to drop sub-section 7.

Gerd Kirchhoff:

I think 'on-site visits' is pretty strong, pretty strong. It is scaring enough if the committee asks for further information. I think it is absolutely clear that this is a point of critique and, so I do not think it is necessary to retain that, I think it is dangerous.

Marc Groenhuijsen:

I am really glad that Gerd and the two of you agree on this. I do agree too. We have a similar problem in the European Union, so I will suggest that if we abolish the power to have on-site visits that we reflect on a different method for an effect-finding process which is reliable.

ARTICLES 16 - 25

PANEL CRITIQUE

Xin Ren:

I have a comment about Article 19 and Article 24. Article 24 deals with who has the power to deal with a depository and Article 19 is also about a depository issue, accession.

Sam Garkawe:

Again, I just repeat that this is copied from the rights of the child Convention and they must have had their reason as to why they had two different sections. I agree that it could easily be consolidated into one article, but I don't see any problem with leaving it as it is.

Xin Ren:

I think, leave it the way it is, okay. If it is a standard provision, I have no problem, but it looks like the language can be incorporated together.

Sam Garkawe:

One is talking about accession by the State and where they would deposit their instrument of accession; whereas the other one makes clear that it is the Secretary General of the United Nations who is the depository of the Convention. So, they do cover different things. They could have been consolidated into one.