THE UNIVERSITY OF QUEENSLAND

AUSTRALIA

The Role of the Victim in Criminal Proceedings in Australia and Germany
- a Comparison-

Kerstin Braun
LL.M (UQ)

A thesis submitted for the degree of Doctor of Philosophy at
The University of Queensland in 2014

TC Beirne School of Law

Abstract

Victims of crime once played a significant role in the administration of criminal justice by actively participating as private prosecutors. However, over the centuries the victim was gradually marginalised from criminal trials in both common law and civil law jurisdictions and the victim's role became mainly that of a witness. In the 1970s and 1980s, scholars and policy makers started challenging the diminished role of victims in criminal justice proceedings. This contributed to the adoption of the 1985 General Assembly *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the '*Declaration*') setting out basic principles for the treatment of victims.

An international declaration requires translation into Member States' national law to afford state nationals the rights contained in the instrument. However, over the course of the past decades some scholars and non-governmental organisations have suggested that Member States may not have implemented the basic principles contained in the *Declaration* sufficiently. The extent of the *Declaration's* implementation in Member States' national law is under-researched and not sufficiently understood. This thesis makes a new and original contribution to the existing literature by exploring the implementation of section 6(b) of the *Declaration* — the victim's right to present views and concerns — in two UN Member States, Germany and Australia.

This thesis analyses the implementation of formal processes and procedures concerning victim participation at the trial and sentencing stage in an inquisitorial system — Germany — and an adversarial system — Australia. It subsequently investigates the expansion of participation procedures at the trial and sentencing stage in the two Member States. The thesis also examines the possibilities for Member States to reject the extension of participatory rights based on the qualifications contained in the *Declaration* itself. According to section 6(b) Member States can choose not to implement victim participation rights where participation of victims would be 'prejudicial' to the accused and/or not 'consistent' with the respective national criminal justice system.

The analysis conducted in this thesis highlights that the possibilities for victim participation in light of section 6(b), almost 30 years after its adoption, could be extended and enhanced — in both Germany and Australia. Moreover, the expansion of participation rights for victims would not necessarily be prejudicial for defendants' rights in every case. However, it is arguable that an expansion of participatory rights is 'inconsistent' with the national criminal justice systems in

Germany and Australia. Both Member States may be able to rely on the argument that 'modern' criminal justice is a state-based conflict from which victims have intentionally been excluded. The qualifications contained in the *Declaration* may therefore enable Member States to continue to justifiably refuse the expansion of victims' participatory rights at the trial and sentencing stage beyond current limits.

As this is a major limitation of section 6(b), the thesis examines the potential success of proposed alternative international standards for victims *inter alia* aimed at influencing victim participation procedures in Member States. The analysis focuses on the possible adoption of a proposed legally binding *UN Convention on Justice and Support for Victims of Crime and Abuse of Power* (the '*Convention*'). However, in regards to victim participation, the proposed *Convention* contains the same qualifications as currently enshrined in section 6(b) of the *Declaration*. This means that signatory States might be able to rely on the same qualifications and justifiably reject the expansion of victims' participatory rights after the ratification of the *Convention*.

This thesis concludes that it may be necessary to explore alternatives on the international level apart from the adoption of a *Convention* to promote the expansion of victims' participatory rights. It suggests that the viability of the adoption of a Human Rights Council 'Special Procedures-Mandate' for the implementation of the *Declaration* could be explored in future research. Special Procedures might engage actors in Member States in dialogue on victims' rights to a greater extent and emphasise the importance of victim participation at the trial and sentencing stage. The thesis argues that a change of attitude regarding the victim's role in criminal justice in Member States might contribute to the introduction of procedures that allow for greater victim participation at the trial and sentencing stage in Germany and Australia.

Declaration by author

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

I have clearly stated the contribution of others to my thesis as a whole, including statistical assistance, survey design, data analysis, significant technical procedures, professional editorial advice, and any other original research work used or reported in my thesis. The content of my thesis is the result of work I have carried out since the commencement of my research higher degree candidature and does not include a substantial part of work that has been submitted to qualify for the award of any other degree or diploma in any university or other tertiary institution. I have clearly stated which parts of my thesis, if any, have been submitted to qualify for another award.

I acknowledge that an electronic copy of my thesis must be lodged with the University Library and, subject to the General Award Rules of The University of Queensland, immediately made available for research and study in accordance with the *Copyright Act 1968*.

I acknowledge that copyright of all material contained in my thesis resides with the copyright holder(s) of that material. Where appropriate I have obtained copyright permission from the copyright holder to reproduce material in this thesis.

Publications during candidature

Refereed journal articles:

1. Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' (2013) 14(9) *German Law Journal* 1889-1908

2. Kerstin Braun, 'Do Ask, Do Tell: Where Is The Protection Against Sexual Orientation Discrimination In International Human Rights Law?' *American University International Law Review* (accepted for publication on 15 July 2013)

3. Kerstin Braun, 'Legal Representation for Sexual Assault Victims- Possibilities for Law Reform?' (2014) 25(3) *Current Issues in Criminal Justice* 819-837

4. Kerstin Braun, '"Nothing About Us Without Us" - The Legal Disenfranchisement Of Voters With Disabilities In Germany And The Compliance With International Human Rights Standards On Disabilities' *American University International Law Review* (accepted for publication in March 2014)

Publications included in this thesis

No publications included.

Contributions by others to the thesis

No contributions by others

Statement of parts of the thesis submitted to qualify for the award of another degree

None.

Acknowledgements

The research in this thesis could never have been undertaken without the help of many persons.

I would like to thank my supervisors Prof. Dr. Heather Douglas and Dr. Mark Burdon for their continuous support in my PhD research, their guidance and advice. I am grateful for their knowledge and for making sure that I finished the thesis.

Further I thank Radha Ivory, Andreas Schoenhardt, Jonathan Crowe, Warren Swain, as well as my fellow PhD students at the TC Beirne School of Law, for their encouragement and support during this time. I am especially grateful to Ruth Walker for picking me up when I was feeling down.

Lastly, this thesis would have remained unfinished if it had not been for the love and support of my husband Seamus Tovey, my friends and my family. Without the great work of my father Karl-Heinz Braun for, and with, victims of crime this thesis would never have been written. I dedicate this thesis to my father.

This thesis was financed through the UQ Centennial Scholarship and the International Postgraduate Research Scholarship.

"*I have hated words and I have loved them, and I hope I have made them right*"
Markus Zusak, The Book Thief

Keywords

Victims of crime, UN Declaration for victims, Germany, Australia, Convention for victims

Australian and New Zealand Standard Research Classifications (ANZSRC)

ANZSRC code: 180110 Criminal Law and Procedure (50%)
ANZSRC code: 180106 Comparative Law (25%)
ANZSRC code: 180116 International Law (excl. International Trade Law) (25%)

Fields of Research (FoR) Classification

FoR code: 1801, Law (100%)

TABLE OF CONTENTS

List of Tables and Figures

List of Abbreviations

CJS	Criminal Justice System
DPP	Director of Public Prosecutions
EU	European Union
ICC	International Criminal Court
NSW	New South Wales
OECD	Organisation For Economic and Co-operation and Development
PAP	Private Accessory Prosecutor
StPO	Strafprozessordnung (German Code of Criminal Procedure)
UN	United Nations
VIS	Victim Impact Statement
WSV	World Society of Victimology

Note that bibliographic abbreviations are not included in the List of Abbreviations.

Chapter 1: Introduction

I INTRODUCTION

During the Early Middle Ages (circa 600 – 900 AD), victims of crime played a significant role in the administration of criminal justice by actively participating as private prosecutors.[1] However, over the centuries the victim was marginalized from criminal trials in both common law and civil law jurisdictions and the victim's role became mainly that of a witness.[2] In this role victims had little opportunity to present their views and concerns during proceedings and to participate actively at trial unless when testifying.

In the 1970s and 1980s scholars and policy-makers started to challenge the diminished role of victims in the justice process.[3] In particular, a study by Shapland et al in 1985 on victims and their treatment in criminal proceedings received much attention at the time.[4] The researchers found that surveyed victims of violent crime in the United Kingdom often felt powerless as a result of not being able to participate in the criminal justice system.[5]

Enhanced academic debate on, and increased public awareness of, victims and their role in the criminal justice system contributed to the adoption of an international instrument. In 1985 the

[1] For further discussion on the shift away from private prosecution and to public prosecution see: Chapters 2 and 5. On the historic developments see in general: Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) 17(2) *The University of New South Wales Law Journal* 595; Sam Garkawe, 'The History of the Legal Rights of Victims of Crime in the Australian Criminal Justice System' in Victims Services Victims of Crime Bureau, Attorney General's Department (ed), *Raising the Standards: Charting Government Agencies' Responsibilities to Implement Victims' Rights* (Victims of Crime Bureau, 2003) 34; Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006); Peter Sankoff and Lisa Wansbrough, 'Is Three Really a Crowd? Thoughts about Victim Impact Statements and New Zealand's Revamped Sentencing Regime' (Paper presented at the 20th International Conference of the International Society for the Reform of Criminal Law, Brisbane, 2 July - 6 July 2006) 6.

[2] See in general: Garkawe, above n 1; William Frank McDonald, 'Towards a Bicentiennial Revolution in Criminal Justice: The Return of the Victim' (1975) 13 *American Criminal Law Review* 649; Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20(4) *Criminal Law Forum* 395; Stefanie Hubig, 'Die historische Entwicklung des Opferschutzes im Strafverfahren' in Friesa Fastie (ed), *Opferschutz im Strafverfahren* (Barbara Budrich, 2008) vol 2, 285; Heinrich Henkel, 'Die Beteiligung des Verletzten am kuenftigen Strafverfahren' (1937) 56 *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 227; Ernst Heinrich Rosenfeld, *Die Nebenklage des Reichsstrafprozesses: Ein Beitrag zur Lehre von den Rechten des Verletzten im Strafverfahren* (J. Guttentag, 1900); Michael Kilchling, 'Opferschutz und der Strafanspruch des Staates-ein Wiederspruch' (2002) *Neue Zeitschrift fuer Strafrecht* 57, 58.

[3] See in general: M Ash, 'On Witnesses: A Radical Critique of Criminal Court Procedures' (1972) (48) *Notre Dame Lawyer* 159; William Frank McDonald, *Criminal Justice and the Victim* (Sage Publications, 1976); Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower, 1985).

[4] Shapland, Willmore and Duff, above n 3. Subsequent discussion of the study, for example, in Edna Erez and Pamela Tontodonato, 'The Effect of Victim Participation in Sentencing on Sentencing Outcome' (1990) 28 *Criminology* 451; Stephanos Bibas and Richard Bierschback, 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114(1) *The Yale Law Journal* 85, 138.

[5] Shapland, Willmore and Duff, above n 3.

United Nations ('UN') General Assembly unanimously adopted the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the '*Declaration*') in Resolution 40/34,[6] emphasising that 'millions of people throughout the world suffer[ed] harm as a result of crime and the abuse of power and that the rights of these victims ha[d] not been adequately recognized'.[7]

The General Assembly nominated a number of basic principles of justice for victims ('basic principles') that Member States should adopt in order to reduce secondary victimisation,[8] and secure justice and assistance for victims. The *Declaration* consists of two parts: part A relates to victims of crime,[9] part B relates to victims of abuse of power.[10] Part A outlines four avenues of redress for victims of crime: access to justice and fair treatment,[11] restitution,[12] compensation,[13] and assistance.[14] The *Declaration* is based on the idea that 'victims should be adequately recogni[z]ed and treated with respect for their dignity'.[15] It is therefore frequently called the 'Magna Carta' for victims.[16]

Many basic principles enshrined in the *Declaration* are concerned with the provision of 'services' for victims. These 'services' include the obligation to treat victims with respect, provide victims with information about proceedings and offer compensation for losses suffered from a criminal

---

[6] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res, 40/34, UN GAOR 40th sess, 96th plen mtg, supp no 53, UN Doc A/RES/40/34 (29 November 1985) annex (the '*Declaration*'). The numbered sections of the Declaration containing the Basic Principles of Justice are referred to as sections in this thesis.

[7] GA Res, 40/34, UN GAOR 40th sess, 96th plen mtg, supp no 53, UN Doc A/RES/40/34 (29 November 1985) (the '*Resolution'*), para 2. The first three introductory paragraphs to the *Resolution* are not numbered. They are referred to as paras 1-3 in this thesis. The following numbered sections of the *Resolution* are referred to as sections.

[8] Secondary Victimisation has been defined as 'negative social or societal reaction in consequences of the primary victimization and is experienced as further violation of legitimate rights or entitlements by the victims'. See: Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 314.

[9] Defined as 'People, who have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing abuse of power'. See: definition in *Declaration* s 1.

[10] Defined as 'People, who have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights'. See: definition in *Declaration* s 18.

[11] *Declaration* ss 4-7

[12] Ibid ss 8-11

[13] Ibid ss 12-13.

[14] Ibid ss 14-17.

[15] *UN Guide for Policymakers. On the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International crime Prevention, 1999) ('UN Guide') Introduction, 1.

[16] See, for example: C Chockalingam, 'Impact of the UN Declaration on Victims: Developments in India' in Eduardo Vetere and David Pedro (eds), *Victims of Crime and Abuse of Power Festschrift in Honour of Irene Melup* (11th United Nations Congress on Crime Prevention and Criminal Justice, 2005) 118.

act.[17] These 'service-related' basic principles were largely undisputed by representatives of Member States during the drafting of the *Declaration* and have generally been accepted in Member States since.[18] One basic principle contained in section 6(b) concerning giving victims a voice in the criminal justice system, however, was strongly debated during the drafting of the *Declaration*.[19] Section 6(b) explicitly sets out that:

> The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

During the drafting process of the *Declaration*, Member States reacted differently to the proposal of introducing victims' participatory rights in the respective national criminal justice systems. Some Member States were concerned about potential risks for the procedural guarantees of defendants if victims were allowed to present views and concerns.[20] Others argued that victims had not been given the right to present views and concerns in their system in order to protect them from proceedings which could otherwise be traumatic.[21] Despite these concerns the *Declaration* was unanimously adopted by the General Assembly in 1985 without a vote and without any reservations by Member States.[22]

An international declaration requires translation into Member States' national law to afford state nationals the rights contained in the instrument.[23] However, some scholars and non-governmental

[17] See in general: Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000) 18; Andrew Sanders et al, 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447.

[18] See in general: Ashworth, above n 17; Andrew Ashworth, 'Victim Impact Statements and Sentencing' (1993) 39(2) *Criminal Law Review* 498; Sam Garkawe, 'Enhancing the Role and Rights of Crime Victims in the South African Justice System: An Australian perspective' (2001) 14 *South African Journal of Criminal Justice* 131, 135.

[19] This issue will be discussed further in Chapters 5-7 of this thesis. Regarding a detailed analysis of the Declaration and section 6(b) in particular see Chapters 3, 4. All sections without further specification of legislation are sections contained in the Declaration.

[20] For example, the Netherlands expressed concerns regarding violations of defendants' rights in the case victim participation was introduced in the criminal justice system. The opposition of the Netherlands contributed to the inclusion of the phrase 'Without Prejudice to the Accused' in section 6(b). For further discussion of this issue see: Raquel Aldana-Pinell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly* 605, 657.

[21] Issue raised during deliberations by the United Kingdom. See: *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan 26 August - 05 September 1985): Report prepared by the Secretariat*, UN Doc A/Conf.121/22/Rev.1 (1986) ('7th Congress Report') 157. For further discussion of this issue see Chapter 3.

[22] A reservation concerning section 6(b) by the UK which can be found in the Report of the 7th Congress was not upheld when the General Assembly adopted the Declaration.

[23] The term 'national law' as used in this thesis refers to legislation passed by Member States or rights set out in case law. In contrast, the term international law in this thesis refers to law enacted by the international community. The Declaration is a non-binding instrument, so-called 'soft law', and therefore requires translation into Member States' national law. The Declaration has also not become binding as customary international law since its adoption. For a

organisations have suggested that Member States may not have implemented the basic principles contained in the *Declaration* sufficiently.[24] As a result it is questionable whether victims in these Member States receive the degree of protection from the law that the *Declaration* aimed to ensure.

To overcome the alleged shortfalls in the *Declaration*'s implementation, commentators have called for the adoption of a legally binding international instrument to further encourage the integration of victims' rights into national law. In 2006, the World Society of Victimology ('WSV'), an organisation which aims to promote and advance research on victims around the globe, together with INTERVICT, the International Victimology Institute in Tilburg, the Netherlands, started to promote the adoption of a *UN Convention on Justice and Support for Victims of Crime and Abuse of Power* (the '*Convention*').[25] The proposed *Convention* strengthens victims' rights especially in regards to information and stipulates the possibility to appeal against prosecutorial decisions. In contrast to the *Declaration*, the *Convention* explicitly emphasises Member States' commitment to take measures to reduce victimisation and stresses the importance of crime control. Additionally, articles 12-16 of the *Convention* cover the areas of implementation, cooperation and monitoring. State parties are called upon to take appropriate measures regarding the implementation of the *Convention* and the monitoring of national victim-related policies. The *Convention* makes provisions for the establishment of a 10-person expert Committee on 'Justice and Support for Victims of Crime and Abuse of Power' to examine the progress made on the national level.

---

detailed analysis of the status of the Declaration see Chapter 3. In some UN Member States no international instrument (including legally binding instruments, such as, treaties or conventions) has direct force until the State adopts legislation that transports these obligations into national law (distinction between monist and dualist states). See in general: J G Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Year Book of International Law* 6; Giuseppe Sperduti, 'Dualism and Monism, A Confrontation to Be Overcome' (1977) 3 *Italian Year Book of International Law* 31; David Feldman, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Year Book of International Law* 105. Regarding 'Monism' and 'Dualism' in Germany and Australia see further Chapter 8.

[24] Willem van Genugten et al, 'Loopholes, Risks and Ambivalences in International Lawmaking; the Case of a Framework Convention on Victims' Rights' (2007) XXXVII *Netherlands Yearbook of International Law* 109, 119, 122; John PJ Dussich, 'The Need for an International Convention for Victims of Crime, Abuse of Power and Terrorism' (Paper presented at the First World Conference on Penal Law/ Penal Law in the XXIst Century, Guadalajara, Mexico 18-23 November, 2007) 4; Marc Groenhuijsen, 'Current Status of the Convention on Justice for Victims of Crime and Abuse of Power' (Paper presented at the 4th Tokiwa International Institute Symposium "Raising the Global Standards for Victims: The proposed Convention for Victims of Crime and Abuse of Power", Miwa Japan, 2008) 10. Marc Groenhuijsen, 'The Draft UN Convention on Justice and Support for Victims of Crime, With Special Reference to its Provisions on Restorative Justice' (2008) 46(2) *International Annals of Criminology/ Annales Internationales de Criminologie* 121, 121. The assessment of the impact of the Declaration is largely based on the findings of studies on EU victim related instruments containing similar rights as the Declaration. For further explanations see discussion of victim related EU 'hard' and 'soft' law in Chapter 8.

[25] The idea of having a convention was first developed by Marlene Young, Irvin Waller and Sam Garkawe. See: Groenhuijsen, above n 24, 12. The World Society of Victimology ('WSV') is a not for profit, non-governmental organisation and holds consultative status with the United Nations Economic and Social Council. For further information on WSV and their projects see: <http://www.worldsocietyofvictimology.org/index.html>.

Member States are obliged to submit a report on the measures they have adopted to the Committee quinquennially. The *Convention* therefore contains explicit monitoring and reporting mechanisms.[26]

II PURPOSE AND AIM OF RESEARCH

The aim of this thesis is to examine whether and to what extent victims of crime are able to present views and concerns during the trial and sentencing stage as enunciated in section 6(b) in two Member States, Germany and Australia.

A comparative study of relevant German and Australian laws concerned with the victim's right to present views and concerns during the trial and sentencing stages is undertaken.[27] The findings of the comparative study inform the next part of this thesis which examines whether victims' participatory rights under section 6(b) could be extended and enhanced. Other research in the field of victims' participatory rights tends to approach the subject from the victim's perspective by considering to what extent victims wish to participate in proceedings.[28] By comparison, this thesis considers the concept of victim participation in Member States through the lens of an international instrument, the *Declaration*, and its implementation in national law.

This thesis will also consider whether Member States could justifiably refuse the introduction or expansion of victims' participatory rights based on the two qualifications contained in section 6(b). According to the first qualification victims should only be able to present views and concerns where the presentation is not prejudicial to the accused. The second qualification states that victims do not have to be given the opportunity to present views and concerns, where to do so is inconsistent with the relevant national criminal justice system.[29] An in-depth analysis of the meaning of the qualifications will be provided in Chapter 4 setting out the research methodology.

Lastly, this thesis will comment on the potential success of proposed alternative international standards on victims of crime to the *Declaration* which are aimed at enhancing the implementation

---

[26] The draft Convention in the latest version of 08 February 2010 is available at: <http://www.worldsocietyofvictimology.org/publications.html#victimologist >.

[27] When the term implementation is used in this thesis, it is intended to describe the process that States have taken in order to make international law effective in their jurisdictions. See: Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 392.

[28] In relation to studies focusing on victims' needs see for example: Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999); Jan Jordan, 'Lest We Forget: Recognising and Validating Victims' Needs' in School of Government Institute of Policy Studies (ed), *Addressing the Causes of Offending - What is the Evidence?* (2009) 14; Jo-Anne Wemmers and Marie-Marthe Cousineua, 'Victim Needs and Conjugal Violence: Do Victims Want Decision-Making Power?' (2005) 22(4) *Conflict Resolution Quarterly* 493.

[29] *Declaration* s 6(b).

of victims' (participatory) rights in Member States. The analysis in this thesis focuses on the potential success of the proposed *Convention* and its potential influence on Member States' conduct.

III RESEARCH QUESTIONS

Three research questions are addressed in this thesis:

1. To what extent can victims present views and concerns during the trial and sentencing stage in Germany and Australia in light of section 6(b) of the *Declaration*?

In order to answer the first research question it is necessary to determine the level of participation possible for victims under national law in Germany and Australia. Therefore, the current possibilities for victims to present views and concerns during the trial and sentencing stage will be analysed.

2. Could victims' rights to present views and concerns during the trial and sentencing stage be extended and enhanced in a way that is beneficial to victims, complements the national justice system and is not prejudicial to the accused?

Resolution 40/34 and section 6(b) specify the importance of introducing victims' rights — including participatory rights — in a way that complements national criminal justice systems and is not prejudicial to the accused. Therefore, when considering possibilities for extending and enhancing victims' participatory rights in Member States' national law, it is necessary to contemplate whether Member States could rely on the qualifications enunciated in the *Declaration* and justifiably reject the extension of victims' participatory rights.

3. Does an alternative approach to the *Declaration* exist on the international level which could have the potential to influence the expansion of victims' participatory rights in Germany and Australia?

As pointed out above, commentators have suggested that the *Declaration* may not have been implemented in Member States' national law sufficiently and that a legally binding *Convention* for victims might be suited to overcome this shortfall. This thesis will analyse whether the proposition

applies to the victim's right to present views and concerns during the trial and sentencing stage in the two Member States.

While much has been written on victims' rights and their treatment in the criminal justice system this thesis will make a new contribution to the field. The original approach of this thesis is detailed in the next section.

IV JUSTIFICATION OF RESEARCH AND PREVIOUS LITERATURE

In order to assess whether the *Declaration* has achieved its goals, it is necessary to examine the degree of implementation it has received in national law. According to General Assembly's Resolution 40/34, every Member State is called upon to undertake a review of their existing legislation concerning victims of crime 'in order to give effect to the provisions contained in the Declaration'.[30] While some commentators have suggested in the past that the basic principles of justice in the *Declaration* are not being implemented in Member States around the world,[31] the current status of implementation in national law is under-researched and uncertain.

Research to date has tended to focus mainly on the role and rights of victims in criminal procedure in the national criminal justice system,[32] and on questions concerning victims' rights in specific states.[33] Zedner commented that 'given the huge body of research on crime, criminal law, and criminal justice systems in specific countries and the growing interest of criminologists and

[30] *Resolution* s 4.
[31] See discussion above under part 1 'Introduction'.
[32] For literature on the role of victims in Germany see in general: Martin Heger, 'Die Rolle des Opfers im Strafverfahren' (2007) (4) *Juristische Ausbildung* 244; Tanja Hoernle, 'Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht' (2006) 19 *Juristische Zeitung* 950; Bernd Schuenemann, 'Die Stellung des Opfers im Strafprozess' (2007) 2 *The Yamanaski Gakuin University Law Journal* 75. For literature on the role of victims in common law countries see in general: Christine M Engelbrecht, 'The Struggle for "Ownership of Conflict": an Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 12; Kelly Richards, 'Taking Victims Seriously?: The Role of Victims' Rights Movements in the Emergence of Restorative Justice' (2009) 21 *Current Issues in Criminal Justice* 302; Garkawe, above n 1; Garkawe, above n 18; Wemmers, above n 2.
[33] For literature on specific victims' rights in Germany and Anglo-American systems see in general: Kerstin Spiess, *Das Adhaesionsverfahren in der Rechtswirklichkeit* (Lit Verlag Dr. W Hopf, 2008); Eva Luetz-Binder, *Rechtswirklichkeit der Privatklage und Umgestaltung zu einem Aussoehungsverfahren* (Peter Lang, 2009); Robert C Davis and Barbara E Smith, 'Victim Impact Statements and Victim Satisfaction: an Unfulfilled Promise?' (1994) 22(1) *Journal of Criminal Justice* 1; Edna Erez, 'Victim Impact Statements' (Australian Institute of Criminology, 1991); Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (1999) *Criminal Law Review* 54; Edna Erez, 'Integrating a Victim Perspective Through Victim Impact Statements' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000) 16; Edna Erez and Kathy Laster, 'Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements' (1999) 45(4) *Crime & Delinquency* 53; Edna Erez and Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience' (1995) 23 *Journal of Criminal Justice* 36; Sanders et al, above n 17; Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294.

criminal lawyers in the systems of countries other than their own, it is perhaps surprising that truly comparative studies of criminal justice remain in their infancy'.[34] Goodey adds to Zedner's assessment arguing that if one replaced the word 'criminologist' with 'victimologist' it remained accurate that there is a lack of 'cross-national comparative research on victim-centred issues' apart from a few isolated studies.[35] Cross-national literature regarding the implementation of the basic principles set out in the *Declaration* is not extensive and usually aims to comment on the implementation of all basic principles in a large number of Member States. This leads to broader research results that do not focus in detail on the implementation of a specific basic principle. The existing research focusing on the implementation of the *Declaration* consists mainly of three isolated studies that will be analysed below.

In 1987 Joutsen undertook a study on the implementation of the *Declaration* in 15 European countries.[36] The study assessed statutory law and legal practice regarding victims' rights in criminal justice systems in Europe. Data was collected from UN agencies, research centres in Europe and from European governments.[37] In relation to section 6(b), Joutsen identified three main categories of victim participation in Europe at the time: to prosecute the offence, to present a civil claim and to be a witness. Joutsen's conclusion on the implementation of section 6(b) was rather general. He found that regardless of the victims' role, criminal justice authorities (for example, the courts and public prosecutors) in European States take the victims' views into account to varying degrees.[38]

The results of Joutsen's research are problematic for three reasons. Firstly, the study considers all basic principles of the *Declaration* and their operation in many European countries and does not go into great depth in relation to the implementation of section 6(b). Thus, the extent of victim participation in different Member States at different trial stages is not outlined in detail. Secondly, the research findings are based on the situation in European States over 25 years ago and legislative

[34] Lucia Zedner, 'Comparative Research in Criminal Justice' in L Noaks, M Levi and M Maguire (eds), *Contemporary Issues in Criminology* (University of Wales Press, 1995) 8, 8; cited in Jo Goodey, 'Book Review: Vicitms of Crime in Twenty-Two European Criminal Justice Systems' (2001) 8 *International Review of Victimology* 291, 296.
[35] Goodey, above n 33, 296. The studies on victim related EU instruments, similar to the Declaration, are discussed in Chapters 3 and 8 when the differences between 'hard' and 'soft' law are analysed.
[36] Matti Joutsen, *The Role of the Vicitm of Crime in European Criminal Justice Systems. A Crossnational Study of the Role of the Victim* (United Nations European Institute for Crime Prevention and Control (HEUNI) Finland, 1987). In 2000 Brienen and Hoegen undertook a measurement of victim-related rights and their implementation in European States when analysing the implementation of the non-binding Council of Europe Recommendation 85/ 11 of the on the Position of the Victim in the Framework of Criminal Law and Procedure (the 'Recommendation 85/11'). As the study is not concerned specifically with the implementation of the Declaration it will be discussed in Chapter 4 'Research Methodology'. See: Marion Brienen and Ernestine Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers, 2000).
[37] Ibid 25-26.
[38] Ibid 197.

reform concerning crime victims enacted since Joutsen's research indicates that the situation may have changed significantly.[39] This makes it questionable whether the research findings are still up to date. Thirdly, Joutsen's research only focuses on the implementation of the *Declaration* in European States and does not take into account whether research findings differ between European and Non-European States.

In addition to Joutsen's research, the UN Secretary-General has prepared two reports on the implementation of all basic principles based on a survey of Member States in 1996 and 2009.[40] Although both reports found that Member States had implemented the *Declaration* into national legislation to a certain extent, it was not specified which of the basic principles were challenging for Member States to implement and what the underlying reasons were.[41] The 1996 review concluded that differences in legal traditions, justice systems and judicial practices of the responding Member States did not present an obstacle to the introduction of legislative provisions designed to improve the position of victims.[42] As a general finding, the UN Secretary-General stated that the amount of attention given to the plight of victims had increased in Member States since the adoption of the *Declaration*.[43] The Secretary-General's 2009 report found that Member States had at least in part implemented the provisions contained in the *Declaration*. However, it emphasised that the approach to implementation of the *Declaration* varied to a great extent.[44]

There are three key problems with the Secretary-General's research findings on the implementation of the *Declaration* and particularly section 6(b) in UN Member States. Firstly, the overall findings with respect to the implementation of section 6(b) are of a general nature and do not go into great

[39] For discussion on victim related law reform in general see: Hans Joachim Schneider, 'Victimological Developments in the World During the Past Three Decades (I): A Study of Comparative Victimology' (2001) 45(4) *International Journal of Offender Therapy and Comparative Criminology* 44; Hans Joachim Schneider, 'Victimological Developments in the World during the Past Three Decades: A Study of Comparative Victimology (II)' (2001) 45(5) *International Journal of Offender Therapy and Comparative Criminology* 539.

[40] The survey was conducted as a response to ESC Res 1994/18 which endorsed a questionnaire on the Declaration. See: 'UN Report of the Secretary-General Addendum-United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice- Use and Application of the Declaration of Basic Priniples of Justice for Victims of Crime and Abuse of Power', UN Doc E/CN.15/1996/16/Add. 3 (10 April 1996) ('Report 1996'); 'UN Report of the Secretary-General- Use and Application of Standards and Norms in Crime Prevention and Criminal Justice', UN Doc E/CN.15/2009/16 (06 February 2009) ('Report 2009') 3. The number of Member States is based on membership figures for 2007 provided by the UN at <http://www.un.org/en/members/growth.shtml>.

[41] The monitoring-process involves the collection of information on the de jure and de facto situation in particular states. See: Roger S Clark, 'United Nations Standards and Norms in Crime Prevention and Criminal Justice' (1995) 5 *Transnational Law & Contemporary Problems* 287, 304.

[42] Report 1996, above n 40, 13.

[43] Ibid.

[44] Report 2009, above n 40, 19. The questionnaire used to survey the Member States by the Secretary-General was divided into 10 different areas including: legislative measures relating to victims, assistance and support to victims and information provided to victims. The questionnaire was approved by UN ESC Res 2007/21.

depth.[45] Secondly, the monitoring effort on the implementation of the *Declaration* relies on voluntary reporting of Member States. States are under no explicit legal obligation to report on the progress of implementation. In the 1996 survey, replies to the questionnaire distributed by the Secretary-General were only received from 44 out of the 185 Member States (23.7%).[46] In 2009, the reporting rate was even lower with 28 out of 192 Member States replying to the questionnaire (14.5%).[47] The low response rate does not allow for a general conclusion on the state of implementation of the *Declaration* in UN Member States.

Thirdly, Groenhuijsen,[48] who analysed the results of the 1996 report, found that civil servants responsible for victim policies in the respective Member States mostly provided the answers to the survey.[49] He has challenged the findings of the Secretary-General on the grounds that those civil servants have a self-interest in portraying a positive picture of the victim situation in their country.[50] His argument appears convincing, especially considering that Member States may take an interest in being viewed as credible treaty partners that do not want to be shamed in front of the international community for failing to implement an international instrument. It is unclear whether the issues raised by Groenhuijsen concerning the 1996 report also apply to the 2009 survey. If so, it would also bring into question the results of the latter survey.

The above review underlines the limitation of existing research on the extent of the *Declaration*'s implementation in UN Member States. It shows that the effects of the *Declaration* on Member States' conduct remain insufficiently understood. This thesis will consider these issues by analysing

[45] The Secretary-General stated in the Report 1996 that section 6(b) of the Declaration was always applied in 33 Member States, usually applied in 7 Member States and in another State only in exceptional cases. Explicit information regarding the relevant procedures in place and their effectiveness, however, was missing from the report. See: Report 1996, above n 40, 6. The 2009 report merely listed States in which victims were allowed to present views and concerns without specifying the extent and means of the victim participation in question. See: Report 2009, above n 40, 13.

[46] During the 1996 survey, both Australia and Germany submitted the answered questionnaire to the UN. The number of Member States is based on the figures provided by the UN under <http://www.un.org/en/members/growth.shtml>.

[47] Germany replied to the 2009 survey questionnaire while Australia did not. See: ESC Res 2006/20, UN Doc E/RES/2006/20. ECOSOC requested the Secretary-General to convene an intergovernmental expert group meeting to design an information-gathering instrument in relation to UN standards related to victim issues. The questionnaire used in the 2009 survey was developed at the meeting of the intergovernmental expert group in Vienna from 27-29. November 2006. See: 'UN Report of the Secretary-General-Results of the Meeting of the Intergovernmental Expert Group to Develop an Information-Gathering Instrument on United Nations Standards and Norms Related Primarily to Victim Issues', UN Doc E/CN.15/2007/3 (01 February 2007) annexed questionnaire. As a response to resolution 2006/20. In December 2007 the Secretary-General invited Member States to reply to the questionnaire.

[48] Marc Groenhuijsen is the Director of the International Victimology Institute in Tilburg (INTERVICT), the Netherlands. The institute promotes and executes interdisciplinary research on the empowerment and support of crime victims and victims of abuse of power. More information on the work of INTERVICT is available at: <http://www.tilburguniversity.edu>.

[49] Groenhuijsen, above n 24, 9.

[50] Ibid 9. For further critique of the survey see: Marc Groenhuijsen, 'Victims' Rights in the Criminal Justice System: a Call for More Comprehensive Implementation Theory' (Paper presented at the Caring for Victims: Selected Proceedings of the Ninth International Symposium on Victimology, Amsterdam August 25-19, 1997, Amsterdam, 1999) 85, 89-97.

the possibilities for victims to present views and concerns in light of section 6(b) in Germany and Australia. The study is undertaken to identify the current possibilities of victim participation in two Member States with different legal backgrounds — an inquisitorial system and an adversarial system. It aims to assess whether Member States could implement section 6(b) to a greater extent and thus provide victims with more possibilities for participation during the trial and sentencing stage. The thesis also examines the two qualifications in the section, which enable Member States to reject victim participation in their jurisdiction. Accordingly the thesis aims to provide a greater understanding of the *Declarations*' potential influence on Member States' conduct regarding victims' participatory rights. The analysis is intended to underpin subsequent discussions on the potential success of possible alternative approaches to the *Declaration* on the international level, such as the proposed *Convention*.

V LIMITATIONS OF RESEARCH

The following part of this chapter considers the research limitations of this thesis. It explains why the research only focuses on the 'law on the books' and not also on the 'law in practice'. It explains why only two UN Member States were chosen as case studies and why these particular Member States were selected. It identifies that the focus of this thesis is on victims of crime and not victims of abuse of power. It further clarifies why one particular basic principle, section 6(b), was chosen for analysis and sets out the reasons for focusing on the right to present views and concerns at the trial and sentencing stage.

A 'Law on the Books'

One limitation of this thesis is that it considers the possibilities for victims to present their views and concerns at the trial and sentencing stage according to German and Australian statutory and case law.[51] The methodology defined in Chapter 4 of this thesis will outline this approach in more detail.

The thesis generally does not consider how these laws are complied with in practice. This approach may be criticised on the basis that the actual treatment of victims may differ from the way the law prescribes it. However, the implementation of the obligation contained in section 6(b) in Member

[51] In Germany criminal law is legislated in Federal statutory law. German States have no jurisdiction over these matter. In Australia all States and Territories have their own criminal and criminal procedure laws. Additionally, Federal criminal law and procedures exists. This will be explained in greater detail in the assessment methodology in Chapter 4. For analysis of 'law on the books' and 'law in action' in regards to victims of crime in 9 different jurisdictions (the USA, the Netherlands, England and Wales, Scotland, the Republic of Ireland, Australia, New Zealand, Canada and South Africa) based on face-to-face and telephone interviews see: Matthew Hall, *Victims and Policy Making: A comparative Perspective* (Routledge, 2012).

States' law may be the first step in improving standards for victims of crime. Concurring, the General Assembly in its Resolution 40/34 called upon Member States to review their national law in order to give effect to the content of the *Declaration*. Although national law is not necessarily a safeguard for the better treatment of victims in practice, statutory law may be seen as a symbol of the governments' intention to address the needs of victims in their jurisdictions by explicitly stating what victims' rights entail. Explicitly setting out victims' rights in statutory law could also potentially avoid misunderstandings that might occur if no legislation existed and the situation of victims' rights was unclear.[52] In a study on victims' rights in the United States Kilpatrick, Beatty and Howley concluded that overall the enactment of victim-related statutory law had an influence on the treatment of victims in practice.[53] Therefore, the degree of implementation of the *Declaration* as 'law on the books' is a valuable first step towards understanding the extent of the implementation of section 6(b).

B Selection of Member States

Two UN Member States, Germany and Australia, were chosen as case studies for examination in this thesis.[54] The reasons for selecting Germany and Australia as case studies regarding the implementation of the *Declaration* are considered below.

1 Difference in Legal System

The different legal systems in Member States may be an important factor influencing the implementation of section 6(b).[55] Germany and Australia were chosen as representatives of two different legal systems, the inquisitorial and the adversarial system. Criminal procedure in Australia is based on the adversarial system (common law tradition) while Germany operates under the inquisitorial system (civil law tradition) in which the judge has greater control and influence over

[52] Paul G. Cassel, 'Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act' (2005) *Brigham Young University Law Review* 835, 854. The Principle is referred to as *expressio unius est exlusio alterius.*

[53] For example, the study found that victims in different US States which provided victims with extensive statutory rights, were more likely to be notified of events occurring in their cases as well as being informed on their rights as victims. However, it has to be acknowledged that the researchers found that enactment of laws alone appeared insufficient to guarantee the full provision of victims' rights in practice. See: Dean G Kilpatrick, David Beatty and Susan Smith Howley, 'The Rights of Crime Victims- Does Legal Protection Make a Difference?' (US Departmet of Justice, National Institute of Justice, 1998) 1.

[54] The Federal Republic of Germany and the German Democratic Republic were admitted to Membership in the UN on September 18, 1973 and united to one sovereign State on 3 October 1990. Australia became a Member State on 01 November 1945. See: United Nations, *Press Release*, UN ORG/1469 (03.07.2006),< www.un.org/en/members/index.shtml>

[55] For detailed description of the differences between the adversarial and inquisitorial system see: Volker Krey, 'Characteristic Features of German Criminal Proceedings. An Alternative to the Criminal Procedure Law of the United States?' (1999) 21 *Loyola Los Angeles International Law & Comparative Law Journal* 591; Michael Block et al, 'An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes' (2000) 2(1) *American Law and Economics Review* 170.

the criminal proceedings.[56] Although the two criminal justice systems vary to a great extent,[57] both Germany and Australia participated in the preparation and unanimous adoption of the basic principle set out in section 6(b) in 1985.[58]

Some academic literature suggests that in civil law systems, such as that of Germany, victims are formally recognised in proceedings and can present views and concerns to a much greater extent than in common law countries such as Australia.[59] In order to evaluate this further, a comparison of the degree that section 6(b) has been implemented in the two legal systems, inquisitorial and adversarial, is called for.

2 Supranational Effect

A UN Member State that is also a member of another supranational organisation which obligates the State to address victims' rights issues in a particular manner, might deal differently with the implementation of section 6(b). Germany is a Member State of the UN but also of the European Union ('EU') while Australia is not an EU Member State.[60] As an EU Member State, Germany had to comply with the *EU Framework Decision on the Standing of Victims in Criminal Procedure* (the *'Framework Decision'*) since 2001.[61] The *Framework Decision* set out rights for victims of crime including the right to be heard during proceedings. Since October 2012, Germany must comply with the successor legislation of the *Framework Decision*, the *EU Directive on Minimum Standards on the Rights, Support and Protection of Victims of Crime* (the '*EU Directive*').[62] The *EU Directive* sets out detailed standards regarding the treatment of victims, including the victim's right to be

[56] See in general: Jo-Anne Wemmers, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121.
[57] See in general: Helmut Kury, Michael Kaiser and Raymond Teske, 'The Position of the Victim in Criminal Procedure- Results of a German Study' (1994) 3 *International Review of Victimology* 6; Markus Loeffelmann, 'The Victim in Criminal Proceedings: a Systematic Portrayal of Victim Protection under German Criminal Procedure Law (Part 1)' in UNAFEI (ed), *Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power - Twenty Years After its Adoption* (2005) 31; William Pizzi and Walter Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) 32 *Stanford Journal of Intenational Law* 37.
[58] The Declaration was first unanimously recommended for adoption to the General Assembly during the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26-6 September 1985. Both Germany and Australia were represented at the Congress. See: 7th Congress Report, above n 21, 102. Afterwards the Declaration was adopted by the General Assembly on 29 November 1985.
[59] See, for example: M Baril et al, 'La Declaration de la Victim au Plaais de Justice de Montreal. Rapport Final' (1990) cited in Wemmers, above n 56, 124; Pizzi and Perron, above n 57, 57.
[60] Another supranational victims' rights instrument relevant for Australia is the Commonwealth Statement of Basic Principles of Justice for Victims of Crime (endorsed by Senior Law Officers for the Commonwealth 2005). The Statement reaffirms the commitment of Member States to the basic principles as contained in the Declaration.
[61] *Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings (15 March 2001)*, 2001/220/JHA, OJ L82, 22.03.2001 sets out standards for victims of crime. Germany was obligated to comply with the Framework Decision according to Art. 34IIb *Treaty on European Union,* opened for signature 07.02.1992 [1992] OJ C 191/1 (entered into force 1 November 1993), as amended by *Treaty of Athens [2003] C 321 E/3* (29.12.2006) ('EU'), until the EU adopted the Directive, see below 62.
[62] EU Commission 2011/0129, 18 May 2011 (adopted 4 October 2012).

heard, replacing the 2001 *Framework Decision*. It is noted, however, that while the above mentioned instruments enunciate that victims should have the right to be heard in Member States neither instrument has explicitly required Member States to introduce any specific participatory rights for victims. This may be related to the fact that the instruments are addressed to both civil law and common law jurisdictions in the EU and thus need to accommodate the difference in the relevant legal systems. Germany's Membership in the UN and EU and the imposed 'dual obligation' to implement victims' rights, although not specifically tailored to certain participation rights, by comparison to Australia's 'single obligation' is a factor that may be relevant in Germany's approach to implementing the content of section 6(b). This is an additional reason for the selection of Germany and Australia as case studies.

3 Small Number of Member States

The decision to choose only two Member States was made in order to be able to analyse the implementation of the obligation set out in section 6(b) in each jurisdiction in depth. Furthermore, it allowed for a comprehensive analysis of whether victims could be afforded further opportunities to present views and concerns in light of the procedural guarantees for the defendant and the structure of the national criminal justice system.

C Victims of Crime

Another limitation is that only victims of crime and not victims of abuse of power, also considered in the *Declaration*, form part of the research. This limitation is justified because section 6(b) only applies to victims of crime and not to victims of abuse of power.[63] In this thesis the term 'victim' is defined in accordance with the *Declaration* as:

> Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power […].[64]

When referring to Germany this thesis will use the terms 'victim' and 'aggrieved person' simultaneously. The *Strafprozessordnung* ('Code of Criminal Procedure') in Germany does not use the term 'victim' but instead refers to the 'aggrieved person'.[65] This thesis also uses the male form

[63] The focus of this thesis, section 6(b), is integrated into part A of the Declaration relating to victims of crime and not part B concerned victims of abuse of power.
[64] *Declaration* s 1.
[65] The 5th book of the *Strafprozessordnung* [Code of Criminal Procedure] (Germany) [Brian Duffet and Monika Ebinger Trans, updated by Kathleen Mueller-Rostin, Uebersetzung der Strafprozessordnung] (Juris, 2011) ('StPO') is entitled

('he'/'him'),[66] as German legislation refers to the victim this way. The reference encompasses both male and female victims unless when otherwise stated. For reasons of clarity, in this thesis the male form of reference will also be used for all other actors and participants in the criminal justice system, such as defendants, judges and prosecutors.

D Selection of Section 6(b)

Only one basic principle, the basic principle contained in section 6(b), has been selected for analysis in this thesis. Other basic principles contained in the *Declaration* are concerned with providing victims with information on the trial process and their role, information on how to seek redress,[67] availability of services,[68] and granting compensation,[69] as well as restitution to victims.[70] Representatives of Member States have, for the most part, accepted these basic principles during the drafting process of the *Declaration*. However, the basic principle setting out victims' participatory rights has always been controversial.[71] Wemmers opines that 'there is nothing non-controversial about victims and the criminal justice system.'[72] The thesis aims to analyse how the controversies surrounding victim participation at the trial and sentencing stage in light of section 6(b) have been resolved in two Member States with different legal systems and what could be done in the future to enhance victim participation.

Section 6(b) states that Member States should allow victims to present views and concerns at 'appropriate stages' of the proceedings where their personal 'interests' are affected. It is recognised that there may be many other situations in which victims' interests could be affected during criminal proceedings, namely the decision to have a non-jury trial, to grant the defendant bail, to grant a convicted person parole, or to have a consensual transfer of the prosecution to another court.

While victims' interests may be affected in all of these situations, this thesis focuses on the victim's right to present views and concerns at the trial stage, when guilt or innocence of the accused is

---

'Participation of the Aggrieved Person in Criminal Proceedings'. Riess explains that the term 'aggrieved person' has traditionally been used in criminal procedure in Germany while the term 'victim' has been introduced and used since the debates on the role of the 'victim' in criminal procedure in the mid-1980s in Germany. In his opinion the term 'victim' is related to a criminological-victimological point of view which does not consider the defendant or the crime as such but solely the victim. He concludes, however, that it is impossible to separate the terms from each other because the terms both refer to the same subject. See: Peter Riess, 'Der Strafprozess und der Verletzte - eine Zwischenbilanz' (1987) *JURA* 281, 281-282.

[66] The reason for the reference to victim as male in this thesis is that the chosen translation of the *StPO* refers to the victim as male. See, for example, *StPO* s 111 h (1) ('he').

[67] *Declaration* ss 5, 6(a).

[68] Ibid s 15.

[69] Ibid ss 12-13.

[70] Ibid ss 8-11.

[71] Ibid s 6(b).

[72] Wemmers, above n 2, 414.

determined. It will also focus on the sentencing stage, when the appropriate sentence is determined. Victims of a criminal act may perceive the criminal trial as 'their' trial and may therefore be particularly affected if proceedings end before they have had the opportunity to present views and concerns.[73] The possible importance for victims to present views and concerns at the trial and sentencing stage justifies the focus of this thesis.

VI STRUCTURE OF THESIS

The thesis is structured into nine chapters. After a brief introduction, Chapter 2 examines the key aspects of the criminal justice framework in Germany and Australia and how this has shaped the role of victims in criminal procedure. A discussion of the reasons why Member States would implement the basic principles contained in the *Declaration* into national law is provided in Chapter 3. This chapter examines the legal character of the *Declaration* and subsequently considers the potential of the *Declaration* as a non-binding instrument to influence Member States' conduct. Before analysing the extent to which victims have been afforded procedural participation rights in Germany and Australia, Chapter 4 sets out the methodology used to determine the existing level of participation. The chapter explains the comparative methodology and interprets the obligations contained in section 6(b). It subsequently introduces the assessment scale developed to measure the level of participation possible for victims in the two Member States.

This methodology is applied in Chapter 5, where procedures for victim participation in Germany and Australia at the trial and sentencing stage are analysed. Chapter 6 discusses the prospects of expanding victims' rights to present views and concerns in the two Member States in a way that is beneficial for victims. The chapter further comments on whether the two Member States could justifiably reject the expansion of victims' rights by relying on the first qualification of section 6(b), 'without prejudice to the accused'.

Chapter 7 examines whether Member States could reject the expansion of victims' rights based on the second qualification of section 6(b) 'consistent with the relevant national criminal justice system'. The chapter therefore identifies what the aims and goals of the criminal justice system are in both Member States and whether expanding victims' participatory rights is consistent with these goals. The implications of the research findings for the potential success of the proposed legally binding *Convention* are explored in Chapter 8. Lastly, Chapter 9 synthesizes the issues raised in

[73] See in general: Marianne Wade, Christopher Lewis and Bruno Aubusson de Cavarlay, 'Well Informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-Making' (2008) 14 *European Journal on Criminal Policy and Research* 249.

Chapters 5-8 and provides answers to the research questions. In conclusion, the chapter identifies theoretical and policy implications and comments on areas of future research.

Chapter 2: Overview of the Legal and Regulatory Framework Relating to Victims of Crime in Germany and Australia

I INTRODUCTION

While Chapter 1 provided a brief introduction to this thesis, the goal of this chapter is to give a general overview of the principles of the German and Australian criminal justice system and the integration of victims within the two systems. Before an effective analysis of the implementation of the *Declaration* in German and Australian law can be undertaken in subsequent chapters it is necessary to understand the principles and limitations of the criminal justice systems that influence the role victims have. Victims' rights in Germany and Australia have also been influenced and shaped by numerous historical factors. Although no detailed historic account of the role of victims is provided in this thesis, it will be noted in this chapter where particular historical factors still influence victims' rights in the current criminal justice systems in the two Member States.

II VICTIMS OF CRIME IN GERMANY AND AUSTRALIA IN THE SECOND HALF OF THE 20TH CENTURY

As set out in Chapter 1, victims were once important participants in the criminal justice system as private prosecutors. However, as Lab and Doerner put it '[s]omething not very funny happened on the way to a formal system of justice. The victim was left out.'[1] This statement, although put crudely, is accurate: in most jurisdictions around the globe, including Germany and Australia, victims' rights until the mid-20th century were not considered a major priority for policy making. Criminal procedure and criminal procedure reforms mainly focused on the defendant and the state, which left little room for victims and their rights in criminal procedure.[2] One of the first authors to acknowledge the situation was McDonald in 1976 who described the victim as 'the forgotten man' in criminal procedure.[3]

Sometime between the late 1960's and early 1980's, the role of the victim started to change. During this time scholars and researchers first started to notice and address the absence of victims from the

[1] William G Doerner and Steven P Lab, *Victimology* (Elsevier, 6 ed, 2011) 1.
[2] Douglas E Beloof, *Victims' Rights Documentary and Reference Guides* (ABC-CLIO, 2012) 1.
[3] William Frank McDonald, 'Towards a Bicentiennial Revolution in Criminal Justice: The Return of the Victim' (1975) 13 *American Criminal Law Review* 649, 650. Phrase repeated frequently in subsequent literature. See, for example, Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower, 1985) 1.

criminal justice system.[4] As a result of this development the victim received more political, legislative and academic attention. One possible explanation offered for this advancement is that the development that aimed to (re-) integrate victims into criminal procedure is connected to the rise of the victims' rights movements in the 1970s and 1980s. The movement sought to take action against problems victims encountered. Academic scholars also attribute the development to the women's rights movement which gave rise to research on crime against women, such as rape and sexual assault, and women's treatment in the criminal justice system.[5] Research studies conducted on rape victims in the 1970s indicated that victims, especially rape victims, were unlikely to report crimes to the police because they feared being blamed for their victimisation and experiencing disrespect.[6] Motivated by these research findings feminists started to promote a more humane criminal justice system for female victims which put the focus onto victims of crime more generally.[7] German scholars have argued that the changed focus in German criminal policy away from the defendant and towards the victim in the 1980s can be largely attributed to the emergence of the science of victims, victimology, in the 1970s. This development led to subsequent academic and political debates focusing on and drawing attention to the situation of crime victims.[8]

---

[4] M Ash, 'On Witnesses: A Radical Critique of Criminal Court Procedures' (1972) (48) *Notre Dame Lawyer* 159, 160. See in general: Hans Joachim Schneider, *Viktimologie* (Mohr, 1975); William Frank McDonald, *Criminal Justice and the Victim* (Sage Publications, 1976); Nils Christie, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology, Delinquency and Deviant Social Behaviour* 1, 7; Guenther Kaiser, *Kriminologie: Eine Einfuerung in die Grundlagen* (Mueller, Jur. Verlag, 7 ed, 1985) 109; For a short overview on the historical development of the victims' role see: Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20(4) *Criminal Law Forum* 395; Stefanie Hubig, 'Die historische Entwicklung des Opferschutzes im Strafverfahren' in Friesa Fastie (ed), *Opferschutz im Strafverfahren* (Barbara Budrich, 2008) vol 2, 285; Sam Garkawe, 'The History of the Legal Rights of Victims of Crime in the Australian Criminal Justice System' in Victims Services Victims of Crime Bureau, Attorney General's Department (ed), *Raising the Standards: Charting Government Agencies' Responsibilities to Implement Victims' Rights* (Victims of Crime Bureau, 2003) 34, 36.

[5] Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002); J Scutt, *Rape Law Reform* (Australian Institure of Criminology, 1980) 8; Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 2; Tracey Booth and Kerry Carrington, 'A Comparative Analysis of the Vicitm Policies Across the Anglo-Speaking World' in Sandra Walklate (ed), *Hanbook of Victims and Victimology* (Willan Publishing, 2007) 380, 381; For 1970's and 1980's research studies on rape victims in different jurisdictions see, for example: Ann Burgess and Lynda Holmstrom, 'Rape: The Victim and the Criminal Justice System' (1975) 3(2) *International Journal of Criminology & Penology* 101; Ngaire Naffin, *An Inquiry into the Substantive Law of Rape* (Department of the Premier and Cabinet, 1984); A 1987 report by the New South Wales Task Force on Services for Victims of Crime, for example, stated that attention to domestic violence and sexual assault had directed attention to the role of the victim in the criminal justice system in general: See: New South Wales Task Force on Services for Victims of Crime, 'Report and Recommendations of the New South Wales Task Force on Services for Victims of Crime, Criminal Injuries Compensation in New South Wales' (1987) 29.

[6] See in general: Michael Hindelang and Michael Gottfredson, 'The Victim's Decision Not to Invoke the Criminal Justice Process' in William Frank McDonald (ed), *Criminal Justice and the Victim*, Sage criminal justice system annuals (Sage, 1976) 57.

[7] Deborah Kelly, 'Victims' (1987-1988) 34 *Wayne Law Review* 69, 71; Lorraine Wolhuter, Neil Olley and David Denham, *Victimology-Victimisation and Victim's Rights* (Routledge-Cavendish, 2009) 23-26.

[8] Heike Jung, 'Die Stellung des Verletzten im Strafverfahren' (1981) 93 *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 1147, 1147; Heinz Schoech, 'Die Rechtsstellung des Verletzten im Strafverfahren' (1984) *Neue Zeitschrift fuer Strafrecht* 385, 385. The female rape victim and her plight, however, also appears to have shaped criminal-policy debate about victims in Germany significantly in the 1980s. For example, the governmental opposition introduced a bill for the better protection of victims of sexual crimes to Parliament in 1983 and applied to the German Parliament to obligate the government to promote workshops for police officers dealing with victims of sexual crime, see BT-Drucks (German Parliament printed matter numbers) 10/580. Nevertheless the proposed Act was never passed

No matter what the reasons behind these developments, since the 1970s and early 1980s the role of victims in the criminal justice process has been on the political agenda in both Germany and Australia. The structure and principles of the criminal justice system that shape the role victims have today and the victim-related policies introduced in Germany and Australia are analysed in the following part of this chapter.

III AUSTRALIA

A The Adversarial Trial Structure

Australia has a Federal criminal jurisdiction as well as State and Territory criminal jurisdictions that co-exist. Referring to *the* Australian criminal justice system in the following part of this chapter is nevertheless justified because the main principles of the criminal justice system influencing the role of victims are similar in all Australian jurisdictions.[9] Where principles and rights differ between Australian jurisdictions this will be pointed out explicitly.

Historically, the Australian criminal justice process has developed from the English criminal justice system. When Australia was occupied by Britain in the 18th century and the convict colony of New South Wales and subsequent colonies were established,[10] foundations of English common law as well as English policing principles were largely implemented into the colonies' criminal justice systems.[11] The trial by jury, for example, was an important feature of English and subsequently of Australian criminal trials for indictable offences.[12] However, the necessity of trials by jury in Australia has been questioned in recent years in light of issues concerning the expediency and costliness of jury trials, as well as questions of fairness to the accused where (prejudicial)

---

by Parliament. Victimology is defined as the study of the victim, including the offender and society. See definition in Ann Burgess, Cheryl Regehr and Albert Roberts, *Victimology: Theories and Applications* (Jones&Bartlett Learning, 2011) 5. One of the first authors to show an interest in the study of victims was Hertig in the 1940s who published a book focusing on victims of crime. See: Hans Von Hertig, *The Criminal and His Victim* (Yale University Press, 1948). Victimology received more (international) recognition in the second half of the 20th century starting with the International Symposium on Victimology in Jerusalem in 1973. For an overview on the development of victimology see: Doerner and Lab, above n 1, 3-12.

[9] For an overview on Australian Criminal Justice see: Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4 ed, 2009).

[10] On 14 July 1824 Van Diemens land later re-named Tasmania was established, on 21 January 1827 Western Australia was established, on 28 December 1836 South Australia was established, in 1851 Victoria was established, on 10 December 1859 Queensland was established.

[11] Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62(2) *Law and Contemporary Problems* 69, 70; Patrick Parkinson, *Tradition and Change in Australian Law* (Thomas Reuters, 4 ed, 2010) 63. Concerning the adoption of common law principles in South Australia see: Michael O'Connell, 'South Australian Victims of Crime Review' in Michael O'Connell (ed), *Victims of Crime. Working Together to Improve Services Conference Proceedings* (South Australian Institute of Justice Studies, Victim Support Service Inc., Justice Studies Department, Australasian Society of Victimology, 2000) 122, 122.

[12] Tyrone Kirchengast, *The Criminal Trial in Law and Discourse* (Palgrave Macmillan, 2010) 76.

information on crime and offender is readily available to individual jurors through electronic media.[13] As a consequence, judge alone trials are now possible, and common, in most Australian jurisdictions and some Australian states have contemplated the abolition of juries in criminal trials altogether.[14] As the vast majority of criminal cases in Australia are tried in in the Magistrates' Courts, where a single judicial officer determines questions of law and fact without a jury, the number of jury trials in Australia has decreased significantly.[15]

Although Australia can be seen as a common law country, meaning that the law developed primarily through judicial decisions, significant criminal law and procedure has been codified and legislated in Australia.[16]

The adversarial system operating in Australia has been described as a system in which 'the parties, and not the judge have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.'[17] The system accentuates the control of the contesting parties, prosecution and defence, over the legal proceedings.[18] The traditional conception of adversarial criminal trials is that of a conflict between two adversaries, prosecution and defence, conducted before an impartial judge. The judge is mainly responsible for ensuring procedural fairness to the parties by, for example, deciding on questions of law and admissibility of evidence.[19] The bipartite structure of the adversarial system is often considered the reason why giving victims an individual role in the adversarial trial is impossible without offsetting the existing balance at trial.[20] Therefore, during the trial the victim's main role is that of a witness for the prosecution. This

[13] Ibid. Concerning media coverage and its impact on jurors see, for example: *Dupas v The Queen* (2010) 241 CLR 237.
[14] Gary Heilbronn et al, *Introducing the Law* (CCH Wolters Kluwer, 7th ed, 2008) 271. Additionally, see in general: Vicki Waye, 'Judicial Fact-Finding: Trial by Judge Alone in Serious Criminal Cases' (2003) 27(2) *Melbourne University Law Review* 423; Jodie O'Leary, 'Twelve Angry Peers or One Angry Judge: an Analysis of Judge Alone Trials in Australia' (2011) 35 *Criminal Law Journal* 154.
[15] According to the Australian Bureau of Statistics between 1 July 2012 and 30 June 2013, 92% of all defendants were finalised in Magistrate Courts, 3 % in Higher Courts and 6% in the Children's Courts <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4513.0main+features102012-13>. Concerning the court structure in Queensland and Western Australia see: J Devereux and M Blake, Kenny Criminal Law in Queensland and Western Australia (8th ed, 2012) 15-16. For example, in Queensland the Magistrate has jurisdiction to hear summary offences as well as to hear certain indictable offences summarily. See: *Queensland Criminal Code Act* 1988 (Qld)-Schedule 1 Criminal Code, ss 552A-552.
[16] Findlay, Odgers and Yeo, above n 9, 11.
[17] Australian Law Reform Comission, *Managing Justice: a Review of the Federal Civil Justice System* (ALRC, 2000) para 1.117.
[18] Michael Block et al, 'An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes' (2000) 2(1) *American Law and Economics Review* 170, 171.
[19] Edna Erez and Julian Roberts, 'Victim Participation in the Criminal Justice System: Normative Dilemmas and Practical Responses' in Giora Shlomo Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Criminology* (CRC Press, 2009) 599, 600-601.
[20] See in general: Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294; Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, 2008).

issue will be analysed in great detail in Chapter 6 of this thesis when the possibilities for expanding victim participation in the adversarial criminal justice system are considered.

The following part of this chapter will outline policies and legislation relating to victims and their treatment in the criminal justice system in Australia in order to demonstrate that victims have been granted specific rights they can exercise. Furthermore it will outline the policies that stipulate what treatment victims can expect in the criminal justice system.

B Victims' Rights in Australia

The bipartisan nature of the adversarial criminal justice system outlined above makes it problematic to integrate a third party into the system. Therefore, debate in Australia has not so much focused on victims' participatory rights during the actual criminal trial but more on victim-related matters concerning protection for vulnerable witnesses, the respectful treatment of victims in the criminal justice system and victim compensation schemes.[21] Furthermore, Victim Impact Statement ('VIS') schemes have been introduced that allow victims to express how the crime has affected them at the sentencing stage.

1 Victims' Charters and Victim Compensation Schemes

Over the past 30 years Australian States and Territories have adopted legislation, charters and declarations on victims' rights which outline the treatment that victims can expect in the criminal justice system. The charters and declarations are often seen as recognition of victims as consumers of the criminal justice system rather than as parties to proceedings.[22] Zauberman, for example, states that the introduction of victim charters is evidence of the development of a more service oriented adversarial criminal justice system aiming to provide services to victims as consumers.[23]

The first administrative guideline setting out a declaration on the treatment of victims was introduced in the 1985 South Australian *Declaration of Rights for Victims of Crime*. The declaration entailed 17 rights for victims of crime during criminal procedure.[24] These rights included the right

[21] Findlay, Odgers and Yeo, above n 9, 200. See in general: Judy Cashmore, 'The Use of Video Technology for Child Witnesses' (1990) 16 *Monash University Law Review* 228; Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999).

[22] Commenting on the situation in the UK, where victim charters are also in operation are: Ian Marsh, John Cochrane and Gaynoer Melville, *Criminal Justice: An Introduction to Philosphies, Theories and Practice* (Routledge, 2004) 95; Brian Williams, *Victims of Crime and Community Justice* (Jessica Kingsley Publishers, 2005) 25.

[23] R. Zauberman, 'Victims as Consumers of the Criminal Justice System' in Jo Goodey and Adam Crawford (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000) commenting on the UK situation.

[24] The principles were declared by Attorney-General at the time, Chris Sumner, in his speech during the second reading for the *Statutes Amendment (Victims of Crime) Bill* (1986). A reprint of the South Australian Document can be found in

to be informed about the trial process, to be dealt with at all times in a sympathetic manner and also to be entitled to have the full effects of the crime upon the victims made known to the sentencing court. Most States and Territories followed the South Australian approach and introduced victims' charters or declarations in their own jurisdictions. Most charters focus on providing services to victims including information and respectful treatment.[25] The major impact of victims' charters or declarations is seen to be mostly symbolic and as a confirmation of the commitment of states to the improved treatment of victims.[26] Today, most States and Territories in Australia have also enshrined these declarations and charters in legislation.[27]

Despite the fact that victims' rights are now predominantly enacted in statutory law, most victim-related legislation explicitly states that a violation of these rights by a public authority does not entitle victims to a remedy.[28] The Queensland and South Australian victims' rights legislation, for example, explicitly sets out that no criminal or civil liability arises from a breach of charter/declaration rights.[29] Victims, however, are entitled to file a complaint if their rights are not being honoured.[30]

In addition to victims' charters or declarations which are mostly concerned with victims' treatment in the criminal justice system and available services, victims can exercise certain rights in Australian criminal trials. For example, eligible victims can act as a private prosecutor and they can

---

Julie Gardner, *Victims and Criminal Justice* (Office of Crime Statistics, South Australian Attorney-General's Department, 1990) Appendix A, 66-67.

[25] Sam Garkawe, 'Victims Rights Are Human Rights' (Paper presented at the The 20th Anniversary Celebration of the 1985 UN Victims Declaration, Canberra, 16. 11. 2005) 9. Tasmania did not introduce a charter on victims' rights until July 2011.

[26] Booth and Carrington, above n 5*,* 384.

[27] *Victims of Crime Act* 1994 (WA) schedule 1; *Victims of Crime Act* 1994 (ACT) s 4; *Victims of Crime Assistance Act* 2009 (Qld) part 2, *Victims Rights Support Act* 2013 (NSW); *Victims of Crime Act* 2001 (SA) part 2, division 2; *Victims' Charter Act* 2006 (Vic). While Tasmania and the Northern Territory have enacted legislation stipulating financial assistance for victims, they have not implemented victims' charters into statutory legislation. The Northern Territory has a legal provision that allows the Minister to issue a Charter of Victims Rights. See: *Victims of Crime rights and Services Act* 2006 (NT) s 30. The victims' declaration in the NT, however, is an administrative statements published by the Director of Public Prosecution. See also: Michael O'Connell, 'Victim's Rights: Integrating Victims in Criminal Proceedings' (The Australasian Institute of Judicial Administration, 2011) <www.aija.org.au> 2. On the reasons for the transformation of the Declaration into statutory legislation in South Australia see: K T Griffin, *Ministerial Statement on the Review on Victims of Crime and the Government's Response to it, S*outh Australian Legislative Council, 07 December 2000, 869, 870. The developments in South Australia are the result of the review of policies on victims of crime by the Justice Strategy Unit and their recommendation 11: "The government should reaffirm its commitment to improving the provision of information to victims of crime". See: South Australia Justice Strategy Unit, 'Victims of Crime Review (Report One)' (Justice Strategy Unit, 1999) 5. See also: South Australia, South Australian House of Assembly 'Second Reading of the Victims of Crime Bill in the South Australian House of Assemlby', 27 September 2001, 2305, 2305 (R G Kerin, MP).

[28] In South Australia, it was stressed at the beginning of the discussion on implementation of the victims' declaration in legislation that the legislation would not entitle victims to legal action against the state. See: K T Griffin, *Ministerial Statement on the Review on Victims of Crime and the Government's Response to it, S*outh Australian Legislative Council, 07 December 2000, 869, 870.

[29] *Victims of Crime Act* 2001 (SA) part 2, s 5 (3); *Victims of Crime Assistance Act* (Qld) s 7.

[30] See below under part 3B2.

submit a VIS, in which they can make the consequences of the crime for the victim known to the sentencing court. These rights will be analysed in detail in Chapter 5 of this thesis.

Eligible victims in Australian jurisdictions also have the right to receive compensation from a state funded compensation scheme for the harm they have suffered. Victim compensation schemes have been operating in Australia for the last 40 years.[31] For example, New South Wales introduced the first State-funded criminal injuries compensation scheme in 1967.[32] Today, all Australian States and Territories operate compensation schemes.[33] Under the schemes victims can claim the reimbursement for expenses, such as, medical costs or specific payments for any purpose. The schemes, however, are typically limited to victims of violent crimes.

In order to ensure that victims are being treated in alignment with victims' charters and declarations and can exercise their rights adequately, some Australian jurisdictions have set up special government agencies to monitor the treatment of victims of crime and assist them in the criminal justice system.

2 *Establishment of a Separate Government Body for Victims of Crime*

Several jurisdictions in Australia have established a separate Government body responsible for victims of crime and victim-related policies. For example, New South Wales, the Australian Capital Territory and South Australia introduced the *Victims of Crime Commissioner* and the *Commissioner for Victims' Rights*.[34] These independent Government bodies are explicitly assigned to assist crime victims. As part of their responsibilities they are obligated to ensure that victims are afforded their rights by Government agencies. In that regard they act as specific complaint bodies for victim-related matters. Their role also includes developing victims' rights legislation and promoting its implementation. The Commissioners are responsible for aiding and assisting victims in the criminal

[31] For an overview on Australian compensation schemes see in general: Christine Forster, 'Victims of Crime Compensation Schemes: Compensating Victims of Family Violence' (2013) (116) *Precedent* 40; Liam McCarthy, 'Victims of Crime' in Jude Wallace and G T Pagone (eds), *Rights and Freedoms in Australia* (Federation Press, 1992) 166.

[32] *Criminal Injuries Compensation Act* 1967 (NSW).

[33] *Victims Compensation Act* 1996 (NSW); *Victim Support and Rehabilitation Act* 1996 (NSW); *Victims of Crime Assistance Act* 1996 (Vic); *Victims of Crime Assistance Act* 2009 (Qld); *Criminal Injuries Compensation Act* 1985 (WA); *Victims of Crime Act* 2001 (SA); *Victims of Crime Assistance Act* 1976 (Tas); *Victims of Crime (Financial Assistance) Act* 1983 (ACT); *Victims of Crime Assistance Act* 2006 (NT).

[34] A Victims of Crime Co-ordinator was first appointed in 2001 in South Australia, to assist victims to exercise their rights. See: Kerin, above n 26, 2305. In 2008 this position was terminated and replaced by the appointment of the Commissioner for Victims' Rights ("Commissioner") who has a broader role than the previous Victims of Crime Coordinator. The position of the Commissioner was established according to the *Victims of Crime (Commissioner for Victim's rights) Amendment Act* 2007 (SA). For the ACT and the appointment of a Victims of Crime Commissioner see: *Victims of Crimes Act* 1994 (ACT) part 3, division 3.1. In NSW a Commissioner for Victims' Rights has been appointed for the first time in June 2013. For further information on the Commissioner's duties see: *Victims' Rights Act* 2013 (NSW) s 8.

justice system and, for example, can recommend that agencies apologise to victims where charter/declaration obligations have been breached.[35] The introduction of the respective Government agencies in some Australian jurisdictions demonstrates that progress has been made to ensure that victims receive appropriate treatment according to statutory requirements and can exercise the rights granted to them.

3 Summary

The above analysis indicates that victims generally have no standing at trial. Their role is mainly limited to that of a witness for the prosecution with the exception of making a VIS at the sentencing stage and the possibility of acting as a private prosecutor. In an attempt to recognise and accommodate the needs of victims, legislation was enacted concerning how victims should be treated in the criminal justice system. Additionally, schemes concerning victim compensation, typically available only for victims of violent crime, have been established.[36] Some Australian jurisdictions have introduced a separate Government body responsible for the supervision of the treatment of victims in the criminal justice system. Although the actual involvement of victims in the Australian criminal trial is limited due to the structure of the adversarial system, much policy reform regarding victims' rights has occurred in other areas. The availability of victims' charters and declarations and the focus on providing services for victims may suggest that the victim is considered more of a consumer or client of services provided by actors in the Australian criminal justice system than as a party to the trial.[37]

VI GERMANY

The following part of this chapter first outlines the structure of the German inquisitorial trial and subsequently considers victim-related legislation enacted in Germany.

A The Inquisitorial Trial Structure

In Germany, the core legislation governing the criminal trial is the *StPO* (German Code of Criminal Procedure*)*.[38] Unlike Australia, in Germany criminal law and procedure fall under Federal jurisdiction.[39] In addition to the *StPO*, general guidelines have been established in order to unify

[35] *Victims of Crime Act* 2001 (SA) ss16 and 16 A; *Victims Rights and Support Act* 2013 (NSW) s 10.
[36] Kumar Satyanshu Mukkherjee and Adam Graycar, *Crime and Justice in Australia* (Hawkins Press, 1997) 40.
[37] Concerning the victim as a consumer see in general: Brian Williams, 'The Victims' Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38(4) *The Howard Journal of Criminal Law* 384; Andrew Karmen, *Crime Victims: An Introduction to Victimology* (Wadsworth 8ed, 2012) 163.
[38] Strafprozessordnung or 'StPO'
[39] Germany consists of 16 States (Bundeslaender) with 16 State and 1 Federal jurisdictions. In Germany, criminal law and criminal procedure are federal matters, regulated by a (federal) criminal code and criminal procedure code, which apply equally to all states. The states generally do not have the constitutionally granted legislative authority to enact

court and prosecution practices in German criminal trials.[40] The structure of the German criminal justice system is of an inquisitorial nature, which has several implications for victims and their role in the system.[41]

In Germany, the judge is responsible for conducting the criminal trial and not prosecution and defence. The inquisitorial trial judge has a very active role conducting judicial inquiries.[42] During the trial the judge controls proceedings and is responsible for deciding what evidence will be called and examining this evidence.[43] For this reason, trials in Germany are not a contest between two adversaries as in in the Australian criminal justice system. Due to the German trial structure it may be easier to accommodate the victim as a participant without offsetting the balance of the trial.[44] The different possibilities for victim participation at trial in Germany and the possibilities to expand the participation role will be analysed in Chapters 5 and 6 of this thesis.

B Victims' Rights in Germany

1 Legislation Relating to Victims

In Germany, three major law reforms concerning victims of crime have led to the current victims' rights situation. In 1986 the *Opferschutzgesetz* (Victim Protection Act*)* which amended and extended victims' rights in the *StPO* was passed. The Act introduced, inter alia, certain rights to information, including information on the outcome of proceedings, the right to inspect court files under certain circumstances and the right to be legally represented by a lawyer when participating at trial.[45]

---

their own legislation regarding criminal law and procedure. See Grundgesetz fuer die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) art 74 (1) Nr. 1 ('Grundgesetz').

[40] Richtlinien fuer das Bussgeldverfahren und Strafverfahren (Guidelines for criminal procedure and administrative fine procedure) (in the version of 1 April 2012).

[41] Thomas Weigend, 'Germany' in Kevin Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) 252, 257; Joachim Hermann, 'The Federal Republic of Germany' in George F. Cole, Stanislaw Frankowski and Marc G Gertz (eds), *Major Criminal Justice Systems: a Comparative Survey* (Sage Publications, 2 ed, 1987) 106, 123. Explaining that no criminal justice system today is just inquisitorial or just adversarial is Arie Freiberg, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8(1) *European Journal of Criminology* 82.

[42] *StPO* s 244 (2).

[43] For detailed analysis see Chapter 6.

[44] William Pizzi and Walter Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) *Stanford Journal of Intenational Law* 37, 41.

[45] *Erstes Gesetz zur Verbesserung der Stellung des Verletzten im Strafverfahren (Opferschutzgesetz - OpferSchG)* [Victim Protection Act] (Germany) 18.12.1986 entered into force 01.04.1987, BGBl I, 1986, 2496 ('OpferSchG') s 406 d. For a detailed overview of the changes to the StPO by the Act see: Bharat Das Bhudan, *Victims in the Criminal Justice System* (APH Publishing, 1997) 154.

In 2001, the EU passed the *Framework Decision on the Standing of Victims in Criminal Proceedings* (the '*Framework Decision')*[46] which defines minimum standards for victims' rights. Germany as a EU Member State, was obligated to implement the *Framework Decision* into national law. In October 2012 the EU Parliament replaced the *Framework Decision* with the *EU Directive on Minimum Standards on the Rights, Support and Protection of Victims of Crime* (the '*EU Directive*'). The *EU Directive* sets out detailed standards regarding the treatment of victims which must now be implemented by Germany.[47]

In 2004, an EU evaluation on the implementation of the *Framework Decision* identified Germany as failing to implement the instrument to the required extent in certain areas.[48] Around the same time as the evaluation pointed out deficits in German law, the German Government initiated the process of passing new victims' rights legislation. During the same year, the *Opferrechtsreformgesetz* (First Victims Rights Reform Act*)* was passed amending sections of the *StPO* which dealt with the rights of aggrieved persons and witnesses.[49] The explanatory memorandum acknowledged that criminal proceedings could be an immense burden on the aggrieved person.[50] It identified that the task of a democratic state was not only to prosecute crimes and watch over a fair criminal process that determines guilt or innocence of the offender but also to make sure that the interests of victims are safeguarded.[51] The Act increased victims' procedural and information rights in criminal proceedings and improved the possibility of claiming and collecting restitution from the defendant during the criminal trial. After passing the Act, the Government was faced with ongoing demands from victim support organisations to expand victims' rights further.[52]

---

[46] *Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings (15 March 2001)*, 2001/220/JHA, OJ L82, 22.03.2001('Framework Decision'). The Framework Decision is discussed further in Chapters 5 and 8 of this thesis.

[47] EU Commission 2011/0129, 18 May 2011 (adopted 4 October 2012).

[48] Commission of the European Communities, 'Report from the Commission on the Basis of Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings' (Sec (2004)102)/COM/2004/0054 final/ Doc 52004DC0054 (03 February 2004)). In relation to victim information and the shortfall of implementation see explanations in the report under article 4.1.

[49] *Gesetz zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz – ORRG),* [Victims' Rights Reform Act (Germany) 24 June 2004 entered into force 9 September 2004, BGBl I, 2004, 1354 ('ORRG').

[50] Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) text identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003) 1.

[51] Ibid.

[52] The explanatory memorandum to the *Gesetz zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz - 2. ORRG)* [Second Victims' Rights Reform Act 2009], explicitly states that the intent of the drafting members of Parliament was also to meet the demands of victim support groups. See: Bundesregierung, Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) identical with Gesetzesentwurf der Fraktionen der CDU/CSU und SPD Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BT-Drucks [German Parliament printed matter number] 16/12098 (3 March 2009) 9, 10, 11. For a detailed overview of the reform see in general: Christoph Safferling, 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law' (2011) 11(2) *International Criminal Law Review* 183.

Additionally, potential voters were found to identify themselves more and more with being a victim than with being a defendant.[53] This pressure contributed to the passing of the *Zweites Opferrechtsreformgesetz* (Second Victim Rights Reform Act) in 2009.[54] This new Act again strengthened the procedural rights of aggrieved persons in criminal proceedings, the rights of juvenile victims/witnesses, and the rights of adult witnesses.[55]

2 Victim Participation

The *StPO* allows certain victims to take up a very active role at trial and to present views and concerns by joining the prosecution as a Private Accessory Prosecutor ('PAP'), so-called *Nebenklaeger*.[56] Eligible victims can also participate as an applicant to the adhesion procedure, in which civil claims can be presented during the criminal trial.[57] In these roles eligible victims can actively participate at trial, request evidence, examine witnesses, ask questions and make statements.[58] These participatory rights, as the focus of this thesis, will be analysed in detail in Chapter 5. Similar to the situation in Australia, eligible victims also have the right to receive compensation and certain information in Germany.

3 Victim Compensation and Victim Information

Part 2 of this chapter outlined that the German criminal justice system focused mostly on defendants' rights until the late 1970s/1980s. The first exception to the general focus on the defendant was the introduction of the *Victim Compensation Act* in 1976 allowing the victim to receive compensation not under criminal law but under social law. Social law in Germany governs matters such as welfare and social assistance, social insurance as well as child and housing allowances.[59] An amended version of the original Act is in force for victim compensation today.[60] Responsible for the administration of victim compensation claims are the social security institutions established in each German State. Thus, disputes about the claims are not heard by criminal courts but by courts established to deal with social law issues ('Sozialgericht').[61] Compensation is mostly limited to violent crimes, and it is left up to the individual victim to prove that a violent offence has

[53] See for example the newspaper article: Konrad Adam 'Alle wollen Opfer sein' *Frankfurter Allgemeine Zeitung* (Frankfurt), 12 April 2009 explaining why 'being the victim' has become a popular notion.
[54] *Gesetz zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz - 2. ORRG)* [Second Victims' Rights Reform Act 2009] (Germany) 29 July 2009 entered into force 01 October 2009, BGBl I, 2009, 2280 (Nr. 48) ('2. ORRG').
[55] For a detailed overview of the Act see: Martina Peter, 'Measures to Protect Victims in German Criminal Proceedings. A Summary with Special Focus on the Key Points of the Second Victims' Rights Reform Act' in UNAFEI (ed) *The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Criminal Justice Process* (2010) 125.
[56] *StPO* ss 395-402.
[57] This applies to all eligible victims in all German courts (local courts, district courts, higher courts).
[58] On these rights see in detail Chapter 5.
[59] For an overview of social law in Germany see: Michael Stolleis, *History of Social Law in Germany* (Springer, 2014).
[60] Opferentschaedigungsgesetz [Victim Compensation Act] (Germany) 07 January 1985, BGBl. I 1985, 1 ('OEG').
[61] *OEG* s 7.

occurred.[62] While under German law victims can receive compensation for health and economic consequences of a crime, non-tangible harm, such as emotional consequences are generally not covered.[63]

In addition to being able to receive compensation in certain circumstances, victims in Germany have to be informed about specific aspects of the trial and about particular rights they can exercise. For example, according to German law victims should be informed about the termination or outcome of proceedings. Further, victims should be informed where the perpetrator has — finally or temporarily — been released from prison.[64] Information should also be provided on the right to claim damages from the defendant, on the possibility to take out a restraining order according to the *Act against Violent Acts and Stalking* and to receive help from victim support organisations.[65]

4 Summary

In contrast to Australia, the structure of the German inquisitorial justice system does not appear to limit the participation of victims at trial *per se*. While victims in Australian criminal trials have generally not been afforded standing, the above overview has shown that some victims in Germany have received standing and respectively the right to participate actively during criminal proceedings. Perhaps due to the opportunities for some victims to participate actively at trial in Germany, victims are seen less as consumers of criminal justice services provided by the relevant authorities than in Australia. Consequently, in Germany, no victims' charters and/or declarations are in place detailing the treatment of victims by criminal justice authorities.[66]

V CONCLUSION TO CHAPTER 2

This chapter has outlined the principles of the Australian and German criminal justice system relevant for the understanding of the victims' role within the two systems. It has provided background information for the subsequent in-depth analysis of the implementation of the basic principle contained in section 6(b) in German and Australian national law. The chapter has demonstrated that despite the differences in the two criminal justice systems, adversarial and

[62] *OEG* s 1.
[63] For an overview of victim compensation schemes in Germany see in general: Frieder Duenkel, 'The Victim in Criminal Law- On the Way from an Offender-Related to a Victim-Related Criminal Justice?' in Ezzat A Fattah and Stephan Parmentier (eds), *Victim Policies and Criminal Justice on the Road to Restorative Justice: Essays in Honour of Tony Peters* (Leuven University Press, 2001) 167, 199-201; Frieder Duenkel, 'Victim Compensation and Offender Restitution in the Federal Republic of Germany- a Western European Comparative Perspective' (1985) 9(1-2) *International Journal of Comparative and Applied Criminal Justice* 29.
[64] *StPO* s 406(d)
[65] Ibid s 406(h).
[66] Concurring that victims in the UK common law system are treated more as consumers than victims in Germany is Theresia Hoeynck, *Das Opfer zwischen Parteirechten und Zeugenpflichten* (Nomos, 2005) 146.

inquisitorial, law and policy reforms in the area of victims' rights have occurred in both Member States over the past 30 years.[67]

Despite their different legal backgrounds, Germany and Australia have both participated in the drafting process of the basic principles enunciated in the *Declaration*. The next chapter will consider whether the *Declaration* has the potential to influence Member States' conduct in relation to the implementation of victims' rights in their national law.

[67] For further discussion on the change in inquisitorial and adversarial systems on victim related issues see: Marc Groenhuijsen, 'International Protocols on Victims' Rights and Some Reflections on Significant Recent Developments in Victimology' in R Snyman and Davis L (eds), *Victimology in South Africa* (Van Schaik Publishers, 2005) 333, 334.

Chapter 3: Potential Influence of the *Declaration* on Member States' Conduct

I INTRODUCTION

The goal of this chapter is to critically assess the potential influence the *Declaration* could have on Member States' victim-related legislation. The chapter explores possible explanations for why Member States might or might not be inclined to comply with the *Declaration*. In order to generally assess the *Declaration*'s potential influence its legal status is first considered.

II LEGAL STATUS OF THE *DECLARATION*

In 1985 in its Resolution 40/34 the UN General Assembly unanimously adopted the *Declaration*, thereby establishing international standards for the treatment of victims of crime and abuse of power. In its Resolution the General Assembly affirmed 'the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime …'[1] and stressed the 'need to promote progress by all States in their efforts' to achieve this goal.[2] When assessing the *Declarations*' potential influence on the adoption of national victim-related legislation, the first question to consider is whether Member States are legally bound to implement the content of the *Declaration* into their national law.

International instruments can be legally binding for Member States. These legally binding instruments are frequently referred to as 'hard law' and include treaties, conventions and rules of customary international law. Legally binding in the above context means that Member States are required to comply with the standards and norms contained in the instruments and refrain from acts that defeat their objects and purposes.[3] In contrast, sources of international law can also be non-binding, or 'soft law'.[4] In this case Member States are not legally obligated to comply with the international instrument. Where legally binding instruments are in effect, non-compliance by

[1] *Resolution* s 1.
[2] Ibid s 2.
[3] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331(entered into force 27 January 1980) (the 'Vienna Convention') arts 12, 18.
[4] On the differences between soft law and hard law in relation to the above discussion see in general: A E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) *International and Comparative Law Quarterly* 901, Hartmut Hilgenberg, 'A Fresh Look at Soft Law' (1999) 10(3) *European Journal of International Law* 499; Dinah Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 *Studies in Transnational Legal Policy* 119; Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167.

Member States can result in legal consequences.[5] In contrast, 'soft law' expresses a recommendation on how Member States should behave but commonly no legal consequences are attached to non-compliance.[6]

Although a declaration is generally considered to be non-binding 'soft law', the label attached to the international instrument is not always conclusive.[7] A declaration can be legally binding if the representatives of Member States involved in drafting the declaration demonstrate an intention to create legally binding obligations.[8] Therefore, each individual declaration must be assessed in light of all the circumstances of its adoption to identify whether Member States intended to be bound.[9] In order to explore the intention of Member States in relation to the *Declaration*, its language and the circumstances of its development and adoption[10] will be considered below.

A Language of the Declaration

The language of the *Declaration* offers a first indication of its legal status. The principles set out in the *Declaration* are open-textured and create imprecise obligations. The *Declaration* states, for example, that victims 'should' be treated with compassion and respect, and that the responsiveness of judicial and administrative processes to the needs of victims 'should' be facilitated, rather than 'must/shall' be facilitated/treated.[11] The *Declaration* furthermore states that victims 'should' be allowed to present their views at 'appropriate stages' of the proceedings, 'consistent' with the relevant national criminal justice system.[12] Concerning restitution the *Declaration* stipulates that offenders should, 'where appropriate', make 'fair' restitution to victims.[13] This allows for Member States' discretion and permits a wide range of activity to be considered compliant with the basic principles enunciated in the *Declaration*. The open language of the *Declaration* does not create explicit obligations concerning the treatment of victims and speaks against the intention of Member States to be legally bound by the *Declaration*.

---

[5] Hilgenberg, above n 4.
[6] Andrew T Guzman and Timothy Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 174; Cynthia Crawford Lichtenstein, 'Hard Law v. Soft Law: Unnecessary Dichotomy?' (2001) 35 *The International Lawyer* 1433, 1433.
[7] A E Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 141, 143.
[8] Oscar Schachter, 'The Twilight Existence of Nonbinding Internatinoal Agreements' (1977) 71(2) *The American Journal of International Law* 296, 297.
[9] Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 15.
[10] Schachter, above n 8, 297.
[11] *Declaration* ss 4, 6.
[12] Ibid s 6(b).
[13] Ibid s 8.

Another point to consider is the circumstances under which the instrument was drafted and adopted. There has been no comprehensive analysis of the historic development of the *Declaration* in regards to Member States' intention to create a binding document. Therefore, part of the adoption process of the *Declaration* will be analysed in this chapter to explore whether Member States intended it to be legally binding.

B Circumstances of the Adoption of the Declaration

During the drafting and adoption process significant controversy arose between Member States about the basic principles relating to victims of crime and victims of abuse of power. Controversy regarding the content of an international instrument during the drafting and adoption stage might suggest that Member States ultimately only agreed to it because they considered it not to be legally binding.[14]

The UN General Assembly adopted the *Declaration* unanimously in UN Resolution 40/34 upon recommendation by the *7th UN Congress on the Prevention of Crime and the Treatment of Offenders* (the '*7th Congress'*).[15] The *7th Congress*, held in Milan in 1985, was the first UN Congress at which the topic of victims of crime was discussed on an international level.[16] The discussions of *7th Congress*' Committee Two ('Committee'), responsible for considering the topic of 'victims of crime' show that representatives of different Member States could only agree on some issues in relation to victims and their treatment in the criminal justice system. At the same time little agreement could be reached on others. The Committee, for example, generally agreed that efforts should be made to ensure that redress and support services for victims are provided promptly.[17] It was noted that, with regard to criminal proceedings, the lack of appropriate arrangements for victims, and their insensitive treatment during the trial could lead to a form of secondary victimisation.

The Committee found that if the position of victims remained unchanged in Member States eventually a situation could develop where victims would fail to cooperate with the criminal justice

[14] Explaining that the Declaration is not legally binding and that this is one reason why States agreed to it is Gerd Ferdinand Kirchhoff, 'The Function of UN Instruments and the Path Towards Success' (Paper presented at the 4th Tokiwa International Institute Symposium "Raising the Global Standads for Victims: The proposed Convention for Victims of Crime and Abuse of Power", Miwa Japan, 2008) 56.

[15] The UN Congress on the Prevention of Crime and Treatment of Offenders, held every five years, is an official organ of the United Nations. Further information on the Congress is available at <http://www.unodc.org/unodc/commissions/CCPCJ/>.

[16] The 7th Congress took place from 26 August 1985 to 06 September 1985. 'Victims of Crime' was Topic 3 on the agenda. *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan 26 August - 05 September 1985): Report prepared by the Secretariat*, UN Doc A/Conf.121/22/Rev.1 (1986) ('7th Congress Report').

[17] The Committee met from 30 August to 05 September 1985.

system. The neglectful treatment of victims could lead to 'vigilantism', meaning that frustrated victims could take criminal justice into their own hands and seek extrajudicial revenge.[18] Some members of the Committee suggested that for certain kinds of offences victims should be able to exercise a veto right over the initiation of proceedings by state authorities. They also suggested that victims should be heard during criminal proceedings to allow for greater involvement in the criminal justice system. However, there was overall very little support for this argument.[19] The disagreement of Member State's representatives on victim participation may be related to their different legal traditions, inquisitorial or adversarial, and the significance of the role victims previously played in criminal proceedings.[20] As a result of discussions, the Committee agreed on a draft *'Declaration of Basic Principles of Justice: A. Relating to Victims of Crime and B. Relating to Victims of Abuse of Power'* and recommended it to the 7th Congress for further consideration.[21]

Certain provisions in the draft *Declaration* lead, once again, to a critical discussion between representatives of Member States at the 7th Congress. For example, the representative for the United Kingdom of Great Britain and Northern Ireland stated explicitly that, in the opinion of his delegation, the *Declaration* should not enable victims to take part in sentencing considerations, case disposal and the trial process in general.[22] Due to this debate, the basic principle regarding victim participation eventually recommended for adoption to the General Assembly by the *7th Congress* and subsequently adopted is greatly qualified and open worded. This has allowed a variety of state behaviours to be seen as compliant.[23] Discussion of this issue in greater detail will follow in Chapter 4.

The debate at the *7th Congress* suggests that Member States with different legal traditions struggled to agree on principles concerning the role victims should play in the criminal justice system. In addition, more significant disagreements regarding victims of abuse of power took place during the drafting process.

[18] In relation to all the points mentioned above see: 7th Congress Report, above n 16, 142.
[19] Ibid.
[20] See further the discussion in Chapters 5-7 concerning the differences between victim participation in inquisitorial and adversarial systems.
[21] Decided on its 17th meeting on 05 September 1985.
[22] 7th Congress Report, above n 16, 157.
[23] *Declaration* s 6 'The responsiveness of the judicial and administrative process to the needs of victims should be facilitated by: (b) allowing the views and concerns of the victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system'.

The *Declaration* was adopted in 1985 during the 'cold war' period,[24] where conflicts and frictions existed between communist-oriented and capitalist-oriented states.[25] Representatives of some Member States were concerned that a *Declaration* relating to victims of abuse of power would cause interferences from other countries.[26] For example, some Member States were concerned that the impact of their labour policies which may have resulted in unemployment could be seen as an abuse of power, for which the international community would hold them responsible.[27] Kirchhoff argues that during the cold war communist-oriented and capitalist-oriented states alike accused each other of abusing their power to some extent. For this reason there was a general reluctance to agree on a *Declaration* relating to 'abuse of power'.[28] It has been suggested that at the end of the *7th Congress*, the United States of America and the Russian Soviet Federative Socialist Republic only agreed to the text of the *Declaration* because of pressure exercised by other Member States as well as non-governmental organisations and because they did not consider the *Declaration* to be binding.[29]

After the 7th Congress finally recommended the *Declaration* to the General Assembly,[30] it was adopted unanimously in November 1985 without vote.[31] No further debate on the content of the *Declaration* was permitted possibly due to the problems and conflicts faced by the *7th Congress* in trying to reach a consensus.[32]

The controversial circumstances, under which the *Declaration* was adopted, particularly in relation to victims of abuse of power, may suggest that Member States did not intend to create a legally binding document. This presumption seems supported by the Committee's suggestion to develop further normative (legally binding) standards on an international level, and to create the tools for the

[24] An overview of the Cold War is provided in Elizabeth Sirimarco, *The Cold War* (Marshall Cavendish, 2005).
[25] See: Kirchhoff, above n 14, 54-55.
[26] LeRoy Lamborn, 'The United Nations Declaration on Victims: Incorporating "Abuse of Power"' (1987) 19 *Rutgers Law Journal* 59, 69.
[27] 7th Congress Report, above n 16, 140-141.
[28] Kirchhoff, above n 14, 56.
[29] Ibid.
[30] Adopted on 06 September 1985. See: 7th Congress Report, above n 16, 159. Printed meeting records were not issued at the 7th Congress. Therefore original speeches held are not available to portray the atmosphere at the Congress. However, Gerd Ferdinand Kirchhoff, attendee of the 7th Congress, describes the time leading up to the Congress and the mood at the Congress itself as 'enthusiastic', Kirchhoff, above n 14, 83.
[31] In regards to the adoption of the *Resolution* and its annexed *Declaration* without vote see: United Nations General Assembly 'Declaration of Principles for Victims of Crime and Abuse of Power' United Nations Yearbook 1985, 742.
[32] The Third Committee of the General Assembly (Social, Humanitarian and Cultural) had held a series of meetings in which possible clarifications of the Declaration's language were contemplated. Yet, considering the difficultly attained compromise at the 7th Congress no changes were ultimately made. See: Crime and Prevention and Criminal Justice: 'Report of the Third Committee 40 U.N. GAOR (Agenda Item 98)' UN Doc. A/40/881 (1985) cited in: Lamborn, above n 26, 80.

enforcement of such standards, at a later stage.[33] The Committee's suggestion can be interpreted as recommending that the principles expressed in the *Declaration* at the *7th Congress* be non-binding, with the subsequent development of legally binding standards.[34] It appears to be common UN practice to adopt a 'soft law' instrument first and to transform it to a legally binding instrument at a later stage. This strategy makes the 'soft law' instrument part of a 'multilateral treaty-making process'.[35] This is supported by academic scholarship that has concluded that it is Member States' intention not to be legally bound that makes the *Declaration* 'soft law'.[36]

Whether the *Declaration* has become legally binding for Member States since its adoption as customary international law is considered in the following section of this chapter.

C Customary International Law

Customary international law describes general practices on the international level that have commonly been accepted by Member States.[37] One requirement of customary international law is a 'settled state practice' regarding certain rules. The International Court of Justice defines a settled state practice as acts that 'show a general recognition that a rule of law was involved'.[38] The International Court of Justice found it necessary that the practice must be 'both extensive and virtually uniform…'.[39] As discussed in Chapter 1 there is a lack of research on the implementation of the *Declaration* in Member States. Therefore, it is impossible to positively affirm that settled state practice regarding the basic principles of justice exists in Member States, and that the *Declaration* has the status of international customary law. However, van Genugten et al in a discussion on the status of the *Declaration*, argue tentatively that, from the limited research available, it cannot be convincingly concluded that a settled state practice exists regarding the *Declaration*.[40] The researchers explain that the limited research available indicates that compliance is neither extensive nor uniform and that the *Declaration* cannot be considered customary

[33] 7th Congress Report, above n 16, 146-147.
[34] Boyle, above n 4, 904
[35] Boyle, above n 7, 145. In regards to the non-binding Declaration and the possibility to develop legally binding hard law subsequently see: Marc Groenhuijsen and Rianne Letschert, 'Reflections on the Development and Legal Status of Victims' Rights Instrument' in Groenhuijsen and Letschert (ed), *Compilation of International Victims' Rights Instruments* (Wolf Legal Publishers, 1 ed, 2006) 1, 8.
[36] Concurring that the Declaration is non-binding soft law: Kirchhoff, above n 14, 53.
[37] For more detailed discourse on customary international law see in general: Brownlie, above n 9, 23-30.
[38] *North Sea Continental Shelf* (Federal Republic of Germany v Denmark/Netherlands) (Merits) [1969] ICJ Rep 3 44 [77] discussed in Willem van Genugten et al, 'Loopholes, Risks and Ambivalences in International Lawmaking; the Case of a Framework Convention on Victims' Rights' (2007) XXXVII *Netherlands Yearbook of International Law* 109, 118.
[39] *North Sea Continental Shelf* (Federal Republic of Germany v Denmark/Netherlands) (Merits) [1969] ICJ Rep 3 44 [74]. For detailed analysis of the Declaration as customary law see: van Genugten et al, above n 38, 118.
[40] Ibid 118-119.

international law.[41] Garkawe concurs that the *Declaration*, due to the lack of identifiable uniform state practice, has not become customary international law.[42] These assumptions conform with the analysis undertaken on existing research studies in Chapter 1 which suggested significant deviations in Member States' conduct in relation to the implementation of the *Declaration*.[43]

As the *Declaration* is not legally binding because it was not intended to be binding when it was adopted in 1985 and has not subsequently reached the status of customary international law, a Member State acting contrary to the objectives set out by the *Declaration* does not breach international law. They merely commit an 'unfriendly act' without legal consequences.[44] This situation has been criticised by Lamborn[45] on the basis that 'states that are not interested in preventing victimization or aiding victims are free to ignore the Declaration'.[46] The following part of this chapter considers whether Member States could or could not be encouraged to implement the *Declaration*. It therefore comments on the potential of the *Declaration* to influence Member States' conduct.

III POTENTIAL OF THE *DECLARATION* TO INFLUENCE MEMBER STATES' CONDUCT

A Why a Declaration May Not Influence Member States' Conduct

At a workshop at the 11th UN Congress on Crime Prevention and Criminal Justice in Bangkok in 2005, and elsewhere, Garkawe claimed that in terms of international law, the *Declaration*, as 'soft law', appears insufficient to influence Member States because of its legal status.[47] As observed earlier, declarations are neither binding nor do they contain specific requirements which Member States must follow strictly. Garkawe explained further that the breach of principles contained in a declaration is not subject to the international principle of 'State Responsibility' which means that Member States generally cannot be held responsible for failure to comply with the instrument's

[41] Ibid.
[42] Sam Garkawe, 'A Victims' Convention- The Arguments in Favour and an Analysis of the Draft by the World Society of Victimology/Intervict' (Paper presented at the 12th International Symposium on Victimology, Orlando, USA, 2006).
[43] See Chapter 1, part IV.
[44] Hilgenberg, above n 4, 514. The *Vienna Convention* does not cover international agreements such as declarations. Art 2(1)(a) states that only treaties are governed by the *Convention*. Therefore a failure to implement soft law agreements does not necessarily result in legal consequences. By comparison, for international treaties art 18 states that a State is obliged to refrain from acts, which would defeat the object and purpose of a treaty when it has signed the treaty. Art 26 states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Breach of a treaty constitutes a breach of international law and can result in treaty or customary law consequences.
[45] LeRoy Lamborn, at the time Professor of the Law School of Wayne State University, Detroit, Michigan, together with Irvin Waller, Professor of Criminology, was involved in the drafting process of the Declaration. See: Lamborn, above n 26, 63. For further information on the work of Irvin Waller see <http://irvinwaller.org/about/>.
[46] Ibid 86.
[47] Sam Garkawe, 'The need for a Victim's Convention' (2005) 9(2) *The Victimologist* 4, 4; Garkawe, above n 42.

content.[48] Therefore, Garkawe argued that a non-binding instrument with vague wording may not put sufficient pressure on Member States to implement victims' rights.[49] He particularly pointed out the lack of legal enforceability as a major shortfall of the current *Declaration*.[50] Similarly Dussich, the current president of WSV, opined that many countries currently did not necessarily comply with the *Declaration* possibly because it is not legally binding and therefore not subject to monitoring mechanisms and consequences for non-compliance.[51]

Dussich and Garkawe's arguments are based on the 'rational choice theory' developed in international law to explain reasons for Member States' compliance with international instruments.[52] The rational choice theory assumes that norms influence Member States' behaviour through offering rewards for compliance and by creating negative consequences for non-compliance, such as sanctions.[53] According to this theory, Member States behave tactically in relation to compliance with international instruments in order to avoid the probable negative consequences or to achieve the expected benefits.[54] In the context of the *Declaration* this could suggest that Member States may not implement victims' rights, contained in a non-binding instrument, into their national law as no negative or positive consequences are directly attached.

While the lack of enforceability of the *Declaration* may keep Member States from implementing its content, the following part of this chapter considers why Member States may be compelled to implement the *Declaration* regardless of its legal status.

---

[48] State Responsibility means that Member States are responsible in international law for their wrongful acts. See in general: James Crawford, *State Responsibility The General Part* (Cambridge University Press, 2013); Floroiu Mihai, 'State's Responsibility for International Illicit Acts' (2011) 2011(1) *Agora International Journal of Juridical Sciences* 1.
[49] Garkawe, above n 47, 5.
[50] Ibid 4.
[51] John P J Dussich, 'The Need for an International Convention for Victims of Crime, Abuse of Power and Terrorism' (Paper presented at the First World Conference on Penal Law/ Penal Law in the XXIst Century, Guadalajara, Mexico 18-23 November, 2007) 4.
[52] For further discussion see: Artuhur A. Stein, 'Coordination and Collaboration: Regimes in an Anarchic World' (1982) 36 *International Organization* 115; Robert O. Keohane, 'The Demand for International Regimes' (1982) 36 *International Organization* 141.
[53] Asher Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4(1) *Journal of International Law and International Relations* 151, 155; Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1 *European Journal of International Relations* 157, 160. For an overview of the Rational Choice Theory in International Law and its limitations see: Robert O Keohane, 'Rational Choice Theory and International Law: Insights and Limitations' (2002) 31 *The Journal of Legal Studies* S307.
[54] See generally: Keohane, above n 53.

B Why a Declaration May Influence Member States' Conduct

1 Motivation of Member States

Van Genugten et al contended that the unanimous adoption of an international instrument can be seen as the agreement of Member States to implement the norms in question into their national law and to comply with them.[55] Concurring, Brownlie explains that General Assembly resolutions can commonly be seen as evidence of the attitudes of Member States to comply with the particular rules contained in them and as evidence of the existence of a consensus on these rules.[56] The unanimous adoption of the *Declaration* could therefore be evidence of the will and motivation of Member States to comply with its content.

The *Declaration* has specifically served as a basis for victim-related law reform in several Australian jurisdictions. For example, in 2001 South Australia commenced reform in the area of victims' rights and passed the *Victims of Crime Act* 2001 (SA).[57] Before the Act was passed, the Hon K T Griffin, Attorney-General at the time, elaborated in a Ministerial Statement to the South Australian Parliament that a new right, namely the right for victims to be informed about available services, was to be introduced into the South Australian regulatory framework. This was intended to ultimately enhance the implementation of the content of the *Declaration*.[58] At a later stage, in 2006 Victoria passed the *Victims Charter Act* 2006 (Vic) which explicitly states that the objectives of the Act are based on the *Declaration*.[59] In 2009, Queensland enacted the *Victims of Crime Assistance Act* 2009 (Qld) in order to enshrine the basic principles contained in the *Declaration* further in Queensland legislation.[60] The above suggests that the *Declaration*, at least to a certain extent, may be considered an inspiration for some jurisdictions to implement the basic principles in national law.[61]

---

[55] van Genugten et al, above n 38, 117.
[56] Brownlie, above n 9, 297.
[57] The act is the result of a three-part review and analysis of law relating to victims of crime in South Australia between 1999 and 2000. See South Australia, South Australian House of Assembly 'Second Reading of the Victims of Crime Bill in the South Australian House of Assembly', 27 September 2001, 2305, 2305 (R G Kerin, MP).
[58] K T Griffin, *Ministerial Statement on the Review on Victims of Crime and the Government's Response to it, S*outh Australian Legislative Council, 07 December 2000, 869, 870. S 15 of the Declaration contains the obligation to inform victims on the availability of health and social services and other relevant assistance.
[59] *Victims of Crime Assistance Act* (Vic) 2006 s 4(2). The explanatory memorandum to the bill stipulates that the principles contained in the bill are drawn from the Declaration. See: <http://www.austlii.edu.au/au/legis/vic/bill_em/vcb2006185/vcb2006185.html>.
[60] *Victims of Crime Assistance Bill* (Qld) 2009, Queensland Bills Explanatory Notes available at <http://www.austlii.edu.au/au/legis/qld/bill_en/vocab2009281/vocab2009281.html>.
[61] Other Australian States and Territories have also implemented victims' charters and victims' rights legislation as explained in Chapter 2. The above-mentioned States, however, have explicitly referred to the Declaration as a stimulus for law reform.

Another reason why the *Declaration* may influence Member States to implement its content is that the UN has actively promoted the implementation of the *Declaration* since the 1980s. It may therefore have enhanced the visibility of the international instrument and outlined the importance of implementing the basic principles for Member States.

2 Active Promotion of the Declaration

The UN has undertaken a range of activities to promote the implementation of the *Declaration* since its adoption in 1985. The UN Economic and Social Committee ('ECOSOC')[62] has emphasised the importance of the implementation of and compliance with the *Declaration* by Member States in several resolutions in the 1980s, 1990s and 2000s.[63] For example, Resolution 1998/21 ECOSOC established a holistic plan of action for the implementation of the *Declaration*.[64] The plan called upon Member States to assist the Secretary-General in updating UN manuals regarding victims. It also recommended that particular attention be paid 'to practical national experiences', enacted legislation, and case law concerning the treatment of victims of crime. Through the resolutions and the action plan, the UN has attempted to encourage Member States to implement the basic principles set out in the *Declaration* into national law and practice.

Another UN endeavour to promote the implementation of the *Declaration* was the publication of implementation guidelines and handbooks to overcome problems and uncertainties arising from the content of the *Declaration*.[65] In 1989, ECOSOC first recommended the creation and publication of a guide for criminal justice practitioners to assist Member States in implementing the *Declaration*.[66] A 'Guide for Practitioners Regarding the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' was subsequently prepared by Shapland. The Guide was submitted to the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba,[67] where it became part of the official conference documents.[68]

---

[62] For an overview of the work of the United Nations Economic and Social Committee ('ECOSOC') see: <http://www.un.org/en/ecosoc/about/index.shtml>.

[63] ESC Res 1989/57, Implementation of the Declaration of Basic Principles of Justice for Victims and of Crime and Abuse of Power, UN ESCOR, Supp. No. 1, at 43, UN Doc. E/1989/89 (1989); ESC Res 1990/22, UN ESCOR, Supp. No.1, UN Doc E/1990/90 (1990); ESC Res 1998/21, Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (18.07.1998; ESC Res 2000/15, Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (27.07.2000).

[64] ESC Res 1998/21, Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (18.07.1998) annex.

[65] Irene Melup, 'The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' in Yael Daniel, Elsa Stamatopoulou and J. Clarence Dias (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publishing Company, 1998) 53, 56.

[66] ESC Res 1989/57, above n 63.

[67] See: *Guide for Practitioners regarding the Implementation of the Declaration of Basic Priniciples Of Justice for Victims of Crime and Abuse of Power,* Eigth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-07 September 1990) Report prepared by the Secretariat, UN Doc A/CONF.1442/20 (1990) annex.

Subsequently, in 1999 the UN Office for Drug Control and Crime Prevention published the 'Handbook on Justice for Victims: On the Use and Application of the Declaration'[69] (the 'UN Handbook') and a 'Guide for Policymakers on the Implementation of the Declaration'[70] (the 'UN Guide') in order to enhance the implementation of the *Declaration* in Member States.[71] The shorter UN Guide defines and suggests possibilities to implement the *Declaration* for policymakers in Member States' ministries, government departments and on a local level.[72] The complementary and more detailed UN Handbook outlines the steps necessary to develop appropriate assistance services for victims of crime in Member States. In 2006 the UN Office on Drugs and Crime published the 'Criminal Justice Assessment Toolkit' ('Toolkit') which included a section on victims and witnesses. The Toolkit was developed in order to provide Member States with an overview of possible criminal justice responses to the needs of victims.[73] The Toolkit contains a questionnaire relating to the situation of victims of crime and allows Member States to complete a self-assessment of the situation for victims in their own jurisdiction.

Through the above-described promotional activities the UN has attempted to enhance the recognition of the *Declaration*'s existence by the international community and has endeavoured to overcome implementation problems in Member States. This may have served as a reminder for the international community of the importance of the *Declaration* and its efficient implementation.

The active promotion of the *Declaration* demonstrates that the UN consider the *Declaration* an important instrument and that it has given it imperative status. Whether the formal status that declarations have in UN practice, despite not being legally binding, may influence the implementation of the content of the *Declaration* in Member States is discussed below.

---

[68] Ibid 23. The purpose of the Guide, as stated in its first part, was to help national authorities, practitioners and individuals to implement the Declaration. The Guide provided practical examples on how to achieve the objectives set out by the Declaration for Member States.

[69] *UN Handbook on justice for victims. On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (*United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, 1999) ('UN Handbook').

[70] *UN Guide for Policymakers. On the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, 1999) ('UN Guide'). The publications are based on ESC Res 1996/14, UN ESCOR, 1996, Sess., Supp. No. 1, 45th mtg, U.N. Doc. E/1996/96 (1997), in which the Committee recognized the desirability of preparing a draft manual or draft manuals on the use and application of the Declaration.

[71] For a more detailed overview on the events leading up to the publication of the manuals in 1999 see: Commission on Crime Prevention and Criminal Justice, *Use and Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, ESCOR 6th sess, Agenda Item 8, UN Doc E/CN.15/1997/16 (28.02.1997); Melup, above n 65, 62.

[72] UN Guide, above n 70, preface.

[73] United Nations Office on Drugs and Crime, *Cross-Cutting Issues, Victims and Witnesses, Criminal Justice Assessment Toolkit (*United Nations 2006) ('UN Toolkit'), 1-2.

3 Formal Recognition of Victims' Rights

Lador-Lederer observes that a declaration, despite not being legally binding, is not merely 'a scrap of paper'.[74] Similarly, Letschert and Groenhuijsen argue that a soft law instrument, like the *Declaration*, can be a significant influence on Member States to implement its goals because it has a 'high moral force'.[75] This assumption is based on the status declarations have generally received in UN practice, as noted in a memorandum of the UN Office of Legal Affairs in 1962:

> In UN practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated …[I]n view of the greater solemnity and significance of a 'declaration' it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it.[76]

In light of the above, the *Declaration*, although not legally binding on Member States, may have sufficient 'moral force' to influence Member States' conduct in relation to the implementation of victims' rights into their national law.[77]

V CONCLUSION TO CHAPTER 3

While some authors have suggested that a declaration can influence Member States' conduct regardless of its legal status, others have argued that it is the lack of legal enforceability that keeps Member States from implementing its content. Whether and to what extent the *Declaration* has actually been implemented in national law is uncertain, as limited research into this area has been conducted. Therefore, commencing from Chapter 5, this thesis examines the extent to which Germany and Australia have implemented one particular basic principle contained in section 6(b) of the *Declaration* into their national law. Based on the findings made in Chapter 5, the thesis will analyse whether the implementation of victims' participatory rights could be expanded and enhanced. In order to undertake a meaningful examination, the methodology for this analysis is introduced in the following chapter, Chapter 4.

---

[74] J Lador-Lederer, 'Legal Aspects of Declarations' (1977) 12(2) *Israel Law Review* 202, 225.
[75] Groenhuijsen and Letschert, above n 35, 5.
[76] Memorandum of The Office of Legal Affairs, UN Secretariat, UN ESCOR, 34th session, support no 8, [15], UN Doc E/CN.4/L610, quoted in Shelton, above n 4, 126-127.
[77] On the question of whether soft law has the potential to guide Member States to implementation see: Groenhuijsen and Letschert, above n 75, 5. Commenting on the effects of the Declaration on other international instruments is, Michael O'Connell, 'Cloaking the truth-ex post facto the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (2010) 13(2) *The Victimologist* 6, 6.

Chapter 4: Research Methodology

I INTRODUCTION

This chapter will outline the methodology used for the subsequent analysis. However, first the methodologies applied in other research studies on the implementation of victims' rights are examined. On this basis the assessment methodology for this thesis is later developed by taking into consideration the difference in research designs of this and past studies.

II REVIEW OF EXISTING RESEARCH METHODOLOGIES

A Approach Taken by the United Nations to Assess Implementation of the Declaration

The UN has previously reviewed the implementation of the *Declaration* twice, in 1996 and 2009, by using an 'information-gathering' instrument to survey Member States.[1] In order to analyse the implementation of the basic principles contained in the *Declaration*, UN agencies drafted a questionnaire for completion by Member States focusing on the treatment of victims in the criminal justice system. The questionnaire was subsequently sent out to government agencies in Member States. The questionnaire, for example, collected information on section 6(b) through a 'yes/no' question: 'Does your country allow the views and concerns of victims to be presented and considered at appropriate stages of the justice process where their personal interests are affected?". Space was also provided for details in case of an affirmative answer.[2] The only other question relating to section 6(b) was 'Does your country allow victims to provide information through a victim impact statement?'. Again the answer opportunity was 'yes' or 'no' and some space was given to provide details if the answer was affirmative.[3]

Conclusions drawn from the responses of Member States to the questionnaire can only be of a general nature and are not specific to section 6(b). This is because of the general nature of the

[1] 'UN Report of the Secretary-General- Use and Application of Standards and Norms in Crime Prevention and Criminal Justice', UN Doc E/CN.15/2009/16 (06 February 2009) ('Report 2009'); 'UN Report of the Secretary-General Addendum-United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice- Use and Application of the Declaration of Basic Priniples of Justice for Victims of Crime and Abuse of Power', UN Doc E/CN.15/1996/16/Add. 3 (10 April 1996) ('Report 1996'), See Chapter 1, part IV for further analysis of the UN surveys.

[2] 'UN Report of the Secretary-General-Results of the Meeting of the Intergovernmental Expert Group to Develop an Information-Gathering Instrument on United Nations Standards and Norms Related Primarily to Victim Issues', UN Doc E/CN.15/2007/3 (01 February 2007) 17.

[3] Ibid 18.

questions and the limited information collected. Therefore, after receiving the responses to the questionnaire the Secretary-General was only able to conclude that the *Declaration* 'appears to be respected in most States'.[4] This thesis aims to draw more specific conclusions by analysing the extent to which Germany and Australia have implemented section 6(b) in their national law. The questions from the UN information-gathering tool including questions on victim participation will therefore not be used as the basis for the research in this thesis as they were designed to give a broader picture of implementation around the globe.

B Approach Taken by Joutsen in 1987 to Assess Implementation of the Declaration

As outlined in Chapter 1, in 1987 Joutsen undertook a cross-national study of the role of the victim in the European criminal justice system and considered the implementation of the basic principles in Europe.[5] Joutsen used a comparative methodology he referred to as a 'cross-national approach'. He conducted his research by analysing the 'flow of a case through the criminal justice system'. Information was analysed from the entry of the case into the criminal justice system right through to the exit of the case, including any state compensation provided for victims of crime.[6] For example, Joutsen considered the circumstances surrounding the reporting and non-reporting of crime in different European Member States.[7] He also commented on issues relating to informing the victim, allowing victims to present views and concerns, providing victims with assistance and avoiding unnecessary delay in Member States.[8] In relation to the exit of a case from the criminal justice system Joutsen analysed the situation of receiving restitution and state compensation for victims.[9]

Joutsen's approach is well structured setting out the relevant basic principle first and subsequently considering legislation and practice in European States in relation to implementation of and compliance with the *Declaration*. It allowed him to comment on the situation regarding implementation in particular jurisdictions which he grouped together in core countries, for example the Romano-Germanic, the Socialist and the Common law system. However, he did not develop and apply specific evaluation criteria in order to identify the extent of implementation and compliance within these jurisdictions.

[4] Report 1996, above n 1, 13.
[5] Matti Joutsen, *The Role of the Vicitm of Crime in European Criminal Justice Systems. A Crossnational Study of the Role of the Victim* (United Nations European Institute for Crime Prevention and Control (HEUNI) Finland, 1987). For further analysis of Joutsen's research see Chapter 1, part IV.
[6] Ibid 9.
[7] Ibid 150-170.
[8] Ibid 171-213.
[9] Ibid 220-277.

The structure of Joutsen's research, the introduction of a basic principle and subsequent analysis of Member States' responses to the basic principle, allows for a thorough analysis and will also be applied for the analysis in this thesis. This will be discussed further below in part 2. However, answering the research question in this thesis requires the formulation of additional criteria in order to analyse the extent of participation possible in Germany and Australia. This is also necessary to evaluate not only the current situation but also whether victims' rights could be expanded.

An example of a research approach where additional criteria have been developed to analyse the extent of implementation is the report of the European Commission on the implementation of EU law dealing with victims of crime. The European Commission, when analysing the implementation of the *Framework Decision*, has developed additional assessment criteria which will be discussed in the following part of this chapter.

C Approach Taken by European Commission Regarding the Implementation of the Framework Decision

In 2001 the Council of the European Union ('Council') passed the *Framework Decision* obligating EU Member States to enact the content of its provisions into Member States' national law. These obligations, similar to the *Declaration*, related to providing victims with information and other support services, and allowing victims to present views and concerns during proceedings.[10] The European Commission ('Commission') has reported twice on measures taken by Member States to comply with the *Framework Decision* in 2004 and 2009.[11] The Commission set out that, in order to determine objectively whether or not the *Framework Decision* has been implemented by a Member State, general criteria must be applied.[12] When developing these criteria the Commission drew on standards previously used to analyse compliance with EU directives. The criteria stipulated that the *Framework Decision* must be implemented in 'mandatory domestic legislation'. Also the national legislation implementing the *Framework Decision* must safeguard that the 'intended effect' of the *Framework Decision* is ensured.[13]

---

[10] *Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings (15 March 2001)*, 2001/220/JHA, OJ L82, 22.03.200; A Pemberton et al, 'APAV Intervict Report: Implementation of the EU Framework Decision on the Standing of Victims in the Criminal Proceedings in the Member States of the European Union' (2009) <ec.europa.eu/justice/news/.../project_victims_europe_final_report_en.pdf>.

[11] Commission of the European Communities 'Report from the Commission on the Basis of Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings' (Sec (2004)102)/COM/2004/0054 final/ Doc 52004DC0054 (03 February 2004); Commission of the European Communities 'Report from the Commission Pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings' (2001/220/JHA) [SEC (2009) 476] (20 April 2009).

[12] Ibid 2.

[13] Ibid.

In order to measure the implementation of the obligation set out in section 6(b) in Germany and Australia, the approach of developing specific assessment criteria to measure the participation possible will be applied in this thesis.

D Approach Taken by Brienen and Hoegen Regarding Recommendation 85/11

In 2000 Brienen and Hoegen undertook a measurement of victim-related rights and their implementation in European States when analysing the implementation of the non-binding *Council of Europe Recommendation 85/ 11 of the on the Position of the Victim in the Framework of Criminal Law and Procedure* (the '*Recommendation 85/11*')[14] by using a measuring tool.[15] *Recommendation 85/11* is a non-binding instrument that was adopted to improve the situation for victims in the European States.[16] The principles expressed in *Recommendation 85/11* regarding the treatment of victims in the criminal justice system are similar to the ones set out by the *Declaration*.[17] Brienen and Hoegen's objective was to study the implementation and compliance of *Recommendation 85/11* in European States' national law with a focus on information, compensation, treatment and protection of victims.[18]

In order to measure its implementation in law and compliance with *Recommendation 85/11* in practice Brienen and Hoegen developed a 'definitive measuring instrument' referred to as a 'developmental scheme',[19] or a 'score-card' methodology.[20] It assesses and rates the conduct of Member States in relation to implementation and compliance from 'under-achievement' to 'compliance' to 'superseding the standards of the Recommendation'.[21]

The advantage of the measuring instrument applied by Brienen and Hoegen lies in providing an analysis of the extent of implementation in a particular jurisdiction in relation to *Recommendation 85/11*. However, the actual application of the score-card methodology to their research findings

[14] *Council of Europe Recommendation 85/ 11 of the on the Position of the Victim in the Framework of Criminal Law and Procedure* (25 June 1985) (the '*Recommendation 85/11'*).
[15] Marion Brienen and Ernestine Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers, 2000).
[16] Recommendation 85/11 resembles the Declaration on the position of the victim in many respects. For a detailed analyses of differences and similarities of the Declaration and Council of Europe see: Jan van Dijk, 'Benchmarking Legislation on Crime Victims: the UN Victims Declaration 1985' in *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (United Nations Press, 2005) 202, 202.
[17] Ibid.
[18] For their research Brienen and Hoegen used a 'development model' as their methodology to assess the progress made by EU States in implementing Recommendation 85/11. Under the 'development model' they analysed victim related reforms which occurred between 1985 and 1999 in the respective jurisdictions. See: Brienen and Hoegen, above n 15, 47.
[19] Ibid.
[20] Jan van Dijk and Marc Groenhuijsen, 'Benchmarking Victim Policies in the Framework of European Union Law' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing, 2007) 364.
[21] Brienen and Hoegen, above n 15, 47.

appears less transparent in some instances. For example, the researchers applied the measuring tool partly to assess both the implementation in legislation and compliance in practice at the same time,[22] and partly to assess both separately.[23] The reason behind this was to demonstrate the gap between the 'law on the books' and the 'law in practice'. Goodey refers to the tables created by Brienen and Hoegen as 'a useful overview, in table form'.[24] However, the varying application of the assessment tool and the fact that the researchers were assessing a large number of jurisdictions, 22 European States, made the application of the assessment tool and the respective findings expressed in tables challenging to comprehend at times. Furthermore, while the researchers allocated two scores for best practice (+ and ++) the other scores measuring the implementation only indicated underachievement (-) or fulfilment of the requirements (R). These scores make it difficult to measure where jurisdictions have undertaken some efforts but where they have not reached the fulfilment of the requirements.

Brienen and Hoegen's research findings enjoy great recognition in the field and many authors have relied on their research.[25] Brienen and Hoegen's research has demonstrated that it is viable to measure implementation of and compliance with, victims' rights in detail and rank the performance of Member States through the application of an assessment tool. For this reason, an assessment tool will also be used in this thesis to measure the possibilities of participation in light of section 6(b) in Germany and Australia. However, due to the above concerns, the 'score-card' methodology used by Brienen and Hoegen will not be applied as an assessment tool in this thesis. Part 2 of this Chapter will discuss the assessment tool that will be used.

III METHODOLOGY APPLIED IN THIS THESIS

A Comparative Law Aspect

The research in this thesis aims to investigate whether victims' participatory rights, as detailed in section 6(b) have been adequately implemented in German and Australian national law. It considers how and whether victims' participatory rights could be extended and enhanced while keeping in mind the possibility for Member States to refuse the expansion based on the qualifications contained in the *Declaration*. In order to address these questions a comparative law method is applied.

---

[22] Ibid 1016.
[23] Ibid 1015.
[24] Jo Goodey, 'Book Review: Vicitms of Crime in Twenty-Two European Criminal Justice Systems' (2001) 8 *International Review of Victimology* 291, 293.
[25] See, for example, application of Brienen and Hoegen's findings in Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294.

Comparative law per se deals with 'the other'.[26] It is concerned with the specific comparison of characteristics of two or more legal systems.[27] The research undertaken in this thesis differs significantly from comparative law studies which exclusively focus on existing differences between several legal systems in an attempt to assess the possibility of transplanting aspects from one legal system into the other.[28] By comparison this thesis uses an existing agreement of Member States, the *Declaration*, as a starting point for the analysis of different legal systems.[29] The research is nevertheless comparative in nature as it considers and compares aspects of two legal systems in regards to the *Declaration*.[30]

Sources used for analysing the implementation of the *Declaration* in national law in Germany and Australia include legislation and case law implementing section 6(b). Furthermore, parliamentary debates on legislation concerning victims' rights and scholarly literature in the two Member States are considered.

Germany has enacted Federal criminal law and procedure applicable to all Federal states. Thus for the analysis of Germany's national law, the Federal legislation relating to victims of crime will be considered when contemplating the implementation of section 6(b).[31] In Australia, all States and Territories have enacted their own criminal law and procedure. In addition, Federal criminal law and procedure exists. When analysing the implementation of section 6(b) in national law in Australia this thesis will consider the implementation in State and Territory jurisdictions and not on the Federal level.[32] As States and Territories vary in their victim-related legislation the question has to be addressed as to when the right to present views and concerns at the trial and sentencing stage

[26] Vivian Curran, 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives' (1998) 46(4) *American Journal of Comparative Law* 657, 657.
[27] John C Reitz, 'How to Do Comparative Law' (1998) 46(4) *American Journal of Comparative Law* 617, 618; J Kamba, 'Comparative Law A Theoretical Framwork' (1974) 23 *International and Comparative Law Quarterly* 485, 505.
[28] Referred to as 'External Comparative Law' by Sebastian McEvoy, 'Descriptive and Purposive Categories of Comparative Law' in Pier Guiseppe Monateri (ed), *Methods of Comparative Law*, Research Handbooks in Comparative Law (Edward Elgar, 2012) 146. McEvoy describes external comparative law as comparing 'two more or less distinct and different legal systems in relation to particular issues', 148 .
[29] Referred to as 'hybrid' comparative law by McEvoy, ibid 152. McEvoy uses the EU as an illustrative example: hybrid comparative law 'considers how EU law and the Convention have affected the domestic laws of several Member States.' This thesis does not look at EU law but at another overarching framework, the Declaration, and how it has affected Member States. The comparative law undertaken in this thesis therefore also falls in the category defined by McEvoy as 'hybrid comparative law'.
[30] McEvoy, above n 28, 152; Harold Gutteridge, *Comparative Law An Introduction to the Comparative Method of Legal Study & Research,* Cambridge Studies in International Law (Cambridge University Press, 2 ed, 1949) 9.
[31] In Germany, victim related issues are mostly regulated in the *StPO*.
[32] In Australia some legislation now exists on the Federal level in relation to victims of crime, see, for example, *Crimes Act* 1914 (Cth) s 16AAA. However, individual victims' rights on the Federal level are still not prominent. This is the case because traditionally most Federal crime dealt with offences to which the State is the victim and not an individual. Therefore the situation for victims' rights on the Federal level will not be part of the analysis of this thesis.

in light of section 6(b) can be considered implemented in Australia as a whole. In this thesis, the implementation is judged based on what approach was taken in the majority of Australian jurisdictions.

B Participation According to Section 6(b) of the Declaration: Minimum Requirements as Benchmarks

In accordance with Joutsen's approach, this thesis first sets out the requirements for Member States contained in the basic principle enshrined in section 6(b). It will subsequently analyse to what extent victims can present views and concerns at the trial and sentencing stage in Germany and Australia. In accordance with the approach taken by the EU, implementation requires the implementation of section 6(b) in national law or case law. The implementation in quasi legislation, such as charters and declarations in the national justice system, will not be considered a sufficient form of implementation in this thesis. The section must furthermore be implemented in a way that recognises the intended effect of the *Declaration* as analysed below. In order to determine the extent to which victims can participate according to national law in Germany and Australia this thesis uses the obligation set out in section 6(b) as a benchmark. Benchmarks are defined as 'concrete, normative standards or criteria' to which the existing situation is compared.[33] Benchmarks can be used to examine whether the national laws of a Member State implement certain rights required by an international instrument.[34]

As discussed in Chapter 3, the wording of section 6(b) is open-textured. In order to establish criteria as benchmarks that indicate the level of participation possible for victims of crime, the terms used in section 6(b) require interpretation which will be provided below.

1 Interpretation of Section 6(b) of the Declaration

The wording of the *Declaration* offers interpretive leeway in order to recognise the differences between Member States' national justice systems. Thus room for interpretation is given to the individual Member States. Section 6(b), for example, does not specify how victims should be able to present views and concerns but allows Member States and jurisdictions to interpret the section in a way that is in accordance with their national criminal justice systems. The analysis below aims to interpret the general meaning of the terms contained in section 6(b) according to the principles developed for the interpretation of international (soft) law. This will allow for a clear definition of what Member States must do to be compliant with section 6(b).

[33] Anna Wuerth and Frauke Lisa Seidenstein, 'Indices, Benchmarks and Indicators: Planning and Evaluating Human Rights Dialogues' (2005) 23 <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/study_indices_benchmarks_and_indicators.pdf>.
[34] Ibid 28.

(a) Rules of Interpretation For International Soft Law

Methods regarding the interpretation of international instruments have focused largely on treaty interpretation.[35] The question arises as to whether the method that is applied for interpreting treaties in international law can be applied analogously to the interpretation of other decisions of international organisations, such as General Assembly's Resolution 40/34 adopting the *Declaration*. On this matter Thirlway has noted that it is uncertain whether, and to what extent, the rules for treaty interpretation can be applied to the interpretation of soft law because the two situations differ. He explains that on one hand the decision of the international organisation, here the *Declaration* adopted by the General Assembly, has been negotiated during the drafting process by Member States and can therefore be considered a meeting of wills. The situation is consequently similar to that which occurs during treaty negotiations. However, on the other hand the instrument expresses the will of the agency adopting it, here the General Assembly, as a 'unilateral act'.[36] With these concerns in mind, Wood has modified the rules of the interpretation of treaties to accommodate the differences between treaties and other decisions of international organisations.[37] The amended rules developed by Wood will be applied in this thesis in order to interpret the terminology used in section 6(b).

The terms of section 6(b) will first be interpreted in accordance with their ordinary meaning.[38] It needs to be ensured that the interpretation chosen is not absurd.[39] The terms contained in section 6(b) also need to be interpreted within their context.[40] This means that the whole text of the *Declaration* as well as the text of General Assembly's Resolution 40/34, to which the *Declaration* was annexed, including the preamble, will be included in the interpretation where relevant. Similar to a treaty, the *Declaration* also has to be interpreted in light of its object and purpose.[41] Identifying the object and purpose includes examining all the circumstances relating to its adoption. The object and purpose of the *Declaration* may become clear in the preamble of Resolution 40/34 or in background documents, such as reports from the Secretary-General, statements made by members of the *7th Congress* which recommended the *Declaration* to the

[35] Michael Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73, 73. For international treaty interpretation see generally *Vienna Convention*.
[36] Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part Eight' (1989) 67 *British Year Book of International Law* 1, 29.
[37] Wood focuses specifically on the interpretation of Security Council Resolutions, above n 35.
[38] This principle applies to treaty interpretation according to the *Vienna Convention* s 31(1) as much as to the interpretation of soft law.
[39] Wood above n 35, 89
[40] Ibid.
[41] In the context of Security Council Resolutions see: ibid 90.

General Assembly or other preparatory work.[42] In addition subsequent agreements regarding the interpretation of the *Declaration* may be taken into account.[43]

Supplementary means of interpretation may be applied only to confirm the meaning of section 6(b) or if its meaning remains ambiguous or leads to absurd results. Supplementary means that may be considered in relation to the interpretation of the *Declaration* are all other means that are not sufficient to 'establish the agreement of the parties'.[44] In the case of the *Declaration*, supplementary means include UN guides and handbooks drafted by experts in victimology and published by the UN on the implementation of the *Declaration* and best practice in Member States.[45] While the various publications referred to contain guidance for Member States they constiute no 'agreement of parties' and cannot serve as a primary means of interpreation. The interpretation of the terms of section 6(b) in light of the rules of interpretation of internatioanl law is conducted below.

(b) Interpretation of the Terms Contained in Section 6(b) of the Declaration

The wording of section 6(b) sets out that:

> The responsiveness of the judicial and administrative processes to the needs of victims should be facilitated: by allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

When analysing to what extent victims can currently participate in proceedings in Germany and Australia this thesis uses the positive obligation set out in section 6(b) as a benchmark. Subsequently the qualifications of section 6(b) are considered when assessing the possibility of Member States to justifiably reject the expansion of such rights.

The question arises as to what the meaning is of 'allowing victims' views to be presented and considered… where their personal interests are affected'.

---

[42] Discussion on the interpretation of object and purpose of Security Council Resolutions see: ibid 90. Arguments of why supplementary material may be used for the interpretation of organization decisions in particular made at 93.
[43] Ibid 91.
[44] Ibid 95.
[45] *UN Guide for Policymakers. On the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International crime Prevention, 1999; *Guide for Practitioners regarding the Implementation of the Declaration of Basic Priniciples Of Justice for Victims of Crime and Abuse of Power,* Eigth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-07 September 1990) Report prepared by the Secretariat, UN Doc A/CONF.1442/20 (1990) annex.

(i) Presenting and Considering Views and Concerns

Section 6(b) does not clearly outline what the term 'considered' means. Three possible interpretations need to be contemplated.[46] They are:

1. Victims can present their views and concerns to a decision-maker while no obligation rests on the decision-maker to acknowledge their views in any way. The term 'considered' in this case could be understood as the victim not being left out of the decision-making process in general without imposing an obligation on the decision-maker to take the views into account at all.

2. Victims can present their views and concerns to the decision-maker who is obligated to take the views and concerns into consideration. In the decision-making process the victims' views need to be weighed against other factors relevant for the decision. As opposed to the first interpretation, this interpretation requires the decision-maker to acknowledge the victims' views. Yet, depending on the relevance of the other interests considered in the process, the victims' interests might not have any effect on the final outcome.[47]

3. Victims' views, in comparison to the first two interpretations, determine the outcome of the decision affecting the victims' personal interests. This would mean that the victims' views are binding on the decision-maker and ultimately determine the outcome of the decision to be taken.

The ordinary meaning of the word 'considered' is that a matter is weighed or taken into account when formulating an opinion.[48] The ordinary meaning of the term speaks against the suggested third interpretation in which 'considered' is seen as vesting the final decision-making power in the victim. The ordinary meaning equally speaks against the first suggested interpretation of allowing victims only to present views and concerns without obligating the decision-maker to take them into account at all. According to the ordinary meaning interpretation the phrase 'allowing victims' views to be presented and considered' needs to be understood as giving victims the right to present views and concerns and have these weighed against other factors relevant to the decision by the decision-maker. This interpretation is consistent with the object of section 6(b) which will be defined below.

---

[46] The different forms of victim participation were described and ranked from low to high by Ian Edwards, 'An Ambiguous Participant The Crime Victim and Criminal Justice Decision Making' (2004) 44 *British Journal of Criminology* 967, 975.

[47] For more explanations on consultation in relation to victims of crime see: ibid 975.

[48] Mariam Webster Online Dictionary, 'Consideration' def 2 <http://www.merriam-webster.com/dictionary/consideration>.

According to the *7th Congress* when drafting the *Declaration*, one major aim of providing victims with adequate justice mechanisms, including being able to present views and concerns, was to avoid further trauma for victims.[49] The drafters of the *Declaration* explicitly pointed out that, particularly with regard to criminal proceedings, the lack of suitable arrangements for victims during the trial process could not only lead to the disassociation of victims from the outcome of the trial but could also cause secondary victimisation.[50] It was feared that if victims' views remained irrelevant to the process vigilantism and other undesirable responses could occur.[51]

In light of these considerations the object of section 6(b) can be seen as allowing victims to present views and concerns in an attempt to avoid their secondary victimisation during criminal proceedings. Secondary victimisation could potentially be reduced if victims perceived proceedings and outcomes as fairer due to the possibility of participating in the process.[52] The possibility for victims to present views and concerns which are considered by criminal justice authorities, could strengthen the victims' perception that they have an important role in proceedings.[53]

A second object of section 6(b) could be to assist victims in obtaining therapeutic benefits, such as closure, through the criminal trial. As a consequence of the criminal act victims can be left feeling unsafe and insecure.[54] The feeling of insecurity could be restored through the victims' perception that they play an important role in criminal procedure by being able to make their views and concerns known. This perception could be enhanced by knowing that their views are considered by courts and by other actors in the criminal justice system.[55] It has been found that consideration and acknowledgement are factors that can contribute greatly to the healing process of victims and allow them to reach a form of closure.[56] This interpretation of the object of section 6(b) — helping to obtain closure for victims through the criminal process — is supported by the discussions of the 7th

[49] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan 26 August - 05 September 1985): Report prepared by the Secretariat*, UN Doc A/Conf.121/22/Rev.1 (1986) 142 ('7th Congress Report').
[50] Ibid 142.
[51] Ibid 142.
[52] Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 314.
[53] Ibid 321-324.
[54] Harald Richter, 'Wie erleben und verarbeiten Opfer den Strafprozess' in Dieter Eppenstein (ed), Taeterrechte-Opferrechte (Weisser Ring, 1994) 57, 58. For criticism on therapeutic terms such as 'closure' and their use in therapeutic jurisprudence see Antony Pemberton and Sandra Reynaers, 'The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), Therapeutic Jurisprudence and Victim Participation in Justice (Carolina Academic Press, 2011) 229, 235.
[55] Ibid 62.
[56] See explanations by Maren Burkhardt on victims' needs in internatioanl criminal court proceedings, *Victim Participation Before the International Criminal Court* (Doctor Iuris Thesis, Humboldt Universitaet, 2010) 65.

Congress. Representatives of Member States pointed out that it was essential to avoid negative social impact on victims and important for the individual victim, and also for the general community, to have confidence in the criminal justice processes.[57] Furthermore, it was pointed out that the lack of suitable participation arrangements for victims during the trial could lead to their 'disassociation' with the outcome of the trial.[58] Victim involvement in the process could reduce victim alienation from the criminal justice system and might ultimately contribute to providing victims with therapeutic benefits.

In summary, in order to safeguard the objects of section 6(b) it is necessary, but also sufficient, to allow victims to present views and concerns. In turn decision-makers must be able to take these into consideration in the decision-making process. However, in order to comply with section 6(b) it is not necessary to give victims final control over the outcome of the decision. That means that according to the objects of section 6(b) the victim does not have to be offered a 'veto' right in regards to decisions taken but also cannot be left out of the decision-making process altogether.

Section 6(b) does not prevent Member States from granting victims' rights beyond those set out in the *Declaration*. For example, Member States could grant victims veto rights or afford them final decision-making power in relation to particular decisions. Therefore, section 6(b) is not prescriptive about how Member States implement the principle as long as they provide an opportunity to victims to present views and concerns that are considered in the decision-making process. Ultimately, the implementation chosen in national law must have the potential to safeguard the objects of section 6(b) and assist victims in avoiding secondary victimisation and providing them with closure. Thus national law that does not sufficiently safeguard the intended effects of section 6(b) does not constitute a sufficient implementation.

The definition of 'victim' contained in section 6(b) is considered below.

(ii) 'Victim'

The wording of section 6(b) states that 'victims' should be able to present views and concerns. As explained in Chapter 1, victims are defined in the *Declaration* as:

> Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts

[57] 7th Congress Report, above n 49, 143.
[58] Ibid.

> or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power […][59]

The wording does not limit its applicability to certain groups of victims, for example, victims of serious offences or violent crimes. To the contrary, the wording suggests that victims of any criminal act should be given the right to present views and concerns. This interpretation is supported by the wording of section 6 (a) relating to providing victims with information. The section explicitly specifies that victims should be updated about their cases, 'especially where serious crimes are involved'. Had the drafters of the *Declaration* intended to grant only victims of certain offences, for example, victims of serious crime, the right to present views and concerns, they would have included this in the section. The lack of specific reference to certain groups of victims suggests that section 6(b) is addressed to all victims as per the definition in the *Declaration* and not only to victims of certain offences.

Further, section 6(b) is concerned with 'victims' presenting views and concerns and not 'witnesses'. This differentiation suggests that victim participation, as envisioned by section 6(b), differs from the participation of a witness. Such interpretation is supported by the explanations on victim participation at the International Criminal Court ('ICC'), where eligible victims can participate in proceedings on the international level. Modelled after section 6(b) article 68 (3) of the Rome Statute of the International Criminal Court allows 'victims' to 'present views and concerns' in proceedings before the ICC 'where their personal interests are affected'.[60] Victim participation in the sense of section 68 (3) of the Rome Statue of the ICC has been characterised as voluntary participation that allows victims to communicate their views and concerns, in comparison to witness participation which serves the interests of the court and consists of testifying on a particular matter in question.[61] The same differences between 'witnesses' and 'victims', as described by the ICC, exist on the national level in Member States. Thus it is not sufficient for Member States to point out that victims may testify as witnesses to meet the obligation contained in section 6(b).

(iii) 'Where their Personal Interests are Affected'

This chapter has identified that section 6(b) requires Member States to allow victims to present views and concerns. Member States are further under an obligation to ensure that criminal justice

---

[59] *Declaration* s 1.
[60] *Rome Statute of the International Crimianl Court* preamble, 17 July 1998, 2187 UNTS 90 (the 'Rome Statute').
[61] International Criminal Court, *Booklet Victims Before the International Criminal Court, A Guide For the Participation of Vicitms in the Proceedings of the Court* (International Criminal Court) 10; see further explanations in Solange Mouthaan, 'Victim Participation at the ICC For Victims of Gender-Based Crimes: A Conflict of Interests' (2013) 21 *Cardozo Journal of Internatioanl and Comparative Law* 619, 620.

authorities can take these views and concerns into consideration in their decision-making process. However, the question arises as to when victims should be able to present their views and concerns to decision-makers. Section 6(b) states that the victim should be able to do so 'at appropriate stages during proceedings where their personal interests are affected'. However, the section remains silent on what stages of the proceedings are appropriate.

This thesis focuses on the trial and sentencing stages which are established parts of criminal proceedings. However, the question remains whether victims' personal interests may be affected during these stages. The ordinary meaning suggests that it is not necessary that any legal or financial interests the victim may have, such as, receiving a compensation order, must be affected before the victim can present views and concerns. Rather it is sufficient that 'personal interests' are affected. Furthermore, the term 'affected' in its ordinary meaning suggests that it is sufficient that the interests are influenced in some way without having to be severely influenced. This indicates that a personal interest of a victim, for example, wanting to be heard at the trial and sentencing stage, is sufficient to fulfil this requirement of section 6(b). Thus the threshold for assuming that victims' interests are affected in light of section 6(b) is very low. Assuming a low threshold in regards to an 'affected personal interest' is supported by the objects and purpose of the *Declaration* in general and section 6(b) in particular. As pointed out above, the objects of section 6(b) are to avoid secondary victimisation and assist victims in obtaining therapeutic benefits. Doing so, however, is only possible where the threshold for assuming that victims' personal interests are affected is fairly low. The above suggests that victims' interests are affected by a criminal offence and victims should therefore receive the right to present views and concerns at the trial and sentencing stage.

(iiii) Summary Interpretation of Section 6(b) of the Declaration

Based on the above interpretation of section 6(b) and the limitation of this thesis to the trial and sentencing stage, the following minimum requirements for Member States as contained in the section have been identified:

- Member States should put procedures and processes into place that allow victims to present views and concerns at the trial and sentencing stage.

- The procedures and processes should allow victims to present views and concerns in a role other than as a witness serving the interests of the court by testifying.

- The established procedures and processes should implement the objects of the *Declaration* — providing victims with benefits by assisting them in avoiding secondary victimisation and obtaining therapeutic benefits.

- The established procedures and processes should enable decision-makers to take views and concerns presented by victims into consideration in their decision-making process.

C Development of an Assessment Tool to Rate the Extent of Victim Participation

As pointed out above the level of participation possible in Germany and Australia will be measured with an assessment tool. This raises the question of how participation in Germany and Australia should be measured.

A three-grade assessment scale with three graduating steps will be used in this thesis to measure the possibilities for victim participation. The three steps range from 'High', to 'Intermediate' to 'Non-Existent'. Each grade is anchored with a definition relating to participation as positively defined by section 6(b). This scale provides quantitative means to assess Member States' conduct regarding the possibility for victim participation. The scale and the definitions used in this thesis are provided and described in Table 1 below.

Possibility for victim participation at the trial and sentencing stage	Requirements
High	Procedures are in place giving victims the right to present views and concerns on a range of issues in a role other than as a witness. Victims' views and concerns can be considered by decision-makers during the trial and sentencing stage.
Intermediate	Procedures are in place giving victims the right to present views and concerns on a more limited range of issues in a role other than as a witness. Victims' views and concerns can be considered by decision-makers during the trial and sentencing stage.
Non-Existent	No procedures are in place giving victims the right to present views and concerns during the trial and sentencing stage.

Table 1: Three-Grade Assessment Scale on the Possibility for Victims to Participate in the Criminal Process in Light of the Obligations Set Out in Section 6(b)

The reasons why a three-grade rating scale is an appropriate analytical tool and when similar rating scales have been applied in the past will be discussed below.

1 The Use of Rating Scales in the Financial Sector

Assessment scales to measure compliance and implementation of particular principles and regulations have predominantly been used in the past by different supranational organisations in the financial sector. For example, in 2012, the Basel Committee on Banking Supervision developed and put forward an assessment methodology consisting of a four-grade measuring scale to assess the full, timely and consistent implementation of the Basel III framework (regulations designed by the Basel Committee on Banking) into national law of its Members. The Basel III framework requires implementation in national law in order to become effective. Therefore, the 'Basel III Regulatory Consistency Assessment Program' aims to measure the implementation of the framework in Member's national law. The researchers applied a so-called 'compliance scale' ranging from compliant to non-compliant to determine the degree of compliance of Members with the framework.[62]

In 2009 the Financial Action Task Force ('FATF') FATF promoting 'policies to protect the global financial system against money laundering and terrorist financing' developed a methodology to allow third parties to assess a countries' compliance with the policies. For the assessment of compliance by Member States, FATF developed a four-grade assessment scale, similar to the one used by the Basel Committee.[63] For a similar task in the financial sector in 2007, the Organisation For Economic and Co-operation and Development ('OECD') has also published a Methodology for Assessing the Implementation of the OECD Principles of Corporate Governance for Sound Financial Systems in order to establish an ongoing dialogue to support implementation. They also relied on an assessment scale ranging from fully implemented to not implemented.[64] As a final example, a four-grade assessment scale has also been developed and proposed by the International Organisation of Securities Commission ('OICV') for assessing the implementation of 'Objectives and Principles of Securities' developed to protect investors and create fair, efficient and transparent markets.[65] Many Member States have made use of the suggested assessment tools and created

[62] Basel Committee on Banking Supervision, 'Basel III Regulatory Consistency Assessment Programme' (2012) <www.bis.org>. For an updated report on the work in progress on the programme see <http://www.bis.org/publ/bcbs264.pdf>.
[63] The Financial Action Task Force, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Sepcial Recommendations, <www.FATF-GAFI.org> (24 February 2004, updated February 2009).
[64] Organisation For Economic Co-Operation and Development, Methodology For Assessing The Implementation of The OECD Prinicples of Corporate Governance, <www.OECD.org> (2007).
[65] International Organization of Securities Commissions, Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation (October 2003) <www.IOSCO.org>.

country specific reports on the situation of implementation in their Member State.[66] All of the above proposed methodologies have in common that they are trying to determine the degree of implementation of particular norms in order to underpin subsequent policy discussions in relation to enhancing implementation. The following part of this thesis discusses the advantages of the application of an assessment scale and how it relates to the assessment in this thesis.

2 The Use of Rating Scales Regarding the Implementation of Section 6(b)

The question arises as to whether the application of an assessment scale, as has been used in the financial sector, could also produce useful results to underpin policy discussions regarding the implementation of the *Declaration* and victims' rights. In order to answer this question the similarities and differences of the approaches discussed above and the situation regarding the implementation of the positive obligation set out in section 6(b) will be identified to see if the situations are comparable. Below the question of how the use of a four-grade assessment scale to measure the degree of implementation is comparable to the situation of the implementation of a particular basic principle of the *Declaration* will be discussed.

First of all, the above methodologies using an assessment scale are all concerned with principles, objectives or recommendations made on a supra national level, providing a general framework for a specific matter (mostly banking and finance). Similarly, the assessment in this thesis is concerned with one particular basic principle of justice for victims of crime contained in a *Declaration* made on a supra national level providing a framework for the treatment of victims in relation to participation. Second, all principles, objectives or recommendations described above require implementation into domestic law in order to afford nationals the rights set out in the instrument. That means that none of the described frameworks are self-executing. As has been pointed out in Chapter 3, the *Declaration* including the basic principle set out in section 6(b) is not legally binding and not self-executing and therefore also requires implementation into national law in order to become effective. Third, the methodologies described above focus on principles, objectives and recommendations that are open to interpretation to accommodate the differences in the law of Member States. This is also the case regarding section 6(b) as has been described in detail above. Fourth, the situation of addressor and addressee regarding the above principles, objectives and recommendations and the basic principle of justice set out in the *Declaration* is comparable. The addressor of all instruments is a supranational agency while the addressee is a Member to the supranational agency and a national entity. Fifth, the purpose for using the assessment tool as set

[66] On the implementation of the FATF Recommendations see: <http://www.fatf-gafi.org/topics/mutualevaluations/>. On the implementation of the OICV objectives see: <http://www.imf.org/external/pubs/ft/scr/2012/cr12269.pdf>.

out in the above methodologies and the purpose for using an assessment tool in this thesis are similar. The above assessment methodologies state that the assessment tools are used to answer the question of to what extent the principles, objectives and recommendations have been implemented in national law (and/or practice) and to detect shortfalls to further policy discussion.[67] To detect the shortfalls in the implementation of section 6(b) and further policy discussion on what alternatives exist on the international level to influence the introduction of victims' participatory rights in Member States is also the purpose of the assessment in this thesis.

The comparability of the scope of this research and the scope of the above-described assessment methodologies suggests that the application of an assessment scale to measure the degree of participation is possible. It could also produce research results which help answer the first research question and to underpin subsequent responses to the challenges of victim participation in Germany and Australia.

By comparison to the rating scales applied to measure implementation in Member States in the financial sector, which generally consist of four-grades ranging from high to low, the rating scale used in this thesis uses three-grades to measure the extent of participation for victims possible in the two Member States ('High', 'Intermediate' and 'Non-Existent'). The modification of the rating scale used in this thesis from four to three-grades was necessary for the following reason.

The above named principles, objectives and recommendations in the financial sector place obligations on Member States that are generally more precise than the content of section 6(b).[68] Therefore, more specific assessment criteria can be derived from these principles than can be derived from section 6(b). The more assessment criteria there are the greater the possibility to differentiate between different levels of implementation. By comparison, section 6(b) places much more discretion in relation to the exact implementation upon Member States due to the structure of the different national justice systems. The minimum requirements identified above in part 2 B of this chapter thus only allow measuring if the possibility for victim participation is 'High', 'Intermediate', or 'Non-Existent'. Significant definitions to distinguish between intermediate level considerations, such as, for example, participation that is broadly possible and participation that is

[67] See, for example, International Organization of Securities Commissions, Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation (October 2003) <www.IOSCO.org>; The Financial Action Task Force, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Sepcial Recommendations, <www.FATF-GAFI.org> (24 February 2004, updated February 2009) 4.

[68] The content of the 'Objectives and Principles' of IOSCO, for example, are so specific that questions regarding its implementation can be asked which determine the level of assessment by member. See: International Organization of Securities Commissions, Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation (October 2003) <www.IOSCO.org>.

only partly possible, cannot be provided. This is due to the discretion that section 6(b) bestows upon Member States. Differentiation on the intermediate level is also not necessary to answer the research questions in this thesis. In order to underpin policy discussion in relation to victim participation it is sufficient to demonstrate where Member States provide high, intermediate or no possibilities for victim participation at the trial and sentencing stage. An 'Intermediate' or a 'Non-Existent' rating allows for further analysis on whether participatory rights could be extended and enhanced in the respective Member State. It also allows for analysis of what consequences an increase in victims' participatory rights would have for the rights of the defendant in the national criminal justice system.

The analysis in this thesis will also take into consideration whether the two Member States, Germany and Australia, could reject the enhancement and extension of participation rights based on the qualifications contained in section 6(b): 'without prejudice to the accused' and 'consistent with the national criminal justice system'.

D Possibility to Reject the Right to Present Views and Concerns Based on the Qualifications Contained in Section 6(b)

1 'Without Prejudice to the Accused'

Member States can refuse the implementation of section 6(b) if the introduction of such rights would be 'prejudicial to the accused'. While the *Declaration* aims to achieve justice for victims in Member States by encouraging them to implement the basic principles including the principle contained in section 6(b), the *Declaration* acknowledges that the introduction of victims' rights should not occur at the expense of the defendant's fair trial rights. This qualification clearly indicates that assisting victims in avoiding secondary victimisation and supporting them in obtaining closure cannot be seen as a justification for infringing upon defendants' procedural rights.[69]

This means that where victim input would render a violation of defendants' rights more likely, Member States can reject the introduction of such rights. Defendant's rights possibly affected include all rights introduced to secure a fair trial and avoid a wrongful conviction. Thus section 6(b) prioritises the defendant's right to a fair trial over the victim's right to participate whenever it seems that victim input renders violations of defendants' rights more likely.

[69] Similar arguments in Orth, above n 52, 323.

However, Member States are not only able to reject victims' participatory rights based on the qualification discussed above but also based on the argument that the introduction of victims' participatory rights is not 'consistent with the relevant national criminal justice system'.

2 'Consistent with the Relevant National Criminal Justice System'

The second qualification allows Member States to reject victim participation on the basis that this is not 'consistent' with their national criminal justice system. The *Declaration* itself remains silent on when victim participation can be considered 'consistent' with the national criminal justice system. However, Joutsen, interpreting this part of the *Declaration*, explains that if victim involvement at a certain stage, here the trial and sentencing stage, 'does not accord with the criminal policy of a country, [this] country can argue that such involvement is inappropriate and not consistent with the national criminal justice system'.[70] This interpretation appears convincing particularly considering the significant concerns in relation to section 6(b) raised by delegates from common law countries in the drafting process of the *Declaration*.[71] Therefore, the second qualification contained in section 6(b) allows Member States to reject victim participation where this is not consistent with their criminal justice policy and thus inconsistent with their system.

Whether Germany and Australia could refuse a possible expansion of victims' participatory rights based on these qualifications and the consequences this has for the potential success of the proposed *Convention* is analysed in Chapters 6 and 7 of this thesis.

IV CONCLUSION TO CHAPTER 4

This chapter has introduced the methodology that will be applied in Chapters 5 to 7 to assess victim participation in light of section 6(b) under German and Australian law. The next chapter, Chapter 5, will apply the methodology by considering to what extent victims can participate in Germany and Australia at the trial and sentencing stage.

[70] Joutsen, above n 5, 180.
[71] See, for example, the concerns uttered by the representative of Great Britain at the 7th Congress in relation to section 6(b) of the Declaration. According to this delegation the Declaration should not enable victims to take part in sentencing considerations, case disposal and the trial process in general. See: 7th Congress Report, above n 49, 157.

Chapter 5: Victims' Views and Concerns at the Trial and Sentencing Stage in Germany and Australia

I INTRODUCTION

The purpose of this chapter is to address the first research question: to what extent can victims present views and concerns during the trial and sentencing stage in Germany and Australia in light of section 6(b) of the *Declaration*? The chapter commences with an analysis of the current legal situation in both Member States in regards to victim participation. After applying the three-grade assessment scale developed in Chapter 4 to the individual circumstances of Australia and Germany it is suggested that the possibilities for victim participation at the trial and sentencing stage vary between 'Non-Existent', 'Intermediate' and 'High' for victims in either Member State.

II STATUS QUO OF VICTIM PARTICIPATION RIGHTS DURING THE TRIAL AND SENTENCING STAGE IN GERMANY AND AUSTRALIA

A Germany

In Germany, PAPs[1] who are formally recognised in proceedings and can participate next to the public prosecution, can present views and concerns on a significant number of issues at trial. These include the introduction of evidence and the questioning of the accused and other witnesses. Applicants to the adhesion procedure can present views and concerns on fewer issues during the criminal trial than PAPs can. This procedure allows victims who have suffered financial loss through a criminal act to bring civil claims against the accused during the criminal process. The judge decides on the civil matters and criminal charges in the same trial. Victims as applicants to the adhesion procedure can present views and concerns that are relevant to their civil claim.[2] Victims who are ineligible to take up one of the above roles or who are eligible but refrain from participating in such a way have more limited opportunities to present views and concerns as will be analysed below.

[1] *StPO* ss 395-402.
[2] Ibid ss 403-406(c). Eligible victims can exercise these participation rights in all German criminal courts. That includes local courts, district courts and higher courts.

1 Victims With a Formal Role

The *StPO* allows certain victims to take up a very active role at trial and to present views and concerns by joining the prosecution as a PAP.[3]

(a) Participation as a PAP

The right to act as a PAP was first implemented in the *German Criminal Procedure Code* of 1877. Although still in force today in an amended version, it has since been expanded in a number of reform acts.[4] Victims who participate as a PAP during the trial are not part of the public prosecution and can therefore exercise their rights completely independently. A victim who is acting as PAP, or their legal representative, has a number of rights during the main trial[5] which victims without such a formal role cannot exercise. Unlike victims who only act as witnesses in Germany, the PAP has the right to be present during the main trial even if he still has to testify at a later stage of the proceedings.[6] In addition, the PAP or their legal representative has the following rights: 'to be heard at trial whenever the prosecution is heard',[7] 'to request evidence',[8] 'to refuse judges in case of partiality',[9] 'to question the accused, witnesses and experts',[10] 'to object to court orders and questions of the trial parties',[11] and 'to make statements' including a final pleading.[12] PAPs also have the right to be heard at trial in regards to the facts and consequences of the crime.[13] The PAP has very broad rights during the criminal trial and thus has been granted a 'High' number of possibilities to present views and concerns at the trial and sentencing stage.[14]

---

[3] In relation to participation in the German inquisitorial system see also analysis in Chapter 2, part IIIA.
[4] Germany has been united as the German Reich (German Empire) since 1877 with a unified Criminal Procedure Code first enacted in 1877. See: *Reichs Strafprozessordnung* [(Reich) Criminal Procedure Code] (Germany) Reichsgesetzblatt (RGBl), 253, 1 February 1877 (entered into force 1 October 1879) ('RStPO').
[5] The PAP also has certain rights during other stages of proceedings. Due to the limitation of this thesis to the trial and sentencing stage, rights available to the PAP during other stages of proceedings are not discussed here.
[6] *StPO* s 397(2).
[7] Ibid s 397.
[8] Ibid ss 397(1), 244(3)-(6).
[9] Ibid ss 397(1), 24, 31.
[10] Ibid ss 397(1), 240(2).
[11] Ibid ss 397(1), 242, 238(2).
[12] Ibid ss 3971(1), 257, 258.
[13] Marlene Hanloser, *Das Recht des Opfers auf Gehoer im Strafverfahren* (Peter Lang, 2010) 139. The PAP furthermore has the right to appeal court decisions independently from the other parties under certain circumstances, see StPO s 401. As this thesis focuses on the trial and sentencing stage this right will not be discussed further.
[14] For an overview of the *Nebenklage* see in general: Helmut Kury and Michael Kilchling, 'Accessory Prosecution in Germany: Legislation and Implementation' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice, International Perspectives* (Carolina Academic Press, 2011) 4; Michael K. Browne, 'International Victims' Rights Law. What Can Be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of A "Victim's Rights Amendment" to its Constitution?' (2004) 27 *Hamline Law Review* 15, 29-37.

However, not all victims are eligible to participate as PAPs. According to German law, victims of certain offences, usually of serious crime, are eligible to participate in such a role.[15] Additionally, victims of other offences not explicitly stipulated in the *StPO* may be eligible to participate where the courts find their participation indispensable to safeguard their interests — particularly in light of the consequences of the crime for the victim.[16] Whilst courts may find victims of other offences eligible to participate as a PAP this decision is in the court's discretion and does not provide victims in general with an explicit right to participate.[17]

(b) Participation as an Applicant to the Adhesion Procedure

Victims can also participate and present views and concerns at trial in Germany to some extent by initiating an adhesion procedure. In Germany, every person who can 'claim that they have directly suffered financial loss resulting from a criminal act committed' or who can claim that 'they are the heir of such person' can make an application for an adhesion procedure during the criminal trial.[18] The court, in an adhesion procedure, decides on whether the victim, as the applicant, has a valid civil law claim for damages against the defendant. The determination occurs during the criminal trial. According to German case law and literature, once the victim has filed such an application, he has the following rights: to be heard during the main trial in relation to the civil claim, to ask questions and make requests for evidence to be introduced — if the requested evidence holds relevance for the outcome of the civil claim — and, arguably, to make a closing statement.[19] For

[15] *StPO* s 395. Criminal acts allowing participation as a PAP include sexual crimes, murder, manslaughter and other violent offences.

[16] Ibid s 395(3). The introductory bill's explanatory memorandum remains rather vague in regards to when victims should be able to participate in other than the named cases. It states that in order to determine whether victims should participate or not the overall situation of the victim has to be taken into consideration, see: Bundesregierung, Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) identical with Gesetzesentwurf der Fraktionen der CDU/CSU und SPD Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BT-Drucks [German Parliament printed matter number] 16/12098 (3 March 2009) 31.

[17] Criticism that the discretion of the court may lead to different treatment of similar cases is expressed by Guelsen Celebi, 'Kritische Wuerdigung des Opferrechtsreformgesetzes' (2009) *Zeitschrift fuer Rechtspolitik* 110, 111. The German Federal Court of Justice has recently found that Private Accessory Prosecution in case of the offence of 'breach of trust' in a case where the damage amounted to more than 13 million Euro was as such not sufficient to satisfy the criteria of s 395(3) StPO. The Court, however, clarified that trial court's decision to allow PAP participation could not be overturned on appeal as this discretionary power of the court was not subject to review. See: Bundesgerichtshof [German Federal Court of Justice], 5 StR 523/11, 09 May 2012. Arguing for a restricted use of this section are Matthias Jahn and Jochen Bung, 'Die Grenzen der Nebenklagebefugnis' (2012) 12 *Strafverteidiger* 754, 758. In regards to the question of whether the introduction of such right has lead to a 'paradigm shift' in German criminal procedure see Chapter 7.

[18] *StPO* ss 403-406c.

[19] Bundesgerichtshof [German Federal Court of Justice], 2 StR 68/55, 21 September 1956 reported in Neue Juristische Wochenschrift 1956, 1767; Bayerisches Oberlandesgericht [Bavarian Higher Regional Court], 1 St 746/52, 15 April 1953 reported in Neue Juristische Wochenschrift 1953, 1116 (1117); Eberhard Siegismund, 'Ancillary (Adhesion) Proceedings in Germany as shaped by the First Victim Protection Law: An Attempt to Take Stock' (Paper presented at the 112th International Training Course, Japan, 2000) 106; Jo-Anne Wemmers, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121, 126; Marion Brienen and Ernestine Hoegen, 'Compensation Across Europe: A Quest for Best Pratice' (2000) 7(4) *International Review of Victimology* 281;

this reason, the adhesion procedure has been described as 'a bit of civil law tied onto the criminal justice process'.[20] However, according to German law, victims who have not experienced any financial loss through the criminal act or who do not want to 'put a price tag'[21] on any harm suffered are not eligible participants of an adhesion procedure.

The adhesion procedure was originally introduced in German law in 1943 due to financial restrictions and the need to save administrative expenses during the Second World War.[22] The adhesion procedure held the advantage that civil and criminal trials could be combined and therefore was expected to save administrative costs.[23] Despite the fact that the adhesion procedure allows victims, to some extent, to present views and concerns about the civil claim its introduction was largely based on financial considerations and not necessarily on the desire to give victims a voice.[24] Notwithstanding the fact that the adhesion procedure has existed since the first half of the 20th century in Germany, it had been used sparingly and had sometimes been referred to as a 'stillbirth'.[25] Its limited use was perhaps based on the fact that conducting an adhesion procedure required the criminal judge's consent to do so. It appeared, however, that criminal courts frequently withheld their consent because they had little interest in dealing with and deciding on questions of civil law.[26] For these reasons applications were frequently dismissed on the basis that the adhesion procedure 'would lengthen the criminal trial' this being one of the reasons contained in legislation that allowed for a dismissal.[27] The legal situation has changed since 2004 and judges are no longer able to categorically dismiss an application solely based on the ground that proceedings could be increased in length. A dismissal now requires an expected 'significant' increase in trial length.[28]

Stoffers and Moeckel argue that an applicant to the adhesion procedure does not have the right to make a closing statement in Kristian Stoffers and Jens Moeckel, 'Beteiligtenrechte im Strafprozessualen Adhaesionsverfahren' (2013) *Neue Juristische Wochenschrift* 830, 831.

[20] Wemmers, above n 19, 125.

[21] Ibid.

[22] Stoffers and Moeckel, above n 19, 830; Joachim Hermann, 'Die Entwicklung des Opferschutzes im Deutschen Strafrecht und Strafprozessrecht- eine unendliche Geschichte' (2010) 3 *Zeitschrift fuer Internationale Strafrechtsdogmatik* 236, 236.

[23] Michael Kilchling, *Die Stellung des Verletzten im Strafverfahren* (Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht, 1992) 75.

[24] Kerstin Spiess, *Das Adhaesionsverfahren in der Rechtswirklichkeit* (Lit Verlag, 2008) 12.

[25] Thomas Weigend, 'Viktimologische und Kriminalpolitische Ueberlegungen zur Stellung des Verletzten im Strafverfahren' (1984) 96(3) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 761, 765; See further: Michael Kaiser, 'The Status of the Victim in the Criminal Justice System According to the Victim Protection Act' in G Kaiser, H Kury and H J Albrecht (eds), *Victims and Criminal Justice: Legal Protection, Restitution, and Support* (Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht, 1991) 543, 561.

[26] Discussed in Kilchling, above n 23, 75. Suggested in Hermann, above n 22, 243.

[27] Kilchling, above n 23, 76.

[28] Klaus Haller, 'Das "kraenkelnde" Adhaesionsverfahren- Indikator struktureller Probleme der Strafjustiz' (2011) *Neue Juristische Wochenschrift* 970, 970. *StPO* s 406(1).

Whether a greater number of adhesion procedures will now occur in German criminal trials is uncertain. Figures published in 2011 still suggest that the adhesion procedure is underutilised.[29]

(c) Participation as a Private Prosecutor

The question arises of whether private prosecution by victims in Germany could also be an avenue to allow victims to present views and concerns in light of section 6(b). The right to participate as a private prosecutor in Germany differs significantly from the right to private prosecution in common law jurisdictions which will be analysed in more detail in part II of this chapter.

Private prosecution in different forms is anchored in German legal history. Criminal prosecution during the Early Middle Ages (circa 476 AD to 900 AD) was conducted by the victim.[30] Crime was perceived as an offence against the individual victim or his kinship group.[31] Under the law at the time no investigations into crimes by the state existed and the victim had to initiate proceedings against the offender to bring them to the state's attention.[32] However, during the High Middle Ages (circa 1000 AD to 1300 AD) a shift away from private to public prosecution occurred because private prosecution proved to be ineffective in investigating criminal acts.[33] With the introduction of the inquisitorial trial, in which no private prosecutor existed but the prosecution of crimes was the responsibility of an inquisitorial judge, the victim appeared to have no role except for that of a witness.[34] One of the first codifications of the state's obligation to conduct public prosecution instead of relying on private prosecution by the victim, can be found in the *Penal Code* of 1532[35] introduced by the Emperor Charles V. The *Penal Code* of 1532 stated that the prosecution of

---

[29] Ibid 971.

[30] Peter Becker, *Eine kurze Einfuehrung in die Deutsche Rechtsgeschichte* (GRIN Verlag, 2011) 13.

[31] Grimm, Deutsche Rechtsaltertümer (4 ed, 1899), 401, cited in: Markus Loeffelmann, 'The Victim in Criminal Proceedings: a Systematic Portrayal of Victim Protection under German Criminal Procedure Law (Part 1)' in UNAFEI (ed), *Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power--Twenty Years After its Adoption* (2005) 31, 31; Stephen Meder, *Rechtsgeschichte: Eine Einfuehrung,* UTB fuer Wissenschaft (UTB, 3 ed, 2008) 120-121. Eberhard Schmidt, *Einfuehrung in die Geschichte der Deutschen Strafrechtspflege* (Vandenhoeck&Ruprecht, 3 ed, 1995) 6.

[32] Gunter Deppenkemper, *Beweiswuerdigung als Mittel prozessualer Wahrheitserkenntnis,* Osnabruecker Schriften zur Rechtsgeschichte (Universitaet Osnabrueck, V&R Unipress GmbH, 2004) 96.

[33] John H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (The Lawbook Exchange, Ltd, illustrated reprint ed, 2005) 152. Becker believes that this development is connected to increased attention of the church to prosecute heretics during these times. The prosecution of heretics, however, could not be conducted via private prosecution because the crimes committed by heretics were not against another person but against the church and God. See: Becker, above n 30, 21. See also: Thorsten Guthke, *Die Herausbildung der Strafklage: Exemplarische Studien anhand Deutscher, Franzoesischer und Flaemischer Quellen,* Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas/Fallstudien (Boehlau Verlag, 2009) 105.

[34] Deppenkemper, above n 32, 164; Schmidt, above n, 31, 86; Eva Luetz-Binder, *Rechtswirklichkeit der Privatklage und Umgestaltung zu einem Aussoehungsverfahren* (Peter Lang, 2009) 31. The inquisitorial judge dominated these proceedings. See discussion in: John H Langbein, 'The Constitutio Criminalis Carolina in Comparive Perspective: An Anglo-American View' in Peter Landau and Friedrich-Christian Schroeder (eds), *Strafrecht, Strafprozessrecht und Rezeption, Grundlagen, Entwicklungen und Wirkung der Constitutio Criminalis Carolina* (Klostermann, 1984) 215, 216-217.

[35] Referred to as *Peinliche Gerichtsordnung* or *Constitutio Criminalis Carolina*.

serious crimes was a matter that was going to be dealt with by the state under certain circumstances.[36] Although private prosecution was not directly prohibited, with the introduction of the *Penal Code* of 1532 it decreased drastically. This was the case, at least in part, because the *Penal Code* of 1532 stated that the private prosecutor had to pay damages to the accused if the accused was acquitted after the trial to compensate his shame.[37] Furthermore, the payment had to be deposited before the trial commenced and a private prosecutor who was unable to deposit the amount could be incarcerated.[38] Burdened with these risks, many victims refrained from initiating private prosecution.[39]

A public prosecution service, independent from the courts was established in Germany for the first time in the first half of the 19th century.[40] The existence of a public prosecution service made private prosecution largely superfluous. With the introduction of the *StPO* in 1877 the State was granted a monopoly over prosecutions.[41] This means that in Germany the public prosecution, and not the victim or the general public, has the exclusive right to prosecute criminal acts. However, as an exception to this monopoly, the victim has been granted the right to carry out private prosecutions in certain, limited cases explicitly named in legislation.[42] The intention behind the (re)-introduction of the right in the *StPO*, however, was not to give up the monopoly of public prosecution but rather to decrease their workload for less serious offences of a more private character.[43] Such minor matters explicitly mentioned in the *StPO* include, for example, libel, threat and property damage. Due to the limited scope of private prosecution it can only be conducted in the few cases explicitly set out in legislation.[44]

Furthermore, private prosecution has proven difficult for victims in practice for the following reasons. Firstly, victims have to conduct their own investigation without assistance from state

[36] *Penal Code* 1532 s 6 sets out that the inquisitorial process is conducted by the authorities under certain circumstances.
[37] Deppenkemper, above n 32, 149.
[38] *Penal Code* 1532 s 12.
[39] Deppenkemper, above n 32, 150.
[40] Public Prosecution, for example, was made obligatory in all of Prussia with decree from 03 January 1849. For a historical overview of the development of the public prosecution service see: Ludwig Frey, *Die Staatsanwaltschaft in Deutschland und Frankreich* (Verlag von Ferdinand Ente, 1850), 53-234.
[41] Germany had been united again as the German Reich (German Empire) since 1877.
[42] *RStPO*. These rights were kept on in the StPO after the legislation was amended and revised in 1950 by the Gesetz zur Wiederherstellung der Rechtseinheit auf dem Gebiet der Gerichtsverfassung, der buergerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts (Act to Restore the Legislation in the Area of the Court Constitution Act, Civil law, Criminal law and Costs) 12 September 1950, Federal Law Gazette Part 1, 455 after the break down of the German State under the Nazi regime. See: 3. Verordnung zur Vereinfachung der Strafrechstpflege (3rd Ordinance to Simplify Criminal Justice) 29 Mai 1943.
[43] Monika Ackermann, *Die Rechtsbehelfe des Verletzten gegen die negative Anklageentscheidung des Staatsanwaltes in den USA* (Herbert Utz Verlag, 2006) 36.
[44] *StPO* s 374. For statistical information on the number of private prosecutions occurring in German courts see: below n 50.

investigation authorities. As such, private prosecutors do not have any of the investigatory powers the police have when conducting an investigation. Thus, it may not be possible for many private prosecutors to investigate the criminal offence in a manner that will allow them to present sufficient evidence at trial.[45] Secondly, private prosecutors are obligated to finance the private prosecution by paying an advance on the trial fees, and possibly also a security deposit for the potential costs arising for the accused before a trial can commence.[46] Where the private prosecutor does not succeed with the prosecution they can be ordered to pay the costs of the proceedings and also the costs necessary for the defence of the accused, possibly including the costs for the defence lawyer. Private prosecutors are thus under a high cost risk in proceedings.[47] The cost distribution in private prosecutions, despite the fact that Legal Aid is available for eligible private prosecutors, has been described as favouring financially able victims over victims without financial means.[48] Thirdly, the court can terminate private prosecutions at any time if it finds the perpetrator's guilt to be negligible, which has been found to occur frequently in practice.[49] Consequently, private prosecution in Germany rarely occurs.[50] It has been argued in academic scholarship that German law treats private prosecutors unfavourably due to the above considerations and that private prosecution in its current form is not worth maintaining.[51]

The above analysis suggests that private prosecution, subject to the identified burdens in Germany, does not have the potential to avoid secondary victimisation and provide closure for victims, as the objects of section 6(b) identified in Chapter 4.[52] This is because victims are responsible for conducting their own investigation without the help and powers of state investigation authorities and are also responsible for presenting a case in a way that satisfies the burdens of proof in court. This can be a stressful and difficult undertaking for private individuals. Furthermore, great cost implications and financial risks exist for the private prosecutor. Due to these risk factors it seems unlikely that victims are able to obtain closure and avoid victimisation through the route of private prosecution. Therefore, private prosecution possible in Germany is unlikely to be seen as an implementation of section 6(b).

---

[45] Luetz-Binder, above n 34, 40.
[46] *Gerichtskostengesetz* [Court Fees Act] 5 May 2004 (Federal Law Gazette I p. 718) s 67; *StPO* s 379.
[47] *StPO* s 471(3).
[48] Luetz-Binder, above n 34, 136.
[49] Ibid s 383(2); Klaus Schroth, *Die Rechte des Opfers im Strafverfahren* Praxis der Strafverteidigung (C.F. Mueller Verlag, 2005) 212.
[50] Overall in 2011 out of 772867 terminated criminal matters in the lower courts only 656 matters were private prosecution, less than 1%. See: Statistisches Bundesamt [Federal Statistical Office], 'Rechtspflege Strafgerichte [Criminal Procedure Criminal Courts]' (Statistisches Bundesamt, 2012), table 2.1.
[51] Schroth, above n 49, 212. For discussion of German academic scholarship including a detailed literature review on the argument that private prosecutors are treated unfavourably under German law see: Luetz-Binder, above n 34, 136.
[52] On the analysis of the object of section 6(b) of the Declaration refer to the interpretation in Chapter 4, part III.

The above has shown that victims acting as PAPs have a 'High' number of possibilities to present views and concerns at the trial and sentencing stage in Germany. Participants to the adhesion procedure have the opportunity to present views and concerns relevant to their financial claim. While the opportunities to present views and concerns for these applicants may be more limited than for PAPs they nevertheless have an 'intermediate' number of possibilities. Other victims have more limited opportunities to present views and concerns as will be analysed in the following part of this chapter.

2 Possibilities for Victims to Present Views and Concerns Without a Formal Role

According to the interpretation of section 6(b) applied in this thesis all victims and not just victims of certain, more serious, offences should be given the opportunity to present views and concerns. However, in Germany, victims without a formal role in proceedings are restricted to presenting views and concerns at trial exclusively in the role of a witness. German victims, who testify as witnesses, have the right to testify without interruption by questions and remarks from the court, public prosecution and defence.[53] This means that victims can testify in an uninterrupted narrative form. Yet, at the same time this does not mean that the victim can freely present views and concerns as a witness about any possible issue they wish to bring up, for example the consequences of the crime on them. In Germany, the role of a victim witness is to testify on the matter relevant to the criminal trial, for example how the crime has occurred.[54] The victim has no explicit right to address other issues they wish to address in order to bring them to the court's attention. Ultimately, where the victim is not required to testify as a witness during the trial, the victim is not afforded any possibilities to present views and concerns at trial. Furthermore, as pointed out in Chapter 4, the *Declaration* refers to 'victims' being able to present views and concerns as differentiated from 'witnesses'. Victim participation is interpreted in this thesis as voluntary participation that allows victims to communicate their views and concerns, by comparison to witness participation which is obligatory, serves the interests of the court and consists of testifying on a particular matter in question.[55] Thus being able to testify as a witness cannot in itself be considered an implementation of section 6(b).

---

[53] *StPO* s 69(1). Victims in Germany without a formal role have received certain rights, such as, the right to receive information on particular events, *StPO* ss 406d, 406h, the right to inspect court files under certain circumstances, *StPO* s 406e, the right to be legally represented either as a witness when testifying, *StPO* s 406f, or as a victim eligible to participate as a Private Accessory Prosecutor but refusing to do so, *StPO* s 406g. However, this thesis focuses exclusively on the right to present views and concerns as a victim at trial and does not explore other victim related rights in Germany.

[54] Ibid s 69(1).

[55] See explanations in: International Criminal Court, *Booklet Victims Before the International Criminal Court, A Guide For the Participation of Vicitms in the Proceedings of the Court* (International Criminal Court) 10; Solange Mouthaan, 'Victim Participation at the ICC For Victims of Gender-Based Crimes: A Conflict of Interests' (2013) 21 *Cardozo Journal of International and Comparative Law* 619, 620.

However, victims who are required to testify as witnesses have the possibility to present views and concerns through their legal representative to a limited extent.[56] In Germany, the victim's legal representative can be present when the victim is being questioned as a witness at the trial. Prior to questioning, the legal representative can make applications on behalf of the victim, including the exclusion of the public[57] and the defendant[58] during examination of the victim witness. Furthermore an application can be made for allowing victims to testify using video technology.[59] The task of the legal representative during examination is to object to abusive, compromising, disrespectful, suggestive or leading questions thereby ensuring compliance with existing witness protection legislation.[60]

However, German law generally does not grant the victim witness' legal representative the right to ask questions and thereby present the victims' views and concerns during the trial and sentencing stage. In 2004, the Bundesgerichtshof (German Federal Court of Justice)[61] had to decide upon appeal whether a trial judge's decision to grant the victim's legal representative the right to ask occasional questions during criminal proceedings constituted a ground of appeal based on an error of law.[62] The appeal, however, was ultimately unsuccessful. The Federal Court held that whilst a victim's legal representative generally has no explicit right to ask questions during criminal proceedings, it is in the trial judge's discretion to grant him such a right on occasion during the trial. The fact that the Federal Court explicitly pointed out the absence of a general right for a victim's legal representative to ask questions suggests that victim witnesses only have limited opportunities to present views and concerns at trial. Their input is mostly related to issues concerning the victim's protection during testifying as a witness. No opportunities for victims to present views and concerns during the trial and sentencing stage exist, where victims are not required to testify as a witness.[63]

---

[56] *StPO* s 68b.
[57] *Gerichtsverfassungsgesetz* [Courts Constitution Act*]* (Germany) [Kathleen Mueller-Rostin Trans, Uebersetzung des Gerichtsverfassungsgesetzes] (Juris 2011) ("GVG"), s 171b.
[58] *StPO* s 247(1).
[59] Ibid s 247a.
[60] Ibid ss 68a, 241(2).
[61] The Bundesgerichtshof ('BGH') is Germany's highest court of civil and criminal jurisdictions. For further information on the structure and work of the BGH see: < http://www.bundesgerichtshof.de/SharedDocs/Downloads/EN/BGH/brochure.pdf?__blob=publicationFile>.
[62] Bundesgerichtshof [German Federal Court of Justice], 1 StR 424/04, 11 November 2004 reported in Neue Zeitschrift fuer Strafrecht 2005, 396.
[63] Concurring Hanloser asserts that victims who are not eligible to participate as PAPs have no right to be heard in German criminal procedure: above n 13, 146.

3 Summary

Victims participating as PAPs can present views and concerns to a significant degree during the trial and sentencing stage. Victims who testify as witnesses can present views and concerns to a limited extent through their legal representative in regards to matters relating to testifying. Victims as applicants to the adhesion procedure can present their views only if they are relevant for their civil claim. Victims who have no special role and who are not required to testify cannot present views and concerns at trial at all, as no general right to participate at trial for all victims exists in Germany. The German Parliament has rejected the introduction of a general right for every victim to present views and concerns at trial and thus to participate in a role different to that of a witness. This limitation has been justified by stating that only particularly 'deep violations of a victim's personal sphere', for example violent acts towards the victim, can justify their participation at trial.[64] It has also been argued that the participation of every victim who so desires at trial would be alien to German criminal justice and would lead to a general redistribution of roles in German criminal trials.[65] The right to be heard at trial, other than as a witness, has therefore only been afforded to victims who are directly affected by the proceedings by joining the prosecution as PAPs and/or applicants to the adhesion procedure, and not to those victims who are merely called as witnesses.[66]

Having considered the situation for victims to present views and concerns in Germany, the following part of this chapter will explore the current situation for victims to present views and concerns at the trial and sentencing stage in Australian jurisdictions.

B Australia

As observed in Chapter 2, victims in the adversarial system are not considered parties to the proceedings and therefore usually have no standing in criminal trials.[67] In general, victims have limited possibilities to present views and concerns during the trial and sentencing stage in Australian jurisdictions.

---

[64] Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003) 13.

[65] For a detailed discussion of this view see Chapter 7.

[66] Ralf Peter Anders, 'Straftheoretische Anmerkungen zur Verletztenorientierung im Strafverfahren' (2012) 124(2) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 374, 380.

[67] Standing, *locus standi*, as used in this thesis means the right to participate and be heard at trial. Regarding standing of sexual assault victims in relation to application for disclosure of privileged communication in NSW see explanations below, n 70 and in Chapter 6.

1 Possibilities to Present Views and Concerns During the Trial and Sentencing Stage

During the trial stage in adversarial proceedings victims are potential witnesses, who may be called — usually by the prosecution — to present their account of the facts in relation to a particular criminal act.[68] Victims in Australia, however, have no opportunities to present views and concerns in relation to the crime at trial as such and can only be heard in regards to answering the particular questions they are asked as witnesses.[69] For this reason their role has been described as 'reactive' rather than 'active'.[70] As pointed out in Chapter 4 the Declaration refers to 'victims' being able to present views and concerns as differentiated from witnesses. Thus being able to testify as a witness cannot be considered an implementation of section 6(b).

One avenue for victims to present views and concerns during the contested trial, however, may be for the victim to act as a private prosecutor. The common law right to private prosecution for everyone, including victims, exists in all Australian jurisdictions.[71] In some jurisdictions in Australia, the right to private prosecution is explicitly set out in legislation. According to legislation in New South Wales, for example, a 'common informer'[72] has the right to commence private prosecution.[73] In that case the defendant is summoned to court to answer the charges.[74]

Private prosecution under common law is a historically developed right going back to the Early Middle Ages when a criminal justice system in a modern sense did not exist in most of England.[75] Similarly to the situation in Germany described above, an offence was considered a wrong against the individual victim or his kinship group and not against the state. The victim or his kinship group conducted revenge against an offender through battle.[76] Between the 13th and 15th century a so-

---

[68] Larry C Wilson, 'Independant Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services' (2005) 23(2) *Windsor Yearbook of Access to Justice* 249, 261.
[69] Edna Erez, 'Victim Impact Statements' (Australian Institute of Criminology, 1991); State Government Victoria 'A Victim's voice Victim Impact Statements in Victoria- Findings of an Evaluation into the Effectiveness of Victim Impact Statemetns in Victoria' October 2009, 16.
[70] Stephanos Bibas and Richard Bierschback, 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114(1) *The Yale Law Journal* 85, 136. While victims generally have no right to formally participate at trial in Australia, in New South Wales sexual assault victims have received a limited right to standing on decisions regarding the prevention or restriction of disclosure of sexual assault communications since 2010. See *Criminal Procedure Act* 1986 (NSW) s 299A and further explanations in Chapter 6.
[71] Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006) 11; Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2011) 57.
[72] *Criminal Procedure Act* 1986 (NSW) s 14.
[73] Ibid s 49.
[74] Ibid s 54. The right is also discussed in Tyrone Kirchengast, 'Private Prosecution and the Victim of Crime', Macquarie Law Working Paper Series, April 2008, 3.
[75] With further explanations on the role of victims during the early Middle Ages: Juan Cardenas 'The Crime Victim in the Prosecutorial Process' (1986) 9 *Harvard Journal of Law and Public Policy* 357, 359.
[76] See in general: Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002; Sidman Andrew, 'The Outmoded Concept of Private Prosecution' (1975-1976) 25 *The American University Law Review* 754.

called King's attorneys (*Attornatus Regis*) was introduced in proceedings, referred to as Attorney-General from the 15th century onwards.[77] The Attorney Generals were responsible for conducting particular litigations in royal courts to maintain the interests of the King.[78] Despite these developments, it has been suggested that the individual victim continued to be an important actor by conducting private prosecutions until the establishment of a modern police and public prosecution service.[79] Early Australian legislation allowed private prosecution in criminal proceedings which had been common in England.[80] Subsequently, in the mid-19th century, in the Australian colonies, a shift away from private to public prosecution occurred that reduced the role of the victim largely to that of a witness for the prosecution. Thereby the victim, despite being able to conduct private prosecutions under common law, practically lost the decision-making power to the public prosecutor.[81]

Victims as private prosecutors in Australia face similar problems to the ones outlined above for private prosecutors in Germany. Conducting private prosecution in Australia is costly for victims and Legal Aid is usually not accessible. Additionally, private prosecution is time intensive for victims, as it requires them to discover evidence and develop strategies to run the trial. Overall it holds few benefits for the individual victim.[82] Furthermore, private prosecutions may be stayed, terminated or taken over by the state on various grounds.[83] Finally, private prosecutors must have the right skill set and the evidence to prove a case 'beyond a reasonable doubt', which constitutes a high standard of proof. This may be a difficult undertaking for a private individual without police investigation powers.[84] Consequently, comparable to the situation in Germany, private prosecution is seldom exercised by victims in the Australian jurisdictions.[85]

[77] Rita Cooley, 'Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies' (1958) 2(4) *The American Journal of Legal History* 304, 304-305.
[78] Ibid.
[79] See in general: Langbein, above n 33.
[80] See, for example, *Queensland Justices Act* 1886 50 Vic. No 17. Part IV, s 42 dealt with the General Procedure and stated that a complaint may be made by the complainant in person or a solicitor or other person authorised in that behalf. On the historic development see further: Alex C Castles, *An Australian Legel History* (The Law Book Company Limited, 1982); J M Bennett and Alex C Castles, *A Source Book of Australian Legal History* (The Law Book Company Limited, 1979); Patrick Parkinson, *Tradition and Change in Australian Law* (Thomas Reuters, 4 ed, 2010) 121.
[81] Sam Garkawe, 'The History of the Legal Rights of Victims of Crime in the Australian Criminal Justice System' in Victims Services Victims of Crime Bureau, Attorney General's Department (ed), *Raising the Standards: Charting Government Agencies' Responsibilities to Implement Victims' Rights* (Victims of Crime Bureau, 2003) 34, 35.
[82] Daniel Klerman, 'Settlement and the Decline of Private Prosecution in Thirteenth-Century England' (2001) 19 *Law and History Review* 1, 8; Garkawe, above n 81, 35
[83] Kirchengast, above n 74, 8-9. Possibilities to limit private prosecution include the DPP taking over private prosecutions and terminating them or entering into a *nolle prosequi*.
[84] Garkawe, above n 81, 35.
[85] Kirchengast, above n 74, 11.

Even if private prosecutors did not face the above challenges, it is doubtful whether the right to private prosecution could generally have the potential to reach the objects of section 6(b), namely avoiding secondary victimisation and providing victims with closure. Research by Wemmers and Cyr on crime victims in Canada has identified that where the interviewed victims were given the choice of what kind of participation they preferred in proceedings, the majority stated that they wanted to be heard while not being responsible for the decisions taken.[86] This finding is in accordance with earlier research on crime victims and their perception of criminal justice in the Netherlands. Research there indicates that victims felt burdened when being held responsible for the decisions taken in the criminal justice system and that they did not want to be responsible for taking control of the case.[87] In other words, both studies suggest that victims do not want to be burdened with being directly responsible for the conviction of the defendant and other decisions taken. Rather they want to be heard by decision-makers. No similar research has been undertaken in Australian jurisdictions and it may be problematic to generalise overseas research findings. However, it seems likely that victims in Australian jurisdictions have similar needs to victims in Canada in regards to participation due to the similarity of the structure of the criminal justice system and the role of the victim within. Comparable to the situation in Australia, the role of victims under the Criminal Code of Canada has been described as largely reduced to that of witnesses for the state.[88] It is therefore also possible that victims in Australia may not wish to be responsible for the ultimate decision made regarding the conviction of the defendant. They might prefer only to be heard by decision-makers. As private prosecutors, however, they would be exclusively responsible for all decisions taken in addition to being responsible for collecting the evidence, conducting the trial and possibly being subject to trial costs in certain courts.

In light of the above, burdening victims with the obligation to be legally and financially responsible for the prosecution of a criminal case seems to contradict the object of section 6(b) of avoiding secondary victimisation and providing closure for victims. For this reason the right to private prosecution does not stipulate an implementation of section 6(b) capable of avoiding secondary victimisation and providing victims with closure.

[86] Jo-Anne Wemmers and Katie Cyr, 'Victims' Perspective on Restorative Justice. How Much Involvement are Vicitms Looking For?' (2004) 11 *International Review of Victimology* 259. The research focused on victims who participated in victim-offender mediation programs.
[87] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 208.
[88] Wemmers and Cyr, above n 86.

Recognising that victims had little possibility to present views and concerns in adversarial criminal proceedings VIS schemes were introduced in common law jurisdictions like Australia in order to provide victims with a 'voice'.[89]

2 Victim Impact Statements During the Sentencing Stage

The adversarial trial has been described as a conflict between two opposing parties, prosecution and defence. Therefore, much academic debate has arisen in Australia and other common law jurisdictions as to how victims' views could be considered during these bipartite proceedings.[90] In order to allow victims to present their views in the criminal justice system, VISs were introduced in Australian jurisdictions from the mid-1980s.

Wemmers asserts that VISs were originally introduced in adversarial criminal justice systems as a response to the generally passive role victims had in adversarial criminal trials.[91] This is in accordance with the justification for the introduction of the first VIS scheme in South Australia in 1989. The Attorney-General at the time of their introduction, Sumner, explained that VISs were introduced in South Australia, inter alia, to minimize victims' feelings of alienation from, but also dissatisfaction with, the criminal justice system due to their role.[92] Similarly, in the Queensland case of *R v Singh*, Fryberg J has explained that the introduction of VISs was meant to have a 'primarily therapeutic' purpose for victims. This means that primarily victims are meant to benefit from such schemes.[93] Furthermore, the rationale for the introduction of VISs in Victoria has been described as giving victims the opportunity to have a 'voice' in proceedings, to be therapeutic for victims and to increase victim satisfaction with the criminal justice system.[94]

VISs can be defined as statements that are submitted to the sentencing judge (orally or in writing, also in the form of drawings, pictures and poems) after a guilty verdict and before the sentence is

---

[89] Edna Erez, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal Law Bulletin* 483, 483; Edna Erez, 'Integrating Restorative Justice Principles in Adversarial Proceedings through Victim Impact Statement' in Ed Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (Legal Action Group, 2004) 81, 82; Joan Baptie, 'The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 79; State Government Victoria, above n 69, 16.

[90] See further discussion in Chapter 6 on the risks and benefits of VISs.

[91] Wemmers, above n 19, 124.

[92] Edna Erez, Leigh Roeger and Frank Morgan, 'Victim Impact Statements in South Australia: An Evaluation' (Office of Crime Statistics of the South Australian Attorney General, 1994) 206. Other reasons mentioned by Sumner were that the provided information could help the court to determine a more just sentence and that the statements could help to rehabilitate offenders.

[93] *R v Singh* [2006] QCA 71, 77.

[94] State Government Victoria, above n 69, 4; Victoria, Parliamentary Debates, Legislative Assembly, 31 March 1994, 778.

determined. The statements outline the consequences the crime has had on the victim.[95] The first VIS pilot scheme was introduced in South Australia in the 1980s.[96] After the pilot scheme, the right to submit a VIS was enshrined for the first time in Australia in South Australian legislation.[97] Today all Australian States and Territories have enacted statutory legislation allowing victims to submit VISs. Generally these are to be taken into account by the court according to its discretion and the rules of evidence when formulating the penalty.[98]

Prescribed content and form of VISs, however, vary between Australian jurisdictions. Victoria, Western Australia and the Northern Territory, for example, generally allow victims of all criminal acts to submit a VIS.[99] In South Australia, the Australian Capital Territory and Tasmania, VISs can only be made for indictable offences and some other offences specified in legislation.[100] According to New South Wales legislation, VISs can be submitted for offences that result in death or actual bodily harm, as well as for actual or threatened violence or certain prescribed sexual offences.[101] Queensland law stipulates that a VIS can be submitted for offences committed or attempted against the person of someone.[102] In some jurisdictions relatives or other persons authorized by the court, are allowed to submit a VIS on behalf of the victim if the victim is no longer alive or if the victim is unable to prepare and tender the statement himself.[103] In some Australian jurisdictions, therefore, only victims of certain criminal offences have the right to be heard through the use of VISs. In others, all victims and even some family members are eligible to communicate what harm they have suffered through the use of a VIS at the sentencing stage.

Legislation stipulating how VISs must be submitted to the relevant authorities upon completion varies between the different Australian jurisdictions. In most jurisdictions, VISs can be submitted in written form and can also be read out during the sentencing stage.[104] In all Australian jurisdictions VISs can contain an expression of how the crime has affected the victim. However, with few

---

[95] Sam Garkawe, 'Victim Impact Statements and Sentencing' (2007) 33 *Monash University Law Review* 90, 91.
[96] John H Philips, 'Victims of Crime, Not Forgotten but Sufficiently Remembered?' (2003) 55(1) *Revue Internationale de Droit Compare* 47, 52.
[97] *Criminal Law (Sentencing) Act 1988* (SA) s 7.
[98] *Crimes (Sentencing Procedure) Act* 1999 (NSW) ss 26- 30A; *Sentencing Act* 1997 (Tas) s 81A, *Sentencing Act* 1995 (WA) ss 24-26, *Sentencing Act* 1995 (NT) ss 106A, 106B, *Crimes Sentencing Act* 2005 (ACT) s 47-53, *Sentencing Act* 1991 (Vic) ss 8J-8S ; *Victims of Crime Assistance Act* 2009 (Qld) ss 15, 15A, 15B; *Penalties and Sentences Act* 1992 (Qld) s 9(2)(c)(i); *Criminal Law Sentencing Act* 1988 (SA) s 7A.
[99] *Sentencing Act* 1991 (Vic) s 8k; *Sentencing Act* 1995 (WA) s 24; *Sentencing Act* 1995 (NT) s 106A.
[100] *Sentencing Act* 1997 (Tas) s 81A; *Criminal Law (Sentencing) Act* 1988 (SA) s 7a, *Crimes Sentencing Act* 2005 (ACT) s 48.
[101] *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 27.
[102] *Victims of Crime Assistance Act* 2009 (Qld) s 25(8).
[103] For example, *Crimes (Sentencing Procedure) Ac*t 1999 (NSW) s 30(2).
[104] *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 30A; *Sentencing Act* 1991 (Vic) s 8, *Sentencing Act* 1997 (Tasmania) s 81A, *Criminal Law Sentencing Act* 1988 (SA) s 7A, *Sentencing Act* 1995 (WA) s 25, *Sentencing Act* 1995 (NT) s106A; *Crimes (Sentencing) Act* 2005 (ACT) s 50, *Victims of Crime Assistance Act* 2009 (Qld) s 15A.

exceptions, for example, the Northern Territory, the VIS cannot contain an expression of what sentence the victim finds appropriate for the defendant.[105] The defendant is further generally accorded the right to cross-examine victims on the content of their VISs.[106] Also, in some jurisdictions, such as Queensland, prosecutors may edit the victim's statement in order to remove any information that may be contested by the defence. Therefore, the public prosecution have the power to decide what information from the VISs, if any at all, will be presented to the sentencing judge.[107] Ultimately, in all Australian states, it is at the court's discretion whether, and to what extent, they will consider the content of the VISs in their sentencing decision.[108]

The question arises as to whether VISs allow victims' views to be 'presented' but also 'considered' by the relevant decision-maker, as section 6(b) requires. The possibility of submitting VISs gives eligible victims the opportunity to present their views by outlining how the crime has affected them.[109] In relation to 'consideration', most legislation in Australian jurisdictions states that VISs may be taken into consideration in the decision-making process by the court according to the rules of evidence before the sentencing decision is reached.[110]

This, however, is not always the case in practice. For example, New South Wales case law has consistently set out that VISs made by family members for a deceased victim must be received by the sentencing judge. However, in order to maintain objectivity, VISs cannot be considered in regards to the offender's sentence.[111] The first case establishing the limited impact of family VISs in New South Wales was the 1997 decision of *R v Previtera*. The case was concerned with the murder of 81-year old Eileen Cantley by her former neighbour, Salvatore Previtera, during the course of an attempted robbery. During the criminal process the victim's son tendered a VIS describing his and his families' reaction to the death of his mother. The Court based the limitation

[105] *Sentencing Act* 1995 (NT) s 106B(5a). A sentencing recommendation is specifically prohibited in WA see: *Sentencing Act* 1995 (WA) s 25.
[106] South Australia Justice Strategy Unit, 'Victims of Crime Review (Report One)' (Justice Strategy Unit, 1999) 134. For explicit reference in legislation see: *Sentencing Act* 1991 (Vic) s 8o(2); *Crimes (Sentencing) Act* (ACT) 2005 s 53(3).
[107] See, for example, *Victims of Crime Assistance Act* 2009 (Qld) s 15(3).
[108] In NSW, in the case of *R v Previtera* (1997) 94 A Crim R 76 it was first declined by the courts to consider the opinions set out in a family VIS. For an analysis of the decision and its consequences see: Tyrone Kirchengast, 'Sentencing Law and the 'Emotional Catharsis' of Victims' Rights in NSW Homicide Cases' (2008) 30 *Sydney Law Review* 615; Tracey Booth, "Cooling Out' Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court' (2012) 45(2) *Australian & New Zealand Journal of Criminology* 214.
[109] Wemmers, above n 19, 129.
[110] See, for example, *Victims of Crime Assistance Act* 2009 (Qld) s 15(8); *Sentencing Act* 1995 (NT) s 106B(4).
[111] *R v Previtera* (1997) 94 A Crim R 76. For further analysis of the situation in NSW see: Tyrone Kirchengast, 'Victim Impact Statements and the Previtera Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases' (2005) 24 *University of Tasmania Law Review* 114. Legislation in NSW on the other hand sets out that family VISs can be considered by courts if they believe it appropriate to do so, see: *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 28(4b).

of family victim impact evidence in New South Wales on the argument that the court already knows the victims' harm where the victim is deceased. It found that the family VISs, in comparison to VISs of primary victims, only contain information about the relationship between family members and the victim. This information, however, is considered irrelevant for determining the sentence of the defendant as no life is worth more than another and the information in a family VIS does not permit for a longer sentence.[112] Therefore, in the case of a family VIS in New South Wales, family members of the victim would have the possibility to 'present' views and concerns but these could not be 'considered' by the sentencing court in regards to the sentencing decision. This suggests the requirements of section 6(b) have not been implemented in relation to family VISs in New South Wales. The situation, however, differs significantly in other Australian jurisdictions. For example, according to Victorian case law family VISs can generally be taken into consideration by the sentencing judge.[113]

Additionally, in most jurisdictions it is at the discretion of the judge to rule the whole or parts of the VIS inadmissible in accordance to the rules of evidence.[114] In these cases, victims could present a VIS, however, the content of the statement may not be considered due to these rules.

Overall however, with some exceptions, VISs in Australian jurisdictions allow certain victims to present views and concerns that can mostly be considered by the courts in relation to the sentencing decision in accordance with the rules of evidence. Therefore, the right to allow victims to present views and concerns in light of section 6(b) has been implemented to some degree in Australian jurisdictions. A detailed analysis of risks and benefits of VISs will be provided in Chapter 6, where the possible expansion of existing victims' participatory rights to more or all victims is considered.

III Application of Rating Scale

While under German law PAPs have received a 'High' number of opportunities to present views and concerns, other victims have received fewer opportunities to do so. For example, applicants to the adhesion procedure can present views and concerns in regards only to their financial claim. Legally represented victim witnesses can present views and concerns mostly in regards to matters relating to their protection when testifying. Where victims are not required to testify as a witness no possibility exists for these victims to present views and concerns during the trial or at the sentencing

[112] *R v Previtera* (1997) 94 A Crim R 76.
[113] See, for example, *R v Willis* [2000] VSC 297. However, reluctance to consider a family VIS was demonstrated in *R v Penn* (1994) 19 MVR 367, where the information in the VIS was considered to be irrelevant.
[114] See for example: *Victims of Crime Assistance Act* 2009 (Qld) s 15, *Sentencing Act* 1995 (WA) s 26(2); *Sentencing Act* 1991 (Vic) s 8L(3).

stage. Ultimately, no general right to be heard at trial has been introduced for victims in Germany. Applying the three-grade assessment scale to the findings for Germany suggests that the possibilities to present views and concerns for victims during the trial and sentencing stage range from 'High' for PAPs to 'Intermediate' for applicants to the adhesion procedure and legally represented victim witnesses. General victim participation for all victims is 'Non-Existent'.

In Australia, not all victims, usually only victims of more serious offences, can present views and concerns on how the crime has affected them through a VIS at the sentencing stage. The content of these statements can, except for some cases, for example, family VISs in New South Wales, be taken into account by the sentencing judge in accordance with the rules of evidence for the sentencing decision. However, victims have no standing at trial and cannot present any views and concerns during the trial stage. For this reason the application of the three-grade assessment scale suggests that the possibilities for victims to present views and concerns during the trial and sentencing stage in Australia range from 'Intermediate' for victims who are eligible to make a VIS to 'Non-Existent' for victims in general. These findings are outlined below in Table 2.

	Germany				**Australia**	
	PAP	**Adhesion Procedure**	**Legal Represent. for Victim Witnesses**	**Victim**	**VIS**	**Victim**
Eligibility	Mostly victims of more serious offences	Victims with financial loss	Victims as witnesses	N/A	Mostly victims of more serious offences	N/A
Kind of Participation	Be present during the entire trial, be heard at trial when pros. is heard; request evidence; refuse judges in case of partiality; question the accused, witnesses and experts; object to court orders and questions; make statements; make a final pleading; appeal outcome of proceedings independently from other parties	Be heard during the main trial re civil claim; ask questions, make requests for evidence to be introduced; make closing statement	LR can make applications on behalf of victim re testifying, e.g. exclusion of the public and defendant; testifying via video tech. LR can object to abusive and compromising questions	None	Expression of harm suffered at sentencing stage/ Only in few jurisdictions views on sentence length	None
Limitations	PAPs have the same part. rights as public prosecutors	Participation only re civil claim	Participation only re testifying	N/A	VIS only at sentencing stage/ Only views on effects of crime	N/A

					on victim	
Reasons for Participation	Acknowledgement that victims have been seriously affected by the criminal act[115]	Allowing victims to receive civil compensation without a civil trial	Better protection of witnesses at trial	No general part. right as victims are not seen as parties at trial[116]	Acknowledging victims' harm and avoiding alienation from Criminal Justice System	No general part. right as victims are not seen as parties at trial[117]
Level of Part.	**High**	**Intermediate**	**Intermediate**	**Non-Existent**	**Intermediate**	**Non-Existent**

Table 2: Overview and Rating of Victim Participation Procedures and Processes in Germany and Australia

IV CONCLUSION TO CHAPTER 5

The application of the three-grade rating scale to the comparative analysis shows that the possibility for victim participation in light of section 6(b) is not 'High' for all victims in both Germany and Australia. Based on this conclusion, the next chapter, Chapter 6, will consider whether, and to what extent, victim participation during the trial and sentencing stage could be extended and enhanced in a way that is beneficial for victims. The chapter will further consider whether such expansion of victims' participatory rights could be rejected by the two Member States based on the first qualification of section 6(b) — 'prejudice to the accused'.

[115] See analysis of 'modern' criminal justice and the victims' role in Germany in Chapter 7.
[116] Ibid.
[117] See analysis of 'modern' criminal justice and the victims' role in Australia in Chapter 7.

Chapter 6: Enhancing the Possibilities for Victims to Present Views and Concerns and Qualification 1 of Section 6(b) of the *Declaration*

I INTRODUCTION

Chapter 5 analysed the extent to which victims can currently present views and concerns at the trial and sentencing stage in Germany and Australia. This chapter will examine whether victims' participatory rights could be extended in both Member States.[1] Importantly, it will assess whether Germany and Australia could legitimately refuse the expansion of victims' rights to present views and concerns during the trial and sentencing stage based on the first qualification contained in section 6(b); 'prejudice to the accused'. Chapter 7 will then consider the possibilities for Member States to refuse the expansion of such rights based on the second qualification concerned with possible inconsistencies of victim participation with the respective national criminal justice systems.

The analysis in this chapter focuses on two specific areas in both jurisdictions: part 1 concerns the use of VISs and part 2 considers active victim participation at trial.

II INTRODUCING/ EXPANDING THE VICTIM'S RIGHT TO TENDER A VIS

A Expanding the Right to Make a VIS in Australian Jurisdictions to All Victims

It is mostly victims of more serious offences who can currently tender VISs in Australian jurisdictions. It will be considered below whether VIS schemes in Australian jurisdictions could be extended to all victims regardless of the offence that has been committed against them. Such an expansion of VIS schemes in Australia in light of section 6(b), however, would only be pertinent where the expansion had the potential to reach the objects of the section — potentially avoiding secondary victimisation and assisting victims in obtaining closure. If VIS schemes did not provide victims with the benefits envisioned by the drafters of section 6(b), Australia may be able to justifiably refuse the expansion of such schemes on this basis.

[1] Refer to the interpretation of participation in light of section 6(b) provided in Chapter 4, part III.

1 Potential to Reach the Objects of Section 6(b)

Scholars and policy-makers in common law jurisdictions have intensely debated whether making a VIS can afford victims benefits. One benefit attributed to VISs is that the possibility to express one's emotions and to have one's harm acknowledged by the courts might reduce or avoid secondary victimisation and provide victims with closure.[2] Some scholars therefore contend that VISs are well suited to support 'empowerment, validation, and moving on' for victims.[3]

In response to the literature on the benefits of VIS schemes, some scholars have emphasised the negative effects associated with the tendering of a VIS.[4] Victims could experience disappointment and frustration rather than therapeutic benefits by submitting a VIS where the statement does not influence the sentence, where it was amended by the prosecution, or, where it was not taken into consideration by the courts.[5] Scholars have also cautioned that some victims may have certain expectations regarding their participatory role and could feel frustrated where these expectations are not met.[6]

What follows is an analysis of existing primary research and arguments presented in academic scholarship concerning the benefits of VISs. The analysis is aimed at identifying whether VIS participation provides reliable benefits for victims and relatedly whether Australia could refuse the expansion of such schemes to all victims based on a lack of benefits.

(a) Research and Arguments Concerning the Benefits of VISs

The existing research on the benefits of VISs for victims or, in other words, the impact of making a VIS on victim satisfaction, is neither extensive nor conclusive. Roberts, for example, identified only 11 studies on primary victims' reactions to VIS between 1988 and 2007 in different national

[2] Antony Pemberton and Sandra Reynaers, 'The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 229, 232. For further discussion on restorative sentencing see: Malini Laxminarayan 'The Effect of Retributive and Restorative Sentencing on Psychological Effects of Criminal Proceedings' (2013) 28(5) *Journal of Interpersonal Violence*, 938-955.

[3] Edna Erez, Peter Ibarra and Daniel Downs, 'Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 15, 21, 24.

[4] See generally Andrew Sanders et al, 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447.

[5] Ibid.

[6] Ibid. For in-depth analysis on approaches to delivering VIS see also: Kim Lens, Antony Pemberton, Stefan Bogaerts, 'Heterogeneity in Victim Participation: A New Perspective on Delivering a Victim Impact Statement, *European Journal of Criminology*, (2013) 10(4), 479-495.

jurisdictions including Australia.[7] Research on the issue has therefore been described as 'patchy and relatively unsystematic'[8] and as a 'work in progress'.[9]

Studies of the impact of VISs on victims continue to generate conflicting findings. For example, research by Sanders et al on the English VISs pilot scheme published in 2001 found that making a VIS did not contribute to victim satisfaction.[10] In their study, they interviewed 289 victims, of whom 148 had chosen to make a VIS in the pilot scheme. Offences included in the scheme were domestic violence and assault causing grievous bodily harm, sexual assault, robbery and criminal damage as well as racially motivated crime. The interviews with victims were conducted immediately after they had made a VIS and again once the case had concluded. Sanders et al found that at the end of the trial only 57% of victims, compared to 77% at the beginning of the trial, thought that making a VIS was the right decision. Based on the reduction of the satisfaction rate by 20% from the beginning until the end of the trial, the researchers concluded that VIS schemes were not considered beneficial for many participating victims.[11]

Previous research conducted by Erez, Roeger and Morgen in South Australia in 1997 on victims of indictable offences suggested no significant increase in victim satisfaction by making a VIS.[12] The researchers analysed cases in the South Australian Supreme and District Courts between January 1990 and July 1992. They subsequently surveyed 427 victims via mail on matters including their court involvement and their satisfaction with the criminal justice system.[13] Out of the 427 victims only 152 victims indicated that they had provided information in a VIS.[14] While 45% of these victims felt satisfied after making a VIS, 49% of victims did not feel that making a VIS made any difference.[15] Overall, only a relatively small number of victims, 7%, stated that they felt worse after making a VIS. The study found that victims ultimately felt more satisfied when they believed that the defendant had received — in their view — an appropriate sentence.[16] Based on their findings,

[7] Julian V Roberts, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole ' (2009) 38 *Crime & Justice* 347, 367. Primary victims in this context does not include family members of victims.
[8] Sandra Walklate, 'Victim Impact Statements' in Brian Williams (ed), *Reparation and Victim Focused Social Work* (Kingsley, 2002) cited in: ibid 366.
[9] Peter Sankoff, 'Is Three Really A Crowd? Evaluating the Use of Victim Impact Statements Under New Zealand's Revamped Sentencing Regime' (2007) *New Zealand Law Review* 459, 491.
[10] See generally: Sanders et al, above n 4.
[11] Ibid 450.
[12] Edna Erez, Leigh Roeger and Frank Morgan, 'Victim Harm, Impact Statements and Vicim Satisfaction with Justice: An Australian Experience' (1997) 5 *International Review of Victimology* 37, 51, 55.
[13] Ibid 45. The mail survey was originally sent out to 847 victims.
[14] Ibid 49.
[15] Ibid 49.
[16] Ibid 51.

Erez, Roeger and Morgan concluded that VISs may not be an effective way for victims to present views and concerns to the court.[17]

One study that appears to contradict the finding that VISs do not increase victim satisfaction is the 2007 study by Chalmers et al on crime victims and their experience with VIS in the Scottish pilot scheme. [18] Similar to the English pilot scheme, victims of prescribed offences in Scotland, including offences against the person, theft and sexual offences, received the right to make a VIS in prescribed courts for a two-year period. Chalmers et al conducted telephone interviews with 182 victims overall: 88 victims who had made a VIS during the course of the pilot scheme and 94 victims who had not. The telephone interviews were followed up by face-to-face interviews of 20 selected victims. The researchers found that 61% of the 88 victims who had made a VIS thought that submitting the statement had made them feel better and 86% believed that making a VIS was the right decision.

The research findings on victims' experiences with VISs in the research studies outlined by Roberts, including the three studies described above, are not unproblematic due to the difference in interview questions and the small sample sizes.[19] Most studies undertaken focused on the situation of a rather small sample of victims who had submitted a VIS in one particular jurisdiction. The sample usually consisted of less than 200 victims and, in the studies conducted in the 2000s, of less than 100 victims. Due to the small sample size, the research findings in the studies can only be suggestive.[20] Furthermore, the questions researchers asked victims varied greatly between studies. While some studies focused on victim satisfaction in making a VIS others asked whether victims were 'happy' or 'glad' when making a VIS, whether it was the 'right decision', what their 'attitudes' were in regards to VIS schemes, or whether they would advise others to 'submit a statement'.[21] Unified findings on victim satisfaction or benefits for victims are difficult to derive from the answers to such different interview questions. Furthermore, it appears that a number of studies did not consider whether other factors, such as sentence length, acknowledgement of the VIS by criminal justice authorities or treatment by the criminal justice system, may have influenced the positive or negative attitudes of victims in regards to VIS schemes. While the studies show that

[17] Ibid 55.
[18] J Chalmers, P Duff and F Leverick, 'Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)' (2007) *Criminal Law Review* 360, 378.
[19] For an overview and further analysis of the studies and victims satisfaction see Roberts, above n 7, 365-372.
[20] See ibid, Table 1, 366-369 for an overview of the sample sizes of existing studies.
[21] For an overview of the questions asked and criticism of the conducted studies see further ibid 366-369.

at least some victims benefited from VIS schemes, overall the existing research is not conclusive on the question of whether VISs can be beneficial for the majority of participating victims.[22]

Whether victim satisfaction increases when a VIS is tendered has not only been subject to primary research studies. Legal scholarship has also given explanations as to why VIS schemes could be beneficial for victims and increase their satisfaction with the criminal justice system. It has been argued that victims may perceive outcomes of particular decisions taken in the criminal justice system as unfair where their expectations are not met.[23] This could then lead to secondary victimisation.[24] It has been suggested, however, that a person's perception of fairness does not solely depend on an outcome itself but on other elements of the decision-making process.[25] One important element for the perception of fairness is whether the people involved were given the opportunity to present their views on the issue in question.[26] It has been proposed that the perception of voice and the possibility to present an issue to authorities can promote the acceptance of decisions as fair, even where these decisions are not favourable to the individual person involved. This may be the case, for instance, where sentence lengths are shorter than desired by the victim.[27] The possibility to present views to a decision-maker via a VIS could therefore allow victims to perceive proceedings as fairer and potentially to assist them in avoiding secondary victimisation.[28] Furthermore, the possibility to present views and concerns could impact on the victim's self-esteem and self-reliance and strengthen the perception that they are important actors in criminal proceedings.[29] It may be reassuring and a positive experience for some victims to know that

[22] See also: Sankoff, above n 9, 491.
[23] Referred to as 'Procedural Justice Theory'. The concept of procedural justice is mainly developed from research conducted by Thibaut and Walker in the 1970s on the differences between inquisitorial and adversarial criminal justice system and which system better serves the purpose of justice. See in general: John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum Associates, 1975). For the psychological effects of criminal proceedings and procedural justice theory see also: Malini Laxminarayan, 'Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' *Social Justice Research* (2012) 25 (4), 390-405.
[24] Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 315.
[25] See, for example, explanations in Michael O'Hear, 'Plea Bargaining and Victims: From Consultation to Guidelines' (2007-2008) 91 *Marquette Law Review* 32; Malini Laxminarayan, Jens Henrichs and Antony Pemberton, 'Procedural and Interactional Justice: A Comparative Study of Victims in the Netherlands and New South Wales' (2012) 9(3) *European Journal of Criminology* 260, 261. Research on procedural justice does not only focus on victims but also on other actors in the criminal justice system. See: Tom Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002), 326; Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime & Justice* 283.
[26] O'Hear, above n 25; Gerald Leventhal, 'What Should Be Done with Equity Theory?' in KJ Gergen, MS Greenberg and Willis RH (eds), *Social Exchange: Advances in Theory and Research* (Plenum Press, 1980) 27.
[27] Erez, Roeger and Morgan, above n 12, 41. For an analysis on the interaction between procedural quality and outcome favourability in light of victim's trust in the legal system see: Malini Laxminarayan, Antony Pemberton, 'The Interaction of Criminal Procedure and Outcome', *International Journal of Law and Psychiatry*, available online 19 March 2014.
[28] Tom Tyler and Allen Lind, 'Procedural Justice' in Joseph Sanders and Lee Hamilton (eds), *Handbook of Justice Research in Law* (Kluwer Academic/Plenum Publishers, 2001) 65.
[29] Jo-Anne Wemmers, 'Procedural Justice and Dutch Victim Policy' (1998) 20(1) *Law & Policy* 57, 65.

decision-makers value their input into the sentencing decision. The possibility to participate could therefore provide victims with a sense of importance which might have been damaged by the initial experience of the criminal act.[30]

While the above considerations may provide an explanation as to why allowing victims to present views and concerns and thus to participate in proceedings can be beneficial, it is unclear whether VIS schemes can provide victims with the expected benefits. A key consideration in the above line of argument appears to be that victims perceive proceedings as fairer because they believe that decision-makers 'value' their input.[31] However, in the case of written VISs, it has been found that it is often unclear for victims whether, and to what extent, their statements are being considered and relied upon by decision-makers during the sentencing stage.[32] Studies on VIS schemes and victim satisfaction in Australia and other common law jurisdictions suggest that many victims do not necessarily know whether their statements have been considered and fear that their VISs may not have been relevant in the decision-making process at all.[33] Where victims are unaware of their input in proceedings, VIS schemes may not reliably give victims the feeling that they and their input are being 'valued' by decision-makers. For these victims tendering a VIS may not provide the expected benefits.

Another argument offered as to why VISs could be beneficial for victims relates to their 'expressive function'. In that regard, some authors have argued that allowing victims to express themselves about the effects of the crime, as predominantly associated with oral VISs, is the reason why VISs are beneficial for victims.[34] The argument is based on the assumption that 'opening up' to others through expression has the potential to start the healing process for victims.[35] The act of expression could assist in avoiding secondary victimisation and may support victims in obtaining closure. The benefits of VISs could therefore lie in the mere act of expression regardless of how the statement is perceived by decision-makers.

---

[30] Erez, Ibarra and Downs, above n 3, 20.
[31] Ibid.
[32] See, for example: Tracey Booth, *Accommodating Justice: An Exploratory Study of Structures and Processses That Shape Victim Participation and the Presentation of Victim Impact Statements in the Sentencing of Homicide Offenders in the NSW Supreme Court* (Doctor of Philosophy Thesis, University of New South Wales, 2012) 308.
[33] Sanders et al, above n 4, 456; Edna Erez, Leigh Roeger and Michael O'Connell, 'Victim Impact Statements in South Australia' (Paper presented at the International Victimology: Selected Papers from the 8th International Symposium: Proceedings of a Symposium held 21-26 August 1994, Canberra, 1996) 212, see also the discussion in Brian Williams, *Victims of Crime and Community Justice* (Jessica Kingsley Publishers, 2005) 103.
[34] Argument discussed and analysed in Pemberton and Reynaers, above n 2, 238-239. See also explanations by Booth, above n 32, 63.
[35] Edna Erez, 'Integrating Restorative Justice Principles in Adversarial Proceedings through Victim Impact Statement' in Ed Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (Legal Action Group, 2004) 81, 86.

While some victims may benefit from oral VIS schemes which give them an opportunity to express themselves,[36] other victims may not be able to receive these benefits for the following reasons. Firstly, whether victims can benefit from VISs depends largely on the environment in which they are presented. Oral VISs are read out in the courtroom setting which is unfamiliar to most victims.[37] As considered by Shapland and Hall the unfamiliar courtroom environment and their participation within it may cause a number of victims to feel more distressed and anxious rather than safe and protected.[38] Psychological research has found that a safe environment of confidence is required to start a healing process and allow individuals to 'open up'.[39] Due to the unfamiliar setting some victims may not choose to read out their VISs and may therefore not be able to benefit from the 'expressive function'. Others who choose to read out the statements may feel anxious and may therefore not necessarily experience the expected benefit.

Secondly, victims whose expectations of VISs, and their participation in the criminal justice system, go unfulfilled may not be able to benefit from VISs regardless of whether they are presented orally or in writing.[40] Some research on crime victims' motives for submitting VISs indicates that many victims submitted VISs primarily to have a 'voice' at trial and not to influence the decision-maker.[41] Although this may be one of the motives for making a VIS, it may not be the only one. For example, in 2000, a South Australian study on victims in the criminal justice system interviewed 222 victims out of whom 49 had prepared a VIS. Over 12 % of surveyed victims indicated that the main reason for submitting a VIS was to influence the sentencing decision.[42] Similarly, Sanders et al found in their study that around 50% of participating victims also participated to influence the sentence.[43] Research by Erez, Roeger and Morgan in South Australia described above and by Erez and Tontodonato in the US found that victims who submitted a VIS to influence the sentence were particularly dissatisfied when they realized that their input did not have the desired impact on

[36] Booth, above n 32, 307.
[37] Pemberton and Reynaers, above n 2, 240.
[38] Joanna Shapland and Matthew Hall, 'Victims at Court: Necessary Accessories or Principal Players at Centre Stage?' in Anthony Bottoms and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan Publishing, 2010) 163, 168.
[39] Discussed in Pemberton and Reynaers, above n 2, 240; Harald Richter, 'Wie erleben und verarbeiten Opfer den Strafprozess ' in Diter Eppenstein (ed), *Taeterrechte-Opferrechte* (Weisser Ring, 1994) 57, 59.
[40] See for example *DPP v Dupas* [2007] VSC 305 (27 August 2007) [16], where the defendant could not be sentenced to a longer sentence than the one he was already serving. Thus the trial judge found that the whole trial was conducted as a vindication for the victim and for all victims in general.
[41] State Government Victoria 'A Victim's voice Victim Impact Statements in Victoria- Findings of an Evaluation into the Effectiveness of Victim Impact Statemetns in Victoria' October 2009; in a study on Scottish crime victims, Chalmers et al identified that the reason most often given by participating victims on why they participated in the scheme was to be able to express themselves. Chalmers et al, above n 18, 368; Erez, Roeger and Morgan, above n 12, 49.
[42] South Australia Justice Strategy Unit, 'Victims of crime review- Survey of victims of crime-(Report Two)' (2000) <http://www.voc.sa.gov.au/Publications/Reports/Reports.asp> 20.
[43] Sanders et al, above n 4. While identifying that around 2/3 of participating victims tendered a statement for therapeutic pruporses.

sentence length.[44] These victims reported that they had 'heightened expectations' about the impact of their statement and felt 'let down' when the sentence was different than expected. Where such victim expectations go unsatisfied, the benefits of VISs might be significantly reduced.[45]

(b) Reduced Benefits for Victims Due to Operation in Practice

In addition to the above concerns, the benefits of VIS schemes may also be significantly decreased due to their current mode of operation in practice.

(i) Possibility to Cross-Examine Statements

In Australia the defendant's right to a fair trial dictates that the defendant must have the right to challenge the content of a VIS by being able to cross-examine the statement.[46] Some victims who are cross-examined on their statement may not benefit from VISs at all but might actually be traumatised to a greater extent.[47] Being questioned and critically examined on one's emotions and personal perception of the crime, as contained in the VIS, may be worse for many victims than being cross-examined as a witness at trial. It has been found, however, that cross-examination on the content of a VIS does not occur often in practice.[48] This is possibly due to the fact that defendants do not want to appear unremorseful by cross-examining the victim.[49] However, cross-examination of VISs could potentially occur every time a victim submits such a statement. Thus, the benefits of participation through VISs may be counteracted through the limitation — the right to cross-examine — to safeguard the rights of the defence.[50]

(ii) Amendment and Non-Consideration of Statements

Chapter 5 has shown that in some Australian jurisdictions parts or all of the VIS may be edited by the prosecution.[51] In other jurisdictions the defence can apply to have certain prejudicial material

---

[44] Erez, Roeger and Morgan, above n 12, 52; Edna Erez and Pamela Tontodonato, 'Victim Participation in Sentencing and Satisfction with Justice' (1992) 9(3) *Justice Quarterly* 394, 403. See also Martin Hinton, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in Australia' (1995) 14(1) *University of Tasmania Law Review* 82.
[45] Leah Daigle, *Victimology: The Essentials* (Sage, 2012) 126.
[46] Sam Garkawe, 'Victim Impact Statements and Sentencing' (2007) 33 *Monash University Law Review* 90, 111 (2007); see, for example: *Sentencing Act* 1991 (Vic) s 8o(2); *Crimes (Sentencing) Act* (ACT) 2005 s 53(3).
[47] Ian Edwards, 'The Evidential Quality of Victim Personal Statements and Family Impact Statements' (2009) 13 *The International Journal of Evidence and Proof* 293, 300; C J Sumner, 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian & New Zealand Journal of Criminology* 195, 208.
[48] E. Erez, Leigh Roeger and Frank Morgan, 'Victim Impact Statements in South Australia: An Evaluation' (Office of Crime Statistics of the South Australian Attorney General, 1994), 10; State Government Victoria, above n 41, 73.
[49] *R v Sing* [2006] QCA 71 (15 March 2006).
[50] Edwards, above n 47, 300.
[51] See Chapter 5, part II.

removed before the statement is presented in court.[52] Furthermore, the judge has the right to decide whether and, if so, to what extent they will take the content of a VIS into consideration. The editing of VISs has caused great frustration and distress for some victims.[53] An example of this is the 2010 Victorian case of *R v Borthwick*. In the criminal trial, Leon Borthwick was convicted of the manslaughter of Mark Zimmer, who died after the defendant had struck him with his vehicle in a jealousy related incident.[54] At the beginning of the sentencing stage, the judge heavily edited family VISs in the presence of the two family members of the deceased victim who had tendered the statements.[55] While the court's amendment of the VIS was permitted by law it caused one family member to rip up her VIS and run out of the courtroom in tears.[56] The other family member whose statement was significantly edited stated that:

> …we did spend a lot of effort and a lot of tears went into this, and really we put our heart and soul into this, and to have it torn apart in front of us at the court […] they were heartless and they tore it in front of us, in front of the court, and then they expect us to be quiet about it.[57]

The above statement outlines the emotional trauma some victims can experience when they are not afforded the participatory role they believe they will receive.[58] As a consequence and in an attempt to avoid such trauma for victims for the future, in May 2011, a new practice direction was issued for sentencing hearings in the Supreme Court of Victoria.[59] According to the practice direction, the defence must inform the prosecution of any concerns in relation to a VIS in advance.[60] Concerns are to be discussed prior to the hearing to avoid the type of emotional reactions of the victims that occurred in the *Borthwick* case. It remains to be seen whether the practice direction will be successful in protecting victims from emotional trauma.

---

[52] State Government Victoria, above n 41, appendix C 124-139.
[53] State Government Victoria, above n 41, 73.
[54] Kate Jones 'Leon Borthwick Sentenced to Seven and a Half Years in Jail for Killing Love Rival Mark Zimmer' The Herald Sun (online) 22 December 2010 <http://www.news.com.au/national/leon-borthwick-sentenced-to-seven-and-a-half-years-in-jail-for-killing-love-rival-mark-zimmer/story-e6frfkx0-1225974957647>.
[55] *R v Borthwick* [2010] VSC 613 (22 December 2010).
[56] See: Damien Carrick, The trial of Leon Borthwick: Part 2, ABC, 01 February 2011 (transcript) <http://www.abc.net.au/radionational/programs/lawreport/the-trial-of-leon-borthwick-part-2/3006470#transcript>.
[57] See: Damien Carrick, The trial of Leon Borthwick: Part 3, ABC, 08 February 2011 (transcript) <http://www.abc.net.au/radionational/programs/lawreport/the-trial-of-leon-borthwick-part-3/2999722#transcript>.
[58] Tyrone Kirchengast, 'Victim Lawyer's, Victim Advocates, and the Adversarial Criminal Trial' (2013) 16 *New Criminal Law Review* 568, 574.
[59] Practice Note 3 of 2011: Sentencing Hearings. For further discussion and explanations see: Tracey Booth, "Cooling Out' Victims of Crime: Managing Victim Participation in teh Sentencing Process in a Superior Sentencing Court' (2012) 45(2) *Australian & New Zealand Journal of Criminology* 214, 218.
[60] Ibid.

Some authors have suggested that victims' frustrations could be avoided or reduced by informing them that their statements may not be considered or may have to be amended.[61] This, however, may not be sufficient to avoid victims' disappointments. This is particularly problematic in light of the research outlined above indicating that a number of victims hope, or expect, that their statements will influence sentences or have an impact on decision-makers.[62] It is questionable whether disappointed expectations could be overcome by merely informing victims that their statement may not be considered or may be significantly edited. Roberts outlines the ambiguity of this approach by comparing it to the situation where graduate students are told that they should submit a reference letter when applying for entry while at the same time, it is pointed out to them that the letter will have no effect on their chances of admission to the school.[63]

Additionally, it may be important for some victims that decision-makers refer to their VISs during the sentencing stage in order to feel valued and derive benefits from tendering a VIS. Judges, however, may not be able to specifically refer to and rely on the content of the VIS where it conflicts with other pieces of evidence. Such conduct could potentially constitute a miscarriage of justice in the case of a manifestly excessive sentence and may give rise to an appeal of the sentencing decision.[64]

Hence, a number of victims may not be able to benefit from making a VIS due to their operation in the criminal justice system, and due to the constitution of the individual victim and the victims' motives when making the statement. Australia, as a Member State, may therefore be able to argue that a significant number of victims may not benefit from VIS schemes and thus refuse the expansion of the schemes to all victims. Additionally, Australia may be able to refuse the expansion of VIS schemes to more or all victims by relying on the first qualification of section 6(b) and the argument that such schemes are prejudicial to the rights of the accused.

2 Rejection Based on Qualification 1 of Section 6(b) — 'Prejudice to the Accused'

In order for Australia to be able to reject the expansion of VIS schemes to more or all victims based on the first qualification, VISs would have to be 'prejudicial' to the rights of the accused. What follows is an analysis of whether, by considering the content of VISs, sentencing judges could infringe upon the defendant's right to a proportionate sentence and thus be 'prejudicial' to the accused.

[61] State Government Victoria, above n 41, 53; Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (1999) *Criminal Law Review* 545, 553.
[62] See discussion above under part IIA1a.
[63] Roberts, above n 7, 371.
[64] Kirchengast, above n 57, 576.

(a) Violation of Sentencing Principles Through VISs

Violations of defendant's rights could become more likely in jurisdictions where victims are able to make VISs as their emotional and subjective content may endanger objective sentencing procedures.[65] It may be argued that victims could exaggerate the affects the crime has had on them in order to achieve a higher sentence for the defendant. Also judges might be overly influenced by the VIS and exceed normal sentencing expectations. This could violate the principle of proportionality of sentencing — meaning that the punishment received should fit the crime — and could thereby cause a disproportionate sentence.[66] Additionally, more eloquent victims might obtain longer sentences for defendants than less articulate victims by tendering VISs of a higher quality.[67] Ultimately, the sentence the defendant receives should be based on his guilt and not on his 'good or bad luck as to the forgiving or vindictive nature of their victims'.[68]

Conversely, it has to be acknowledged that, when the court is fully informed about the consequences of the crime for the victim, sentences might become more proportionate and precise compared to when such information is not available to courts.[69] Therefore, the introduction of VISs schemes might reduce the risk of a violation of the sentencing principle of proportionality rather than increase it. Furthermore, judges who have received legal training should be able to distinguish between evidence in VISs that simply expresses emotions and is irrelevant to sentencing, and evidence contained in the statements which should be taken into consideration in their decision-making.[70]

Furthermore, no primary research in Australia or elsewhere suggests that sentence lengths have increased significantly where victims have presented a VIS.[71] This may indicate that VISs presented at the sentencing stage do not infringe upon the sentencing principles of proportionality and objectivity. On this basis it may be possible to conclude that VIS schemes do not make a violation of the proportionality principle in sentencing more likely. The risk remains, however, that in some cases prejudicial information is submitted to the sentencing judge in a VIS. The prejudicial

[65] See with further references: Bryan Myers and Edith Greene, 'The Prejudicial Nature of Victim Impact Statements-Implications for Capital Sentening Policy' (2004) 10(4) *Psychology, Public Policy, and Law* 492.
[66] In regards to VISs and proportionality see in general: Mark Stevens, 'Victim Impact Statements Considered in Sentencing' (2000) 2(1) *Berkeley Journal of Criminal Law* <http://scholarship.law.berkeley.edu/bjcl/vol2/iss1/3>.
[67] See in general: Amy K Philipps, 'Thou Shalt not Kill any Nice People: The Problem of Victim Impact Statements in Capital Sentencing' (1997) 35 *American Criminal Law Review* 93.
[68] Paul H Robinson, 'Should the Victim's Rights Movement have Influence Over Criminal Law Formulation and Adjudication?' (2002) 33 *McGeorge Law Review* 749, 749.
[69] See, with further references: Chalmers, Duff and Leverick, above n 18.
[70] Garkawe, above n 45, 95.
[71] See in general: Edna Erez and Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience' (1995) 23 *Journal of Criminal Justice* 363; State Government Victoria, above n 41, 6.

information could then form part of the sentencing decision and affect the defendant's rights: differentiating between information contained in a VIS and other factors relevant to the sentencing decision is not always easy for judges in their decision-making.[72] The 2010 Western Australian case of *Iseenhood v Greene,* in which Isenhood was sentenced to 12 months imprisonment for breaching a violence restraining order and making threats to injure his partner illustrates this risk.

Isenhood appealed on the basis that the sentencing judge had taken into account irrelevant material in the VIS made by his former partner. In its decision, the Supreme Court of Western Australia found that the material included in the VIS went beyond the subject of the conviction and was written in an inflammatory manner. The Court held that the sentencing judge falsely considered the VISs' inflammatory and irrelevant material concerning the relationship history between victim and defendant and thereby imposed a manifestly excessive sentence. The appeal was successful and the appellant was resentenced.[73] Similarly, in *Tran v The Queen*[74] a victim of theft, burglary and indecent assault had tendered a VIS describing the effects of the crime on her. In her statement the victim stipulated that she was unable to return to work solely due to the offence committed against her. While the defence objected to this statement, no cross-examination of the victim was allowed. In regards to the sentence, the trial judge found the criminal act committed to be solely responsible for the inability of the victim to return to work. The Supreme Court of Victoria held that the sentencing judge should have ruled this part of the VIS inadmissible or clarified that he would not rely upon this part of the statement. This case is an example of a sentencing judge's consideration of inadmissible information in a VIS.

Further risks associated with VISs for defendants are that defendants may be unable to appeal sentencing decisions solely on the basis that the sentencing judge has considered irrelevant or inadmissible material in a VIS. Firstly, the defendant may not know whether the sentence was in fact based on information that was disputed or prejudicial and what impact the VIS had on the sentence.[75] Secondly, the weight a sentencing judge gives to a particular sentencing consideration is generally no ground for appeal as such.[76] Upon appeal, the individual sentencing consideration can only be reflected in relation to the question of whether the sentence was overall 'manifestly excessive' and whether the sentencing judge correctly imposed the sentence given all the relevant

[72] Carolyn Hoyle, 'Empowerment through Emotion: The Use and Abuse of Vicitm Impact Evidence' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapetuic Jurisprudence* (Carolina Academic Press, 2011) 249, 272.
[73] *Isenhood v Green* (2011) WASC 70.
[74] *Tran v The Queen* [2011] VSCA 383 (8 November 2011)
[75] See, for example, *Gorladenchearau v The Queen* [2011] VSCA 432 para 34.
[76] *Raccosta v The Queen* [2012] VSCA 59 (4 April 2012) para 31.

factors.[77] Consequently, there is no possibility for the defendant to appeal the verdict specifically on the basis of incorrectly considered elements of a VIS unless the sentence is also 'manifestly excessive'.[78]

Although primary research in different jurisdictions has suggested that the tendering of VISs has not increased sentence length, some case law in Australian jurisdictions implies that problems have arisen in practice where judges have relied on irrelevant and inadmissible material contained in a VIS. Therefore, the concern exists that VISs in individual cases could make violations of the defendants' right to a proportionate sentence more likely.

The above analysis suggests that a number of victims may not be able to benefit from VIS schemes in Australia. Additionally, in some cases where victims tender VISs the defendant's right to a proportionate sentence might be at risk. This may provide Australia with sufficient grounds to successfully refuse the expansion of VIS schemes to more or all victims based on the first qualification of section 6(b) and 'prejudice' to the accused.

The next part of this chapter will examine whether the introduction of VIS schemes has the potential to meet the objects of section 6(b) in the German setting. It further considers whether Germany could justifiably refuse the introduction of VISs based on the first qualification contained in section 6(b).

B Introducing the Right to Make a VIS in Germany

In relation to VIS schemes and their introduction in civil law jurisdictions, some scholars have suggested that VIS schemes may be superfluous because victims are formal participants in criminal proceedings.[79] The analysis in Chapter 5 has shown that victims in Germany who are ineligible for existing victim participation schemes have little opportunity to present views and concerns in German criminal procedure during the trial and sentencing stage. Thus the introduction of VISs may have the potential to enhance possibilities for victims to present views and concerns in Germany. Yet, similar to Australia, Germany might be able to refuse the introduction of such schemes in their national law if the schemes could not provide victims with the benefits envisioned by the drafters of section 6(b) in the German setting.

---

[77] Ibid.

[78] An appeal is usually based on the notion that the sentencing discretion has been miscarried in general and the sentence is manifestly excessive. See also Ibid.

[79] M Baril et al, 'La Declaration de la Victim au Plaais de Justice de Montreal. Rapport Final' (1990) cited in Jo-Anne Wemmers, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121, 124.

1 Potential to Reach the Objects of Section 6(b)

As outlined above in the context of Australia, academic scholarship has suggested that VISs may hold benefits for victims.[80] The assumed benefits could be less prominent in the German inquisitorial system due to the structure of the system. Similar to the situation in Australia, defendants would have to be granted the right to cross-examine the content of VISs in Germany.[81] By comparison to Australia, where it has been found that examination of the content of VIS does not occur often, examination of the content of VISs would always occur in Germany. Due to the structure of the German criminal justice system and its leading principles, German courts are under an obligation to examine all evidence introduced into proceedings by the 'power of their office', *ex-officio*.[82] That means for the introduction of VIS schemes in Germany that, whenever such a statement was presented during court proceedings, the court would be obligated to examine its content. Victims, however, could see the examination of their VIS by the court as questioning their suffering and doubting their emotions. Making a VIS in German criminal proceedings could therefore ultimately become a traumatising experience for victims.[83] It may be more challenging for victims to be questioned about emotions closely related to a traumatising event than about more objective occurrences that they testify about as a witness.

In summary, fewer victims in Germany may be able to derive benefit from VIS schemes than in the Australian context due to the court obligation to examine all statements *ex-officio*. It is therefore uncertain whether the introduction of VISs in Germany has the potential to reach the objects of section 6(b) and assist victims in avoiding secondary victimisation and in providing them with closure.[84] That VISs may not be beneficial for a significant number of victims may provide Germany with sufficient grounds to refuse their introduction in its national law.

Additionally, Germany may be able to legitimately refuse the introduction of such schemes by relying on the first qualification of section 6(b), 'without prejudice to the accused'.

---

[80] See above part I A.
[81] *StPO* ss 240(2), 244(3)-(5). This right is also constitutionally guaranteed: *Grundgesetz* art. 103(1).
[82] Ibid s 244(2).
[83] Ralf Peter Anders, 'Straftheoretische Anmerkungen zur Verletztenorientierung im Strafverfahren' (2012) 124(2) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 374, 390; Wemmers, above n 79, 127. Contrary Groenhuijsen and Letschert explain in the context of VIS in the Netherlands that this is a speculative prediction and could be improved by taking specific precautions, such as, preparing the victim for the day. They argue that the preparation of victims for the day in court has significantly reduced the risk of potential revictimisation. See: Marc Groenhuijsen and Rianne Letschert, 'Legal Reform on Behalf of Victims of Crime: The Primacy of the Dutch Legislature in a Changing International Environment' (Tilburg Law School, International Victimology Institute Tilburg (INTERVICT), 2011) para 5.
[84] For a critical discussion of the term 'closure' and other therapeutic notions see Pemberton and Reynaers, above n 2, 235.

2 Rejection Based on Qualification 1 of Section 6(b)

In order to address the above question it will first be considered at what stage of the proceedings VIS schemes could operate in German criminal procedure.

In Germany, the trial and sentencing stage are not separated. Upon termination of the trial proceedings, the court returns verdict and sentence without a separate sentencing hearing. Consequently, in Germany, the victim would have to tender the VIS, relevant for sentencing considerations, during the main trial before guilt of the defendant has been established. During the trial stage in Germany, the principles of orality and immediacy apply as two of the maxims of German criminal procedure.[85] Generally, all evidence intended for the trial must be introduced orally and cannot be substituted by a written statement by a witness or expert witness. Therefore, victims would have to orally submit VIS in Germany.[86] Submitting a VIS in writing, as allowed in most Australian jurisdictions, would generally not be consistent with the rules of criminal procedure in Germany.[87]

However, the introduction of oral VIS schemes during the main trial in Germany might make a violation of the defendants' fair trial guarantees more likely. In Australia, when VISs are presented during the sentencing stage, the defendant has already been found guilty. Therefore, at this stage of proceedings in Australia, procedural guarantees, such as, the presumption of innocence, do not apply to the convicted defendant any longer. By comparison, in Germany, VISs would have to be introduced at trial before the guilt or innocence of the defendant has been established. At this stage of proceedings, the presumption of innocence and other procedural safeguards for the defendant still operate. Hence, the victims' right to present VISs verbally at trial in Germany could infringe upon the defendant's fair trial guarantees.[88]

VISs could violate defendants' rights because defendants who plead not guilty at trial or remain silent cannot defend themselves properly against the information contained in a VIS introduced orally by the victim during the trial.[89] Defendants who plead innocent would be unable to credibly argue that the consequences of the crime alleged by the victim are not as severe as described in the

[85] These principles are comparable to the common law doctrine of hearsay, see: John H Langbein, *Comparative Criminal Procedure: Germany* (West Publishing Co., 1977) 67.
[86] Howard D Fisher, *The German Legal System and Legal Language: A General Survey Together with Notes and German Vocabulary* (Taylor & Francis, 4 ed, 2009); *StPO* s 250.
[87] See Chapter 5, part II.
[88] Concurring Marlene Hanloser, *Das Recht des Opfers auf Gehoer im Strafverfahren* (Peter Lang, 2010) 222. For detailed explanations on the right against self-incrimination see: Michael Bohlander, 'Basic Concepts of German Criminal Procedure- An Introduction' (2011) 1 *Durham Law Review Online* 1, 2.
[89] Hanloser, above n 88, 223-224.

VIS. However, in the case that the defendant was convicted and the court had to determine a sentence, his failure to challenge the content of the VIS would mean that the statement could be taken into consideration. Therefore, in order to challenge the content of the VIS properly and credibly the defendant would first have to plead guilty and then challenge the information contained in the VIS. A defendant could thus ultimately be forced to self-incriminate during the trial in order to properly defend himself against allegations contained in a VIS. This violates the freedom from self-incrimination as well as the presumption of innocence. Hanloser calls this situation a 'defence dilemma'.[90]

The different structure of criminal proceedings and the unified trial and sentencing stage in Germany, by comparison to Australia, risks infringements of defendants' rights, if VIS schemes were introduced.[91] For this reason, it appears possible that Germany would be able to rely on the first qualification of section 6(b) and to refuse the introduction of VIS schemes at the trial stage.

The risks for defendants resulting from the introduction of VISs might be reduced, however, if a split criminal process, consisting of a trial and a separate sentencing phase, was introduced in Germany.[92] If this occurred, the defendant, similar to the situation in Australia, would have already been convicted prior to the submission of a VIS. The separation of trial stages might reduce or avoid the risk of a violation of the freedom against self-incrimination and the presumption of innocence of the defendant. While these rights of the accused may not be affected by the introduction of VIS schemes in Germany during a separate sentencing stage, risks for defendants' rights such as the right to a proportionate sentence might arise.

Defendants in Germany, similar to Australia, have the right to receive a proportionate sentence in light of their guilt and the facts of the case.[93] Even at a separate sentencing stage, the risks that could arise for defendants due to the introduction of VIS schemes in Germany may be greater than in other jurisdictions. In Australia, legally trained judicial officers determine the sentence in a separate sentencing hearing.[94] This, however, is not always the case in Germany. *Schoeffen*, 'juror-

[90] Ibid, 223-224.
[91] Generally agreeing that the risks of introducing VISs before a court reaches a verdict are higher than at the sentencing stage is Hoyle, above n 72, 259.
[92] Hanloser, above n 88, 225.
[93] *Strafgesetzbuch [German Criminal Cod*e] [Michael Bohlander trans, Uebersetzung des Strafgesetbuchs (Juris, 2009) ('StGB') s 46.
[94] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4 ed, 2009) 262; *Cheung* v. *The Queen* (2001) 209 CLR 1. Under certain circumstances in Australia registrars without professional legal training may exercise certain court powers. See, for example, schedule 2 Federal Court Rules 2011. The matter, however, must be heard by a judge if the parties request so. In local courts in NSW, for example, the registrar may

like' lay judges without professional legal training, constitute part of the court in Germany in proceedings for offences punishable with a sentence of up to four years, including sexual crimes and forms of capital crime.[95] This means that in the German court system, the panel of judges that decides on matters arising during the main hearing is comprised of professional judges and lay judges who deliberate as one body on the verdict as well as on the sentence.[96] By comparison to professionally trained German judges, lay judges without legal training may find it more challenging to differentiate between relevant and irrelevant content contained in a VIS, ultimately aimed at allowing victims to present the emotional impact of crime. Psychological research and research on behavioural economics indicates that the existence of an identifiable victim — a victim whose name and other personal information is known — encourages people to provide help and assistance to the victim.[97] This phenomenon is often discussed as the 'identified' or 'identifiable victim effect'.[98] It appears plausible that VISs which may contain personal, private and sensitive information about the victim, may make the victim more identifiable especially to lay judges. Consequently, lay judges may feel that they need to assist and support the victim by imposing a lengthy and disproportionate sentence.[99]

No extensive or conclusive evidence on the 'identified' or 'identifiable victim effect' and VISs exists. Some past studies on the impact of VISs on juries in US jurisdictions have suggested that defendants received more severe sentences — the death penalty — where juries witnessed the presentation of a VIS.[100] While it may be difficult to generalise the findings made in the context of VISs and US juries and apply them to reactions of German lay judges the findings may also be

---

exercise certain court power upon delegation. Yet, this power relates exclusively to civil law. See *Civil Procedure Act* 2005 (NSW) s 13.

[95] So called Schoeffengericht. See in general: John H. Langbein, 'Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?' (1981) 6(1) *American Bar Foundation Research Journal* 195; Matthias Reimann and Joachim Zekoll, *Introduction to German Law* (Kluwer Law International, 2 ed, 2005) 425. Lay judges in Germany do not undergo professional legal training. While lay judges receive some introductory training it has been noted that the training provided may not be sufficient to equip lay judges for their role. See, for example: Stefan Machura, 'Interaction between Lay Assessors and Professional Judges in German Mixed Courts' (2001) 72(1-2) *Revue Internationale de Droit Penal* 451, 473. See also analysis of risks identified for VISs in the German context: Grosse Strafrechtskommission des Deutschen Richterbundes, 'Staerkung der Rechte des Opfers auf Gehoer im Strafverfahren' (Bundesministerium der Justiz, 2010) <http://www.rundertisch-kindesmissbrauch.de/documents/GutachtenDRBStaerkungder RechtedesOpfersaufGehoerimStrafverfahren.pdf>.

[96] See in general: Stefan Machura, 'Silent Lay Judges-Why Their Influence in the Community Falls Short of Expectations' (2011) 86(1) *Chicago Kent Law Review* 769.

[97] Ray Paternoster and Jerome Deise, 'A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Captial Decision Making' (2011) 49(1) *Criminology&Public Policy* 129, 138.

[98] For an overview and analysis of studies concerning the 'identifiable victim effect' ibid 139.

[99] Pointing out that lay people tend to sympathise with victims see: Sankoff, above n 9, 460. For similar concerns on the introduction of VISs in Germany see: Grosse Strafrechtskommission, above n 94, 83. Note, however, that it has been suggested that jurors often reach similar sentencing decisions as judges (while not focusing on the impact of VIS on juries), see: Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) (52) British Journal of Criminology 93, 107.

[100] Paternoster and Deise, above n 97, 153. The more severe sentence referred to in this study was the death penalty.

indicative for the behaviour of German lay judges due to the following similarities between the two institutions. Both German lay judges and US juries have been introduced to the system as a result of the recognition of the importance of non-professionals in criminal adjudication. The development of the German mixed court system with lay judges was based on an attempt to replicate the Anglo-American jury system.[101] Due to the similarities of the two institutions, the American Bar Association even contemplated law reform of the US jury system, by introducing lay judges, similar to German criminal procedure in the 1970s.[102] The two institutions, however, differ in the fact that the US jury is isolated in its decision-making process while the German lay judges are responsible for deciding on the verdict and sentence together with one or several professional judges.[103] Thus, due to their isolation, US juries may be more heavily influenced by VISs than German lay judges. What this assumption overlooks, however, is that the German professional judge is simply meant to 'lead' the discussion when contemplating the verdict and sentence. The professional judge may therefore influence but not direct lay judges in relation to the content of the VIS: the lay judge's view on the evidence, for example, cannot be excluded by any rules of criminal procedure. Furthermore, under certain circumstances, lay judges can outvote the professional judge and acquit or convict a defendant in spite of the professional judge's opinion.[104]

In light of the above, the concern remains that German lay judges may not be able to differentiate between relevant and irrelevant information contained in a VIS to the same degree as trained professional judges and may thus be influenced to a greater extent. In order to overcome this problem perhaps lay judges could be provided with training on distinguishing between relevant and irrelevant information in a VIS. This suggestion is problematic, however, as it overlooks the reasons for the introduction of lay judges in Germany in the first place. As pointed out above, lay judges were introduced in Germany in recognition of the importance of non-professionals in criminal adjudication. Providing non-professionals with professional legal training would contravene the role lay judges are meant to exercise in German criminal procedure and the reasons for the introduction of lay judges in the German criminal justice system.

Due to the risks that could arise for defendants with the introduction of VIS schemes, it appears possible that Germany may be able to successfully rely on the first qualification of section 6(b) and refuse the introduction of such schemes in its national law.

[101] Langbein, above n 95, 195.
[102] Ibid 196.
[103] Ibid 202.
[104] Ibid 200.

In conclusion, a number of victims may not be able to benefit from VIS schemes in Germany and Australia due to their mode of operation in practice and their expectations when making the statement. Additionally, Germany and Australia may be able to successfully argue that the introduction or expansion of such schemes is 'prejudicial' to the rights of the accused in their respective criminal justice systems. The two Member States may thus be able to refuse the introduction or expansion of VIS schemes in their jurisdiction based on the first qualification of the section. The remaining part of this chapter will analyse whether victims' rights to present views and concerns during the trial and sentencing stage could be enhanced by allowing victims to present views and concerns during the trial in another role.

III Introducing/Expanding the Right to Present Views and Concerns at Trial — in a Different Role Than a Witness

A Expanding the Right to Act as a PAP to All Victims in Germany

Chapter 5 has demonstrated that victims without a formal role in German criminal proceedings cannot actively participate at trial. When contemplating the expansion of victims' participatory rights in Germany the question needs to be addressed as to whether, and to what extent, an already existing victim participation scheme, the right to act as a PAP, could and should be modified and expanded to more or all victims. The benefits and risks of this approach are analysed in the following part of this chapter.

1 Potential to Reach the Objects of Section 6(b)

In light of section 6(b), Germany might be able to reject the expansion of the right to act as a PAP to all victims if this form of participation did not provide reliable benefits for a significant number of victims. Therefore, the question addressed below is whether it could be beneficial to expand the right to act as a PAP to all victims.[105]

By comparison to the obligations of private prosecutors analysed in Chapter 5, victims acting as PAPs are not responsible for actually conducting a prosecution. In case of accessory prosecution, the public prosecutor brings the prosecution and the PAP does not have to participate where this is not desired. For example, the PAP does not have to attend court,[106] and make any decisions or

[105] In Germany the right to act as a PAP was inter alia introduced in order to enhance victim satisfaction. See: Dirk Fabricius, 'Die Stellung des Nebenklagevertreters' (1994) *Neue Zeitschrift fuer Strafrecht* 257, 260. Kilchling points out that particularly victims of a house invasion could benefit from this form of participation. Michael Kilchling, 'Veraenderte Perspektiven auf die Rolle des Opfers im gesellschaftlichen, sozialwissenschaftlichen und rechtspolitischen Diskurs' in J Hartmann (ed), *Perspektiven professioneller Opferhilfe* (VS Verlag, 2010) 39, 46.
[106] Fabricius, above n 105, 258.

contribute to the proceedings in any way if he does not wish to.[107] It is therefore entirely up to the PAP to choose the extent of participatory rights he wishes to exercise. As PAPs are free to choose their participatory role in accordance with their own needs, this form of participation could have the potential to reach the objects of section 6(b).

Even though the categories of victims who are eligible to participate as a PAP have been expanded over the past decade, little research exists on whether victims experience acting as a PAP as beneficial in practice. The benefits of PAP participation are therefore largely unclear. The assumption that participating as a PAP has the potential to reach the objects of section 6(b) is supported by older research conducted by Kaiser and published in 1991.[108] In his study Kaiser conducted qualitative interviews with 35 crime victims, at the end of the trial, whose cases had been heard at the local and regional courts in Freiburg im Breisgau. He found that over 40% participated or would have liked to participate at trial. Further, the research suggested that PAPs who participated at trial felt that acting in this role had a positive effect on their position and felt more satisfied as a result of participating.[109] However, the findings are based on a small sample of victims in one particular area of Germany. Therefore this may not be representative of the perceptions of PAPs in Germany.

The finding that victims positively perceive participating as a PAP is supported by more recent qualitative research by Kilchling and Kury published in 2011. In a qualitative study, Kilchling and Kury researched the effects of PAP participation by interviewing 18 people including criminal justice authorities, victims, representatives of victim support organisations and legal representatives of PAPs.[110] The researchers found that the participatory status associated with being a PAP can give victims the feeling of being in control and reduce the feeling of helplessness and respectively reduce the risk of secondary victimisation.[111] In 2005, Niedling analysed 333 criminal trial files in the courts of Nuernberg-Fuerth and subsequently surveyed victims who participated as PAPs in these cases.[112] Overall 55 victims participated in his survey. Niedling found that the majority of surveyed victims, 55%, were satisfied or very satisfied with their participation as a PAP. Only

[107] Helmut Kury and Michael Kilchling, 'Accessory Prosecution in Germany: Legislation and Implementation' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice, International Perspectives* (Carolina Academic Press, 2011) 41, 49.
[108] Michael Kaiser, 'The Status of the Victim in the Criminal Justice System According to the Victim Protection Act' in Guenter Kaiser, Helmut Kury and Hand-Joerg Albrecht (eds), *Victims and Criminal Justice: Legal Protection, Restitution, and Support* (Max-Planck Institut fuer auslaendisches und internationales Strafrecht, 1991) 543, 545.
[109] Ibid 560.
[110] Kury and Kilchling, above n 107, 52.
[111] Ibid 53, 61.
[112] Dirk Niedling, *Strafprozessualer Opferschutz am Beispiel der Nebenklage* (Lit Verlag, 2005) 163. The questionnaire was mailed to 257 victims of whom 55 responded.

around 10% were not satisfied with their participation in this role.[113] Niedling therefore concluded that it appears likely that participation as a PAP impacts positively on victim satisfaction in the German criminal justice system.[114] Others have emphasised that it is particularly the official role as a PAP and the insight into the trial process that victims receive which adds authority to their position and allows them to participate in a meaningful way.[115]

Current research in Germany supports the presumption that participation as a PAP can be beneficial for victims and may increase their satisfaction with the criminal justice system as well as assist them in avoiding secondary victimisation. Nonetheless, the research is limited and samples have been small. In light of the above, Germany may not be able to successfully refuse the expansion of PAP schemes to all victims on the basis that the participation is not beneficial for victims. Yet, Germany might be able to legitimately refuse the expansion if this form of victim participation was prejudicial to the accused and the first qualification of section 6(b) was fulfilled.

2 Rejection Based on Qualification 1 of Section 6(b)

The defendant's right to a fair trial could be infringed upon where victims participate as PAPs. In case of PAP participation, the accused might have to defend himself against two 'accusers': the public prosecutor and the PAP. This situation might upset the balance at trial. Furthermore the participation could infringe upon the presumption of innocence that operates during the trial stage. The participation of a 'victim' at trial might already suggest that the defendant has committed the criminal act prior to being found guilty. Additionally, acting as a PAP might provide victims with information that could distort their subsequent testimony as witnesses. Lastly, victim participation could violate defendants' rights because of financial implications associated with victim participation. The next part of this chapter will examine these matters in order to identify whether victim participation in the form of a PAP can be prejudicial for defendants and, accordingly, whether Germany could refuse this form of participation for all victims based on the first qualification of section 6(b).

(a) Balance at Trial

It has been argued that the participation of PAPs could generally offset the balance of German criminal trials and thereby present great risks for defendants.[116] The main concern is that the participation of PAPs, who have the right to ask questions and to examine and request evidence,

[113] Ibid 199.
[114] Ibid 203.
[115] Ibid 61. Sanders et al, above n 4, 456. Niedling, above n 112, 203.
[116] Explained in Karsten Altenhain, 'Angreifende und verteidigende Nebenklage' (2001) 56(15/16) *Juristen Zeitung* 791, 791.

could violate the defendants' right to a fair trial.[117] Where a victim participates as a PAP the defendant might have to face two 'accusers'. This could ultimately violate the 'equality of arms' between state and defendant.[118] Whilst this concern may generally apply to a criminal justice system like the adversarial system, this does not necessarily apply to the German inquisitorial system for the following reasons.

In German criminal trials, judges exercise firm trial control including the selection and subsequent examination of evidence and the questioning of witnesses.[119] The judge is responsible for initiating criminal proceedings, collecting all the evidence the court finds necessary and for deciding how to resolve the issues of the case.[120] In relation to evidence examined at trial, prosecution and defence only have the right to request that additional evidence be introduced at trial if admissible under the StPO.[121] During proceedings the judge undertakes most of the questioning of witnesses. Defence counsel and prosecution can only later ask additional questions.[122] The duty of the court in Germany to examine the facts of the case includes gathering evidence that is exculpating for the accused, even against the accused's will. The court is furthermore obligated to find facts that are incriminating, even if the public prosecutor has no interest in relying on these facts.[123] This means that, even where the prosecution and defence agree not to collect any further evidence, the court cannot refrain from further clarifying the facts of the case.[124] Thus the parties in the German criminal justice system play a subsidiary role while the judge dominates proceedings and has primary control over the questioning of the parties and the collection of evidence.[125] The system has been described as 'vertically structured', meaning that the judge keeps firm control over the trial participants compared to the adversarial system as the 'horizontal courtroom action' of prosecution and defence.[126] The vertical trial structure based on judge control, allows for victim participation in the role of a PAP in Germany without necessarily upsetting the balance of the trial.[127] The trial structure enables the judge to prevent the public prosecution and PAP from allying against the

[117] Ibid.
[118] Ibid.
[119] For a detailed analysis of this issue see discussion below under part IIIB(b).
[120] Amalia Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial' (2005) 90 *Cornell Law Review* 1181, 1188.
[121] *StPO* s 244(3).
[122] Jupp Joachimski, *Criminal Procedure in Germany (Lecture held in Vilnius, Lithuania)* (1999) <www.joachimski.de/StPO/Rechtsvergleich.html>.
[123] Eberhard Siegismund, 'Ancillary (Adhesion) Proceedings in Germany as shaped by the First Victim Protection Law: An Attempt to Take Stock' (Paper presented at the 112th International Training Course, Japan, 2000) 103.
[124] Ibid.
[125] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, 2008) 283.
[126] Kury and Kilchling, above n 107, 48.
[127] Ibid 48.

defendant. The judge's primary power to decide what evidence will be heard and its examination at trial prohibits the defendant from having to face two 'accusers'; public prosecution and PAP.

In a 1969 decision, the German Constitutional Court concurred that the right to act as a PAP does not violate the defendants' constitutionally guaranteed right to a fair trial by him from having to face two 'accusers'.[128] The Court was called upon by a lower instance criminal court to decide on the general constitutionality of PAP participation. The case to be tried in the lower criminal court was concerned with charges of causing bodily harm by negligence. The accused's car collided with another motor vehicle as he tried to turn left at an intersection, leaving the driver of the other vehicle injured. The injured driver subsequently applied to join criminal proceedings as a PAP. On this basis the criminal court temporarily stayed proceedings and requested the decision of the Constitutional Court on the general constitutionality of PAP participation. The Constitutional Court held that this kind of participation is constitutional. The Court saw no grounds for a violation of the fair trial principle as the accused is not limited in his defence and his defence strategy by the participation of a PAP. The Court elaborated further that a fair trial could still be guaranteed because the defendant is not precluded from defending himself against statements made by the PAP and by the public prosecution. It explained that the defendant is free to request evidence and make applications in order to influence the proceedings himself.[129] For the above reasons, the German Constitutional Court did not consider the participation of victims as PAPs as an unconstitutional violation of defendant's rights, including the right to a fair trial.

(b) Presumption of Innocence

Some German academics are concerned that the mere participation of a PAP during the main trial, where the defendant has not yet been found guilty, violates the presumption of innocence.[130] It has been suggested that allowing a victim to participate at trial already indicates that the defendant has committed the offence against the victim before the court has passed a verdict. However, it can be argued that in Germany the court system is familiar with the role of a PAP and the different modes of victim participation during the criminal trial. The concept of victim participation in this form has been part of the German criminal justice system to some extent for over 100 years and is therefore not novel. Courts are not only familiar with victim participation as a PAP but also with other modes of victim participation, such as participation as an applicant to the adhesion procedure. Therefore, it

[128]Bundesverfassungsgericht [German Constitutional Court], 1 BvL 7/68 3 June 1969 reported in Neue Juristische Wochenschrift 1069, 1432.
[129] Ibid 1424.
[130] Discussed in Hans Joachim Schneider, 'Die Rechtsstellung des Verbrechensopfers im Strafrecht und im Strafverfahren' (1989) (2) *JURA* 72, 76.

is very unlikely that German courts will automatically decide against the accused simply because a PAP has joined public prosecution and participates at trial.[131]

(c) Influence on Witness Testimony

Finally, concerns have been voiced that the right of a PAP to be present during the main trial before he testifies as a witness, could influence and distort the victims' subsequent testimony. The skewed witness testimony could then obstruct 'truth finding' at trial.[132] Ultimately, this could be prejudicial to the defendants' right to a fair trial. While this may be a valid concern theoretically, it overlooks the precautions in practice that could avoid or decrease this risk. Currently, the defendant is questioned first in proceedings after he has been informed about his right to remain silent. Only subsequently will other forms of evidence be introduced and witnesses and expert witnesses heard. While the PAP has the right to remain present during the questioning of the accused, other witnesses must leave the courtroom. There would be fewer risks for the accuracy of the witness' testimony if the victim participating in proceedings were examined as a witness at the beginning of the trial, before any other evidence is introduced. Victims would therefore have no opportunity to obtain information that could otherwise distort their testimony. Scheduling the victim witnesses' testimony at the beginning of the trial could therefore avoid risks for the truth finding at trial and ultimately preserve a fair trial for defendants.[133]

The limited research available in this area supports the argument that victim participation in the role of a PAP does not generally infringe upon defendants' rights. For example, studies undertaken by Kuehne and Huesing in the 1980s suggest that the participation of the PAP in practice has no verifiable influence on the conviction or the sentence imposed.[134] While it is unclear whether these findings still apply after three major victim-related law reforms in Germany in the 1980s and 2000s, no current research exists suggesting otherwise. To the contrary, the study described above undertaken by Niedling in 2005 has not shown any significant influence of PAP participation at trial on verdict and sentence.[135]

---

[131] Similar argument made in Ibid.
[132] Klaus Schroth, '2. Opferrechtsreformgestz- Das Strafverfahren auf dem Weg zum Parteienprozess?' (2009) *Neue Juristische Wochenschrift* 2916, 2918-1919.
[133] Concurring Kai-Yuan Wu, *Die Rechtsstellung des Verbrechensopfers im staatlichen Strafverfahren am Beispiel der Nebenklage* (Peter Lang, 2007) 74.
[134] H-H Kuehne, 'Die tatsaechliche Bedeutung von Opferrechten in der Deutschen Strafprozessordnung' (1986) *Monatsschrfit fuer Kriminologie und Strafrechtsreform* 9; Kury and Kilchling, above n 107, 54; D Huesing, *Die Rechtswirklichkeit der Nebenklage* (PhD Thesis, 1982) 91. It is questionable whether these findings are still valid today since the Nebenklage has significantly changed and is now available to victims of more crimes than it was when the studies were undertaken.
[135] Dirk Niedling, *Strafprozessualer Opferschutz am Beispiel der Nebenklage* (Lit Verlag, 2005) 290-291.

Overall, there is little evidence to support the assumption that participation of PAPs can make a violation of defendant's right to a fair trial more likely. However, further research should be undertaken to ensure that possible risks for defendants' rights are minimized as much as possible. For example, it may be advantageous to assess whether certain far-reaching rights currently available for PAPs, for example, the right to request evidence, are necessary to provide victims with a meaningful participation role during the trial stage.[136] Assessing how the role of PAPs could be reshaped by identifying what rights could be modified or omitted seems particularly important. The few existing research studies in this area already suggest that the PAP's right to request evidence and the right to appeal the verdict, are being underutilised in practice.[137] When contemplating a meaningful participation role for all victims in Germany, it would be beneficial to know what rights could be limited or omitted and what rights should be maintained and/or strengthened.[138] Thus, further primary research into this area is required which goes beyond the scope of this thesis.[139]

(d) Financial Concerns and Defendants' Rights

The expansion of victims' participatory rights does not come without cost implications, especially where victims are legally represented: defendant's rights could be infringed where the costs for victim participation are allocated to the defendant upon conviction. The defendant may intentionally seek to keep the trial as short as possible in order to keep the victim participation costs to a minimum. The defendant may therefore be limited in his defence strategy. Furthermore, defendants who receive a jail sentence, and in addition are court ordered to pay for the trial costs and the costs

[136] Arguing that all victims should have the right to be heard at trial but that this does not necessarily have to occur by being granted the right to act as a PAP is Susanne Walther, 'Interessen und Rechtsstellung des Verletzten im Strafverfahren' (2008) (10) *Juristische Rundschau* 405, 406-407. Walther argues that participatory rights for victims must include a minimum amount of rights for victims to be heard. For a critique of the ample rights of PAPs see: Stephan Barton, 'Opferanwaelte im Strafverfahren: Auf dem Weg zu einem neuen Prozessmodell?' in Helmut Pollaehne and Ingrid Rode (eds), *Opfer im Blickpunkt-Angeklagte im Abseits* (LIT-Verlag, 2012) 21, 21.

[137] In a study published in 2011 Barton found that while 86% of 200 PAPs participating in the study exercised their right to be present at trial and 84 % elected to make a final pleading overall only 9% of PAPs in the study made an application to introduce evidence and only 0,5% rejected questions by the defendant: Stephan Barton, 'Nebenklagevertretung im Strafverfahren: Empirische Fakten und praktische Konsequenzen' (2011) 5 *Strafverteidiger Forum* 161, 163. See also Niedling, above n 135, 288.

[138] Walther has suggested that, while it may not be necessary that all victims are afforded the right to attack the defendant's case, all victims should have the right to ask questions during the taking of evidence and to make statements if the 'fair trial' right for victims is taken seriously in Germany. See: Susanne Walther, 'Victims' Rights: Procedural and Constitutional Principles for Victim Participation in Germany' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 97, 110

[139] Hoeynik and Weigend have suggested ending the 'two-tier victim society' in Germany, meaning victims who are eligible to participate and victims who are not, by introducing a uniform participation role for all victims, mainly focused on being able to present views and concerns during the trial and sentencing stage. See: Theresia Hoeynck, *Das Opfer zwischen Parteirechten und Zeugenpflichten* (Nomos, 2005) 207; Thomas Weigend, '"Die Straftat fuer das Opfer"?- Zur Rennaisance des Genugtuungsgedankens im Straf- und Strafverfahrensrecht' (2010) (1) *Zeitschrift fuer Rechtswissenschaftliche Forschung* 39, 55-57. Concurring Peter Riess, 'Gutachten C: Die Rechtsstellung des Verletzten im Strafverfahren' (55 Deutscher Juristentag, 1984) C115.

of victim participation may find themselves under a great financial burden.[140] Whilst they are unlikely to receive an adequate income when serving the prison sentence, they would face significant costs once they are released from jail. These costs could ultimately hinder defendants' reintegration into society.[141]

The financial implications for defendants, however, are not a direct consequence of victim participation. Victim participation as such does not require the defendant to pay and thus does not directly endanger defendant's rights. An increase in costs for defendants is an indirect consequence of victim participation. It is the result of the cost distribution elected by the individual jurisdiction. Thus, financial and administrative costs related to victim participation and the question of cost distribution are not discussed at this point of the analysis, as only direct violations of defendants' rights through victim participation are considered. Financial implications will be considered in the next chapter of this thesis which analyses whether victim participation could be rejected on the basis that it is not 'consistent' with the national criminal justice system.

The above analysis suggests that violations of defendants' rights in the German inquisitorial system are not necessarily more likely if all victims had the right to participate in the role of a PAP. It may therefore be difficult for Germany to successfully refuse the expansion of PAP participation schemes to all victims based on the first qualification of section 6(b).

The remainder of this chapter will analyse whether victims' participatory rights at trial could be extended and enhanced in Australia similar to the German model. It will first consider the possibility of the introduction of the right to act as a PAP in the Australian adversarial system. The chapter subsequently analyses the opportunities for victims to present views and concerns to a more limited extent when testifying as witnesses.

B Introducing the Right to Present Views and Concerns During the Trial in Australian Jurisdictions

1 Introducing the Right to Act as a PAP in the Australian Criminal Justice System

In order to allow victims to present views and concerns to a greater extent in Australian jurisdictions, victims could be afforded the right to participate as a PAP during the trial stage, similar to the situation in Germany. While the introduction of the right to participate as a PAP may be beneficial for victims in Australia for the same reasons as it is in Germany, Australia may be

[140] Above concerns discussed in Niedling, above n 135, 291.
[141] Ibid.

able to legitimately refuse the introduction of such schemes based on the first qualification of section 6(b). There may be significantly greater risks for defendants' right to a fair trial associated with this form of participation in the Australian adversarial system than there are in the German inquisitorial system.

In the Australian adversarial system, where the criminal trial is structured as a contest between two adversaries,[142] the parties take an active role in obtaining the evidence in order to convince the court and the jury, if available, of certain facts. By comparison, in Germany, the trial judge is responsible for the fact finding and the examination of evidence. The adversarial system emphasises the autonomy of the parties involved, prosecution and defence, and their control over the legal proceedings.[143] The characteristic role of the judge in adversarial systems is traditionally more passive, as the legal control over proceedings is bestowed upon the parties. The role is primarily focused on determining questions of law, including the admissibility of evidence and observing the trial procedure and, where no jury exists, questions of fact.[144] The judge in Australian criminal trials can expand the scope of evidence gathering only in exceptional circumstances, for example, by encouraging parties to call witnesses or asking witnesses clarifying questions.[145] Nevertheless, the overall character of the adversarial trial remains traditionally bipartite, with the emphasis on prosecution and defence and their control of proceedings.[146] The underlying reason for the 'two-party'-structure of the adversarial trial is the belief that the conflict between prosecution and defence is best able to guarantee fairness of proceedings.[147] Adversarial trials are seen as creating 'equality of arms' between the parties, defence and prosecution, because defendants can gather their own evidence and challenge the prosecution's case at all procedural stages.[148] It is further claimed

[142] Bianca Fileborn, 'Sexual Assault Laws in Australia' (Australian Institute of Family Studies, 2011) 2.
[143] Michael Block et al, 'An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes' (2000) 2(1) *American Law and Economics Review* 170, 171; Larry C Wilson, 'Independant Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services' (2005) 23(2) *Windsor Yearbook of Access to Justice* 249, 280.
[144] See, for example: *Ratten v The Queen* [1974] HCA 35 ; (1974) 131 CLR 510; Findlay, Odgers and Yeo, above n 94, 188; Murray Gleeson, 'The Role of a Judge in a Criminal Trial' (Paper presented at the LAWASIA Conference, Hong Kong, 2007) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_6jun07.pdf>; Peter Sankoff and Lisa Wansbrough, 'Is Three Really a Crowd? Thoughts about Victim Impact Statements and New Zealand's revamped Sentencing Regime' (Paper presented at the 20th International Conference of the International Society for the Reform of Criminal Law, Brisbane, 2 July - 6 July 2006) 1.
[145] See, for example: *Richardson v The Queen* (1974) 131 CLR 116; *Whitehorn v The Queen* (1983) 152 CLR 657; Donald James Gifford, *Understanding the Australian Legal System* (Routledge, 1997) 94.
[146] Erin C Blondel, 'Victims' Rights in An Adversary System' (2008) 58 *Duke Law Journal* 237, 241.
[147] D Plater and L Line, 'Has the 'Silver Thread' of the Criminal Law Lost its Lusture? The Modern Prosecutor as a Minister of Justice'' (2012) 31(2) *The University of Tasmania Law Review* 56, 69.
[148] Ibid.

that this bipartite structure allows the defence to put forward its case more forcefully, which in turn contributes to fairness of proceedings for the defendant.[149]

Due to the adversarial trial structure, the introduction of the right for victims to act as a PAP in Australia may enable victims with an active role in proceedings to align with the public prosecution against the defendant.[150] In Germany, the trial judge could heavily control such an alliance in order to avoid an imbalance at trial.[151] Therefore in the adversarial system, the introduction of PAP participation may be more likely to endanger a fair trial for the defendant and offset the balance at trial.[152]

The above analysis suggests that allowing victims to present views and concerns as a PAP in the Australian adversarial system can render violations of the defendant's right to fair trial more likely. For this reason, Australia may be able to successfully refuse the implementation of PAP schemes based on the first qualification of section 6(b). The question arises, however, as to whether a more limited right for victims to present views and concerns could be introduced in Australian jurisdictions. The right on the part of the victim to be legally represented as a witness could contribute to reaching the objects of section 6(b), although perhaps to a lesser extent than the right to act as a PAP, while rendering violations of defendants' rights less likely.

2 Introducing the Right to be Legally Represented at Trial While Testifying

In Germany, as described in Chapter 5, victims who testify as witnesses at trial have the right to be legally represented. Their legal representative can make applications on their behalf aimed at their protection when testifying and may object to inadmissible or leading questions. Thus, although to a more limited extent than a PAP, victims can present views and concerns through their legal representative concerning their protection when testifying.

A legal representative for victim witnesses in Australia could have a similar role to the legal representative for victim witnesses in Germany by presenting views and concerns on behalf of the victim on several matters: the legal representative for victims in Australia could request the use of

[149] L Corrado, 'The Future of Adversarial Systems: An Introduction to the Papers from the First Conference' (2010) 35(2) *North Carolina Journal of International Law & Commerical Regulation* 285, 289.
[150] See in general: Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294.
[151] Kury and Kilchling, above n 107, 47. Stressing the benefits of PAP participation in adversarial systems are Lorraine Wolhuter, Neil Olley and David Denham, *Victimology-Victimisation and Victim's Rights* (Routledge-Cavendish, 2009) 196.
[152] On 'Equality of Arms' in the Australian justice system in general see: Martin Blackmore, 'Equality of Arms in an Adversary System' (Paper presented at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000) <http://www.odpp.nsw.gov.au/speeches/Final%20paper%20Capetown.htm>.

alternative ways of giving evidence for victims, for example, through using video technology, where this is set out in legislation. [153] They could further object to inappropriate and inadmissible questions.[154] In case of vulnerable victims, like sexual assault victims, the legal representative could represent the victim's views and concerns when the defence makes an application for the introduction of sexual history or privileged communications.[155]

In light of section 6(b), Australia, however, may be able to refuse the introduction of legal representation for victim witnesses if this form of participation could not be considered beneficial for victims and would not provide victims with the benefits envisioned by the drafters of the section.

(a) Potential to Reach the Objects of Section 6(b)

Having the right to a legal representative who can present views and concerns on matters relating to testifying could potentially avoid secondary victimisation and provide victims with closure for several reasons.

Victims who have the right to be legally represented and can present views and concerns about particular matters relating to testifying may feel that they are being taken more seriously by criminal justice authorities. This assumption is supported by a number of studies on sexual assault victims who have been afforded legal representation when testifying as witnesses. For example, research on legal representation for victims in European jurisdictions suggests that, by having a legal representative present, victims have experienced less hostility from the defendant's lawyer and felt more confident at trial.[156] Additionally, in a 1998 qualitative and quantitative study on the experiences of legally represented rape victims in five European jurisdictions, Bacik et al made the

[153] See, for example, *Evidence Act* 1977 (Qld) s 21A.

[154] See, for example, *Uniform Evidence Acts* s 41. Questions regarding the sexual reputation are generally not admissible in any Australian state or territory jurisdiction with the exception of the Northern Territory. See: *Evidence (Miscellaneous Provisions) Act* 1991 (ACT), s 48-5; *Evidence Act* 1906 (WA), s 36B-BC; *Criminal Procedure Act* 2009 (Vic), ss 341,342A; *Criminal Procedure Act* 1986 (NSW), s 293; *Criminal Law (Sexual Offences) Act* 1978 (Qld), Pt 2 s 4; *Evidence Act* 1929 (SA), s 34L-N; *Evidence Act Act* 2001 (Tas), s 194M. For the situation in the Northern Territory see: *Sexual Offences (Evidence and Procedure) Act* 1983 (NT), s 4. Other measures for victim witness protection exist in Australian jurisdictions, like, for example, testifying behind a screen. Yet, these are not considered in this thesis as the focus lies on victims presenting views and concerns and not protecting witnesses while testifying.

[155] For example, when applications for the admission of sexual history are made by the defence special admission procedures exist. See: Mary Heath, 'The Law and Sexual Offences against Adults in Australia' (Australian Institute of Family Studies, 2005) 7. For an overview on the needs of vulnerable victims in the criminal justice system see: Malini Laxminarayan, 'Interactional Justice, Coping and the Legal System Needs of Vulnerable Victims'(2013) 19(2) *International Review of Victimology*, 145-158.

[156] Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press, 2002) 292; Ivana Bacik, Catherine Maunsell and Susan Gogan, 'The Legal Process and Victims of Rape' (The Dublin Rape Crises Centre, 1998) 17-18. While Temkin's study focuses on rape victims and concludes that their treatment has improved with the introduction of legal representation for witnesses, legal representation in Germany is not limited to victims' of sexual crimes but is applicable to all victim witnesses.

subsequent findings.[157] The researchers identified that victims who were legally represented and had considerable contact with their representative were more satisfied with the criminal justice system. Legally represented victims who were satisfied with their representative often perceived proceedings as fair. Unrepresented victims reported that they felt less confident when testifying and more negative towards the legal process.[158] Concurring, Canadian research on sexual assault victims suggests that, where an independent counsel for victims is involved, 'everyone takes it more seriously'.[159] Being taken more seriously by criminal justice authorities and having the right to present views and concerns to some extent through a legal representative may avoid or reduce victims' secondary victimisation and assist them in obtaining closure.

It may be argued, however, that the findings of the above studies are exclusively applicable to victims of sexual offences due to their potential vulnerability and cannot be generalised for victims of other offences. No specific primary research outlines the benefits of legal representation for victim witnesses of other offences than sexual assault. Yet, issues such as victim dissatisfaction with their role and treatment in the criminal justice system appear common to victims of sexual offences and victims of other offences.[160] It can be expected that the existing research is also relevant to victims of other criminal offences as both groups of victims face some of the same problems. As pointed out in the context of VISs, many victims are unfamiliar with the courtroom setting and perceive it as a foreign environment. It is possible that the insecurities that some victims of non-sexual offences might experience in the criminal justice system could be overcome by having a legal representative safeguarding their interests at trial. In particular their relationship with their legal representative may assist victims in feeling more integrated in the system. Furthermore, in comparison to testifying as a witness and thus serving primarily the interests of the state, victims with a legal representative are able to present their views on certain other decisions relating to their protection at trial. As outlined earlier in the context of VISs, scholars have argued that, where a person perceives proceedings as fair because they are given the opportunity to present their views to authorities, they are more likely to accept unfavourable outcomes. Accepting outcomes and considering proceedings as fair can assist victims in avoiding secondary victimisation by the criminal justice system.[161] Through their legal representative victims would be able to present views

[157] Bacik et al, above n 156.
[158] Ibid 159.
[159] Renate Mohr, '"Words Are Not Enough:" Sexual Assault Legislation, Education and Inforamation' (Department of Justice Canada, 2002) 16-17 cited in: Fiona E. Raitt, 'Research Report for Rape Crisis Scotland: Independant Legal Representation For Complainers In Sexual Offence Trials' (Rape Crisis Scotland, 2010) 70 (discussing the disclosure of records and the Canadian Crown Counsel).
[160] Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 76.
[161] See discussion above under part II A.

and concerns other than in the role of a witness and at more stages of the proceedings than just at the sentencing stage. This involvement could potentially offer some victims greater integration into proceedings,[162] and allow them to perceive proceedings as fair. Greater integration and the perception of fairness might assist legally represented victims in avoiding secondary victimisation and in finding closure.

Nevertheless, this form of participation could also be traumatising for some victims. For example, participation may not be beneficial for victims in cases where the legal representative exercised rights on behalf of the victim during cross-examination that the victim did not wish to exercise. The role of the legal representative suggested in this thesis, however, differs from, for example, the role of a litigation guardian for a child in child welfare cases, who is responsible for determining the best interests of a child in litigation. The suggested role of the legal representative for victims is that of a lawyer acting as an advocate for the client and in accordance with the client's wishes.[163] This means that even where legal representatives did not agree with the client they would be required to act in accordance with the client's wishes. In order to ensure that the legal representative is able to understand and respect the victims' wishes, suitable training should be provided for lawyers acting in this role. Ultimately, this would contribute to keeping victim dissatisfaction with their legal representation to a minimum.

Affording victims legal representation may provide them with benefits for the above reasons and may thus contribute to reaching the objects of section 6(b). Therefore, Australia may not be able to reject the introduction of legal representation for victims based on the argument that this form of participation is not beneficial. Whether a rejection could be based on the first qualification of section 6(b) and prejudice for the defendant, however, will be analysed below.

(b) Rejection Based on Qualification 1 of Section 6(b)

The suggested narrow form in which victims can present views and concerns through a legal representative makes it doubtful whether this form of participation renders a violation of the defendant's right to a fair trial more likely. The legal representative of a victim in the suggested form cannot exercise the same rights as the parties, but is limited to exercising some rights in relation to the protection of the victim witness at trial. By comparison to a PAP, the legal representative of a victim witness cannot request evidence or question witnesses. For this reason, the defendant is not subjected to the risk of the victim's legal representative allying with the public

[162] Kirchengast, above n 57.
[163] In regards to litigation guardians and conflicts of interests see in general: Nancy Moore, 'Conflicts of Interests in the Representation of Children' (1996) 64(4) *Fordham Law Review* 1819.

prosecutor and ultimately does not have to confront and answer to two adversaries. The function of the legal representative for the victim is to safeguard existing procedural and evidentiary rules relating to the victim and to ensure that the rights already granted to victims are complied with. The legal representative does not have the additional rights of a PAP, such as, for example, requesting evidence and questioning the accused and witnesses. Thus the introduction of legal representation for victim witnesses does not appear to present the risk of upsetting the existing balance of the adversarial criminal justice system.

That the suggested form of trial participation would not generally offset the balance of the adversarial trial as such is supported by amicus curiae participation currently a possibility in Australian trials. Traditionally, an *amicus curiae* is a 'non-party' to the court proceedings who, upon application to the court, can be given the opportunity to make a submission on a particular point of law or a general aspect of the particular case.[164] As a 'non-party', the *amicus curiae* is not entitled to file pleadings, request evidence or cross-examine witnesses. By presenting the victims' views as a 'non-party', and so assisting the court with the decision-making process, the victim's legal representative could be considered to be similar to an *amicus curiae*, although not in the traditional sense.[165]

That legal representation for victims as 'non-parties' does not categorically violate defendants' rights is also supported by recent developments in one Australian jurisdiction. Since 2011, New South Wales has introduced the right for sexual assault victims to be legally represented when addressing the court in relation to the prevention or restriction of disclosure of protected sexual assault communications requested by the parties.[166] Protected communications include counselling notes of psychologists and psychiatrists regarding the victim's situation and the victims' personal constitution before or after the alleged sexual assault. The defence may use such notes during the trial to discredit the victim witnesses' character or possibly to demonstrate that they were consenting to the sexual act.[167] In New South Wales, victims have now been afforded standing to contest the discovery of such documents. Their interests are being represented by Sexual Assault Communication Privilege Services established under the Legal Aid scheme who contract out the representation of victims to private practitioners acting on the instructions of the victim.[168] Before

[164] Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 Adelaide Law Rev 159, 159.
[165] The Scottish Executive Justice Department has defined a victim's legal representative in the form suggested in this thesis to be an *amicus curiae*. See: Scottish Executive Justice Department, 'A Consultative Paper on Whether Further Changes to the Law are Needed to Support Vulnerable Witnesses in Giving Evidence' (2002).
[166] *Criminal Procedure Act* 1986 (NSW) s 299A. According to the section a 'protected confider' has standing.
[167] Kirchengast, above n 57, 586.
[168] For further explanations on the scheme see: <http://www.criminalcle.net.au/attachments/SACPLawyersummary.pdf>.

the introduction of this right, the medical professionals in possession of the privileged communication had to challenge the discovery.[169] Because the introduction of such rights is relatively new in Australia no studies have yet focused on the efficiency and risks associated with this form of victim participation.

(c) Financial Concerns and Defendants' Rights

The financial and administrative concerns associated with expanding victims' participatory rights do not directly infringe upon defendants' rights. Therefore, a discussion is undertaken in the next chapter which deals with the consistency of victim participation with the goals of the respective national criminal justice system.

Legal representation for victim witnesses appears to have benefits for victims and may assist them in avoiding secondary victimisation during proceedings. The introduction of the proposed narrowly-tailored right does not seem to render a violation of the defendants' right to a fair trial more likely. The above suggests that Australia may not be able to successfully rely on the first qualification of section 6(b) in refusing the introduction of such rights.

C. Summary

The analysis in this chapter has suggested that the rights of victims to present views and concerns may be expanded to some degree in both Germany and Australia in line with the objects of section 6(b) — avoiding secondary victimisation and providing victims with closure. It has been concluded that both Member States may not be able to categorically rely on the first qualification of section 6(b) in refusing to do so.

IV CONCLUSION TO CHAPTER 6

Research question 2 asks to what extent victims' participatory rights could be extended and enhanced and whether the two Member States could refuse such expansion based on the first qualification of section 6(b).

Chapter 6 has identified that it seems likely that Germany would be able to legitimately refuse the introduction of VIS schemes into its inquisitorial system based on the first qualification of section 6(b). This is because of the risks arising for defendants' rights where victims are allowed to submit VISs in the German courtroom setting. However, Germany may not be able to successfully refuse

[169] Kirchengast, above n 57, 587.

the expansion of the right to act in the role of a PAP to all victims by relying on the first qualification of the section. The participation as a PAP seems beneficial for victims and no greater risks appear to develop for defendants in the case of participation due to firm judicial control of inquisitorial criminal trials.

It seems likely that Australia could successfully reject the expansion of VIS schemes to all victims due to the risks involved for defendants and the reduced benefits a number of victims may experience. Yet, Australia may not be able to reject the right to be legally represented as a witness at trial based on the first qualification of section 6(b). The participation seems to afford victims the benefits envisioned by the drafters of the section and, due to the limitations of the suggested right, the risks to defendants appear minimal. These findings are summarized in Table 3.

	Possible expansion of procedures and processes for victim participation at the trial and sentencing stage?	Possibility for Member States to refuse the expansion based on the first qualification of section 6(b) 'prejudice to the accused'?
Germany	Possibility for all victims to act in the role of a PAP	Not likely to be successful. It will be difficult for Germany to convincingly argue that this form of participation is prejudicial to the accused. The judge's control in the inquisitorial system appears sufficient to safeguard a fair trial for the defendant.
Australia	Possibility to be legally represented as a witness	Not likely to be successful. It will be difficult for Australia to convincingly argue that this form of participation is prejudicial to the accused. Victims' legal representatives would only be afforded limited, narrowly-tailored rights that do not seem to offset the balance of the adversarial trial.

Table 3: Possibilities for Enhancing Victims' Participatory Rights in Light of Qualification 1 of Section 6(b)

The next chapter, Chapter 7, aims to analyse whether Member States could rely on the second qualification contained in section 6(b) in refusing an expansion of victims' participatory rights beyond current limits. It will be assessed whether Germany and Australia could convincingly argue that victim participation is generally inconsistent with their respective national criminal justice system. If such an argument could successfully be presented, Germany and Australia might be able to categorically refuse any form of victim participation based on the second qualification of the

section. The consequences this might have for the potential success of the proposed *Convention* for victims are assessed in Chapter 8.

Chapter 7: Rejecting the Expansion of Victims' Participatory Rights Based on Qualification 2 of Section 6(b) of the *Declaration*

I INTRODUCTION

Chapters 5 and 6 have identified that procedures and processes for victims to present views and concerns at the trial and sentencing stage could be enhanced in both Germany and Australia. Such an extension would not necessarily be prejudicial to the accused. This chapter considers the second qualification contained in section 6(b), stating that victims do not have to be afforded the right to present views and concerns where this is not 'consistent' with respective national criminal justice system. It analyses whether the two Member States could refuse the expansion of victims' participatory rights beyond current limits on this basis.

The second qualification to section 6(b) states that victims must only be allowed to present views and concerns where this is 'consistent with the relevant national criminal justice system'. The interpretation of this phrase offered in Chapter 4 suggested that if victim involvement at a particular stage, here at trial and sentencing, 'does not accord with the criminal policy of a country, this country can argue that such involvement is inappropriate and not consistent with its national criminal justice system'.[1] Thus, where victim involvement is not in accordance with the criminal justice system, Member States could legitimately refuse the expansion of victims' participatory rights. The first part of this chapter will analyse the structure of the national criminal justice system and criminal policy in Germany and Australia in order to determine whether the two Member States could reject the expansion of victims' rights on the basis of the second qualification.

II POSSIBILITY TO REJECT VICTIM PARTICIPATION AS NON-'CONSISTENT' WITH THE NATIONAL CRIMINAL JUSTICE SYSTEM IN GERMANY AND AUSTRALIA

A Victim Participation Inconsistent with the State-Based Conflict

Chapter 5 concluded that, in the German inquisitorial system, a high number of possibilities for participation at the trial and sentencing stage exist for certain eligible victims, mostly victims of more serious offences. In the Australian adversarial system, victim participation is only possible to

[1] Matti Joutsen, *The Role of the Vicitm of Crime in European Criminal Justice Systems. A Crossnational Study of the Role of the Victim* (United Nations European Institute for Crime Prevention and Control (HEUNI) Finland, 1987) 180; see interpretation of section 6(b) in Chapter 4, part IIIB.

a limited extent through VISs mostly for victims of more serious criminal acts. No general victim participation right exists at the trial and sentencing stage in the two Member States regardless of their adversarial or inquisitorial legal tradition. Therefore, the question arises of whether such a general participation right is seen as 'inconsistent' with the criminal justice policies in Germany and Australia.

1 Criminal Justice Policy in the German Criminal Justice System

(a) 'Modern' Criminal Justice: Deprivatisation of Conflict and Crime as a Wrong Against Society

German criminal procedure is dominated heavily by 'collectivistic theory'. Collectivism contends that the activity of the state in criminal procedure is based on, and justified, in accordance with the interests of the general community and not necessarily the individual victim.[2] The aim of criminal procedure in Germany is seen as protecting the legal interests of the community by preventing future crime. Furthermore, criminal procedure aims to punish the breach of society's norms, on the one hand, and to grant the defendant a fair trial on the other hand.[3] It is said that German criminal law does not deal with interpersonal matters, but with acts and omissions that can endanger the current social and economic order.[4] 'Modern' criminal procedure, in which the state has the monopoly over criminal trials and, in which crime is considered a wrong against society rather than against the individual victim, was introduced to replace the system of private prosecutions.[5] Before the introduction of a 'modern' criminal justice system private prosecutions were dominated by vengeance of the individual victim. Due to expected revenge from the defendant and/or their kinship group, private prosecutions were seen as endangering the peace and order of society.[6] Consequently a 'modern' criminal justice system, largely independent from the victims' wishes, was introduced.

---

[2] Tatjana Hoernle, 'Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht' (2006) (19) *Juristen Zeitung* 950, 951. Concurring: Michael Kilchling, 'Opferschutz und der Strafanspruch des Staates- ein Wiederspruch' (2002) *Neue Zeitschrift fuer Strafrecht* 57, 58. Recent academic scholarship has started to explore the possibility of connecting victims' interests with existing theories of criminal procedure. For an analysis of these attempts see: Ralf Peter Anders, 'Straftheoretische Anmerkungen zur Verletztenorientierung im Strafverfahren' (2012) 124(2) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 374, 394-408.

[3] With further explanations on the theories see: Susanne Walther, 'Was soll "Strafe" [Why Penalties?]' (1999) (1) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 123, 129-130, Kristian Stoffers and Jens Moeckel, 'Beteiligtenrechte im Strafprozessualen Adhaesionsverfahren' (2013) *Neue Juristische Wochenschrift* 830, 830.

[4] Thomas Weigend, '"Die Straftat fuer das Opfer"?- Zur Rennaisance des Genugtuungsgedankens im Straf- und Strafverfahrensrecht' (2010) (1) *Zeitschrift fuer Rechtswissenschaftliche Forschung* 39, 42. In that regard Walther promotes the holistic view of crime not only as the violation of society's norms but also as the real conflict behind every criminal act. See: Walther, above n 3, 131.

[5] See Chapter 5, part IIIA. See also Weigend, above n 4, 43.

[6] Weigend, above n 4, 43.

In this system, the state is responsible for reacting to violations of society's norms.[7] Modern criminal law and procedure therefore developed through the 'cutting' of the 'injuring thread'[8] between victim and offender by the state. This led to the 'neutralisation' of the victim and to a 'de-emotionalisation' of criminal procedure.[9] According to the 'modern' view of criminal justice the individual violation of victims' rights is consumed by the respective violation of societal norms.[10] Thus, the limited participatory status for victims in Germany is 'no accident in the history of criminal procedure'[11] but the consequence of the deprivatisation of conflicts. Deprivatisation in this context means that the conflict between victim and offender has intentionally been taken from the victim and has been moved to the public sphere where crime is treated as an offence against the state.

The victims' interest to be heard in order to reduce secondary victimisation and provide victims with therapeutic benefits during the trial does not seem a relevant interest under collectivistic criminal theory.[12] On this basis, some authors have commented that restoring victims should be the aim of civil proceedings which deal with individual conflicts, but not criminal trials.[13] This view has been supported by the argument that criminal courts are not responsible for providing closure for victims but only for judging a matter brought to their attention by the prosecution.[14] Assuming that a criminal court could be obligated to undertake a 'therapy session'[15] for victims, is seen as problematic and foreign to German criminal proceedings.

The above indicates that due to the deprivatisation of conflict, victim participation may not be considered an underlying value of criminal procedure in Germany. To the contrary, 'modern' criminal procedure appears to be characterised by the intentional 'neutralisation' of the victim. The perception of criminal procedure as a 'de-emotionalised' conflict could permit Germany to argue that expanding victims' participatory rights is not 'consistent' with the German criminal justice

[7] Ibid; J P Reemtsma, 'Was sind eigentlich Opferinteressen' (2005) (15) *Rechtsmedizin* 86, 86-87.
[8] Winfried Hassemer and Karin Matussek, *Das Opfer als Verfolger* (Peter Lang, 1996) 10.
[9] Winfried Hassemer, *Einfuehrung in die Grundlagen des Strafrechts* (Beck, 1990) 70; Tanja Hoernle, 'Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht' (2006) 19 *Juristische Zeitung* 950, 953.
[10] Kilchling, above n 2, 58.
[11] Weigend, above n 4. See further Nils Christie, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology*, Delinquency and Deviant Social Behaviour 1
[12] Michael Kilchling, *Die Stellung des Verletzten im Strafverfahren* (Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht, 1992) 70.
[13] Detlev Frehsee, 'Wiedergutmachung und Taeter-Opfer Ausgleich' in Bernd Schuenemann and Markus Dubber (eds), *Die Stellung des Opfers im Strafrechtssystem: Neue Entwicklungen in Deutschland und in den USA* (Heymanns Carl VLG 2000, 2000) 125; further explained by Walther, above n 3, 131. Elsewhere Walther argues that the constitutional guaranteed right to human dignity prohibits treating victims as witnesses without their own rights and otherwise pointing to civil law. See: Susanne Walther, 'Interessen und Rechtsstellung des Verletzten im Strafverfahren' (2008) (10) *Juristische Rundschau* 405, 406.
[14] Bern Volckart, 'Opfer in der Strafrechtspflege' (2005) (5) *Juristische Rundschau* 181, 183.
[15] Ibid.

system. Germany might be able to refuse victim participation in accordance with section 6(b) altogether if no paradigm shift had occurred in German criminal procedure by which victim participation has become an important aim or principle of criminal justice.[16] In that case expanding victims' participatory rights might no longer be seen as 'inconsistent' with German criminal justice policy. The next part of this chapter will examine whether such a shift towards making victim participation an aim of German criminal procedure has occurred.

(b) Victim Participation — A Paradigm Shift in German Criminal Procedure?

The criminal offences that allow for victim participation as a PAP in Germany have gradually been expanded over the past three decades.[17] New legislation has allowed an increasing number of victims to participate in German criminal trials. In 2009, the courts' right to allow the participation of victims of other offences than the ones explicitly mentioned in legislation was introduced.[18] Whether this change suggests a paradigm shift in German criminal procedure, replacing or hybridising collectivistic theory with a more individualistic theory in which victim participation is one of the core values of criminal procedure, is considered below.

The following developments do not support the proposition that a paradigm shift towards victim participation in German criminal procedure has occurred. When expanding the eligibility criteria for PAP participation to more victims in 2004, members of the German Parliament and the German Government explicitly clarified that the right to act as a PAP was never intended to serve a 'general right to victim participation'. The right was expanded only to protect certain victims who have suffered physical consequences of an aggressive crime and thus may need protection in order to avoid further trauma and shock.[19] Members of Parliament and the Government have argued that a 'general right for victims to participate' is foreign to German criminal procedure and would result

[16] For further consideration on victim related issues and the question of a paradigm shift on a German but also international level see: Christoph Safferling, 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law' (2011) 11(2) *International Criminal Law Review* 183.

[17] Anders, above n 2, 381. Walther sees the victim's right to be heard as an obligation in the German criminal justice system. See: Walther, above n 13, 406.

[18] *StPO* s 395(3), See in general: Matthias Jahn and Jochen Bung, 'Die Grenzen der Nebenklagebefugnis' (2012) 12 *Strafverteidiger* 754.

[19] Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003) 13; German Parliament Draft Bill for the Improvement of the Role of Victims in Criminal Procedure (17 October 2003); Joachim Herrmann, 'Die Entwicklung des Opferschutzes im deutschen Strafrecht und Strafprozessrecht-Eine unendliche Geschichte' (2010) 3 *Zeitschrift fuer Internationale Strafrechtsdogmatik* 236, 241; Anders, above n 2, 381; Bundesregierung, Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) identical with Gesetzesentwurf der Fraktionen der CDU/CSU und SPD Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BT-Drucks [German Parliament printed matter number] 16/12098 (3 March 2009) 30-31.

in a general redistribution of the roles of participants in German criminal trials, which is not desired.[20] Yet, in 2009, only five years after explaining that a 'general right to participate for victims' is foreign to German criminal procedure, the courts were given the power to grant victims of 'all offences' the right to participate as a PAP. However, according to the explanatory memorandum to the bill, Parliament seemed to have reserved this right mainly for 'victims of personal offences' that have suffered physical or psychological damage to a significant extent. It was explained that the right was not introduced to allow 'general participation' for victims in Germany but was introduced to support victims who seemed particularly worthy of protection in Parliament's opinion.[21] Thus, the explanations given by German Parliament seem to contradict the assumption that victim participation has become an aim of German criminal procedure. Rather the explanations offered for the introduction of the legislation indicate that victim participation rights in Germany are still deliberately afforded mostly to victims who want to claim financial losses and victims of sexual and other more violent offences. A general right for victims to be heard at trial continues to be perceived as 'inconsistent' with criminal procedure in Germany.[22]

The assumption that victim participation has not become an aim of German criminal procedure is reinforced by the opposition to expanding victims' participatory rights to more or all victims in the legal profession, political institutions and from scholars. The Federal Bar Association, an organisation representing the interests of the German legal profession, has heavily criticised the expansion of the right to act as a PAP. According to the Federal Bar Association the expansion of victim categories eligible to participate as PAPs is likely to 're-introduce' vengeance in criminal procedure. This, it argues, impedes rational, non-subjective conflict processing as the traditional aim of modern German criminal trials.[23] The continuous enhancement of victims' participatory rights in Germany has also been met with great criticism in academic scholarship and political dialogue. It has been argued that the ongoing victims' rights reforms will make victims de facto

[20] Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003) 13.

[21] Bundesregierung, Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) identical with Gesetzesentwurf der Fraktionen der CDU/CSU und SPD Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BT-Drucks [German Parliament printed matter number] 16/12098 (3 March 2009) 31.

[22] Anders, above n 2, 392.

[23] Bundesrechtsanwaltskammer, 'Stellungnahme der Bundesrechtsanwaltskammer zum Gesetzesentwurf der Bundesregierung zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren' (BRAK, 2009) 6-7. Groenhuijsen explains that the judiciary traditionally considers it their main role to guarantee a fair trial for the defendant and see this as a 'core value'. Courts may therefore be reluctant to support victim related law reform that they believe might endanger a fair trial. See: Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20(1) International Review of Victimology 31, 34.

parties to the proceedings, which is foreign to the German criminal justice system.[24] Expanding victims' rights and thus de facto turning criminal proceedings into a 'party process', it is suggested by some, holds the risk of impacting on the objective function of criminal procedure and of introducing retribution and vengeance into the justice process.[25] For this reason a number of commentators have referred to the expansion of victims' participatory rights as a 'historical step back' because victims would once again be tasked with crime control.[26] Opponents to enhancing victims' participatory rights during the trial stage have gone as far as to assert that expanding victims' rights to participate in Germany could cause the 'decline of the constitutional and democratic state'.[27] Scholars have cautioned that enhancing victim participation in criminal procedure could have a significant impact on a criminal justice system that is not equipped for this kind of participation and could lead to a 'privatisation' of criminal conflicts.[28] Some scholars have concluded that ultimately victims' interests in criminal procedure are subordinate to the public interests of truth finding at trial[29] and a general right to participation for victims is therefore not necessary.

Likewise, the German Judge Association, the largest professional association of judges and prosecutors in Germany, warned that further extension of victims' participatory rights could lead to an equality in victims' and defendants' rights, which could endanger the basic structure of German criminal procedure as a 'deprivatised' conflict. They concluded that the victim's need to be heard at trial is generally not worthy of protection, except in cases where private accessory prosecution is already possible and thus rejected a 'general right to be heard' at trial for victims of crime.[30] In 2009, the *Bundesrat* (German Federal Council, similar to a second chamber of Parliament) strongly criticised the ongoing expansion of the listed criminal offences enabling private accessory

[24] Bundesregierung, Begruendung der Bundesregierung zum Entwurf eines Gesetzes zur Verbesserung der Stellung des Verletzten im Strafverfahren BT-Drucks [German Parliament printed matter number] 10/5305 (10 April 1986) 14-15; Klaus Schroth, '2. Opferrechtsreformgestz- Das Strafverfahren auf dem Weg zum Parteienprozess?' (2009) *Neue Juristische Wochenschrift* 2916, 2919.
[25] Schroth, above n 24, 2919.
[26] Jochen Bung, 'Zweites Opferrechtsreformgesetz: Vom Opferschutz zur Opferermaechtigung' (2009) *Strafverteidiger* 430, 434; Schroth, above n 24; Bernd Schuenemann, 'Wohin treibt der Deutsche Strafprozess?' (2002) (1) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 1, 32. In that regard Barton concludes that German criminal procedure is not turning into a party process because searching for the truth and investigating through the power of the court's office (*ex-officio*) remains the obligation of the court. See: Stephan Barton, 'Opferanwaelte im Strafverfahren: Auf dem Weg zu einem neuen Prozessmodell?' in Helmut Pollaehne and Ingrid Rode (eds), *Opfer im Blickpunkt-Angeklagte im Abseits* (LIT-Verlag, 2012) 21, 41.
[27] Schroth, above n 24, 2918.
[28] Peter Riess, 'Entwicklungstendenzen in der deutschen Strafprozessgestaltung' (2009) (10) *Zeitschrift fuer Internationale Strafrechtsdogmatik* 466, 477.
[29] Hassemer and Matussek, above n 8, 23.
[30] Grosse Strafrechtskommission des Deutschen Richterbundes, 'Staerkung der Rechte des Opfers auf Gehoer im Strafverfahren' (Bundesministerium der Justiz, 2010) <http://www.rundertisch-kindesmissbrauch.de/documents/GutachtenDRBStaerkungderRechtedesOpfersaufGehoerimStrafverfahren.pdf> 141-142.

prosecution and asserted that the right to participation in Germany should not be afforded to all victims.[31]

The resistance to the expansion of victims' rights in Germany described above raises doubts as to whether victim participation in general has become a value of 'modern' German criminal procedure. The noticeable opposition to victim participation at the trial and sentencing stage evident in both academic scholarship and political discourse might suggest that this is not currently the case. This leads to the question of why victims' participatory rights have increasingly been expanded in Germany particularly over the past decade.

The expansion of victims' participatory rights in Germany appears largely motivated by electoral politics or 'political opportunism'.[32] It can be beneficial to a political party to promote the better treatment of victims,[33] since the general public, as potential voters, perceives protecting victims as an important political goal.[34] Victims receive much sympathy from the general public while defendants usually do not.[35] For this reason, no politician wants to get their 'fingers burned',[36] turning victim protection into the 'favourite-child' of German politics around criminal law and procedure.[37] Furthermore, the political activism in regards to victim participation is seen as an attempt to satisfy the ongoing lobbying for participatory rights by influential victim support organisations and pressure groups.[38]

The above discussion indicates that victim participation might not have become a genuine aim of 'modern' German criminal procedure which appears still largely characterised by the 'deprivatisation' of conflict. The expansion of victims' participatory rights appears perhaps more

[31] Bundesrat, Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BR-Drucks [German Federal Council printed matter number] 178/09 (03 April 2009) 9-10. Groenhuijsen explains that the opposition to victims' rights appears to have increased in judicial circles and in academic scholarship. He relates these developments to the introduction of victims' rights that are 'over the top'. See: Groenhuijsen, above n 23, 42.
[32] Bernd Schuenemann, 'Risse im Fundament, Flammen im Gebaelk: Die Strafprozessordnung nach 130 Jahren (2009) 10 *Zeitschrift fuer Internationale Strafrechtsdogmatik* 484, 492.
[33] Thomas Weigend, 'Das Opferschutzgesetz-kleine Schritte zu welchem Ziel?' (1987) *Neue Juristische Wochenschrift* 1170. See also: Michael Kilchling, 'Veraenderte Perspektiven auf die Rolle des Opfers im gesellschaftlichen, sozialwissenschaftlichen und rechtspolitischen Diskurs' in J Hartmann (ed), Perspektiven professioneller Opferhilfe (VS Verlag, 2010) 39, 39.
[34] Barton, above n 26, 22. Amongst others the changed public perception of crime victims in different jurisdictions has been attributed to extended (partially unobjective) media focus and coverage on victim related matters. see: Andrew Karmen, *Crime Victims: an Introduction to Victimology* (Wadsworth, 6 ed, 2007) 31. On this matter see also: Kilchling, above n 33, 41.
[35] Kilchling, above n 33, 39.
[36] Helmut Pollaehne, 'Opfer im Blickpunkt- Taeter im Toten Winkel' in Helmut Pollaehne and Ingrid Rode (eds), *Opfer im Blickpunkt-Angeklate im Abseits* (LIT Verlag, 2012) 5, 11.
[37] Anders, above n 2, 382.
[38] Schuenemann, above n 32, 492. On the influence of victim support groups see also: Kilchling, above n 33, 48.

related to tactical political decision-making. For this reason, Germany may be able to argue that expanding victims' participatory rights in general is inconsistent with the current German criminal justice system and its criminal justice policy. Thus Germany may be able to validly reject an expansion of victims' participatory rights based on the second qualification of section 6(b).

(i) Expanding Victims' Participatory Rights in the Future

While Germany may currently be able to legitimately refuse the expansion of victims' participatory rights altogether, the question arises as to whether Germany would be likely to do so in the future. It is acknowledged that expanding victims' participatory rights to more or all victims would change the character of the German criminal justice system to some extent as victims would be afforded a greater and more visible role in proceedings.[39] Yet, German criminal procedure would not, as feared by some, revert back into a 'party process' where the victim acts as the accuser of the defendant similar to historic times. A 'party process' cannot take place as long as the court is tasked with investigating the crime through the power of its office (*ex-officio*) and not the victim, and as long as private accessory prosecution remains an annex to public prosecution.[40] Yet, enhancing victim participation for all victims in Germany would require addressing the systematic question of whether it is still justified to mainly base the participation of victims on the type of crime that has been committed against them, as is currently the case. Accordingly the question would arise as to whether there should be a general right for victims to be heard at the trial and sentencing stage.[41]

In the context of European jurisdictions there seems to be a motivation to improve the situation for victims as long as this does not drastically change the existing criminal justice structures.[42] Discussions in relation to changes to victims' participatory rights in the German criminal justice system could potentially trigger a 'landslide' of other fundamental and individual questions about crime and punishment in Germany. It seems possible that no agreement regarding these fundamental questions might be reached at this stage. For this reason it has been contended that law reform in the area of criminal procedure may altogether constitute a risky undertaking in Germany.[43]

[39] For similar considerations on PAP participation see: Karsten Altenhain, 'Angreifende und verteidigende Nebenklage' (2001) 56(15/16) *Juristen Zeitung* 791, 792.
[40] Barton, above n 26, 41; see in general: Dirk Fabricius, 'Die Stellung des Nebenklagevertreters' (1994) *Neue Zeitschrift fuer Strafrecht* 257.
[41] Anders, above n 2, 392.
[42] Joanna Shapland, 'Victims and Criminal Justice in Europe' in Giora Shlomo Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Victimology* (CRC Press, 2010) 347, 368.
[43] Walther, above n 3, 123.

Law reform in German criminal procedure has been increasingly undertaken over the past decades in general [44] and in particular in regards to victims' rights.[45] However, the opposition to expanding victims' participatory rights based on the traditional perception of the German criminal justice system and the subsequent problems associated with such law reform suggest that these questions may not be answered or even addressed in the near future. On this basis some scholars have concluded that it may be preferable that an overall reform of German criminal procedure is not undertaken at this time due to the current lack of societal consensus on the basic values of a new process model in Germany.[46]

Based on the above, Germany may currently be able to legitimately reject the expansion of victims' participatory rights based on the second qualification of section 6(b). Given the noticeable opposition to victims' participatory rights and the lack of consensus on how a reconceptualised criminal justice system should look, it appears likely that Germany might do so in the future.

2 Criminal Justice Policy in the Australian Criminal Justice System

The next part of this chapter will consider whether Australia could reject the expansion of victims' participatory rights based on the second qualification of section 6(b).

(a) 'Modern' Criminal Justice: Deprivatisation of Conflict and Crime as a Wrong Against Society

Much as in Germany, crime is considered an offence against the norms of society and not against the individual victim in Australia.[47] 'Modern' criminal justice procedures were specifically intended to allow the state to take over proceedings from the victim, [48] so as to end blood feuds between kinship groups and private vengeance that characterised the time of private prosecution.[49] For this

[44] Riess, above n 28, 467 stating that the StPO had been reformed by152 reform acts between 1950 and 2009.
[45] After the *OpferSchG* [Victim Protection Act] was enacted in 1986 it took 12 years until an act on witness protection was passed in 1998 (Gesetz zum Schutz von Zeugen bei Vernehmungen im Strafverfahren -ZSChG- [Witness Protection Act] (Germany) 30.04.1998 entered into force on 01.12.1998, BGBl I, 1998, 820). Subsequently it took only 8 years until the *ORRG* [Victims' Rights Reform Act] was passed in 2004, 5 years until the *2. ORRG* [Second Victims' Rights Reform Act] was passed in 2009 and only 2 years until in 2011 legislation to strengthen the rights of sexual assault victims was passed (so called StORMG).
[46] Riess, above n 28, 481 (commenting on an overall and holistic reform of criminal procedure).
[47] State Government Victoria 'A Victim's voice Victim Impact Statements in Victoria- Findings of an Evaluation into the Effectiveness of Victim Impact Statemetns in Victoria' October 2009, 4; For further dicussion on crime as a violation against society rather than the individual victims see also: Edna Erez and Ewa Bienkowska, 'Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland' (1993) 21 *Journal of Criminal Justice* 47, 48.
[48] Roger Douglas and Kathy Laster, 'Victim Information and the Criminal Justice System: Adversarial or Technocratic' (Criminology Research Council, 1994) <www.criminologyresearchcouncil.gov.au/.../15-92-3.pdf> 3; See also: Karmen, above n 34, 26.
[49] Peter Sankoff and Lisa Wansbrough, 'Is Three Really a Crowd? Thoughts about Victim Impact Statements and New Zealand's revamped Sentencing Regime' (Paper presented at the 20th International Conference of the International Society for the Reform of Criminal Law, Brisbane, 2 July - 6 July 2006) 6.

reason, the determination of the existence of a criminal offence has been placed in the sphere of the state.[50] The decision-making power the victim had before the development of a 'modern' criminal justice system has generally been taken over by the public prosecution service on behalf of society.[51] The aims of 'modern' criminal procedure in Australia have been described as threefold: protecting defendants by having open trials with procedural safeguards,[52] punishing offenders and protecting the general community.[53] Similar to Germany, crime is seen as a wrong against society and the demands of 'individual' victims in adversarial systems are traditionally not significant.[54] This is further evidenced by the fact that no common law principles exist that safeguard the possibility for victims to present views and concerns at trial.[55] Hence, the exclusion of the victim from criminal proceedings was not a coincidental occurrence in the history of criminal procedure but an intentional decision in order to avoid emotionality and subjectivity in criminal trials.[56] In light of the above, the victims' role in adversarial criminal procedure currently lies primarily in being a witness for the prosecution.[57]

As in Germany, some commentators in adversarial systems see the task of restoring victims which may also include restoring victims emotionally by allowing them to participate at trial, as an aim of civil proceedings and not of criminal trials.[58] It has been argued that the civil law process allows victims to make demands and gives them veto power. According to this argument, civil trials are better equipped for victim participation when compared to the criminal justice system. This is

[50] William van Caenegem, 'Advantages and Disadvantages of the Adversarial Ssytem in Criminal Proceedings' (1999) *Bond University E-publications* 69, 70; Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4 ed, 2009) 372.

[51] Sam Garkawe, 'The History of the Legal Rights of Victims of Crime in the Australian Criminal Justice System' in Victims Services Victims of Crime Bureau, Attorney General's Department (ed), *Raising the Standards: Charting Government Agencies' Responsibilities to Implement Victims' Rights* (Victims of Crime Bureau, 2003) 34, 35; State Government Victoria, above n 47, 18.

[52] The due-process model based on the considerations of what best protects defendant's rights has dominated 'normative paradigm of common lawyers'. See explanations in: Tyrone Kirchengast, 'Victim Lawyer's, Victim Advocates, And the Adversarial Criminal Trial' (2013) 16 *New Criminal Law Review* 568, 573.

[53] David Lanham et al, *Criminal Laws in Australia* (The Federation Press, 2006) 1-15. While it is acknowledged that restoration of victims may be becoming more important, this is considered to take place in restorative justice processes outside the traditional criminal justice system.

[54] Jana Bednarova, 'The Heart of the Criminal Justice System: A Critical Analysis of the Position of the Victim' (2011) *Internet Journal of Criminology* <www.internetjournalofcriminology.com/Bednarova_The_Heart_of_the_Criminal_Justice_System.pdf> 10; Peter Sankoff, 'Is Three Really A Crowd? Evaluating the Use of Victim Impact Statements Under New Zealand's Revamped Sentencing Regime' (2007) *New Zealand Law Review* 459, 461.

[55] State Government Victoria, above n 47, 4.

[56] Sankoff and Wansbrough, above n 49, 2; Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) 17(2) *The University of New South Wales Law Journal* 595, 600.

[57] Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006) 172; Sankoff, above n 54, 461.

[58] Argument discussed in: Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294, 299. It is possible in Australian jurisdictions to receive a compensation order from the court in criminal trials for the harm suffered, which breaks the traditional criminal law/civil law divide. Yet, victim participation is traditionally still suggested in the context of civil trials or in restorative justice programs. Karmen, above n 34, 26. See also with further references: Sankoff, above n 54, 461.

because burdens of proof can be more lenient in civil trials and defendants may not have the same protections they are afforded under criminal law. An example of this is that defendants in civil trials are often under the positive duty to incriminate themselves in the course of discovery and the interrogation process. This does not apply to criminal trials.[59]

Therefore, conceptually victims have a limited role in 'modern' criminal procedure in the Australian adversarial system.[60] Commentators on adversarial systems have argued that victims' participatory rights challenge de facto the general conception of crime as a violation of the state's interest rather than that of the individual victim.[61] For this reason the (re-) introduction of victims as participants in criminal procedure is seen as 'reinterpreting centuries of practice' in criminal procedure.[62] For example, granting victims the right to be legally represented during the main trial has been characterised as 'an important departure' from current processes, as the right would ultimately afford victims standing at trial and integrate them to a greater extent than they currently are [63]

In light of the above, Australia may be able to successfully reject the expansion of victim participation based on the second qualification of section 6(b) and the argument that victim participation as such is not consistent with 'modern' Australian criminal procedure and its policies. The argument may, however, not be successfully made if victim participation has become an aim of Australian criminal justice in recent times. In that case, furthering victim participation would not necessarily be 'inconsistent' with the national criminal justice system. Whether victim participation has become such an aim is analysed below.

(b) Victim Participation — A Paradigm Shift in Australian Criminal Procedure?

Despite the apparent consensus that crime is an offence against the norms of society and not against the individual victim, participation in the form of VIS schemes was introduced for eligible victims in all Australian jurisdictions as pointed out in Chapter 5. Whether the introduction of the right to make a VIS for eligible victims at the sentencing stage can be seen as (re-) introducing victim participation as an aim or principle of Australian criminal procedure will be considered below.

[59] Argument explained and discussed in Douglas and Laster, above n 48, 3-4.
[60] Doak, above n 58, 299.
[61] See in general: Sierra Elizabeth, 'The Newest Spectator Sport: Why Extending Victims' Rights to the Spectators' Gallery Erodes the Presumption of Innocence' (2008) 58(2) *Duke Law Journal* 275.
[62] Jo Goodey *Victims and Victimology: Research, Policy and Practice* (Harlow 2005) quoted in: Bednarova, above n 54, 12.
[63] Kirchengast, above n 52, 570.

In a first attempt to introduce VIS schemes in New South Wales in 1987, Premier at the time Unsworth declared that the introduction of VIS schemes was a 'historic step for a common law jurisdiction like New South Wales where the criminal trial has been exclusively a relationship between the state and the offender'.[64] However, the perception of these schemes in scholarship and by actors in the criminal justice system makes the assumption that victim participation can be considered one of the principles of Australian criminal procedure questionable. A small number of Australian cases have described the aims of criminal justice as integrating victims of crime in criminal trials. For example, in the Victorian case of *DPP v Dupas*, Justice Cummins found that generally there needs to be more balance between victims' and defendants' rights. In the case the defendant, Dupas, could not be sentenced to a longer sentence than life which he had already received for other crimes committed. In this instance, Justice Cummins explained that the trial was conducted exclusively for the vindication of the individual victim and for the vindication for all victims of crime in general.[65] Such views, however, remain the exception.

VISs have been described as ill-fitting in common law systems where victims have generally no standing.[66] Since the introduction of VIS schemes, Australian courts have mostly applied caution when considering the content of VISs in order to remain objective and to sentence in a detached fashion.[67] Due to the values underlying criminal justice and sentencing, all Australian jurisdictions have struggled to some extent with the question as to what influence VISs should have on the sentencing decision.[68] State authorities have also generally expressed concerns in regards to victim participation contending that the exercise of victim power is incompatible with the state's power to punish.[69]

Furthermore, the very limited possibilities for victims to present views and concerns during criminal proceedings, namely as a witness, have remained unchanged over the past century. One of the only exceptions in Australia is that some victims can now present VISs at the sentencing stage.[70] For this reason, the actual concept of victims in adversarial justice systems may not have changed:

---

[64] NSW Legislative Assembly, 'Second Reading Speech, Crimes (Sentencing Speech, Crimes (Sentencing) Amendment Bill', *New South Wales Parlimentary Debates*,12 November 1987, 915 (Barrie Unsworth) cited in: Joan Baptie, 'The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 76.
[65] *DPP (Vic) v Dupas* [2007] VSC 305 (27 August 2007) para 16.
[66] Tracey Booth, 'Penalty, Harm and the Community: What Role Now for Victim Impact Satements in Sentencing Homicide Offenders in NSW' (2007) 30(3) *University of New South Wales Law Review* 664, 575.
[67] Baptie, above n 64, 88.
[68] Tyrone Kirchengast, 'Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike?' (2010) 4 *Criminal Law and Philosophy* 197, 199.
[69] Kirchengast, above n 57, 187.
[70] Garkawe, above n 51, 35. As discussed above victims of sexual assault in NSW can be legally represented in relation to certain applications concerning confidential documents. However, this is only possible in one Australian jurisdiction in relation to one specific application.

victims are still regarded largely as witnesses, despite the introduction of the right to make a VIS.[71] Academics have argued that a changed perception of crime and criminal justice that emphasises the importance of victim participation cannot be found in traditional criminal justice systems but only in restorative justice movements. These movements consider crime as harm to the individual victim, the state and the community.[72] The introduction of the right to make a VIS therefore does not suggest that victim participation per se has become an established value of Australian criminal procedure.[73]

The question arises as to why victims' participatory rights in the form of VISs were introduced in Australia at all, when adversarial criminal procedure 'rests on the cogent philosophical foundation'[74] that the views and wishes of the individual victim are overridden by the general good of society.

Some commentators have suggested, in the US context, that the primary reason for the introduction of VIS schemes was largely politically motivated: politicians wanted to show that 'something was being done' for victims.[75] The enthusiasm for the adoption of VIS schemes in other jurisdictions, such as Australia, might be explained by the same political enthusiasm.[76] In practice, supporting victims has become a 'catchphrase' for most Australian political parties.[77] Politicians, similar to Germany, have found that it is beneficial politically to introduce regulations that attempt to protect victims and punish offenders.[78] Victims' rights campaigns are considered as 'risk-free political pandering for professional politicians'.[79] For the situation in Australia, it has been suggested that the introduction of VISs may in fact have been mere 'window dressing' to demonstrate that the

[71] In reference to the adversarial system in the UK see: Lorraine Wolhuter, Neil Olley and David Denham, *Victimology: Victimisation and Victims' Rights* (Taylor and Francis, 2008) 181. The authors argue that VISs do not necessarily only have benefits for victims but can also have benefits for the criminal justice system and improve sentencing outcomes.
[72] Leah Daigle, *Victimology: The Essentials* (Sage, 2012) 127. In regards to the failure in adversarial system to recognise victims as parties see: Andrew Sanders and Imogen Jones, 'Victim in Court' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge, 2012) 282, 284.
[73] In regards to the common law system in the UK, Edwards has argued that the Court of Appeal has taken a more restorative model by allowing victims to influence the actual sentence under certain circumstances. Thus Edwards argues that the Court's approach focuses more on individual victims and the perception that crime is a violation of individual rights. See: Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders' (2002) *Criminal Law Review* 689. For further analysis on what a genuinely victim-centred criminal justice system would look like in the UK context see also: Matthew Hall, *Victims of Crime Policy and Practice in Criminal Justice* (Routledge, 2012).
[74] Sankoff, above n 54, 467.
[75] Brian Williams, *Victims of Crime and Community Justice* (Jessica Kingsley Publishers, 2005) 103.
[76] Ibid 102-103.
[77] Tracey Booth and Kerry Carrington, 'A Comparative Analysis of the Vicitm Policies Across the Anglo-Speaking World' in Sandra Walklate (ed), *Hanbook of Victims and Victimology* (Willan Publishing, 2007) 380, 383.
[78] Ibid.
[79] Mark Stevens, 'Victim Impact Statements Considered in Sentencing' (2000) 2(1) *Berkeley Journal of Criminal Law* nn 1, 10.

situation for victims is being improved.[80] Similar to the explanations offered in Germany in relation to why victims' participatory rights have been expanded in the past, it may be argued that, in Australia, VISs were introduced as a response to the lobbying of victim support groups.[81] Overall, the introduction of VIS schemes does not appear to amount to a changed perception of victims or their participatory role at trial. To the contrary, these schemes seem to have been introduced to uphold the 'time–honoured tradition of excluding victims from criminal justice with a thin veneer of being part of it'[82].

The above presumption is supported by the fact that no attempt has been made, or even been investigated, to amend the structures of the adversarial system in Australia in a way that would allow further victim participation without violating defendants' rights. As pointed out in Chapter 6, due to the bipartisan structure of adversarial proceedings, victim participation without violating defendant's rights is possible during the trial stage only to a limited extent. Based on their structure inquisitorial systems are, in theory, capable of accommodating the needs of victims and defendants to a greater extent than the adversarial system.[83] Reforms 'within' the adversarial system intended to allow victims to present views and concerns have been described as solely playing around with existing structures instead of challenging the actual problem, namely the concept of the adversarial system as a bipartisan contest.[84] On this basis, it may be concluded that 'the adversarial paradigm remains, at its core, fundamentally ill-equipped to provide a platform for the meaningful participation of victims.'[85] To allow for further victim participation in the Australian adversarial system, without endangering the rights of the defendant the adversarial features would have to be replaced with inquisitorial ones.[86] Supporters of the adversarial justice system may believe,

[80] Bree Cook et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 62; Anna Grant, Fiona David and Bree Cook, 'Victims of Crime' in Adam Graycar and Peter Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, 2002) 281, 291.
[81] Jo Goodey, 'An Overview of Key Themes' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 13, 23; Kirchengast, above n 51, 569.
[82] Edna Erez and Leigh Roeger, 'Victim Impact Statements and Sentencing: Outcomes and process' (1999) 39 *British Journal of Criminology* 216, 234-235.
[83] See in general: Sanders and Jones, above n 72.
[84] For the UK context see: R Ericson and P Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Justice Process* (University of Toronto Press, 1992) 225 cited in Jonathan Doak, *Victims' Rights and the Adversarial Trial: The Impact of Shifting Parameters* (Doctor of Philosophy Thesis, Queen's University Belfast, 2004) 342. In Doak's opinion reforming the different elements of the adversarial system in order to accommodate victims more will not change the underlying 'ethos' of the system as a bipartite contest between the State and the defendant.
[85] Doak, above n 84, 342 .
[86] Referring to the UK context see: ibid 380-383.

however, that bipartisan structures are best equipped to provide procedural fairness for the defendant.[87]

Thus, Australia may currently be able to legitimately reject the expansion of victims' rights altogether based on the second qualification of section 6(b). Given the opposition to victims' participatory rights and a lack of consensus for a reconceptualisation of the criminal justice system in order to allow victim participation further, it appears rather unlikely that Australia will embrace a general right for all victims to participate in the near future.

The following part of this chapter considers whether Germany and Australia could also rely on other factors in relation to victim participation being 'inconsistent' with their national criminal justice system.

B Victim Participation and Financial and Administrative Concerns

Member States are able to reject the expansion of victims' participatory rights where this appears 'inconsistent' with the national criminal justice system. This is the case when victim participation does not accord with the criminal policy in the respective Member State. While the above analysis has considered whether victim participation is 'inconsistent' with the 'modern' criminal justice systems in Germany and Australia, the following part of this chapter aims to explore whether victim participation could also be rejected in Germany and Australia based on the argument that it is 'inconsistent' with the respective national policy on administrating and financing criminal justice.

Significant reforms for victims of crime may come with cost implications or an increase in workload for actors in the criminal justice system. Costs may increase due to lengthier trials and the need to finance legal representation for victims. Allowing all victims in Germany to act as PAPs, or in a similar role, may make trials lengthier and require that additional resources in the criminal justice system be made available for victims.[88] Trials could become lengthier where PAPs participate by, for example, making applications for the introduction of additional evidence to be examined. Possibly to a lesser extent trials may also become lengthier where legal representatives are available for victim witnesses as suggested for Australia.

[87] D Plater and L Line, 'Has the 'Silver Thread' of the Criminal Law Lost its Lusture? The Modern Prosecutor as a Minister of Justice'' (2012) 31(2) *The University of Tasmania Law Review* 56, 69. L Corrado, 'The Future of Adversarial Systems: An Introduction to the Papers from the First Conference' (2010) 35(2) *North Carolina Journal of International Law & Commerical Regulation* 285, 289.

[88] Stephan Barton, 'Nebenklagevertretung im Strafverfahren: Empirische Fakten und praktische Konsequenzen' (2011) 5 *Strafverteidiger Forum* 161, 164; Dieter Doelling et al, *Die Dauer von Strafverfahren vor den Landgerichten* (Bundesanzeiger Verlagsgesellschaft, 2000) 293; D Huesing, *Die Rechtswirklichkeit der Nebenklage* (PhD Thesis, 1982) 143-159; Peter Riess, 'Gutachten C: Die Rechtsstellung des Verletzten im Strafverfahren' (55 Deutscher Juristentag, 1984) C129.

Furthermore, victim participation requires financing. Three avenues seem imaginable to finance such schemes: 1. victims could be liable for the costs; 2. upon conviction the defendant could be liable for the costs or 3. the costs could be state funded.

Placing the costs upon the victim would mean that only financially able victims would be able to participate.[89] This, however, has the disadvantage that many victims without sufficient resources may not be able to participate and benefit from the schemes.[90] Introducing legislation which places the costs for victim participation onto the convicted defendant, may be possible in Australia and is currently already the case in Germany for the costs of the legal representative of the PAP after the conviction of the defendant.[91] Even if the costs were ultimately placed upon the defendant this would still not enable victims to finance their legal representation at the beginning of the trial. Thus, additional state funding would have to be made available in order to allow all victims, irrespective of their financial status, to participate.

Member States may be able to argue that the significant financial and administrative implications that victim participation can have on an already overburdened and financially constrained criminal justice system makes victim participation 'inconsistent' with their system. For example, Member States could argue that the need to make financial assistance available for victims' legal representation, as well as the obligation to finance longer trials and to employ more criminal justice personnel to efficiently accommodate victim participation, is inconsistent with their financial policy. Whether the two Member States are likely to rely on this argument and reject an expansion of victims' participatory rights on the basis of financial and administrative concerns is considered below.

It has been argued that there may be an underlying 'bureaucratic resistance' to change in Member States especially in cases where the change could increase the workload of participants in the criminal justice system.[92] This is evidenced by the critical discussion on financing victim participation that has occurred in Australia and Germany in the past. In Australia, for example, the costs of affording victims' participatory rights have been said to be disproportionate, where the

[89] In Germany legal representation for the PAP has to be funded by the victim except in cases explicitly named in legislation in which it is state funded. Legal Aid, however, is available for indigent victims. See: *StPO* s 397(1)(2).
[90] In Germany the victim is liable for their legal representation costs where the defendant is acquitted.
[91] *StPO* s 472. Arguing against the cost liability for convicted defendants in regards to victim participation is Riess, above n 88, C131. Many Australian jurisdictions have introduced or contemplated the introduction of a 'levy' for convicted defendants. The constitutionality of such levies goes beyond the scope of this thesis.
[92] Garkawe, above n 56, 600.

criminal justice system allows victim participation without clear evidence of the benefits.[93] While there may be a significant increase in cost where victims are allowed to participate to a greater extent, the benefits of furthering participatory rights have been classified as doubtful.[94] Similarly, in Germany, the German Judge Association has suggested the introduction of less cost intensive measures for victims, for example, affording victims certain protections before and during the trial, instead of strengthening cost intensive participatory rights with unclear benefits.[95] In German academic scholarship, the argument has been raised that victim participation causes an increase in costs and workload that the criminal justice system is unable to handle.[96] It has further been identified that due to the cost implications the implementation of victims' rights schemes have lacked adequate state-funding in the past.[97] In summary, it may be possible to conclude that 'it is wholly unrealistic' to believe that victims' rights schemes are welcome in Germany where they create more administrative costs.[98] Additionally, it may be possible for Member States to argue that where the criminal justice system only has limited financial resources available these resources should be spent on the defendant. The resources could be used to secure a fair trial for defendants by, for example, making Legal Aid available for more defendants, and should not be spent on victims.[99]

Ultimately, victim participation, particularly in the case of legally represented victims, has the potential to increase the costs of trials and their duration depending on the form of participation. It would thus be necessary for Member States to show willingness to provide financial support for victims and to make additional resources available to the criminal justice system in order to allow trials to continue to run efficiently even where victims participate. It could be argued that the need for additional funding may be justified in the interests of fairness to victims,[100] and that 'fiscal restrictions' should not be considered 'the paramount factor in the calculation of what is due to the victim of crime'.[101] Yet, in an already overburdened and financially constrained criminal justice

[93] C J Sumner, 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian & New Zealand Journal of Criminology* 195, 203-204.
[94] Ibid 204.
[95] Grosse Strafrechtskommission, above n 30, 87.
[96] Discussed in Kilchling, above n 12, 71.
[97] Helmut Kury and Guenther Kaiser, 'The Victim's Position within the Criminal Proceedings- An Empirical Study' in G Kaiser, H Kury and H.J. Albrecht (eds), *Victims and Criminal Justice: Legal Protection, Restitution and Support* (Max-Planck Institut fuer auslaendisches und internationales Strafrecht, 1991) 579, 609.
[98] Ibid 609.
[99] In Queensland, for example, defendants have no general right to a state funded lawyer. Only in limited circumstances do proceedings have to be stayed in order to allow the defendant to receive legal aid for a legal practitioner. See, *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292.
[100] Garkawe, above n 56, 616.
[101] B Villimow, 'The Application of the Victim in Compensation Act in the Federal Republic of Germany' in K Miyazawa and M Ohya (eds), *Victimology in Comparative Perspective* (Seibundo Publishing, 1986) 422 cited in Kury and Kaiser, above n 97, 609.

system it seems likely that Germany and Australia would reject the expansion of victims' participation rights in national law at least partly for financial reasons.[102]

III CONCLUSION TO CHAPTER 7

The analysis in this chapter suggests that the second qualification of section 6(b) may open up the opportunity for both Germany and Australia to reject enhancing and expanding victims' participatory rights in the criminal justice system altogether. Both Member States may be able to successfully argue that, as analysed above, criminal procedure is seen as a deprivatised and state dominated process intentionally excluding victims of crime. Furthermore, both Member States may be successful in arguing that an expansion of victim's participatory rights is not consistent with the policy on administrating and financing criminal justice in the respective Member States due to the expected significant financial and administrative burdens.

It appears likely that Germany and Australia would justify the rejection of expanding participation rights in their national criminal justice system by relying on the qualifications of section 6(b). The increasing (re)-introduction of victims' rights to participate in Germany and Australia over the past 30 years does not necessarily indicate a shift of the traditional perception of and attitudes towards criminal justice but might be attributed more to political motives. The noticeable opposition to the introduction and expansion of participatory rights in both Germany and Australia appears to support this assumption. Unless a societal consensus can be reached on the necessity to redefine the relationship between state, victim and defendant it appears unlikely that the role of victims will change significantly in Germany and Australia in the future.[103] Table 4 provides an overview of the possibilities for Germany and Australia to reject the expansion of victims' participatory rights based on the second qualification of section 6(b).

	Possible expansion of procedures and processes for victim participation	Possibility to refuse expansion based on the second qualification of section 6(b) 'consistent with the national Criminal Justice System'
Germany	Possibility for all victims to act in the role of a PAP	Likely to be successful. Germany seems likely to be able to convincingly argue that victims have intentionally been excluded from criminal trials historically. Therefore, it may be argued that the re-integrating of victims through a

[102] Nevina Crisante, 'Commentary' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 51; Allen Edgar, 'Commentary' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 50; Donna Hacket, 'Commentary' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 501; Bundesrechtsanwaltskammer, above n 23, 6.
[103] See also Doak on the UK context, above n 84, 316.

		general participation role is not consistent with the German criminal justice system.
Australia	Possibility to be legally represented as a witness	Likely to be successful. Australia seems likely to be able to convincingly argue that victims have intentionally been excluded from criminal trials historically. Therefore, it may be argued that the re-integrating victims further by affording them standing in criminal trials is not consistent with the Australian national criminal justice system.

Table 4: Possibilities for Enhancing Victims' Participatory Rights in Light of Qualification 2 of Section 6(b)

Based on the previous analysis the following chapter will examine whether proposed alternative international policies on victims of crime, namely the proposed *Convention*, appear to have the potential to overcome the shortfalls of the *Declaration* in relation to victim participation. It will therefore be considered whether the proposed *Convention* could influence Member States to implement section 6(b) to a greater extent than the current *Declaration*.

Chapter 8: Possible Implications for Proposed Alternative International Standards on Victims

I INTRODUCTION

Over the past decades commentators have questioned the *Declaration*'s influence on Member States' conduct. Calls have been made for the adoption of a legally binding international instrument relating to victims of crime. It has been suggested that legally binding international standards on victims are better suited to influence the implementation of victims' policies in Member States than the *Declaration*. Against this backdrop the adoption of a *Convention* has been proposed.[1]

This chapter will first examine the benefits and risks associated with the adoption of a *Convention* in general. It will subsequently consider the potential influence of the proposed *Convention* on Member States' conduct in relation to the expansion of victims' participatory rights in Member States' national law at the trial and sentencing stage.

II BENEFITS AND RISKS ASSOCIATED WITH THE ADOPTION OF A *CONVENTION* FOR VICTIMS

The World Society of Victimology ('WSV'),[2] an organisation which aims to enhance and develop research on victims worldwide, has suggested that a legally binding *Convention* could be better suited to ensure the greater implementation of the basic principles that are currently contained in the *Declaration*. In 2006, WSV started to promote and lobby for the adoption of such a *Convention* with the UN. The first draft of the *Convention* was produced with the support and assistance of INTERVICT, the International Victimology Institute in Tilburg, the Netherlands.[3] As outlined in Chapter 1, the proposed *Convention* contains further and more detailed victims' rights in some areas than the current *Declaration*. In terms of monitoring, for example, a separate monitoring body and reporting mechanisms have been suggested.[4]

[1] See analysis under part IV.
[2] WSV was founded at the 3rd International Symposia of Victimology in Muenster, Germany from 2-8 September 1979. For further information see Chapter 1 n 44.
[3] The draft was discussed on an international level in Orlando, Florida at the 12th annual World Society of Victimology Conference in 2006 for the first time and has become one of the major projects of WSV.
[4] The draft Convention in the most recent version of 08.02.2010 is available at: <http://www.worldsocietyofvictimology.org/publications.html#victimologist >.

The following section will critically assess arguments made in favour of the adoption of a *Convention* and demonstrate why the arguments are not necessarily convincing. The part will also illustrate why the adoption of a *Convention* could be problematic on the international level and why it may not be worth pursuing.

A Discussion of Benefits of the Planned Convention

Garkawe and Dussich have claimed, as discussed in Chapter 3, that the *Declaration*, as 'soft law', may not be sufficient to influence Member States because declarations have a different legal status than conventions.[5] It has been suggested that a legally binding *Convention* containing well-defined obligations could ultimately increase the pressure on Member States to implement victims' rights.[6] Particularly the lack of legal enforceability has been detected as a major shortfall of the current *Declaration* and is considered one of the reasons why Member States fail to implement its content.[7] It has been proposed that Member States' compliance with the content of the *Declaration* could possibly be increased and strengthened through the introduction of a *Convention* with 'teeth', including more precise legal obligations and a system of consequences for non-compliance.[8]

The key problem with this argument, namely that a stronger instrument 'with teeth' including sanctions is required to enhance implementation, is the following. Member States are under no positive obligation to sign and ratify a *Convention*. Additionally, Member States that have not signed and ratified an international instrument, like a *Convention*, are not legally bound by its content.[9] It seems likely that Member States which are under the impression that they do not comply with the provisions of a particular convention or could not comply with these obligations in the future, would refrain from signing and ratifying such an instrument.[10] This may be particularly the case where a convention sets out consequences for its violation that Member State would have to face. [11] Creating a *Convention* that Member States will not sign and ratify is worthless as nothing

[5] Sam Garkawe, 'The Need for a Victim's Convention' (2005) 9(2) *The Victimologist* 4, 4; Sam Garkawe, 'A Victims' Convention- The Arguments in Favour and in Analysis of the Draft by the World Society of Victimology/INTERVICT' (Paper presented at the 12th International Symposium on Victimology, Orlando, USA, 2006); John P Dussich, 'The Need for an International Convention for Victims of Crime, Abuse of Power and Terrorism' (Paper presented at the First World Conference on Penal Law/ Penal Law in the XXIst Century, Guadalajara, Mexico 18-23 November, 2007) 4.
[6] Garkawe, above n 5, 5.
[7] Ibid 4.
[8] Dussich, above n 5, 4.
[9] Beth Simmons, 'Treaty Compliance and Violation' (2010) 13 *Annual Review of Political Science* 273, 274.
[10] See analysis in Chapter 3, part IIIA.
[11] According to the 'Enforcement School' States will only ratify treaties that are easy for them to comply with. It has been explained that States will only infrequently sign and ratify treaties that require them to do something they would otherwise not have done. See: George W Downs, David M Rocke and Peter N Barsoom, 'Is the Good News About Compliance Good News About Cooperation?' (1996) 50(3) *International Organization* 379, 380. See also in regards to the proposed Convention: Gerd Ferdinand Kirchhoff, 'The Function of UN Instruments and the Path Towards Success' (Paper presented at the 4th Tokiwa International Institute Symposium "Raising the Global Standards for Victims: The

can be gained from such an attempt.[12] Yet, Garkawe has argued that it is not likely that Member States would refrain from signing a *Convention* because the instrument would already be 'watered down' through the state review process by the time it has finally been channelled through the UN system.[13] His suggestion is that a 'watered-down' instrument would not contain many or any provisions that Member States could not comply with making it therefore less risky for Member States to sign and ratify. This argument, however, attracts the criticism that the adoption of a *Convention* where all rejections and objections of Member States have already been accommodated during the drafting process and the provisions have been 'watered down' to accommodate the Member States' views may result in a vague or limited document not dissimilar to the current *Declaration*. A 'watered-down' instrument might therefore do little progress to the issue. What potentially remains of the envisioned stronger instrument 'with teeth' after the drafting process is a document that is open-textured so every Member State already complies with it. The promoters of the *Convention* have failed to address the question of what can be gained by adopting a 'watered-down' *Convention* by comparison to keeping the existing *Declaration*. If the advantage lies solely in the greater visibility of the international instrument, advocates of the *Convention* need to address the question of why promoting the existing *Declaration* and thereby making it more visible on the international and national level cannot fulfil the same purpose as creating a new *Convention*.

After having considered the arguments in favour of a *Convention* and pointed out why they are not necessarily convincing the following part of this chapter will outline risks and problems associated with the adoption of a *Convention*.

B Risks and Problems Associated with the Adoption of the Planned Convention

An argument that can be made against the adoption of a *Convention* is that there are risks involved in the adoption process that could become concerning for the UN. Also, implementation problems post-ratification could arise in Member States making the benefits of a *Convention* overall doubtful.

The first risk associated with the adoption process of the proposed *Convention* is an impasse during negotiations and the drafting process of the instrument due to unresolvable differences between Member States. A failure to reach a consensus on victim related issues during the negotiation of a

---

proposed Convention for Victims of Crime and Abuse of Power", Miwa Japan, 2008) 53. Arguing that it was easy to adopt legally-binding victim related EU instruments because Member States believed they already complied with the standards and would not have to undertake law reform is Marc Groenhuijsen, 'International Protocols on Victims' Rights and Some Reflections on Significant Recent Developments in Victimology' in R Snyman and Davis L (eds), *Victimology in South Africa* (Van Schaik Publishers, 2005) 333, 336.

[12] See: Willem van Genugten et al, 'Loopholes, Risks and Ambivalences in international Lawmaking; the case of a Framework Convention on Victims' Rights' (2007) XXXVII *Netherlands Yearbook of International Law* 109.

[13] Garkawe, above n 5.

Convention is by no means unrealistic, particularly considering the amount of controversy that already arose during the adoption process of the *Declaration* in 1985 and the critical discussion of victim participatory rights in Member States since.[14] The controversy surrounding victims of crime appears to be largely related to the different views of Member States on victims and their role in their national criminal justice systems.[15] Nothing suggests that this controversy could not re-emerge during the negotiations of a *Convention* and thereby terminate the drafting process even before a final instrument has been created. The highly visible failure to even agree on a legally binding instrument for victims on the international level contains the risk that the treatment of victims around the globe may subsequently deteriorate. This might be because Member States may not take the issue of victims' rights seriously any longer. The second risk associated with opening a *Convention* for signature is that not enough Member States sign and ratify the *Convention*. In that case the *Convention* would never enter into force. This could be considered a clear signal about the limited importance of victims' rights and victim related policies in Member States.[16]

Both scenarios could not only be seen as a retrograde step for the recognition of victims' rights and needs in Member States. They could also mean retrogression for the importance of victims' rights issues on the international level. Overall, the possible failure associated with a *Convention* could send a negative message on the standing of victims of crime to the international community and could cause the 'loss of political credibility'[17] for the General Assembly but also for the UN in general.

Even if enough Member States signed and ratified the *Convention* and it entered into force, this would not automatically mean that the obligations set out in the *Convention* would be fully applicable in all Member States. In some Member States the ratification or the accession to an international convention or treaty automatically makes the content of the international instrument part of the Member State's national law.[18] Upon ratification the content of the legally binding

[14] See analysis in Chapter 3, part IIB. See also: *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan 26 August - 05 September 1985): Report prepared by the Secretariat*, UN Doc A/Conf.121/22/Rev.1 (1986) 157. See in general: LeRoy Lamborn, 'The United Nations Declaration on Victims: Incorporating "Abuse of Power"' (1987-1988) 19 *Rutgers Law Journal* 59.

[15] On the problems of victim participation at trial in common law countries see: William Pizzi and Walther Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) *Stanford Journal of Intenational Law* 3; Edna Erez and Julian Roberts, 'Victim Participation in the Criminal Justice System: Normative Dilemmas and Practical Responses' in Giora Shlomo Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Criminology* (CRC Press, 2009) 599. See also discussion in Chapter 5-7.

[16] Kirchhoff, above n 11, 54.

[17] Ibid 54.

[18] Referred to as a 'monist approach'. See in general: David Weissbrodt and Connie De La Vega, *International Human Rights Law: An Introduction,* Pennsylvania Studies in Human Rights (University of Pennsylvania Press, 2007) 343; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7 ed, 1997) 63; Donald Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2010).

international instrument becomes fully justiciable in the national court system. In other Member States, however, international instruments have no direct impact on national legislation until legislation is adopted by the Member State that 'transports' these obligations into national law.[19] Implementation in Australia, and in many instances in Germany, requires the translation of international law into national law to give the law effect.[20] That means that even if the basic principles were set out in a legally binding international instrument which Germany and Australia had ratified — and not only in a *Declaration* — the basic principles would still not automatically have legal force in the two Member States. An additional transformation act, like the incorporation through an act of Parliament by the Member State, would be required to provide state nationals with the rights set out in the *Convention*.[21] Without the above-described transformation acts necessary in Germany and Australia victims of crime might not be able to rely on these rights.[22]

[19] Referred to as a 'dualist approach'. See: ibid.

[20] While Germany is generally referred to as a 'monist' country and international treaties are considered to have the same effect as national legislation this is only the case where the international law is self-executing, meaning the law must be directly applicable without further clarification. German courts do not consider a treaty as self-executing where it allows for State's discretion and/or does not expressly stipulate that it is self-executing. Therefore in many instances where the treaty obligations allow for discretion translation legislation is required in Germany. See on the issue: Katharine Young, 'The Implementation of International Law in the Domestic Laws of Germany and Australia: Federal and Parliamentary Comparison' (1999) 21 *Adelaide Law Review* 177, 184. For further explanations on the situation in Germany see: Josef Isensee, *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Huethig Jehle Rehm, 3 ed, 2007) 167. Ernst Benda, Werner Maihofer and Hans-Joachim Vogel, *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland: Studienausgabe* (Walter de Gruyter, 1995) 1466-1467. For Australia see: Hilary Charlesworth et al, 'International Law and National Law: Fluid States' in Hilary Charlesworth et al (eds), *The Fluid State International Law and National Legal Systems* (The Federation Press, 2005) 1; *Tasmanian Wilderness Society Inc v Fraser* [1982] HCA 37; (1982) 153 CLR 270; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1991] HCA 64; (1992) 176 CLR 1 (8 December 1992); *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292.

[21] It needs to be noted in this context that the Australian Commonwealth Parliament can only pass transformation legislation on subject areas over which it has legislative power. If reform of state legislation and not Commonwealth legislation is required, as would be the case with victims' rights, the Commonwealth government has two options: it can engage States and Territories in co-operative implementation of the international law. See: *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1997). The Commonwealth government can also rely on its external affairs power as set out in sec. 51 of the Commonwealth Constitution. This power has previously been interpreted as empowering the Federal Parliament to legislate on maters including treaties and other international obligations. In accordance with this interpretation of the external affairs power the Commonwealth Parliament could transform victims' rights into Australian legislation although the Australian States and Territories generally have the legislative power over this matter. However, in practice only few treaties have been transformed based on the external affairs power. See: Bill Campbell, 'The Implementation of Treaties in Australia' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 132, 150.

[22] In a decision in 1995 the High Court of Australia made an exception to this principle. The High Court decided that there was a legitimate expectation that the decision maker would act in accordance with a international convention. Such a legitimate expectation could be assumed according to the High Court of Australia where no statutory or executive indications to the opposite existed. See: *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273. The Full Federal Court has since applied this legitimate expectation rule in at least two cases. See: *Morales v Minister for Immigration and Multicultural Affairs* [1998] FCA 334; *Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5.

The introduction of such a transformation act does not always take place once Member States have signed and ratified an international instrument.[23] Charlesworth et al point out that legally binding instruments are no guarantee for implementation in national law. Considering Australia, the readiness to ratify international treaties does not necessarily mean that the same level of eagerness exists in implementing these treaty obligations in national law.[24] Charlesworth also argues that although Australia has signed and ratified a great number of UN human rights treaties numerous provisions contained in the treaty have not been implemented.[25] For this reason, she has characterised Australia as 'Janus-faced' in regards to treaty implementation explaining that Australia's 'international face' happily accepts international treaty obligations while the 'domestic face' fails to implement these legal obligations in national law.[26] She sees this inconsistency as the result of Australia's 'anxiety' caused by international law but also as a consequence of the prioritisation of particular political policies at the time of implementation of the international instrument.[27]

The question of implementation in the national arena is therefore a multifaceted one and depends on a number of factors and not just on the legal status of the international instrument. Reaching the same conclusion on Member States compliance with international obligations, van Genugten et al point out that the success of any international instrument lies in the implementation of and compliance with its obligations by actors in Member States. It is therefore the behaviour of those implementing and complying with these obligations that is vital and not necessarily the development of legally binding or non-binding regulations.[28] Research conducted on the situation for victims and victims' rights in the EU supports the suggestion that developing supranational legally binding regulations does not automatically translate into a successful adoption of these rules in national law. In 2000, Brienen and Hoegen studied the implementation of the non-binding

[23] Marc Groenhuijsen and Rianne Letschert, 'Reflections on the Development and Legal Status of Victims' Rights Instrument' in Groenhuijsen and Letschert (ed), *Compilation of International Victims' Rights Instruments* (Wolf Legal Publishers, 1 ed, 2006) 1, 5. The required translation of international obligations into national law is often not undertaken by Member States. This could leave state nationals without the right enshrined in the international instrument. Charlesworth uses the notion of "regulatory ritualism" to explain why this act is often missing particularly in a human rights context. She explains that countries are often willing to accept human rights treaty commitments to earn international approval, but they resist the changes that the treaties call for. See: Hilary Charlesworth, 'Swimming to Cambodia' (2011) 4 *Australasian Law Teachers Association Law Research Series* <http://www.austlii.edu.au/au/journals/ALRS/2011/4.html> (20 November 2011).

[24] Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 436.

[25] Hilary Charlesworth, 'Australia's split personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty?* (Federation Press, 1995) 129, 129.

[26] Ibid.

[27] Charlesworth et al, above n 24, 436.

[28] van Genugten et al, above n 12, 112.

Council of Europe's *Recommendation 85/11*,[29] concerned with victim related issues in European States. Subsequently in 2009, Pemberton et al carried out research on the implementation of the legally binding *EU Framework Decision*[30] and its implementation in EU Member States. The research and its main implications concerning the influence of victim related 'hard law' and 'soft law' on the conduct of EU Member States are briefly discussed in the following part of this chapter.

In 2000 Brienen and Hoegen[31] carried out a comparative study of 22 European States[32] on the implementation of and compliance with *Recommendation 85/11*, a non-binding instrument adopted to improve the situation for victims in the EU.[33] The principles expressed in *Recommendation 85/11* regarding the treatment of victims in the criminal justice system are similar to the ones set out by the *Declaration*.[34] Brienen and Hoegen's objective was to study the implementation and compliance of *Recommendation 85/11* in European States' national law with a focus on information, compensation, treatment and protection of victims.[35] Their main finding regarding the implementation was that the overall level of implementation of *Recommendation 85/11* was disappointing because many provisions had not been implemented in the European States examined.[36]

In 2001 the legally binding *Framework Decision* was adopted by the EU. After its adoption, Pemberton et al researched the implementation of the *Framework Decision* in EU Member States in a study published in 2009. The aim of the study was to determine whether the legally binding instrument had increased the level of implementation and the compliance with victims' rights in the European States.[37] The researchers used two questionnaires to gather data relevant to their study.

---

[29] For further discussion on *Recommendation 85/11* see analysis in Chapter 4.

[30] For further discussion on the *Framework Decision* see Chapter 4. The 2001 EU Framework decision is the first 'hard law' instrument relating to victims of crime available on a supranational level. For a general overview of the EU Framework decision see: Marc Groenhuijsen and Antony Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 43.

[31] Marion Brienen and Ernestine Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers 2000).

[32] Austria, Belgium, Cyprus, Denmark, France, England and Wales, Greece, Germany, Italy, Iceland, Luxembourg, Ireland, Malta, Liechtenstein, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Turkey, Switzerland.

[33] *Recommendation 85/11* resembles the Declaration on the position of the victim in many respects. For a detailed analyses of differences and similarities of the instruments see: Jan van Dijk, 'Benchmarking Legislation on Crime Victims: the UN Victims Declaration 1985' in *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (United Nations Press, 2005) 202, 202.

[34] Ibid.

[35] For analysis on Brienen and Hoegen's research see Chapter 4, part IIB.

[36] Brienen and Hoegen, above n 31, 1153.

[37] For an overview of current EU Member States see: <http://ec.europa.eu/enlargement/the-policy/from-6-to-27-members/index_en.htm>. See also: Anthony Pemberton et al, 'APAV Intervict Report: Implementation of the EU Framework Decision on the Standing of Victims in the Criminal Proceedings in the Member States of the European Union' (2009) <ec.europa.eu/justice/news/.../project_victims_europe_final_report_en.pdf>. The two-year project was

One questionnaire was used to complete an analysis of the legal implementation of the *Framework Decision* (legal questionnaire).[38] The wording of the legal questionnaire was based on the questionnaire used by Brienen and Hoegen for the research on the implementation of *Recommendation 85/11*.[39] Another questionnaire was used to determine the organisational implementation, such as practice and effectiveness of measures designed to implement the *Framework Decision* (organisational questionnaire).[40] In summary, Pemberton et al found that many countries made some improvements in the implementation of victim related rights. Yet, the organisational survey suggested that the results of the legal questionnaire which largely indicated implementation of the *Framework Decision*, needed to be qualified in some cases. The research showed that while many victim-related safeguards existed on paper, they were not always provided to victims in practice.[41] The validity of Pemberton's et al research results has not been critically addressed in subsequent literature since its publication in 2009.

The above shows that the adoption of 'hard law' on victim related matters by the EU has not necessarily changed the situation for victims in European States significantly. The two studies analysed above demonstrate that the level of implementation and/or compliance of European States has not radically increased with the introduction of supranational 'hard law' (*Framework Decision*) by comparison to previous 'soft law' (*Recommendation 85/11*). On this basis Groenhuijsen and Pemberton have concluded that the binding character of the *Framework Decision* should not be 'overestimated or made absolute'.[42] This conclusion, however, may need to be qualified. The finding by Pemberton et al regarding the limited influence of 'hard law' on EU Member States in relation to victims' rights may also be related to other factors, such as the relatively short timeframe

---

carried out in partnership with the Portuguese Victim Support Organisation (APAV) on behalf of Victim Support Europe and INTERVICT. The project aimed to provide a comparative picture of the effects of the EU Framework Decision in the legislation of the 27 EU Member States as well as on the support of victims in practice. See the project description on the project's homepage: <http://www.apav.pt/vine/>.

[38] The legal questionnaire was sent to experts in the field and to the Ministry of Justice, the Ministry of Internal Affairs, the criminal courts, the police and the law department of universities in different EU Member States and produced 97 responses in total.

[39] Pemberton et al, above n 37, 20.

[40] The organisational implementation questionnaire was answered 218 times mostly by experts from civil society, public bodies, the research sector, the judicial sector and criminal investigation. For a short description of the research and preliminary results see: A Pemberton and C Rasquete, 'Victims in Europe-Assessment of the Implementation of the Framework Decision on the Standing of Victims in Criminal Proceedings: Preliminary Results' in Jutta Hartmann (ed), *Perspektiven professioneller Opferhilfe: Theorie und Praxis eines interdisziplinaeren Handlungsfeldes* (VS Verlag, 2010) 99.

[41] Regarding victims' rights concerning 'information' and 'communication' see: ibid 128. For a summary see further: Antony Pemberton and Marc Groenhuijsen, 'Developing Victims' Rights Within the European Union: Past, Present and Future' (Paper presented at the Proceedings of the 13th World Society of Victimology Symposium, 2011).

[42] Marc Groenhuijsen and Antony Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard law Make a Difference?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 43, 59. Critical on whether the new EU Directive will improve the standards for victims in the EU are Antony Pemberton and Marc Groenhuijsen, 'Developing Victims' Rights Within the European Union: Past, Present and Future' (Paper presented at the Proceedings of the 13th World Society of Victimology Symposium, 2011).

between the introduction of the hard law instrument in 2001 and the commencement of the research study by Pemberton et al in 2007. Member States may not have had sufficient time to successfully implement the *Framework Decision* in the six-year timeframe between the adoption and the commencement of the study. These qualifications and limitations to the above finding need to be kept in mind.

C Summary

The main weakness of arguments made in favour of a *Convention*, namely that Member States would not sign and ratify a *Convention* if they believed they could not comply, has been pointed out above. Opening a *Convention* for signature may jeopardise the credibility of the General Assembly if the proposed *Convention* did not enter into force due to the lack of required signatures. This suggests that the pursuit of a *Convention* is not without risks.

In that context it also needs to be taken into consideration that WSV has been lobbying UN agencies in support of a *Convention* since 2006.[43] UN criminal justice policy is considered at the quinquennial UN Congress on Crime Prevention and Criminal Justice, as well as at the UN Commission on Crime Prevention and Criminal Justice's annual meeting. So far the attempts have not lead to a UN Congress on Crime Prevention and Criminal Justice where the adoption of the draft *Convention* has been an agenda item.[44] The next five-yearly UN Congress on Crime Prevention and Criminal Justice where this could be contemplated and recommended for adoption to the General Assembly will be the 13th Congress taking place in Qatar in 2015. This means that the question of the necessity of a *Convention* will not be decided until then. If the adoption of a *Convention* failed to be a topic of discussion again in 2015, as it currently appears, a decision at the Congress on Crime Prevention and Criminal Justice could not be expected until 2020 at the earliest. Groenhuijsen explains further that since 2007 the UN interest in adopting a Convention appears to have declined as no official reference to the *Convention* can be found in the minutes from annual meetings of the UN Commission on Crime Prevention and Criminal Justice. Therefore, the adoption of a *Convention* on the international level in the near future appears unlikely.[45]

---

[43] A delegation of representatives of WSV attended the 15th session of the UN Commission on Crime Prevention and Criminal Justice in April 2006 and lobbied for the cause. The 16th session of the UN Commission on Crime and Prevention and Criminal Justice in April 2007 was also attended by members of WSV.

[44] Only an meeting for the 12th UN Congress on Crime Prevention and Criminal Justice in Salvador, Brazil was organised by WSV in 2010, where the Convention has been discussed on 15 April 2010. See: International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (ISPAC), 'Twelth United Nations Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 12-19.04.2010, Report on the Activities of the Non-Governmental Organization (NGO's) and the Ancillary Meetings, Meeting 37- Convention on Justice and Support for Victims of Crime and Abuse of Power' (2010). Speakers were John Dussich, Marc Groenhuijsen, Sam Garkawe and Michael O'Connell.

[45] Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20(1) *International Review of Victimology* 31, 35. The Convention has not become an item on the Congress agenda so far. See

While the above has commented on the risks and benefits generally associated with the proposed *Convention*, the following part is specifically concerned with the possible effects of a *Convention* on the implementation of section 6(b) in national law. In other words, the following part will consider whether, in case of the adoption of the proposed *Convention*, Germany and Australia could be more heavily influenced to implement victims' participatory rights in national law than under the current *Declaration*.

III Issues Concerning the Victim's Right to Present Views and Concerns

The question arises of whether the adoption of the proposed legally binding *Convention* could have the potential to influence Germany and Australia to implement victims' participatory rights at the trial and sentencing stage to a greater extent. In order to address this question the general arguments in support of the adoption of a *Convention* analysed above will be revisited in light of the findings made on the implementation of section 6(b) in Chapters 5-7.

A Clearer Obligations will Increase Pressure on Member States?

It has been suggested that a *Convention* with clear and precise obligations could increase the pressure put on Member States to implement victims' rights.[46] This, however, may not apply to the obligation relating to victim participation contained in the planned *Convention* for a number of reasons.

The wording of the obligation to allow victims to present views and concerns in the *Declaration* is replicated in the planned *Convention*.[47] Members of WSV considered the wording of the section on allowing victims to be heard during the drafting process of the planned *Convention*. It was argued that the section was a particularly 'critical provision' and the wording should thus not be changed.[48] That means that the same qualifications in relation to victim participation will be available for Member States in the *Convention* that are currently in place in the *Declaration*.

As pointed out in Chapters 6 and 7 Germany and Australia will likely be able to successfully argue that enhancing victim participation at the trial and sentencing stage is not in accordance with their

---

'Follow up on the Twelfth United Nations Congress on Crime Prevention and Criminal Justice and Preparations for the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice' GA Res A/Res/67/184, 12 March 2013. The issue of victims and their treatment is only specifically mentioned in relation to trafficking in persons, see: 4.

[46] Sam Garkawe, above n 5, 4-5.

[47] See copy of the draft Convention in the current version of 08 February 2010 available at: <http://www.worldsocietyofvictimology.org/publications.html#victimologist >.

[48] Transcript of the 4th Symposium of the Tokiwa International Victimology Institute 'Panel Critique and Discussion' (Tokiwa, Japan, 15-16 Febraury 2008) 83 (Sam Garkawe).

criminal justice system and/or not possible without prejudice to the accused. They may therefore be able to rely on the qualifications contained in the section and reject the expansion of victims' participatory rights. Due to the qualifications to victim participation replicated in the planned *Convention*, signatory Member States might once again be able to reject the further implementation of victims' participatory rights even under a new legally binding instrument. Hence, the above argument related to introducing more precise and clearer legal obligations in the *Convention* to enhance Member States' implementation does not appear applicable in the case of victims' participatory rights at the trial and sentencing stage.

In order to overcome this shortfall and to create more precise legal obligations the wording of section 6(b) in the planned *Convention* could be changed. For example, the ample qualifications contained in the section which are likely to justify Member States' rejections in regards to victim participation, could be omitted. This would amend the character of the section and create a more precise legal obligation for Member States. It may be that in this case Member States would implement the content of the section to a greater extent.

This point overlooks, however, that where Member States believe they do not comply with a particular obligation or will not comply with it in the future, they are likely to refrain from signing and ratifying the obligation in question.[49] Many Member States may not feel that they could comply with a precisely worded obligation in relation to victim participation. In the case of Germany and Australia this might be particularly related to the noticeable opposition to the expansion of such rights in the national arena. A more precise legal obligation might therefore lead Member States, such as Germany and Australia, to refrain from signing the *Convention* altogether. As pointed out above, a *Convention* that Member States will not sign and ratify is pointless. A failed *Convention* might also negatively affect the UN and could send a harmful message regarding victims' rights to the international community. In summary, a more precise legal obligation on victim participation contained in the planned *Convention* might ultimately not positively influence Member States' conduct regarding the implementation of victims' participatory rights.

B The Legally Binding Nature of the Planned Convention Will Increase Pressure on Member States?

It has been argued that the lack of implementation of and compliance with obligations contained in the *Declaration* in Member States could be overcome by the adoption of the *Convention* as a 'stronger mandate with teeth'.[50] The proposed *Convention* is considered 'stronger' than the

[49] See explanations on 'enforcement school' above n 11.
[50] Dussich, above n 5, 4.

Declaration as it includes monitoring mechanisms and provides the possibility for certain consequences in the case of non-compliance. However, this argument may not apply to the implementation of victims' participatory rights in Member States' national law for the following reason.

While supranational norms may have the potential to impact on Member States' conduct and national law reform, the impact the international instrument may have also depend significantly on the level of national opposition to the changes requested by the supranational law. The greater the national resistance the more unlikely it appears that the obligations in the supranational instrument are implemented. As demonstrated in this thesis, the opposition to victims' participatory rights at the trial and sentencing stage in both Germany and Australia seems considerable. Existing national resistance to expanding victims' participatory rights in Germany may have been a contributing factor to the suboptimal implementation of EU obligations on the victim's right to be heard in German national law. Germany has been under a legally binding EU obligation to grant victims the right to be heard for more than a decade.[51] This obligation, according to German Parliament, has sufficiently been implemented in German law.[52] Despite this assumption by German Parliament, not all victims have the right to be heard as Chapters 5 and 6 have pointed out. Hanloser understands this, while observing that Germany may possibly have misunderstood the extent of its obligation, as a possible 'refusal' of Germany to implement the supranational obligation to allow victims to be heard.[53]

This is consistent with the argument made by Charlesworth et al as well as Groenhuijsen and Letschert, explained in detail above, that legally binding instruments are no automatic guarantee for implementation. The scholars argued that other factors in the national arena play a more important role in relation to implementation and compliance than the legal quality of the international instrument.[54] A major impediment to enhancing victims' participatory rights in the national arena may lie in the traditional perception of the inquisitorial and adversarial criminal justice system as a state-based and 'deprivatised' conflict. The victim has intentionally been excluded from this conflict. In order to enhance victim participation in Germany and Australia the advancement of 'a

[51] *EU Framework Decision* art 3.
[52] See, for example, Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003) 7.
[53] Indicated by Marlene Hanloser, *Das Recht des Opfers auf Gehoer im Strafverfahren* (Peter Lang, 2010) 170. Yet, Hanloser explains that the refusal has most likely occurred unintentionally and that Germany has misunderstood the extent of its obligation.
[54] Charlesworth et al, above n 24, 436. Groenhuijsen and Letschert, above n 23, 5.

new paradigm of justice which conceptualises crime in a different way' and a 'fundamental re-evaluation of the values and structures of the criminal justice system by policy-makers' seems necessary.[55] In light of the analysis in this thesis the 'new paradigm' of justice would require a re-examination, in inquisitorial and adversarial systems alike, of whether the traditional collectivistic view of the criminal justice system can be maintained. It would further require addressing the question of whether a more individualistic or hybridised approach to criminal justice which stresses the fact that the victim is part of the crime and should therefore be part of the criminal justice system, is called for today.

The analysis in Chapter 7 suggests that such a reconceptualisation of the criminal justice system does not appear very likely in Germany and Australia in the near future. This seems true despite the growing trend to introduce restorative justice programs in jurisdictions around the globe. Restorative justice has been described as an 'umbrella concept' including victim and offender participation schemes, such as victim-offender mediation.[56] The restorative justice movement does not appear to have altered the conventional understanding of criminal justice and the victims' role within though. Rather restorative justice procedures appear, in most cases, to be 'ad-ons' to the criminal justice system.[57] It has also been pointed out that many restorative justice programs are not developed to assist victims and to further integrate them into the system but to rehabilitate (juvenile) offenders.[58] Therefore the risk exists that in restorative justice programs victims may be used 'in the service of offenders'.[59]

It is questionable whether the adoption of a legally binding *Convention* for victims has the potential to bring about a re-evaluation of the criminal justice system on the national level. On the one hand the continuing process of unifying criminal law and criminal procedure law in different Member States may help to overcome the deep-rooted traditional perceptions of criminal justice that may

[55] Jonathan Doak, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process' (2009) 29(4) *Legal Studies* 651, 677.
[56] Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20(4) Criminal Law Forum 395, 400-401. For further discussion on restorative justice and mediation see: Groenhuijsen, above n 10, 343.
[57] Ibid 406, 415. Dussich argues that in restorative justice the victim continues to be regarded as a 'secondary citizen', see: Dussich, above n 5, 4. For an overview of victim-offender mediation in Germany see: Marianne Loeschnig-Gspandl and Michael Kilchling, 'Victim/Offender Mediation and Victim Compensation in Austria and Germany - Stocktaking and Perspectives for Future Research' (1997) 5(1) European Journal of Crime, Criminal Law and Criminal Justice 58; see in general John Braithwaite, Restorative Justice & Responsive Regulation (Oxford University Press, 2002).
[58] Antony Pemberton and Marc Groenhuijsen, 'Developing Victims' Rights Within the European Union: Past, Present and Future' (Paper presented at the Proceedings of the 13th World Society of Victimology Symposium, 2011).
[59] Andrew Ashworth cited in ibid.

have obstructed the enhancement of victims' participatory rights.[60] For example, in the case of Germany the ongoing reforms in relation to victims of crime in general have been attributed to international trends and incentives on a supranational namely European level.[61] On the other hand the prevailing traditional perception of criminal justice in adversarial and inquisitorial systems alike suggests that another supranational instrument may not have a significant effect on state practice in relation to victim participation. This may be particularly true where a change of the system is closely related to an increase in the administration and financing of the respective schemes, as in the case of victim participation. In light of the above, it does not appear very likely that the adoption of a *Convention*, solely based on its legal status, could lead Member States to reassess the aims of criminal justice and victim participation in their respective national criminal justice systems.

Furthermore, considering the duplicated language of section 6(b) contained in the proposed *Convention*, Germany and Australia might be able to legitimately refuse the expansion of victims' rights based on its ample qualifications. This means that even if the two Member States took no further action concerning their legislation they would potentially remain compliant with the *Convention* due to its qualifications. While the wording and qualifications of section 6(b) are to remain the same in the *Convention* it is questionable how intended monitoring mechanisms and potential penalties for the case of non-implementation would motivate Member States to implement victims' participatory rights to a greater extent.[62]

C Member States Will Comply to Avoid Embarrassment?

The last argument made in favour of the *Convention* examined in this thesis is that in the case of violations of the *Convention*, Member States' governments would have to answer to the international forum regarding a breach. This might cause embarrassment for the breaching State.[63] Member States could be more willing to implement and comply with the content of the *Convention* in order to avoid embarrassment and maintain their reputation. Member States' reputations have a certain value because a good reputation makes Member States appear as reliable treaty partners for other Member States. A Member State may therefore have an interest to act in accordance with international obligations in order to not compromise their reputation.[64] Although the argument that fear of a loss of reputation could motivate Member States to comply with a *Convention* seems

[60] Jonathan Doak, *Victims' Rights and the Adversarial Trial: The Impact of Shifting Parameters* (Doctor of Philosophy Thesis, Queen's University Belfast 2004) 338.
[61] Peter Riess, 'Entwicklungstendenzen in der deutschen Strafprozessgestaltung' (2009) (10) *Zeitschrift fuer Internationale Strafrechtsdogmatik* 466, 477.
[62] See further analysis of 'modern' criminal justice in Germany and Australia in Chapter 7.
[63] Garkawe, above n 5, 4-5.
[64] Michael Tomz, 'Interests, Information, and the domestic Politics of International Agreement' (2004) <www.standoford.edu> 3.

plausible, it does not necessarily seem to have affected the state practice in Germany in relation to the implementation of victims' participatory rights in the EU context.

In case of the EU obligation to allow victims to be heard which Germany has implemented only to a limited extent, Germany has answered to the EU in the past and outlined the limited possibilities for victim participation. The EU appears to have accepted the extent of implementation of this particular right in Germany without criticism.[65] Consequently, Germany did not have to answer to a supranational forum and its reputation was not compromised. This shows that simply because a supranational obligation is monitored on the supranational level no State will automatically face embarrassment in case of non-compliance when answering to that forum.

D Potential Influence of Other Principles Contained in the Planned Convention

This thesis focuses on the possibilities for victims to present views and concerns during the trial and sentencing stage in Germany and Australia. Due to this focus no conclusion is drawn as to whether the remaining sections of the *Convention* could have the potential to influence the conduct of Member States and what the national attitudes in regards to the other obligations contained in the *Convention* are.[66] Garland theorizes, for example, that victims have driven much policy reform in Member States in the areas of information, support and compensation and that the focus has been shifted on to the individual victim again.[67] Thus the situation of the *Convention*'s influence may have to be assessed differently in relation to other victims' rights and their implementation in Member States. This, however, goes beyond the scope of this research.

IV CONCLUSION TO CHAPTER 8

This chapter has considered the general risks and benefits associated with the planned *Convention*. It has argued that the adoption of a *Convention* may be a risky undertaking on the international level in the case that not enough Member States sign and ratify the instrument. The *Convention* may therefore not be worth pursuing.

The chapter has further contended that it is doubtful whether the planned *Convention* has the potential to contribute to the expansion and enhancement of victims' participatory rights in German and Australian national law. Under the proposed *Convention* Member States would have the

[65] Commission of the European Communities, 'Report from the Commission Pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings' (2001/220/JHA) [SEC (2009) 476] (20 April 2009) 3.
[66] On general concerns regarding the adoption of a Declaration see Chapter 3 part IIB.
[67] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society,* Clarendon Studies in Criminology, Oxford Readings in Socio-Legal Studies (Oxford University Press, 2001) 179.

opportunity to reject the expansion of victim participation on the same grounds as currently possible under the *Declaration*. Chapters 6 and 7 have found that Germany and Australia are likely able to successfully reject the expansion of victims' participatory rights beyond current limits based on the qualifications contained in the section. That means that even if Member States took no further action in regards to victim participation at the trial and sentencing stage they might still be considered compliant with the *Declaration* due to its qualifications. Consequently, Member States might be considered compliant with the proposed *Convention* even if they refused to enhance victims' participatory rights altogether. The adoption of the proposed *Convention* on the international level may therefore not be effective in influencing Member States to grant victims further participation rights at the trial and sentencing stage. What the implications of this finding are for victim related policies on the international level is outlined in the next chapter, Chapter 9. The chapter will also address the main research questions of this thesis and identify areas of future research on victims' rights.

Chapter 9: Conclusion

I INTRODUCTION

While victims were once important actors in both the inquisitorial and adversarial criminal justice systems their role changed to that of a witness with the introduction of a public prosecution and police service. Scholars and policy-makers started to challenge the diminished role of victims in the justice process in the second half of the 20th century. On the international level this contributed to the adoption of General Assembly's *Declaration* in 1985 stipulating basic principles for the treatment of victims.[1] Over the past decades, commentators have suggested that the basic principles contained in the *Declaration* may not have been sufficiently implemented into Member States' national law.[2] To overcome this alleged shortfall and further the implementation of victims' rights in Member States, some scholars have called for the adoption of a legally binding *Convention* for victims.[3]

This thesis explored the extent of victims' participatory rights at the trial and sentencing stage in Germany and Australia in light of section 6(b). It considered the possibilities of enhancing and extending participatory rights for victims where applicable, while keeping in mind the possibilities for Member States to validly reject such developments under the qualifications contained in the section. Finally, the thesis contemplated the potential success of a proposed *Convention* for victims in relation to its usefulness in enhancing victims' participatory rights in Germany and Australia. In doing so the thesis sought to address three research questions:

1. To what extent can victims present views and concerns during the trial and sentencing stage in Germany and Australia in light of section 6(b) of the *Declaration*?

[1] See explanations in Chapter 1, part I.
[2] Willem van Genugten et al, 'Loopholes, Risks and Ambivalences in international Lawmaking; the case of a Framework Convention on Victims' Rights' (2007) XXXVII *Netherlands Yearbook of International Law* 109, 119; John P J Dussich, 'The Need for an International Convention for Victims of Crime, Abuse of Power and Terrorism' (Paper presented at the First World Conference on Penal Law/ Penal law in the XXIst century, Guadalajara, Mexico 18-23 November, 2007) 4; Marc Groenhuijsen, 'Current Status of the Convention on Justice for Victims of Crime and Abuse of Power' (Paper presented at the 4th Tokiwa International Institute Symposium "Raising the Global Standards for Victims: The proposed Convention for Victims of Crime and Abuse of Power", Miwa Japan, 2008) 10.
[3] See analysis in Chapter 8, part II.

2. Could victims' rights to present views and concerns during the trial and sentencing stage be extended and enhanced in a way that is beneficial to victims, complements the national justice system and is not prejudicial to the accused?

3. Does an alternative approach to the *Declaration* exist on the international level which could have the potential to influence the expansion of victims' participatory rights in Germany and Australia?

This chapter synthesizes the issues raised in Chapters 5-7 and addresses the research questions. It identifies theoretical and policy implications and comments on areas of future research.

II MAIN RESEARCH FINDINGS

In Germany many victims cannot, or can only to a limited degree, present views and concerns during the trial and sentencing stage. While some victims such as PAPs have received ample participation rights, victims without such a special role are limited to presenting views and concerns on matters relating to their protection as a witness. Victims who are not required to testify as a witness have no possibility to present views and concerns. Ultimately, no general right for all victims to present views and concerns during the trial and sentencing stage exists in Germany.[4]

At the sentencing stage in Australian jurisdictions, eligible victims, who in many jurisdictions are victims of more serious criminal offences, can present views and concerns through making a VIS. Whether, and to what extent, these views are taken into consideration by the sentencing judge is mostly at the discretion of the individual judge and does not necessarily have to be disclosed. At the trial stage victims in the Australian adversarial system generally have no explicit right to present views and concerns unless when giving testimony as witnesses in relation to the questions asked.[5]

Due to the limited possibilities for certain victims in Germany and Australia to present views and concerns during the trial and sentencing stage, the participation possibilities according to the three-grade assessment scale developed in Chapter 4 of this thesis are not 'High' for all victims in either Member State.[6]

[4] See analysis in Chapter 5, part IIA.
[5] Chapter 5, part IIB.
[6] See rating scale applied in Chapter 5, part IIIB.

The second research question considered whether victims' participatory rights could be extended and enhanced in a way that is beneficial for victims. This included the question of whether Member States could justifiably reject the extension and enhancement of victims' participatory rights based on the qualifications contained in section 6(b). The research in Chapter 6 has found that victims' participatory rights could be extended and enhanced in both Germany and Australia to some degree during the trial and sentencing stage. However, both Member States may be able to successfully rely on the qualifications contained in the section to refuse the expansion of processes and procedures that allow for victim participation in their national criminal justice systems.

Germany might be able to reject the introduction of VISs in its national law based on the somewhat limited benefits of these schemes for victims in the German inquisitorial system. As pointed out in Chapter 6, the role of the inquisitorial judge would require the examination of VISs tendered by a victim *ex-officio* every time a VIS is presented to the court. The court's obligation to question victims' suffering as described in a VIS may leave some victims feeling traumatised and may potentially reduce the benefits generally associated with VIS schemes. A successful rejection of VISs may furthermore be based upon the first qualification of section 6(b) and the identified risks that this scheme could hold for defendants in the German setting. In Germany, it seems possible that lay judges participating in German criminal procedure may be unduly influenced by the emotional content often contained in these statements. It can be imagined that, due to their lack of legal training, lay judges might consider irrelevant and illegitimate material contained in a VIS in their decision-making. This could ultimately lead to a violation of the defendant's right to a proportionate sentence.

While Germany may be able to justifiably reject the introduction of VIS schemes based on the first qualification, a rejection of the expansion of PAP participation schemes to more or all victims based on this qualification may not be successful.[7] PAP participation in the German setting appears to offer benefits for victims while not necessarily being prejudicial for defendants' rights at the same time. The risks for defendants' rights in the case of PAP participation appear reduced due to the firm judge control in German criminal trials. It may thus be difficult for Germany to reject the expansion of the participation scheme to a greater number of victims based on the first qualification of the section.

Because of the structural differences between the two systems and possible risks for defendant's rights, the possibilities for victim participation in the Australian adversarial system appear more

[7] See analysis in Chapter 6, parts II, III.

limited. Chapter 6 has found that the bipartisan structure of the adversarial system renders violations of defendants' rights more likely where victims participate during the trial stage. This is the case because the adversarial trial is traditionally designed as a contest between prosecution and defence in which the judge takes up the role of an independent umpire. Introducing a third participant in this bipartisan contest has the potential to cause a 'power imbalance' and thus to endanger the defendant's right to a fair trial. For this reason Australia may legitimately reject the introduction of PAP participation in its national criminal justice system based on the first qualifications of the section. However, Australia may not be able to justifiably reject allowing victims to present views and concerns through a legal representative when they testify as witnesses at trial based on this qualification. This is because this more restricted right does not necessarily infringe upon the defendant's right to a fair trial.[8] With respect to the expansion of VIS schemes to more or all victims, Australia may be able to successfully argue that an expansion does not have to be undertaken due to the seemingly reduced benefits for a number of victims. Additionally Australia may be able to successfully refuse the expansion of VIS schemes based on the remaining risks for some defendants in the adversarial criminal justice system.

Having identified that the expansion and enhancement of victims' participatory rights cannot categorically be refused by Germany and Australia based on the first qualification of section 6(b), Chapter 7 considered whether Member States could reject the expansion of such rights based on the second qualification. Member States could be successful in refusing the expansion of victims' participatory rights based on this qualification if an expansion could not be considered 'consistent with the relevant national criminal justice system'.

Chapter 7 first identified that it does not appear that victim participation has actually become one of the aims of criminal procedure in either Germany or Australia. Both in Germany, an inquisitorial system, and in Australia, an adversarial system, criminal procedure appears to be seen as a state-based, objective process. Criminal procedure in the two Member States seems to focus largely on traditional criminal justice principles such as controlling crime, protecting the community and guaranteeing the defendant a fair trial. Affording victims avenues to participate does not appear to have become an underlying aim of the justice process. The conventional understanding of criminal justice in Germany and Australia may allow both Member States to claim that victim participation beyond current limits is 'inconsistent' with their respective justice systems. Furthermore, both Member States might argue that the significant financial and administrative implications related to such schemes render their introduction 'inconsistent' with the relevant national financial and

[8] See analysis in Chapter 6, parts II, III.

administrative policies. These arguments seem likely to satisfy the second qualification. Thus, the structure of section 6(b) with its two extensive qualifications appears to grant Member States the opportunity to refuse the extension of victims' participatory rights during the trial and sentencing stage altogether.

Lastly, it has been identified that if Germany and Australia were questioned about their approach to implementation of the section, it seems likely that both Member States would rely on the qualifications and refuse the expansion of victim's participatory rights. This may be at least partially related to the noticeable opposition to victim participation at the trial and sentencing stage in the two Member States and the possible financial implications of such schemes. Table 5 provides an overview of the possibilities of expanding victims' participation rights and of Member States' opportunities to refuse an expansion.

	Possible expansion of procedures and processes for victim participation?	Possibility for Member States to refuse expansion based on the **first qualification** of section 6(b) 'prejudice to the accused'?	Possibility to refuse expansion based on the **second qualification** of section 6(b) 'consistent with the national Criminal Justice System'?
Germany	Possibility for all victims to act in the role of a PAP	Not likely to be successful. It will be difficult for Germany to convincingly argue that this form of participation is prejudicial to the accused. The judge control in the inquisitorial system appears sufficient to safeguard a fair trial for the defendant.	Likely to be successful. Germany seems able to convincingly maintain that victims have intentionally not been parties to criminal trials historically. Therefore, it may be argued that re-integrating victims through a general participation role is not consistent with the German criminal justice system.
Australia	Possibility to be legally represented as a witness	Not likely to be successful. It will be difficult for Australia to convincingly argue that this form of participation is prejudicial to the accused. Victims' legal representatives would only be afforded limited, narrowly-tailored rights that do not seem to offset the balance of the adversarial trial.	Likely to be successful. Australia seems able to convincingly maintain that victims have intentionally not been parties to criminal trials historically. Therefore, it may be argued that re-integrating victims further by affording them standing in criminal trials is not consistent with the Australian criminal justice system.

Table 5: Summary of Research Findings Regarding the Possibility for Member States to Refuse the Expansion of Victims' Participatory Rights at the Trial and Sentencing Stage

The third research question concerned the potential success of alternative international approaches to influence the expansion of victims' participatory right on a national level. The thesis focused on

the potential success of the proposed *Convention* and its possible influence on Germany and Australia in light of the findings to research questions 1 and 2.

III THEORETICAL IMPLICATIONS FOR THE ADOPTION OF A *CONVENTION*

Some commentators have hypothesized that the *Declaration* has not been sufficiently translated into Member States national law. They have therefore called for the adoption of a legally binding *Convention* that may exercise greater influence on Member States in order to enhance implementation of victims' rights in national law.[9] The supporting arguments for adopting a *Convention* were outlined in Chapter 8 first and were subsequently revisited specifically in light of section 6(b).

The argument that a *Convention* with clearer and more precise obligations would increase pressure on Member States to implement victims' rights[10] does not necessarily seem to apply to victims' participatory rights. The wording of the victim's right to present views and concerns in the suggested *Convention* is duplicated from section 6(b).[11] This enables signatory Member States to the *Convention* to rely on the same qualifications as currently contained in section 6(b). That means that respective Member States could base a refusal to expand victims' participatory rights at the trial and sentencing stage on the argument that this is not 'consistent' with their criminal justice system. Alternatively they could argue that certain forms of victim participation are 'prejudicial' for the accused and refuse the expansion on this basis. Ultimately, also under a *Convention*, Member States might be able to legitimately refuse the expansion of victims' participatory rights in their national law.

It has been outlined that an amendment of the wording of section 6(b), to restructure the section into a more precise obligation with fewer qualifications in the planned *Convention*, may not be successful in enhancing victim's participatory rights in Member States. This is because signing a *Convention* is a voluntary act. It seems likely that Member States who believe they do not, and will not, comply with a more precise obligation in relation to victim participation will refrain from signing the *Convention*. A *Convention* without signatories, however, as Chapter 8 has explained, may be a fruitless undertaking.

[9] See analysis in Chapter 8, part II.
[10] Sam Garkawe, 'The Need for a Victim's Convention' (2005) 9(2) *The Victimologist* 4, 5.
[11] See analysis in Chapter 8, part III.

The argument that the resistance of Member States to obligations in the *Declaration* could be overcome by a 'stronger mandate with teeth' such as monitoring mechanisms, binding legal obligations and penalties for non-compliance[12] has furthermore been assessed in Chapter 8. It was pointed out that Germany did not necessarily seem influenced to a greater extent by the legally binding *EU Framework Decision* and its content relating to victim participation despite the fact that the *EU Framework Decision* was legally binding and monitored by the EU.[13] Notwithstanding the obligation in the *Framework Decision* to allow victims to be heard Germany has not implemented the right to be heard for all victims at the trial and sentencing stage.[14] In other words, the legally binding EU obligation has not noticeably motivated Germany to change its current legal situation and allow all victims to present views and concerns. To the contrary, despite the fact that only some victims have received the right to present views and concerns at the trial and sentencing stage, the German Parliament appears to consider the victim's right to be heard as sufficiently implemented in German law.[15] Some commentators have suggested that this, although possibly unintentional, could be seen as a refusal by Germany to implement the supranational EU obligation to allow victims to be heard in criminal proceedings.[16] The limited implementation in Germany may be related to the noticeable opposition to expanding victims' participatory rights by the legal profession, by political entities and in academic scholarship.[17] Ultimately, a legally binding instrument like the *Convention* 'with teeth' may not necessarily have the potential to overcome the resistance to expanding victims' participatory rights apparent in Member States.

Furthermore, due to the duplicated language of section 6(b) contained in the *Convention*, Germany and Australia might legitimately refuse the implementation based on the qualifications contained in the section once again. This means that even if the two Member States undertook no further action to amend their victim participation policies they might still be considered compliant with the content of the planned *Convention*. Therefore, intended monitoring mechanisms and potential penalties for the case of non-implementation and non-compliance with the planned *Convention*

[12] Dussich, above n 2, 4.
[13] Chapter 8, part III.
[14] See analysis in Chapter 5, part IIA.
[15] See, for example, Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003) 7, 14.
[16] Indicated by Marlene Hanloser, *Das Recht des Opfers auf Gehoer im Strafverfahren* (Peter Lang, 2010) 170. Yet Hanloser explains that the refusal may have occurred unintentionally as Germany may have misunderstood the extent of its obligation.
[17] See analysis in Chapter 7, part IIA1.

might not necessarily motivate Member States to further implement or comply with victims' participatory rights.[18]

One of the main arguments against the adoption of a *Convention* outlined in this thesis is that the implementation of and compliance with norms set out in international instruments depends mostly on the attitudes of actors in Member States and not on whether the instrument is legally binding or non-binding. The opposition to enhancing victims' participatory rights in Germany and Australia appears mostly based on the traditional view of criminal justice as a state-based conflict. Criminal trials are primarily seen as intended to determine the guilt or innocence of the defendant and do not seem to focus on the wishes of the individual victim. It has been pointed out in both jurisdictions that civil proceedings may be better equipped to allow victims to present views and concerns as civil law deals with private conflicts. The existing attitudes towards victims' participatory rights in the two Member States make the success of a *Convention* in relation to enhancing victims' participatory rights in Member States questionable. It has been suggested that actors in Member States might be unwilling to comply with an international obligation requiring greater victim participation.

Thus, the adoption of a legally binding *Convention* may not necessarily offer a viable avenue to enhancing victims' participatory rights in Member States' national law.

IV POLICY IMPLICATIONS

This thesis suggests that with respect to victim participation a legally binding instrument on the international level may not influence Member States' conduct to the imagined extent. Due to the two existing qualifications concerning victim participation duplicated in the *Convention*, Member States may be able to reject the expansion of victims' participatory rights based on their traditional understanding of criminal justice and due to the potential risks for defendants. To promote the expansion of victims' (participatory) rights, a policy review on what other international avenues could be taken in order to enhance the implementation of the basic principles may be necessary.

One such avenue to actively promote the implementation of the basic principles in Member States internationally could be for the UN Human Rights Council to mandate UN Special Procedures with this task.[19] Such a mandate might encourage the implementation of the basic principles in Member

[18] See conclusion in Chapter 7, part III.
[19] For an analysis of victims' rights as human rights see: Sam Garkawe, 'Victims Rights Are Human Rights' (Paper presented at The 20th Anniversary Celebration of the 1985 UN Victims Declaration, Canberra, November 2005);

States in general and influence Member States' attitudes on victims' rights including the right to present views and concerns. Special Procedures are mandated by the UN Human Rights Council to address specific thematic or country specific issues concerning human rights around the globe.[20] Currently there are 37 thematic mandates, focusing on a range of human rights issues including civil and political rights as well as economic, social and a cultural rights on a global basis. There are also 14 country specific mandates, monitoring and reporting on country specific situations.[21] Special Procedures require independent mandate holders, whose mandate is related to a specific theme, for example, the implementation of the *Declaration*, to examine, monitor, report and advise on one specific phenomenon of human rights violations in Member States.[22] Activities regularly undertaken by mandate holders include responding to individual complaints, advising Member States and providing support, conducting studies and general promotional activities.[23] These activities could help to increase awareness of the importance of the implementation of the *Declaration* in Member States. Increased awareness could also potentially contribute to changed attitudes towards criminal justice and victim participation. In order to fully assess the question of whether mandating Special Procedures has the potential to enhance the implementation of the basic principles in Member States further research is required that goes beyond the scope of this thesis.

V AREAS FOR FUTURE RESEARCH

As this thesis has indicated, the debate on victim participation and what role victims should have in the criminal justice system is extensive at the international and national level. Exploring the following issues as future research projects could assist in facilitating a greater insight into the role of victims in criminal procedure and in allowing more or all victims to present views and concerns at some stage of the proceedings.

Jonathan Doak, 'Trailblazing Victims' Rights as Human Rights: The Quest for Clarity' (Paper presented at ACT Victims of Crime Commissioner Conference, Australia, May 2011); Michael O'Connell, 'Victims' Rights are too often overlooked as Human Rights' (Paper presented at Human Rights Consultation, Parliament House, Canberra, ACT, 1 July 2009).

[20] Regarding an exemplary mandate for a UN Secretary General's Special Rapporteur on the implementation of the Declaration for victims of crime, terrorism and abuse of power drafted by INTERVICT see: <http://www.tilburguniversity.edu/research/institutes-and-research-groups/intervict/undeclaration/>.

[21] For an overview of Human Rights Council country specific and thematic mandates see: <www.ohchr.org>.

[22] Surya P Subedi, 'Protection of Human Rights Through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201, 202-203.

[23] Surya P Subedi et al, 'The Role of the Special Rapporteuers of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 155, 155. See also: *Manual for Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Program* E/CN.4/2000/4 (18 December 1999).

In Germany, there is a need for more detailed research on the right to act as a PAP. This is especially necessary in order to identify whether and to what extent certain rights that are seldom or never exercised by victims could be omitted if this role was expanded to more or all victims. Such a modified role could allow victims meaningful participation whilst not being prejudicial for defendants' rights.

In the adversarial system victim participation is generally possible to a lesser degree without violating defendants' rights at the trial and sentencing stage. However, future research on whether and to what extent victims can currently participate in Member States during other stages of the proceedings could facilitate a better understanding of the role of victims in criminal justice systems around the globe. As a large number of cases in both Germany and Australia are resolved through pre-trial decisions, around 85%-90% are never subject to a full main trial, research should focus on the possibilities for victim participation at the pre-trial stage.[24] Furthermore investigating victim participation at the post-trial stage, for example, in relation to parole decisions, appears valuable to enhance the understanding of victims' rights in Member States. Additionally, research into providing specifically tailored training for criminal justice authorities in order to meet victims' needs could be beneficial.

In contemplation of the overall potential of a planned *Convention* and its possible success more research is needed on the probable impact of the planned *Convention* on other victim related issues. These include, for example, victim protection, information and compensation as well as the current status of implementation in Member States' national law. As pointed out in Chapter 1, section 6(b) has always been critically perceived by Member States since the drafting of the *Declaration*. The overall success of a planned *Convention* in relation to other enunciated rights could therefore have to be judged differently.

Furthermore, this thesis has mainly focused on the 'law on the books' in regards to the implementation of one particular section of the *Declaration*. As pointed out in Chapter 1, 'law in

[24] Information on plea-bargaining in Australian jurisdictions is not easily obtainable, as negotiations do not take place in the public sphere. However, 2005 statistics show that 97% of defendants of summary federal offences pleaded guilty as well as 86% of defendants of indictable federal offences. See: Australian Law Reform Commission, 'Sentencing of Federal Offenders- Issue Paper 29' (Commonwealth of Australia, 2005) <http://www.alrc.gov.au/sites/default/files/pdfs/publications/IP29.pdf> 44. Despite the lack of official data it is believed that most guilty pleas result directly from plea negotiations. See: Simon Verdun-Jones and Adamira Tijerino, 'Victim participation in the plea negotiation process: An idea whose time has come?' (2005) 50 *Criminal Law Quartely* 190, 191. For German figures see: Statistisches Bundesamt [Federal Statistical Office], 'Rechtspflege Staatsanwaltschaften [Criminal Procedure: Prosecution]' (Statistisches Bundesamt, 2012) <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260117004.pdf?__blob=publicationFile> 26.

action' can significantly differ from the prescribed law depending on the attitudes of criminal justice authorities. Thus exploring not only the implementation of the basic principles of justice as enunciated in the *Declaration* but also the compliance of criminal justice authorities with these principles could facilitate the attainment of greater insights into how to best support victims in criminal procedure.

Finally, research is necessary to explore what other international policies could influence Member States' conduct in regards to providing victims with the possibility to present views and concerns. This includes research in relation to the question of whether the adoption of Special Procedure mechanisms by the UN Human Rights Council tasked with actively promoting the implementation of the *Declaration* could be a viable avenue for the future.

VI OVERALL CONCLUSION

Despite what is sometimes referred to as the victim taking 'centre stage' or the 'Cinderella victim returning to the ball',[25] this thesis has identified that the possibilities for victim participation in light of section 6(b) almost 30 years after the adoption of the *Declaration* could be extended and enhanced in both Germany and Australia to some degree. The expansion of victims' participatory rights would not infringe upon defendants' rights in every case depending on how such rights are tailored. Germany and Australia, however, might be able to successfully argue that such an expansion is inconsistent with their national criminal justice system. In that case the two Member States would be able to justify their rejection of expanding victims' participatory rights based on the qualifications contained in section 6(b).

Currently criminal justice seems to be generally regarded as a state-based conflict excluding victims and private vengeance in both Member States. This indicates that allowing victims to participate at trial as such is not seen as an underlying aim or principle of criminal justice in two Member States with different legal traditions, inquisitorial and adversarial. Therefore, in pursuance of furthering victim participation at the trial and sentencing stage, a change of attitude towards the role of the criminal justice system and its aims and principles by actors in these Member States appears essential. It requires acknowledgement that the victim, as the subject of the crime, is also subject to the criminal trial and, as such, needs to be able to participate actively. However, it seems

[25] Roger Douglas and Kathy Laster, 'Victim Information and the Criminal Justice System: Adversarial or Technocratic' (Criminology Research Council, 1994) <www.criminologyresearchcouncil.gov.au/.../15-92-3.pdf> 1; Gilbert Geis, 'Crime Victims: From the Wings to Center Stage' in Hans-Dieter Schwind, Edwin Kube and Hans-Heiner Kuehne (eds), *Festschrift fuer Hans Joachim Schneider zum 70. Geburtstag am 14. November 1998: Kriminologie an der Schwelle zum 21. Jahrhundert* (Walter de Gruyter, 1998) 315, 315.

questionable whether the planned *Convention*, merely based on its legal status, has the potential to bring about such a reconceptualisation of criminal justice and the victim's role in Germany and Australia.

For this reason other international policies with the potential to further a reconceptualisation of the criminal justice system in Member States may need to be explored. This thesis has suggested that alternatives aimed at furthering a dialogic approach between Member States and the international community may perhaps contribute to a changed understanding of criminal justice and the victims' role in criminal procedure. As such, mandating Special Procedures on the implementation of the *Declaration* may be advantageous to enhance victims' (participatory) rights in Member States' national law. Ultimately, a changed perception of crime, criminal justice and the victim's role within in Member States might contribute to the introduction of more ample and efficient procedures that allow for victim participation at the trial and sentencing stage in Germany and Australia.

BIBLIOGRAPHY

A *Articles/Books/Reports*

Ackermann, Monika, *Die Rechtsbehelfe des Verletzten gegen die negative Anklageentscheidung des Staatsanwaltes in den USA [Legal Rights of the Aggrieved Person Against the Prosecutorial Decision Not to Prosecute in the USA]* (Herbert Utz Verlag, 2006)

Adam, Konrad 'Alle wollen Opfer sein [Everybody Wants to Be a Victim]' *Frankfurter Allgemeine Zeitung* (Frankfurt), 12 April 2009

Albrecht, Peter-Alexis, 'The Functionalization of the Victim in the Criminal Justice System' (1999) 91(3) *Buffalo Criminal Law Review* 91

Aldana-Pinell, Raquel, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly* 605

Alkoby, Asher, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4(1) *Journal of International Law and International Relations* 151

Altenhain, Karsten, 'Angreifende und verteidigende Nebenklage [Attacking and Defending Private Accessory Prosecution]' (2001) 56(16) *Juristen Zeitung* 791

Annan, Kofi (United Nations Secretary-General), Speech at the Time Warner Center, New York, 8 December 2006

Anders, Ralf Peter, 'Straftheoretische Anmerkungen zur Verletztenorientierung im Strafverfahren [Criminal-Theoretical Comments on Victim Oriented Criminal Procedure]' (2012) 124(2) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 374

Andrejtschitsch, Jan, '§ 11Strafrechtliche Verfahren [Section 11 Criminal Procedure]' in *Beck'sches Rechtsanwalts-Handbuch* (C.H. Beck, 2011) vol 10

Andrew, Sidman, 'The Outmoded Concept of Private Prosecution' (1976) 25 *The American University Law Review* 754

Anonymous, 'Victims' Rights' (2006) 34(9) *Juvenile Justice Digest* 2

Ash, M 'On Witnesses: A Radical Critique of Criminal Court Procedures' (1972) (48) *Notre Dame Lawyer* 159

Ashworth, Andrew, 'Victim Impact Statements and Sentencing' (1993) 39(2) *Criminal Law Review* 498

Ashworth, Andrew, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 185

Ashworth, Andrew and Mike Redmayne, *The Criminal Process* (Oxford University Press, 3 ed, 2005)

Atkinson, MJ, Advise to the South Australian House of Assembly by the Attorney-General on Steps the Government is Taking to Assist Victims of Crime, 16 June 2002, Hansard, 818

Australian Bureau of Statistics, 'Sexual Assault in Australia: A Statistical Overview' (Australian Bureau of Statistics, 2004)

Australian Bureau of Statistics, 'Recorded Crime-Victims, Australia 2009' (Australian Bureau of Statistics, 2010) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4510.02009?OpenDocument>

Australian Government Department of Social Services, 'Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Children, 2009-2021' (Australian Government, 2009) <http://www.fahcsia.gov.au/SA/WOMEN/PUBS/VIOLENCE/NP_TIME_FOR_ACTION/Pages/default.aspx>

Australian Law Reform Commission, 'Managing Justice: a Review of the Federal Civil Justice System' (ALRC, 2000)

Australian Law Reform Commission, 'Sentencing' (ALRC, 1988)

Australian Law Reform Commission, 'Sentencing of Federal Offenders- Issue Paper 29' (ALRC, 2005) <http://www.alrc.gov.au/sites/default/files/pdfs/publications/IP29.pdf>

Australian Law Reform Commission, 'Family Violence- A National Legal Response (ALRC Report 114)' (ALRC, 2010)

Bacik, Ivana, Catherine Maunsell and Susan Gogan, 'The Legal Process and Victims of Rape' (The Dublin Rape Crisis Center, 1998)

Bandes, Susan, 'Empathy, Narrative, and Victim Impact Statements' (1996) *University of Chicago Law Review* 361

Bandes, Susan, 'Victim Standing' (1999) *Utah Law Review* 331

Baptie, Joan 'The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73

Barbour, J et al, 'Report of the Committee of Inquiry on Victims of Crime' (Committee of Inquiry on Victims of Crime, 1981)

Bargen, Jenny and Elaine Fishwick, 'Sexual Assault Law Reform: A National Perspective' (Office of the Stauts of Women, 1995)

Barton, Stephan, 'Nebenklagevertretung im Strafverfahren: Empirische Fakten und praktische Konsequenzen [Legal Representation for Private Accessory Prosecutors in Criminal Procedure: Empirical Facts and Practical Consequences]' (2011) 5 *Strafverteidiger Forum* 161

Barton, Stephan, 'Opferanwaelte im Strafverfahren: Auf dem Weg zu einem neuen Prozessmodell? [Legal Representation for Victims: On the Way to a New Processmodel?]' in Helmut Pollaehne and Ingrid Rode (eds), *Opfer im Blickpunkt-Angeklagte im Abseits* (LIT-Verlag, 2012) 21

Basel Committee on Banking Supervision, 'Basel III Regulatory Consistency Assessment Programme' (2012) <www.bis.org>

Bassiouni, M Cherif, 'International Recognition of Victims' Rights' (2006) 6(2) *Human Rights Law Review*

Becker, Peter, *Eine kurze Einfuehrung in die Deutsche Rechtsgeschichte [A Short Introduction to German Legal History]* (GRIN Verlag, 2011)

Bednarova, Jana, 'The Heart of the Criminal Justice System: A Critical Analysis of the Position of the Victim' (2011) *Internet Journal of Criminology* <www.internetjournalofcriminology.com/Bednarova_The_Heart_of_the_Criminal_Justice_System.pdf>

Beloof, Douglas Evan, 'The Third Model of Criminal Process: The Victim Participation Model' (1999) 1999(2) *Utah Law Review* 289

Beloof, Douglas E., *Victims' Rights Documentary and Reference Guides* (ABC-CLIO, 2012)

Benda, Ernst, Werner Maihofer and Hans-Joachim Vogel, *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland: Studienausgabe [Handbook of the Constitutional Law of the Federal Republic of Germany: Study Edition]* (Walter de Gruyter, 1995)

Bennett, J M and Alex C Castles, *A Source Book of Australian Legal History* (The Law Book Company Limited, 1979)

Bernard, Harvey Russell, *Social Research Methods, Qualtiative and Quantitative Approaches* (Sage, 2000)

Berril, K and G Herek, 'Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy' in G Herek and K Berrill (eds), *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Sage, 1992) 289

Beucklemann, Stephan, '§ 153 StPO' [Section 153 StPO] in *Beck'scher Online-Kommentar StPO* (C.H. Beck Verlag, 15 ed, 2012)

Bibas, Stephanos, 'Transparency and Participation in Criminal Procedure' (2006) 81 *New York University Law Review* 911

Bibas, Stephanos and Richard Bierschback, 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114(1) *The Yale Law Journal* 85

Birmann-Juy, Rodolphe, Heike Jung and Joerg Biermann, 'The German System' in Mireille Delmas-Marty and John R. Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002) 292

Bittner, Egon, 'The Functioning of the Police in Modern Society: A review of Background Factors, Current Practices, and Possible Role Models' (Chevey Chase, MD: National Institute of Mental Health, Center for Studies of Crime and Delinquency, 1970)

Black, Matt, 'Victim Submission to Parole Boards: The Agenda for Research' (Australian Institute of Criminology, 2003)

Blackmore, Martin, 'Equality of Arms in an Adversary System' (2000) (Paper presented at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000) <http://www.odpp.nsw.gov.au/speeches/Final%20paper%20Capetown.htm>

Blackstone, William, *Commentaries on the Laws of England* (1765-1769) vols 1-4

Block, Michael et al, 'An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes' (2000) 2(1) *American Law and Economics Review* 170

Blondel, Erin C, 'Victims' Rights in An Adversary System' (2008) 58 *Duke Law Journal* 237

Reinhard Boettcher, 'Oeffentliche Anhoerung zu den Gesetzesentwuerfen der Koalitionsfraktion und der Bundesregierung fuer ein 2. Opferrechtsreformgesetz (BT-Drs. 16/12098 und BR-Drs. 178/09)' [Public Hearing Regarding the Draft Legislation of the Coalition and the Government for a 2nd Victims' Rights Reform Act (BT-Drs. 16/12098 and BR-Drs. 178/09] (07 May 2009)

Boettcher, Reinhard, 'Das neue Opferschutzgesetz' [The New Victim Protection Act] (1987) (4) *Juristische Rundschau* 133

Bohlander, Michael, 'Basic Concepts of German Criminal Procedure- An Introduction' (2011) 1 *Durham Law Review Online* 1

Bohne, Steffen, 'Die Rechtsstellung des Verletzten im Strafverfahren [The Role of the Victim in Criminal Procedure]' (2005) 3 *Kriminalistik* 166

Boll, Matthias, *Plea Bargaining and Agreemet in the Criminal Process: A Comparison Between Australia, England and Germany* (Diplomica Verlag, 2009)

Booth, Tracey, "Cooling Out' Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court' (2012) 45(2) *Australian & New Zealand Journal of Criminology* 214

Booth, Tracey, 'Penalty, Harm and the Community: What Role Now for Victim Impact Statements in Sentencing Homicide Offenders in NSW' (2007) 30(3) *University of New South Wales Law Review* 664

Booth, Tracey, *Accommodating Justice: An Exploratory Study of Structures and Processes that Shape Victim Participation and the Presentation of Victim Impact Statements in the Sentencing of Homicide Offenders in the NSW Supreme Court* (Doctor of Philosophy Thesis, University of New South Wales, 2012)

Booth, Tracey and Kerry Carrington, 'A Comparative Analysis of the Victim Policies Across the Anglo-Speaking World' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willam Publishing, 2007) 380

Boyle, A E, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) *International and Comparative Law Quarterly* 901

Boyle, A E, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2006) 141

Boyne, Shawn Marie, 'Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases' (2010) 67 *Washington and Lee Law Review* 1287

Braithwaite, John, 'The Nursing Home Industry' (1993) 18 *Crime & Justice* 11

Braithwaite, John, *Restorative Justice & Responsive Regulation* (Oxford University Press, 2002)

Braithwaite, John, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care, Ritualism and the New Pyramid* (Edward Elgar 2007)

Braithwaite, Valerie, 'Games of Engagement: Postures Within the Regulatory Community' (1995) 17 *Law & Policy* 225

Brewster, Mary P, 'Legal Help-Seeking Experiences of Former Intimate-Stalking Victims' (2001) *Criminal Justice Policy Review* 91

Brienen, Marion and Ernestine Hoegen, 'Compensation Across Europe: A Quest for Best Practice' (2000) 7(4) *International Review of Victimology* 281

Brienen, Marion and Ernestine Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Productions, 2000)

Brown, B, M Burman and L Jamieson, 'Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials' (Scottish Office Central Research Unit, 1992)

Brown Weiss, Edith and Harold Jacobson, 'Getting Countries to Comply with International Agreements' (1999) 41(6) *Environment: Science and Policy for Sustainable Development* 16

Browne, Michael K, 'International Victims' Rights Law. What Can Be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of A "Victim's Rights Amendment" to its Constitution?' (2004) 27 *Hamline Law Review* 15

Brownlie, Ian, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008)

Bundesministerium der Justiz, *Opferfibel, Rechtswegweiser fuer Opfer einer Straftat [Primer for Victims, Legal Guide for Victims of Crime]* (Bundesministerium der Justiz, 2nd ed, 2002)

Bundesrechtsanwaltskammer, 'Stellungnahme der Bundesrechtsanwaltskammer zum Gesetzesentwurf der Bundesregierung zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren' [Statement of the Federal Bar Association in Regards to the Draft Parliament Bill to Enhance Victims' Rights] (BRAK, 2009)

Bundesrechtsanwaltskammer, Stellungnahme der Bundesrechtsanwaltskammer zum Gesetzesentwurf der Bundesregierung zur Verbesserung der Rechte von Verletzten im Strafverfahren [Statement of the Federal Bar Association Regarding the Draft Parliament Bill to Improve the Rights of Aggrieved Persons in Criminal Procedure], BRAK-Stellungnahme-Nr. 7/2004 (BRAK, 2004)

Bung, Jochen, 'Zweites Opferrechtsreformgesetz: Vom Opferschutz zur Opferermaechtigung [Second Victims' Rights Reform Act: From Victim Protection to Victim Enablement]' (2009) *Strafverteidiger* 430

Bureau of Justice Assistance, 'A Policymaker's Guide to Hate Crimes' (United States Department of Justice, 1999)

Burgess, Ann and Lynda Holmstrom, 'Rape: The Victim and the Criminal Justice System' (1975) 3(2) *International Journal of Criminology & Penology* 101

Burgess, Ann, Cheryl Regehr and Albert Roberts, *Victimology: Theories and Applications* (Jones & Bartlett Learning, 2011)

Burkhardt, Maren, *Victim Participation Before the International Criminal Court* (Doctor Iuris Thesis, Humboldt Universitaet, 2010)

Burns, Peter, 'Private Prosecution in Canada: The Law and a Proposal for Change' (1975) 21 *McGill Law Journal* 269

Cameron, Rita, 'The Trial-Grant' in Barbara Giuliano (ed), *Survival and Beyond: an Anthology of Stories by Victims of Crime, and a Victims' Resource Guide* (The National Association for Loss and Grief, 1998)

Campbell, Bill, 'The Implementation of Treaties in Australia' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 132

Cape, E, 'Overview: Is Reconciliation Possible?' in E. Cape (ed), *Reconcilable Rights? Analysing the Tension between Victims and Defendants* (Legal Action Group, 2004) 1

Cardenas, Juan, 'The Crime Victim in the Prosecutorial Process' (1986) 9 *Harvard Journal of Law and Public Policy* 357

Cashmore, Judy, 'The Use of Video Technology for Child Witnesses' (1990) 16 *Monash University Law Review* 228

Cassel, Paul G, 'Crime Shouldn't Pay: A Proposal to Create an Effective and Constitutional Federal Anti-Profiting Statute' (2006) 19(2) *Federal Sentencing Reporter* 119

Cassel, Paul G, 'Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act' (2005) *Brigham Young University Law Review* 835

Cassell, Paul G, 'Barbarians at the Gates? A Reply to the Critics of the Victim's Rights Amendment ' (1999) 2 *Utah Law Review* 479

Cassell, Paul G, 'In Defense of Victim Impact Statements' (2009) 6 *Ohio State Journal of Criminal Law* 611

Castles, Alex C, *An Australian Legel History* (The Law Book Company Limited, 1982)

Cavadino, M and J Dignan, 'Reparation Retribution and Rights' (1997) 4 *International Review of Victimology* 233

Cavadino, M and J Dignan, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4 *International Review of Victimology* 153

Celebi, Guelsen, 'Kritische Wuerdigung des Opferrechtsreformgesetzes [Critical Analyses of the Victims' Rights Reform Act]' (2009) *Zeitschrift fuer Rechtspolitik* 110

Chalmers, J, P Duff and F Leverick, 'Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)' (2007) *Criminal Law Review* 360

Charlesworth, Hilary, 'Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty?* (Federation Press, 1995) 129

Charlesworth, Hilary, 'Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict' (Paper

presented at the The Annual Kirby Lecture on International Law, 19 March 2009)

Charlesworth, Hilary, 'Swimming to Cambodia' (2011) 4 *Australasian Law Teachers Association Law Research Series* <http://www.austlii.edu.au/au/journals/ALRS/2011/4.html>

Charlesworth, Hilary et al, 'International Law and National Law: Fluid States' in Hilary Charlesworth et al (eds), *The Fluid State International Law and National Legal Systems* (The Federation Press, 2005) 1

Charlesworth, Hilary et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423

Charlton III, T Howard 'Note: Booth v. Maryland- Death Knell for the Victim Impact Statement' (1988) 47 *Maryland Law Review* 701

Charney, Jonathan, 'Universal International Law' (1993) 87 *American Journal of International Law* 529

Chayes, Abram, Chayes Handler, Antonia, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998)

Chesterman, Michael, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62(2) *Law and Contemporary Problems* 69

Chockalingam, C, 'Impact of the UN Declaration on Victims: Developments in India' in Eduardo Vetere and David Pedro (eds), *Victims of Crime and Abuse of Power Festschrift in Honour of Irene Melup* (11th United Nations Congress on Crime Prevention and Criminal Justice, 2005)

Christie, Nils, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology, Delinquency and Deviant Social Behaviour* 1

Clark, Haley, '"What is the Criminal Justice Sytem Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' (2010) 58 *Family Matters* 28

Clark, Roger, 'United Nations Standards and Norms in Crime Prevention and Criminal Justice' (1995) 5 *Transnational Law & Contemporary Problems* 287

Clavier, Sophie, 'Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals' (2011) 35(2) *Fordham International Law Journal* 385

Collin, Peter, *"Waechter der Gesetze" oder "Organ der Staatsregierung"? ["Keeper of the Law" or "Body of the Government"?],* Rechtsprechung: Materialien und Studien (Vittorio Klostermann, 2000)

Australian Capital Territory Community Law Reform Committee, 'Victims of Crime' (1993)

Commission of the European Communities, 'Report from the Commission on the Basis of Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (Sec (2004)102)/COM/2004/0054 final/ Doc 52004DC0054' (03 February 2004))

Commission of the European Communities, 'Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA) [SEC (2009) 476]' (20 April 2009)

Connell, R, *Masculinities: Knowledge, Power and Social Change* (University of California Press, 2nd ed, 1995)

Cook, Bree et al, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999)

Cooley, Rita, 'Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies' (1958) 2(4) *The American Journal of Legal History* 304

Copes, Heith, 'Introduction, Guest Editor's Introduction: Advancing Qualitative Methods in Criminal Justice and Criminology' (2010) (4) *Journal of Criminal Justice Education* 387

Corcoran, Suzanne, 'Comparative Corporate Law Research Methodology' (1996) 3(1) *Canberra Law Review* 54

Corns, Chris, 'Police Summary Prosecutions in Australia and New Zealand: Some Comparisons' (2000) 19 *Tasmania Law Review* 280

Corrado, L, 'The Future of Adversarial Systems: an Introduction to the Papers from the First Conference' (2010) 35(2) *North Carolina Journal of International Law & Commerical Regulation* 285

Corrie, Karen, 'Victims' Participation and Defendants' Due Process Rights: Compatable Regimes at the International Criminal Court' (The American Non-Governmental Organizations Coalition for the International Criminal Court, 2007)

Cowell, Frederick and Angelina Milon, 'Decriminalization of Sexual Orientation through the Universal Periodic Review' (2012) 12(2) *Human Rights Law Review* 341

Crawford, James, *State Responsibility The General Part* (Cambridge University Press, 2013)

Crisante, Nevina, 'Commentary' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 515

Curran, Vivian, 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives' (1998) 46(4) *American Journal of Comparative Law* 657

Cymutta, Stephan, 'Sicherung von Opferanspruechen oder staatliches geistiges Eigentum an Straftaten? [Securing Victim Compensation or State Intellectual Property of Criminal Acts?]' (2008) *Zeitschrift fuer Rechtspolitik* 67

Daigle, Leah, *Victimology: The Essentials* (Sage, 2012)

Daly, Kathleen, 'Conventional and Innovative Justice Responses to Sexual Violence' (Australian Centre for the Study of Sexual Assault, Issue No 12, 2011)

Daly, Kathleen and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A comparative Analysis of Five Countries' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (2010) vol 39, 565

Damaska, Mirjan, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45(4) *The American Journal of Comparative Law* 839

Dammer, Harry and Jay Albanese, *Comparative Criminal Justice Systems* (Wadsworth Inc Fulfillment, 2010)

Dannecker, Gerhard and Julian Roberts, 'The Law of Criminal Procedure' in Joachim Zekoll and Mathias Reimann (eds), *Introduction to German Law* (Kluwer Law International, 2nd ed, 2005) 419

Das Bhudan, Bharat, *Victims in the Criminal Justice System* (APH Publishing, 1997)

Davis, Robert C and Barbara E Smith, 'Victim Impact Statements and Victim Satisfaction: an Unfulfilled Promise?' (1994) 22(1) *Journal of Criminal Justice* 1

De Cruz, Peter, *Comparative Law in a Changing World* (Routledge, 2 ed, 1999)

Dedes, Christos, 'Das Schuldinterlokut: Eine Altgriechische Weisheit [The Sentencing Phase: An Ancient Greek Wisdom]' in Armin Kaufmann and Gerhard Dornseifer (eds), *Gedaechtnisschrift fuer Armin Kaufmann* (Heymann, 1998) 749

DeLaet, Debra, 'Don't Ask, Don't Tell: Where is the Protection against Sexual Orientation Discrimination in International Human Rights Law' (1997) 7(31) *Law & Sexuality* 31

Dembour, Marie-Benedicte, 'What are Human Rights? Four Schools of Thought' (2010) 32(1) *Human Rights Quarterly* 1

Denzin, Norman K. and Yvonna S. Lincoln, *The Sage Handbook of Qualitative Research* (Sage, 2011)

Department for Women (NSW), 'Heroines of Fortitude: The Experience of Women in Court as Victims of Sexual Assault' (1996)

Department of the Prime Minister and Cabinet, *Principles and Procedures for Commonwealth-State Consultation on Treaties* (1997)

Deppenkemper, Gunter, *Beweiswuerdigung als Mittel prozessualer Wahrheitserkenntnis [Judging Evidence as a Means of Truth Finding in Proceedings],* Osnabruecker Schriften zur Rechtsgeschichte (Universitaet Osnabrueck, V&R unipress GmbH, 2004)

Deutscher Juristentag, '55. Deutscher Juristentag: Der Tagungsverlauf' (55th German Jurist Forum: Conference Proceedings) (1984) *Neue Juristische Wochenzeitschrift* 2671

Deutscher Juristentag, '55. Deutscher Juristentag: Die Beschluesse' [55th German Jurist Forum: The Recommendations] (1984) *Neue Juristische Wochenzeitschrift* 2676

Deutscher Richterbund, 'Stellungnahme des Deutschen Richterbundes zum Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten in Straufverfahren' [Statement of the German Bar Association on the Government's Draft Bill on Improving the Rights of Aggrieved Persons in Criminal Procedure] (DRB, 2003) < http://www.drb.de/cms/index.php?id=367>

Devereux, J and M Blake, *Kenny Criminal Law in Queensland and Western Australia* (8th ed, 2012)

Doak, Jonathan, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294

Doak, Jonathan, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, 2008)

Doak, Jonathan, 'Trailblazing Victims' Rights as Human Rights: The Quest for Clarity' (Paper presented at the ACT Victims of Crime Commissioner Seminar, 16 May 2011)

Doak, Jonathan, *Victims' Rights and the Adversarial Trial: The Impact of Shifting Parameters* (Doctor of Philosophy Thesis, Queen's University Belfast, 2004)

Doak, Jonathan, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process' (2009) 29(4) *Legal Studies* 651

Doelling, Dieter, 'Stellungnahme Prof. Dr. Dieter Doelling zu dem Gesetzesentwurf der Fraktion der CDU/CSU und SPD "Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) (BT-Drs. 16/12098, 178/09)' [Statement of Prof. Dr. Dieter Doelling Regarding the Draft Legislation of CDU/CSU and SPD "Draft Legislation to Improve the Rights of the Aggrieved Person and Witnesses in Criminal Procedure" (Second Victims' Rights Reform Act) (German Parliament printed matter number 16/12098, 178/09)]

Doelling, Dieter et al, *Die Dauer von Strafverfahren vor den Landgerichten [The Length of Criminal Proceedings before District Courts]* (Bundesanzeiger Verlagsgesellschaft, 2000)

Doerner, William G and Steven P Lab, *Victimology* (Elsevier, 6 ed, 2011)

Dold, Beat and Lisa Yarwood, 'Victim Participation at the ICC: Valid Potentiality or Vanguard Pandering?' (2005) 13 *South African Yearbook of International Law* 159

Dolman, B, 'It was Either, I Kill Myself, or I Feel Something' in H Zehr (ed), *Transcending: Reflections of Crime Victims* (Intercourse, PA: Good Book, 2001)

Donnelly, Jack, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003)

Douglas, Heather et al, *Criminal Process in Queensland and Western Australia* (Thomson Reuters, 2010)

Douglas, Heather and Tanja Stark, *Stories from Survivors: Domestic Violence and Criminal Justice Interventions* (TC Beirne School of Law, The University of Queensland, 2010)

Douglas, Hay and Francis Snyder, *Policing and Prosecution in Britain, 1750-1850* (Clarendon Press, 1989)

Douglas, Roger and Kathy Laster, 'Victim Information and the Criminal Justice System: Adversarial or Technocratic' (Criminology Research Council, 1994) <www.criminologyresearchcouncil.gov.au/.../15-92-3.pdf>

Downs, George and Michael A Jones, 'Reputation, Compliance and International Law' (2002) 31 *The Journal of Legal Studies* S95

Downs, George W, David M Rocke and Peter N Barsoom, 'Is the Good News About Compliance Good News About Cooperation?' (1996) 50(3) *International Organization* 379

Duenkel, Frieder, 'Victim Compensation and Offender Restitution in the Federal Republic of Germany- a Western European Comparative Perspective' (1985) 9(1-2) *International Journal of Comparative and Applied Criminal Justice* 29

Duenkel, Frieder, 'The Victim in Criminal Law- On the Way From an Offender-Related to a Victim-Related Criminal Justice?' in Ezzat A. Fattah and Stephan Parmentier (eds), *Victim Policies and Criminal*

Justice on the Road to Restorative Justice: Essays in Honour of Tony Peters (Leuven University Press, 2001) 167

Dussich, John, 'Introductory Comments -- History of the Draft Convention and Introduction of the Draft UN Resolution for a Convention on Justice and Support for Victims of Crime and Abuse of Power' (2010) 13(2) *The Victimologist* 4

Dussich, John PJ, 'The Need for an International Convention for Victims of Crime, Abuse of Power and Terrorism' (Paper presented at the First World Conference on Penal Law/ Penal Law in the XXIst Century, Guadalajara, Mexico 18-23 November, 2007)

Easteal, Patricia, 'Sexual Assault Law in Australia: Contextual Challenges and Changes' in Nicole Westermarland and Geetanjali Gangoli (eds), *International Approaches to Rape* (The Policy Press, 2012) 13

Easteal, Patricia, 'The Cultural Context of Rape and Reform' in Patricia Weiser Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 1

Easteal, Patricia, 'Rape Prevention: Combatting the Myths' in *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology, 1993) 313

Eastwood, Christine, 'The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System: Trends and Issues in Crime and Criminal Justice No. 250 (Australian Institute of Criminology, 2003)

Eastwood, Christine and Wendy Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (Criminology Research Council, 2002) <http://www.criminologyresearchcouncil.gov.au/reports/eastwood.pdf>

Ebel, Friedrich and Georg Thielmann, *Rechtsgeschichte* [Legal History] (Mueller, 3 ed, 2003)

Edgar, Allen, 'Commentary' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 505

Eduardo, Vetere and Pedro David, *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (United Nations Congress on Crime Prevention and Criminal Justice 2005)

Edwards, Charles, *Changing Policing Theories for 21st Century Societies* (The Federation Press, 2nd ed, 2005)

Edwards, Ian, 'Victim Participation in Sentencing: The Problems of Incoherence' (2001) 40(1) *The Howard Journal* 39

Edwards, Ian, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders' (2002) *Criminal Law Review* 689

Edwards, Ian, 'An Ambiguous Participant The Crime Victim and Criminal Justice Decision Making' (2004) 44 *British Journal of Criminology* 967

Edwards, Ian, 'The Evidential Quality of Victim Personal Statements and Family Impact Statements' (2009) 13 *The International Journal of Evidence and Proof* 293

Elizabeth, Sierra, 'The Newest Spectator Sport: Why Extending Victims' Rights to the Spectators' Gallery

Erodes the Presumption of Innocence' (2008) 58(2) *Duke Law Journal* 275

Ellison, Louise, *The Adversarial Process and the Vulnerable Witness* (Oxford Press, 2001)

Emmett, Arthur, 'Towards the Civil Law? The Loss of 'Orality' in Civil Litigation in Australia' (2003) 26(2) *University of New South Wales Law Journal* 447

Engelbrecht, Christine M, 'The Struggle for "Ownership of Conflict": an Exploration of Victim Participation and Voice in the Criminal Justice System' (2011) 36(2) *Criminal Justice Review* 129

Erez, Edna, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal law Bulletin* 483

Erez, Edna, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (1999) *Criminal Law Review* 545

Erez, Edna, 'Integrating Restorative Justice Principles in Adversarial Proceedings through Victim Impact Statement' in Ed Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (Legal Action Group, 2004) 81

Erez, Edna, 'Integrating a Victim Perspective through Victim Impact Statements' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 165

Erez, Edna, 'Victim Impact Statements' (Australian Institute of Criminology, 1991)

Erez, Edna and Kathy Laster, 'Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements' (1999) 45(4) *Crime & Delinquency* 530

Erez, Edna and Leigh Roeger, 'Victim Impact Statements and Sentencing: Outcomes and process' (1999) 39 *British Journal of Criminology* 216

Erez, Edna and Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience' (1995) 23 *Journal of Criminal Justice* 363

Erez, Edna, Leigh Roeger and Frank Morgan, 'Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience' (1997) 5 *International Review of Victimology* 37

Erez, Edna and Ewa Bienkowska, 'Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland' (1993) 21 *Journal of Criminal Justice* 47

Erez, Edna and Pamela Tontodonato, 'Victim Participation in Sentencing and Satisfction with Justice' (1992) 9(3) *Justice Quarterly* 394

Erez, Edna and Pamela Tontodonato, 'The Effect of Victim Participation in Sentencing on Sentencing Outcome' (1990) 28 *Criminology* 451

Erez, Edna, Peter Ibarra and Daniel Downs, 'Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 15

Erez, Edna and Julian Roberts, 'Victim Participation in the Criminal Justice System: Normative Dilemmas

and Practical Responses' in Giora Shlomo Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Criminology* (CRC Press, 2009) 599

Erez, Edna, Leigh Roeger and Michael O'Connell, 'Victim Impact Statements in South Australia' (Paper presented at the International Victimology: Selected Papers from the 8th International Symposium: Proceedings of a Symposium held 21-26 August 1994, Canberra, 1996)

Erez, Edna, Leigh Roeger and Frank Morgan, 'Victim Impact Statements in South Australia: An Evaluation' (Office of Crime Statistics of the South Australian Attorney General, 1994)

Ericson, R and P Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Justice Process* (University of Toronto Press, 1992)

Fabricius, Dirk, 'Die Stellung des Nebenklagevertreters' [The Role of the Representative of the Private Accessory Prosecutor] (1994) *Neue Zeitschrift fuer Strafrecht* 257

Farrior, Stephanie, 'Human Rights Advocacy on Gender Issues: Challenges and Opportunities' (2009) 1(1) *Journal of Human Rights Practice* 83

Fattah, Ezzat A, 'A Critical Assessment of Two Justice Paradigms: Contrasting the Restorative and Retributive Justice Models' in Ezzat A Fattah and Tom Peters (eds), *In Support For Crime Victims In A Comparative Perspective* (Leuven University Press, 1998) 99

Feldman, David, 'Monism, Dualism and Constitutional Legitimacy' (1999) 20 *Australian Year Book of International Law* 105

Ferber, Sabine, 'Das Opferrechtsreformgesetz' [The Victim's Rights Reform Act] (2004) *Neue Juristische Wochenzeitschrift* 2562

Fileborn, Bianca, 'Sexual Assault Laws in Australia' (Australian Institute of Family Studies, 2011)

Filipas, H H and S E Ullman, "Child Sexual Abuse, Coping Responses, Self-Blame, Posttraumatic Stress Disorder, and Adult Sexual Revictimization" (2006) 21 *Journal of Interpersonal Violence* 652

Financial Action Task Force, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Sepcial Recommendations, <www.FATF-GAFI.org> (24 February 2004, updated February 2009)

Findlay, Mark, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4th ed, 2009)

Finn, P and T McNeil, 'The Response of the Criminal Justice System to Bias Crime: An Exploratory Review' (National Institute of Justice, 1987)

Fisher, Howard D, *The German Legal System and Legal Language: A General Survey Together with Notes and German Vocabulary* (Taylor & Francis, 4th ed, 2009)

Flatman, Michael and Mirko Bagaric, 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 12(6) *Deakin Law Review* 238

Fletcher, George P, *With Justice For Some: Victims' Rights in Criminal Trials* (Addison-Wesley Pub. Co, 1995)

Flick, Uwe and Steiner Kvale, *Doing Interviews,* The Sage Qualitative Research Kit (Sage, 2007)

Flynn, Asher, "Fortnunately We in Victoria are not in that UK Situation': Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform' (2011) 16(2) *Deakin Law Review* 361

Forster, Christine, 'Victims of Crime Compensation Schemes: Compensating Victims of Family Violence' (2013) (116) *Precedent* 40

Franck, Thomas M, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705

Franze, Karin, 'Die Nebenklage im Verbundenen Verfahren gegen Jugendliche und Heranwachsende/Erwachsene [Private Accessory Prosecution in Proceedings against Youth and Young Adults]' (1996) (5) *Strafverteidiger* 289

Frazier, Patricia, 'Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model' (2003) 84(6) *Journal of Personality and Social Psychology* 1257

Frehsee, Detlev, 'Wiedergutmachung und Taeter-Opfer Ausgleich [Restitution and Victim-Offender Mediation]' in Bernd Schuenemann and Markus Dubber (eds), *Die Stellung des Opfers im Strafrechtssystem: Neue Entwicklungen in Deutschland und in den USA* (Heymanns Carl VLG 2000, 2000)

Freiberg, Arie, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8(1) *European Journal of Criminology* 82

Frey, Ludwig, *Die Staatsanwaltschaft in Deutschland und Frankreich [The Public Prosecution in Germany and France]* (Verlag von Ferdinand Ente, 1850)

Frey, Sylvia, 'Victim Protection in Criminal Proceedings. The Victims' Rights to Information, Participation and Protection in Criminal Proceedings' (Paper presented at the 123rd International Senior Seminar, Visiting Experts' Papers, Resource Material Series No 63, Japan, 2003) 57

Friedmann, Jonathan, *The Routledge History of the Holocaust* (Taylor & Francis, 2011)

Frommann, Maike, 'Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve As a Model to Guarantee the Independence of German Judges?' (2009) 5(1) *Hanse Law Review* 197

Gans, Jeremy, *Modern Criminal Law of Australia* (Cambridge University Press, 2011)

Gardner, Julie, *Victims and Criminal Justice* (Office of Crime Statistics, South Australian Attorney-General's Department, 1990)

Garkawe, Sam, 'The need for a Federal, Australia-Wide Approach to Issues Concerning Crime Victims' (2007) 18(3) *Current Issues in Criminal Justice* 488

Garkawe, Sam, 'Victim Impact Statements and Sentencing' (2007) 33 *Monash University Law Review* 90

Garkawe, Sam, 'A Victims' Convention- The arguments in favour and in Analysis of the draft by the World Society of Victimology/Intervict' (Paper presented at the 12th International Symposium on Victimology, Orlando, USA, 2006)

Garkawe, Sam, 'Victims Rights Are Human Rights' (Paper presented at the The 20th Anniversary Celebration of the 1985 UN Victims Declaration, Canberra, November 2005)

Garkawe, Sam, 'The Need for a Victims Convention' (2005) 9(2) *The Victimologist* 4

Garkawe, Sam, 'The Need for a Victims Convention' (Paper presented at the 11th UN Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand 18-25 April 2005)

Garkawe, Sam, 'The History of the Legal Rights of Victims of Crime in the Australian Criminal Justice System' in Victims Services Victims of Crime Bureau, Attorney General's Department (ed), *Raising the Standards: Charting Government Agencies' Responsibilities to Implement Victims' Rights* (Victims of Crime Bureau, 2003) 34

Garkawe, Sam, 'Enhancing the Role and Rights of Crime Victims in the South African Justice System: an Australian Perspective' (2001) 14 *South African Journal of Criminal Justice* 131

Garkawe, Sam, 'The Role of the Victim During Criminal Court Proceedings' (1994) 17(2) *The University of New South Wales Law Journal* 595

Garland, David, *The Culture of Control: Crime and Social Order in Contemporary Society,* Clarendon Studies in Criminology, Oxford Readings in Socio-Legal Studies (Oxford University Press, 2001)

Geis, Gilbert, 'Crime Victims: From the Wings to Center Stage' in Hans-Dieter Schwind, Edwin Kube and Hans-Heiner Kuehne (eds), *Festschrift fuer Hans Joachim Schneider zum 70. Geburtstag am 14. November 1998: Kriminologie an der Schwelle zum 21. Jahrhundert [Festschrift for Hans Joachim Schneider on his 70th Birthday on 14. November 1998: Criminology on the Verge of the 21st Century]* (Walter de Gruyter, 1998) 315

Gerber, David, 'Method, Community & Comparative Law: An Encounter With Complexity Science' (2011) 16 *Roger Williams University Law Review* 110

Gershman, Bennett L, 'Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality' (2005) 9 *Lewis & Clark Law Review* 559

Gerstenfeld, Phyllis, *Hate Crimes: Causes, Controls, and Controversies* (Sage, 2003)

Giannini, Mary Margaret, 'Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act ' (2008) 26 *Yale Law & Policy Review* 431

Gifford, Donald James, *Understanding the Australian Legal System* (Routledge, 1997)

Glanert, Simone, 'Method?' in Pier Guiseppe Monateri (ed), *Methods of Comparative Law*, Research Handbooks in Comparative Law (Edward Elgar, 2012)

Glaser, Barney G and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967)

Gleeson, Murray, 'The Role of a Judge in a Criminal Trial' (Paper presented at the LAWASIA Conference, Hong Kong, 2007) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_6jun07.pdf>

Glenn, Patrick H, *Legal Traditions of the World* (Oxford University Press, 4th ed, 2010)

Goedelt, Katja, *Vergewaltigung und sexuelle Noetigung: Untersuchung der Strafwirklichkeit [Rape and Sexual Assault: Examining Legal Realities]* (Universitaetsverlag Goettingen, 2010)

Goldberg, Ann, *Honor, Politics, and the Law in Imperial Germany 1871-1914,* New Studies in European History (Cambridge University Press, 2010)

Goldsmith, Jack L and Eric A Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' (2002) 31 *The Journal of Legal Studies* S115

Goodey, Jo, 'An Overview of Key Themes' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 13

Goodey, Jo, 'Book Review: Vicitms of Crime in Twenty-Two European Criminal Justice Systems' (2001) 8 *International Review of Victimology* 291

Goodrum, Sarah, 'Victims' Rights, Victims' Expectations, and Law Enforcement Workers' Constraints in Cases of Murder' (2007) 32(3) *Law & Social Inquiry* 725

Gordley, James, 'The Functional Method' in Pier Guiseppe Monateri (ed), *Methods of Comparative Law*, Research Handbooks in Comparative Law (Edward Elgar, 2012)

Grant, Anna, Fiona David and Bree Cook, 'Victims of Crime' in Adam Graycar and Peter Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (Cambridge University Press, 2002) 281

Greco, Gioia, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis' (2007) 7(2-3) *International Criminal Law Review* 531

Greenberg, Jerald, 'The Social Side of Fairness: Interpersonal and Informational Classes of Organizational Justice' in R Cropanzano (ed), *Justice in the Workplace: Approaching Fairness in Human Resource Mangagement* (Lawrence Erlbaum, 1993) 79

Greenspan, Edward, 'The New Truth: Victims Never Lie' (2001) 14 *Supreme Court Law Review* 89

Gregory, Shannon Therese, *The Role of the Judge in Civil Trials: a Comparison of German and Australian Processes* (Doctor of Philosophy Thesis, 2004)

Griffin K T, *Ministerial Statement on the Review on Victims of Crime and the Government's Response to it, S*outh Australian Legislative Council, 07 December 2000, 869

Griffin, K T, *Ministerial Statement on the Introduction of Victims of Crime Bill to the South Australian Legislative Council*, South Australian Legislative Council, 16 May 2001, 1479

Groenhuijsen, Marc, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20(1) *International Review of Victimology* 31

Groenhuijsen, Marc, 'Current Status of the Convention on Justice for Victims of Crime and Abuse of Power' (Paper presented at the 4th Tokiwa International Institute Symposium "Raising the Global Standards for Victims: The proposed Convention for Victims of Crime and Abuse of Power", Miwa, Japan, 2008)

Groenhuijsen, Marc, 'International Protocols on Victims' Rights and Some Reflections on Significant

Recent Developments in Victimology' in R Snyman and Davis L (eds), *Victimology in South Africa* (Van Schaik Publishers, 2005) 333

Groenhuijsen, Marc, 'Victims' Rights in the Criminal Justice System: A Call for More Comprehensive Implementation Theory' (Paper presented at the Ninth International Symposium on Victimology, New York, 1999)

Groenhuijsen, Marc, 'Conflict of Victims' Interests and Offenders' Rights in the Criminal Justice System- a European Perspective' in Chris Sumner, Michael O'Connell and Rick Scarre (eds), *Selected Papers from the 8th International Symposium - Proceedings of a Symposium Held in Adelaide, 21-26 August 1994* (Australian Institute of Criminology, 1996) 163

Groenhuijsen, Marc and Rianne Letschert, 'Legal Reform on Behalf of Victims of Crime: The Primacy of the Dutch Legislature in a Changing International Environment' (Tilburg Law School, International Victimology Institute Tilburg (INTERVICT), 2011)

Groenhuijsen, Marc and Antony Pemberton, 'The EU Framework Decision for Victims of Crime: Does hard law make a difference?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 43

Groenhuijsen, Marc and Rianne Letschert, 'Reflections on the Development and Legal Status of Victims' Rights Instrument' in Groenhuijsen and Letschert (ed), *Compilation of International Victims' Rights Instruments* (Wolf Legal Publishers, 2006) 1

Grosse Strafrechtskommission des Deutschen Richterbundes, 'Staerkung der Rechte des Opfers auf Gehoer im Strafverfahren' [Strengthening the Victim's Right to Be Heard] (Bundesministerium der Justiz, 2010) <http://www.rundertischkindesmissbrauch.de/documents/GutachtenDRBStaerkungderRechtedesOpfersaufGehoerimStrafverfahren.pdf>

Guthke, Thorsten, *Die Herausbildung der Strafklage: Exemplarische Studien anhand Deutscher, Franzoesischer und Flaemischer Quellen [The Development of Public Prosecution: Examplatory Studies of German, French and Flamic Sources],* Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas/Fallstudien (Boehlau Verlag, 2009)

Gutter, Jeroen, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' (2007) 7(1) *Human Rights Law Review* 93

Gutteridge, Harold, *Comparative Law An Introduction to the Comparative Method of Legal Study & Research,* Cambridge Studies in International Law (Cambridge University Press, 2 ed, 1949)

Guzman, Andrew T, 'A Compliance Based Theory of International Law' (2002) 90 *California Law Review* 1823

Guzman, Andrew T and Timothy Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171

Hacket, Donna, 'Commentary' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 501

Hahn, C, *Die gesamten Materialien zur Strafprozessordnung und dem Einfuehrungsgesetz zu derselben vom 1.2.1877 [The Complete Materials to the Criminal Procedure Code and the Introductory Legislation from 1.2.1877]* (1881)

Hall, Matthew *Victims of Crime Policy and Practice in Criminal Justice* (Routledge, 2012)

Hall, Matthew *Victims and Policy Making: A comparative Perspective* (Routledge, 2012)

Haller, Klaus, 'Das "kraenkelnde" Adhaesionsverfahren- Indikator struktureller Probleme der Strafjustiz [The 'ill' Adhesion Procedure-Indication of Structural Problems in Current Criminal Procedure]' (2011) *Neue Juristische Wochenschrift* 970

Hanloser, Marlene, *Das Recht des Opfers auf Gehoer im Strafverfahren [The Victim's Right to be Heard in Criminal Procedure]* (Peter Lang, 2010)

Harrington, Lois (Chairperson of the U.S. President's Task Force on Victims of Crime), 'Final Report' (President's Task Force on Victims of Crime, 1982)

Hassemer, Winfried, *Einfuehrung in die Grundlagen des Strafrechts [Introduction to Criminal Law]* (Beck, 1990)

Hassemer, Winfried and Karin Matussek, *Das Opfer als Verfolger [The Victim as Accuser]* (1996)

Heath, Mary, 'The Law and Sexual Offences against Adults in Australia' (Australian Institute of Family Studies, 2005)

Heenan, Melanie, 'Reconstituting the 'Relevance' of Women's Sexual Histories in Rape Trials' (2002-2003) 13 *Women Against Violence* 4

Heenan, Melanie and Helen McKelvie, 'Towards Changing Procedures and Attitudes in Sexual Assault Cases' (Australian Institute of Criminology, 1993) <www.aic.gov.au/publications/previous%20series/.../1-27/~/.../heenan.ashx>

Heger, Martin, 'Die Rolle des Opfers im Strafverfahren [The Role of the Victim in Criminal Procedure]' (2007) (4) *Juristische Ausbildung* 244

Heilbronn, Gary et al, *Introducing the Law* (CCH Wolters Kluwer, 7 ed, 2008)

Heinze, Eric, *Sexual Orientation: A Human Right: An Essay on International Human Rights Law* (Nijhoff Publishers, 1995)

Helbing Buchholz, Britta, 'Geistiges Eigentum an Straftaten- Die Vermarktung von Straftaten [Intellectual Property of Criminal Acts- Marketing of Criminal Acts' (2008) (8) *Zeitschrift fuer Rechtspolitik* 267

Hellerstein, D R, 'The Victim Impact Statement: Reform or Reprisal?' (1989) 27 *American Criminal Law Review* 391

Henkel, Heinrich, 'Die Beteiligung des Verletzten am kuenftigen Strafverfahren [Participation of the Aggrieved Person in Future Criminal Proceedings]' (1937) 56 *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 227

Herman, Judith Lewis, 'Justice From the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571

Hermann, Joachim, 'Die Entwicklung des Opferschutzes im Deutschen Strafrecht und Strafprozessrecht- eine unendliche Geschichte [The Development of Victim Protection in German Criminal Procedure- a Never Ending Story]' (2010) 3 *Zeitschrift fuer Internationale Strafrechtsdogmatik* 236

Hermann, Joachim, 'Bargaining Justice- A Bargain for German Criminal Justice' (1991) 53 *University of*

Pittsburgh Law Review 755

Hermann, Joachim, 'The Federal Republic of Germany' in George F. Cole, Stanislaw Frankowski and Marc G. Gertz (eds), *Major Criminal Justice Systems: a Comparative Survey* (Sage Publications, 2 ed, 1987) 106

Hilgenberg, Hartmut, 'A Fresh Look at Soft Law' (1999) 10(3) *European Journal of International Law* 499

Hilger, Hans, 'Bericht ueber das Opferrechtsreformgesetz (Report on the Victim's Rights Reform Act)' (2004) *Goltdammer's Archiv fuer Strafrecht* 478

Hilger, Hans, 'Ueber den Begriff des Verletzten im fuenften Buch der StPO [On the Terminology of the Aggrieved Person in the Fifth Book of the Criminal Procedure Code]' (2007) 154(5) *Goltdammer's Archiv fuer Strafrecht* 287

Hindelang, Michael and Michael Gottfredson, 'The Victim's Decision Not to Invoke the Criminal Justice Process' in William Frank McDonald (ed), *Criminal Justice and the Victim*, Sage Criminal Justice System Annuals (Sage, 1976) 57

Hinton, Martin, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in Australia' (1995) 14(1) (1995) *University of Tasmania Law Review* 82

Hoernle, Tanja, 'Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht [The Role of the Victim in Criminal Theory and Criminal Law]' (2006) 19 *Juristische Zeitung* 950

Hoeynck, Theresia, *Das Opfer zwischen Parteirechten und Zeugenpflichten [The Victim Between Party Rights and Witness Obligations]* (Nomos, 2005)

Hoeynik, Theresia and Udo Jesionek, 'Die Rolle des Opfers im Strafverfahren in Deutschland und Oesterreich nach den juengsten opferbezogenen Reformen des Strafverfahrensrechts: Oesterreich als Modell? [The Role of the Victim in Criminal Procedure in Germany and Austria in Light of Recent Victim Related Reforms in Criminal Procedure: Austria as a Model?]' (2006) 89(2) *Monatsschrift fuer Kriminologie und Strafrechtsreform* 89

Home Office United Kingdom (2000) 'Home Secretary announces National Victims' Statements' *Home Office Press Release* 147/2000

Home Office United Kingdom *The Way Ahead,* CM 5074 (London 2001)

Hoyle, Carolyn, 'Empowerment /through Emotion: The Use and Abuse of Vicitm Impact Evidence' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapetuic Jurisprudence* (Carolina Academic Press, 2011) 249

Hubig, Stefanie, 'Die historische Entwicklung des Opferschutzes im Strafverfahren [The Historical Development of Victim Protection in Criminal Procedure]' in Friesa Fastie (ed), *Opferschutz im Strafverfahren* (Barbara Budrich, 2008) vol 2, 285

Hudson, Barbara, 'Balancing the Rights of Victims and Offenders' in Ed Cape (ed), *Reconcilable Rights?* (Legal Action Group, 2004) 125

Huesing, D, *Die Rechtswirklichkeit der Nebenklage [The Legal Reality of Private Accessory Prosecution]* (PhD Thesis, 1982)

Indermaur, David and Lynne Roberts, 'Confidence in the Criminal Justice System: Trends & Issues in Crime and Criminal Justice No 387' (Australian Institute of Criminology, 2009)

Independant Comission Against Corruption, 'Inquisitorial Systems of Criminal Justice and the ICAC-A Comparison' (1994) <www.icac.nsw.gov.au>

International Criminal Court, *Booklet Victims Before the International Criminal Court, A Guide For the Participation of Victims in the Proceedings of the Court* (International Criminal Court)

International Organization of Securities Commissions, Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation (October 2003) <www.IOSCO.org>

International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (ISPAC), 'Twelth United Nations Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 12-19.04.2010, Report on the Activities of the Non-Governmental Organization (NGO's) and the Ancillary Meetings, Meeting 37- Convention on Justice and Support for Victims of Crime and Abuse of Power' (2010)

Isensee, Josef, *Handbuch des Staatsrechts der Bundesrepublik Deutschland [Handbook of State Law of the Federal Republic of Germany]* (Huethig Jehle Rehm, 3rd ed, 2007)

Jackson, John, 'Putting Victims at the Heart of Criminal Justice: The Gap Between Rhetoric and Reality' in Ed Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (LAG Legal Action Group, 2004) 65

Jahn, Matthias, 'Schriftliche Stellungnahme im Rahmen der Oeffentlichen Anhoerung des Rechtsausschusses des Deutschen Bundestages zu den Gesetzentwuerfen zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) [Written Statement in Regards to the Public Hearing of the Legal Committee of the German Parliament on the Strengthening the Victims' Rights Bill]' (2009)

Jahn, Matthias and Jochen Bung, 'Die Grenzen der Nebenklagebefugnis [The Limitations of the Right to Private Prosecution]' (2012) 12 *Strafverteidiger* 754

Jehle, Joerg-Martin, 'Strafrechtspflege in Deutschland [Criminal Procedure in Germany]' (Bundesministerium der Justiz, 2009)

Jenks, Susanne, 'Die 'Assize of Clarendon' von 1166 (The 'Assize of Clarendon' of 1166' (1995) 63 *Tijdschrift voor Rechtsgeschiedenis* 27

Jescheck, Hans-Heinrich, 'Principles of German Criminal Procedure in Comparison With American Law' (1970) 56(2) *Virginia Law Review* 239

Joachimski, Jupp, *Criminal Procedure in Germany (Lecture held in Vilnius, Lithuania)* (1999) <www.joachimski.de/StPO/Rechtsvergleich.html>

Johns, Rowena, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services- Briefing Paper No 10/02' (NSW Parliamentary Library Research Service, 2002) <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/578c6f10c6d98565ca256ecf00083b4d/$FILE/10-02.pdf>

Jones, Gareth, 'Stripping a Criminal of the Profits of Crime' (2000) 1 *Theoretical Inquiries in Law* 59

Jordan, Jan, 'Lest We Forget: Recognising and Validating Victims' Needs' in School of Government Institute of Policy Studies (ed), *Addressing the Causes of Offending - What is the Evidence?* (2009) 147

Joutsen, Matti, 'Victim Participation in Proceedings and Sentencing in Europe' (1994) 3 *International Review of Victimology* 57

Joutsen, Matti, *The Role of the Vicitm of Crime in European Criminal Justice Systems. A Crossnational Study of the Role of the Victim* (United Nations European Institute for Crime Prevention and Control (HEUNI) Finland, 1987)

Jung, Heike, 'Zur Rechtsstellung des Verletzten im Strafverfahren [The Role of the Aggrieved Person in Criminal Proceedings]' (1984) 8 *Juristische Rundschau* 309

Jung, Heike, 'Die Stellung des Verletzten im Strafverfahren [The Role of the Vicitm in Criminal Procedure]' (1981) 93 *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 1147

Kade, Carl, *Die Privatklage in den Strafprozessordnungen der Jetztzeit, insebesondere in der Deutschen R.Str.Pr.O [Private Prosecution in Current Criminal Procedure, Particularly in the German Criminal Procedure Code]* (Heymanns, 1900)

Kaiser, Guenther, *Kriminologie: Eine Einfuerung in die Grundlagen (Criminology: an Introduction to the Basics)* (Mueller, Jur. Verlag, 7th ed, 1985)

Kaiser, Michael, *Die Stellung des Verletzten im Strafverfahren: Implementation und Evaluation des "Opferschutzgesetzes" [The Role of the Victim in Criminal Procedure: Implementation and Evaluation of the "Victim Protection Act"]* (Max-Planck-Institut fuer Auslaendisches und Internationales Strafrecht, 1992)

Kaiser, Michael, 'The Status of the Victim in the Criminal Justice System According to the Victim Protection Act' in G Kaiser, H Kury and H J Albrecht (eds), *Victims and Criminal Justice: Legal Protection, Restitution, and Support* (Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht, 1991) 543

Kamba, J, 'Comparative Law A Theoretical Framwork' (1974) 23 *International and Comparative Law Quarterly* 485

Karmen, Andrew, *Crime Victims: An Introduction to Victimology* (Wadsworth 8th ed, 2012)

Karmen, Andrew, *Crime Victims: an Introduction to Victimology* (Wadsworth, 6th ed, 2007)

Kaufmann, Arthur, *Die Strafvollzugsreform; eine kritische Bestandsaufnahme (The Reform of the Penal System; a Critical Analysis),* Recht, Justiz, Zeitgeschen (C.F. Mueller, 1971)

Kelly, Deborah, 'Victims' (1987) 34 *Wayne Law Review* 69

Kelly, Deborah, 'Victim Participation in the Criminal Justice System' in Robert C. Davis, Arthur J. Lurigio and Wesley G. Skogan (eds), *Victims of Crime: Problems, Policies, and Programs* (Sage Publications, 1990) vol 25, 172

Kelsen, Hans, *Principles of International Law* (The Lawbook Exchange, 2003)

Kennedy, Jessica and Patricia Easteal, 'The Rights (Boxing) Ring: Australian Rape Trials' in Helen Gavin and Jacquelyn Bent (eds), *Sex, Drugs and Rock&Roll: Psychological, Legal and Cultural Examinations of Sex and Sexuality* (Inter-Disciplinary Press, 2010) 131

Kenny, Susan, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159

Kent, Roach, 'Four Models of the Criminal Process' (1999) 89(2) *Journal of Criminal Law and Criminology* 671

Keohane, Robert O, 'The Demand for International Regimes' (1982) 36 *International Organization* 141

Keohane, Robert O, 'Rational Choice Theory and International Law: Insights and Limitations' (2002) 31 *The Journal of Legal Studies* S307

Kerin, R G, Second Reading of the Victims of Crime Bill in the South Australian House of Assembly, 27 September 2001, 2305

Kessler, Amalia, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search For an Alternative to the Adversarial' (2005) 90 *Cornell Law Review* 1181

Kiekbaev, Djalil I., 'Comparative Law: Method, Science or Educational Discipline?' (2003) 7.3 *Electronic Journal of Comparative Law* <http://www.ejcl.org/73/art73-2.html#N_1_>

Kilchling, Michael, 'Opferschutz und der Strafanspruch des Staates-ein Wiederspruch [Victim Protection and the Right of the State to Punish-A Contradiction?]' (2002) *Neue Zeitschrift fuer Strafrecht* 57

Kilchling, Michael, *Die Stellung des Verletzten im Strafverfahren [The Role of the Victim in Criminal Procedure]* (Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht, 1992)

Kilchling, Michael, 'Veraenderte Perspektiven auf die Rolle des Opfers im gesellschaftlichen, sozialwissenschaftlichen und rechtspolitischen Diskurs'[Changed Perspectives on the Role of the Victim in Society, Social Science and Legal Discourse] in J Hartmann (ed), *Perspektiven professioneller Opferhilfe* (VS Verlag, 2010) 39

Kilpatrick, Dean G, David Beatty and Susan Smith Howley, 'The Rights of Crime Victims- Does Legal Protection Make a Difference?' (U.S. Departmet of Justice, National Institute of Justice, 1998)

King, Peter, 'Decision-Makers and Decision-Making in the English Criminal Law 1750-1800' (1984) 27(1) *The Historical Journal* 25

King, Rachel, 'Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Expreiences from Crime Victims' (2000) 68 *University of Cincinnati Law Review* 357

Kirby, Michael, 'UN Special Procedures- Reflections on the Office of UN Special Representatives for Human Rights in Cambodia' (2010) 11 *Melbourne Journal of International Law* 491

Kirchengast, Tyrone, 'Victim Lawyer's, Victim Advocates, And the Adversarial Criminal Trial' (2013) 16 *New Criminal Law Review* 568

Kirchengast, Tyrone, 'The Landscape of Victim Rights in Australian Homicide Cases-Lessons from the International Experience' (2011) 31(1) *Oxford Journal of Legal Studies* 133

Kirchengast, Tyrone, 'The Integration of Victim Lawyers into the Adversarial System' (Paper presented at the The Australian and New Zealand Critical Criminology Conference 2011)

Kirchengast, Tyrone, 'Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike?' (2010) 4 *Criminal Law and Philosophy* 197

Kirchengast, Tyrone, 'The Purification of Torts, the Consolidation of Criminal Law and the Decline of Victim Power' (2008) 10 *University of Notre Dame Australia Law Review* 85

Kirchengast, Tyrone, 'Sentencing Law and the 'Emotional Catharsis' of Victims' Rights in NSW Homicide Cases' (2008) 30 *Sydney Law Review* 615

Kirchengast, Tyrone, 'Victim Impact Statements and the Previtera Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases' (2005) 24 *University of Tasmania Law Review* 114

Kirchengast, Tyrone, *The Criminal Trial in Law and Discourse* (Palgrave Macmillan, 2010)
Kirchengast, Tyrone Private Prosecution and the victim of crime, Macquarie Law Working Paper Series, April 2008

Kirchengast, Tyrone, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006)

Kirchhoff, Gerd Ferdinand, 'The Function of UN Instruments and the Path Towards Success' (Paper presented at the 4th Tokiwa International Institute Symposium "Raising the Global Standads for Victims: The proposed Convention for Victims of Crime and Abuse of Power", Miwa Japan, 2008)

Kirchhoff, Gerd Ferdinand, *What is Victimology,* Monograph Series No. 1 (Seibundo Publishing Co. Ltd., 2005)

Kirchhoff, Gerd Ferdinand and John P J Dussich, 'Tagungsbericht ueber das dritte Internationale Symposion ueber Viktimologie Muenster 2-8 September 1979' [Conference Report on the third International Symposium on Victimology in Muenster, September 2-8, 1979] (1980) 30(3) *Zeitschrift fure die Gesamte Strafrechtswissenschaft* 438

Kirchhoff, Gerd Ferdinand and Klaus Sessar, *Das Verbrechensopfer [The Crime Victim]* (Studienverlag Brockmeyer, 1979)

Klabbers, Jan, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167

Klerman, Daniel, 'Settlement and the Decline of Private Prosecution in Thirteenth-Century England' (2001) 19 *Law and History Review* 1

Kobor, Susanne, *Bargaining in the Criminal Justice System of The United States and Germany: A Matter of Justice and Administrative Efficiencey Within Legal, Cultural Context,* Augsburger Studien zum Internationalen Recht (Peter Lang, 2008)

Koh, Harold Hongju, 'Why Do Nations Obey International Law?' (1995) 106(8) *The Yale Law Journal* 2599

Kool, Renee and Martin Moerings, 'The Victim Has the Floor: The Victim's Right to be Heard in Writing or Orally in the Dutch Courtroom' (2004) 12 *European Jounral of Crime, Crimianl Law and Criminal*

Justice 46

Krey, Volker, 'Characteristic Features of German Criminal Proceedings. An Alternative to the Criminal Procedure Law of the United States?' (1999) 21 *Loyola Los Angeles International Law & Comparative Law Journal* 591

Krey, Volker, *German Criminal Procedure Law: Basics-Prosecution Authorities-Glossary,* Studienbuecher Rechtswissenschaft (W. Kohlhammer Verlag, 2009)

Kuehne, H-H, 'Die Tatsaechliche Bedeutung von Opferrechten in der Deutschen Strafprozessordnung' [The Real Meaning of Victims' Rights in German Criminal Procedure] (1986) *Monatsschrfit fuer Kriminologie und Strafrechtsreform* 98

Kuhn, Sascha, 'Opferrechte und Europaeisierung des Strafprozessrechts [Victims' Rights and the Europeanization of Criminal Procedure]' (2005) *Zeitschrift fuer Rechtspolitik* 125

Kurland, Philipp B and D W M Waters, 'Public Prosecution in England, 1854-79: An Essay in English Legaislative History' (1959) 1959(4) *Duke University School of Law* 493

Kury, Helmut, Michael Kaiser and Raymond Teske, 'The Position of the Victim in Criminal Procedure-Results of a German Study' (1994) 3 *International Review of Victimology* 69

Kury, Helmut and Michael Kilchling, 'Accessory Prosecution in Germany: Legislation and Implementation' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice, International Perspectives* (Carolina Academic Press, 2011) 41

Kury, Helmut and Guenther Kaiser, 'The Victim's Position Within the Criminal Proceedings- An Empirical Study' in G Kaiser, H Kury and H J Albrecht (eds), *Victims and Criminal Justice: Legal Protection, Restitution and Support* (Max-Planck Institut fuer Auslaendisches und Internationales Strafrecht, 1991) 579

Lador-Lederer, J, 'Legal Aspects of Declarations' (1977) 12(2) *Israel Law Review* 202

Lamborn, LeRoy, 'The United Nations Declaration on Victims: Incorporating "Abuse of Power"' (1987) 19 *Rutgers Law Journal* 59

Landman, Todd and Edzia Carvalho, *Measuring Human Rights* (Taylor & Francis, 2010)

Langbein, John H, 'Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?' (1981) 6(1) *American Bar Foundation Research Journal* 195

Langbein, John H, 'Torture and Plea Bargain' (1978) *Faculty Scholarship Series Paper No 543* 3

Langbein, John H., 'Controlling Prosecutorial Discretion in Germany' (1974) 41(3) *The University of Chicago Law Review* 439

Langbein, John H, 'The Origins of Public Prosecution at Common Law' (1973) XVII *The American Journal of Legal History* 313

Langbein, John H, *Prosecuting Crime in the Renaissance: England, Germany, France* (The Lawbook Exchange, Ltd, illustrated reprint ed, 2005)

Langbein, John H, *The Origins of the Adversial Criminal Trial,* Oxford Studies in Modern Legal History

(Oxford University Press, 2003)

Langbein, John H, *Comparative Criminal Procedure: Germany* (West Publishing Co., 1977)

Langbein, John H., 'The Constitutio Criminalis Carolina in Comparive Perspective: An Anglo-American View' in Peter Landau and Friedrich-Christian Schroeder (eds), *Strafrecht, Strafprozessrecht und Rezeption, Grundlagen, Entwicklungen und Wirkung der Constitutio Criminalis Carolina [Criminal Law, Criminal Procedure and Reception, Basic Principles, Developments and the Affects of the Constitutio Criminalis Carolina]* (Klostermann, 1984) 215

Lanham, David et al, *Criminal Laws in Australia* (The Federation Press, 2006)

Laughlin, Angela M, 'Learning From the Past? Or Destined to Repeat Past Mistakes?: Lessons from the English Legal System and its Impact on How Ee View the Role of Judges and Juries Today' (2009) 14 *Widener Law Review* 357

Law Commission of Canada, 'From Restorative Justice to Transformative Justice' (Law Commission of Canada, 1999) <dalspace.library.dal.ca/.../Participatory%20Justice%20Discussion%20Paper%20EN.pdf?>

Law Reform Commission of Victoria, 'Interim Report No 42, Rape: Reform of Law and Procedure' (LRVC, 1991)

Laxminarayan, Malini and A Pemberton, 'The Interaction of Criminal Procedure and Outcome', International Journal of Law and Psychiatry, available online 19 March 2014

Laxminarayan, Malini 'The Effect of Retributive and Restorative Sentencing on Psychological Effects of Criminal Proceedings' (2013) 28(5) *Journal of Interpersonal Violence*, 938-955

Laxminarayan, Malini, 'Interactional Justice, Coping and the Legal System Needs of Vulnerable Victims'(2013) 19(2) International Review of Victimology, 145-158

Laxminarayan, Malini, Jens Henrichs and Antony Pemberton, 'Procedural and Interactional Justice: A Comparative Study of Victims in The Netherlands and New South Wales' (2012) 9(3) *European Journal of Criminology* 260

Laxminarayan, Malini, 'Procedural Justice and Psychological Effects of Criminal Proceedings: The Moderating Effect of Offense Type' Social Justice Research (2012) 25 (4), 390-405

Lees, Sue, 'Judicial Rape' (1993) (16) *Women's Studies International Forum* 11

Lens, K A Pemberton, S Bogaerts, 'Heterogeneity in Victim Participation: A New Perspective on Delivering a Victim Impact Statement' (2013) 10(4) *European Journal of Criminology*, 479-495.

Lens, K, A Pemberton and M Groenhuijsen, 'Abstract. The Oral Victim Impact Statement in The Nethelands ' (University of Tilburg, 2010) <http://english.wodc.nl/onderzoeksdatabase/evaluatie-van-de-invoering-van-de-wet-over-spreekrecht.aspx>

Letschert, Rianne and Marc Groenhuijsen, 'Global Governance and Global Crime-Do Victims Fall In Between?' in Rianne Letschert and Jan van Dijk (eds), *The New Faces of Victimhood* (Springer, 2011) 15

Leventhal, Gerald, 'What Should Be Done with Equity Theory?' in KJ Gergen, MS Greenberg and Willis RH (eds), *Social Exchange: Advances in Theory and Research* (Plenum Press, 1980) 27

Leverick, F, J Chalmers and P Duff, 'An Evaluation of the Pilot Victim Statement Schemes in Scottland' (Scottish Executive Social Research, 2007) <www.scotland.gov.uk/publications>

Lichtenstein, Cynthia Crawford, 'Hard Law v. Soft Law: Unnecessary Dichotomy?' (2001) 35 *The International Lawyer* 1433

Lievore, Denise, 'No Longer Silent: a Study of Women's Help-Seeking Decisions and Services Responses to Sexual Assault' (Australian Institute of Criminolgy, 2005)

Loeffelmann, Markus, 'The Victim in Criminal Proceedings: a Systematic Portrayal of Victim Protection under German Criminal Procedure Law (Part 1)' in UNAFEI (ed), *Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power--Twenty Years After its Adoption* (2005) 31

Loengard, Janet, 'The Assize of Nuisance: Origins of an Action at Common Law' (1978) 37(1) *Cambridge Law Journal* 144

Loeschnig-Gspandl, Marianne and Michael Kilchling, 'Victim/Offender Mediation and Victim Compensation in Austria and Germany - Stocktaking and Perspectives for Future Research' (1997) 5(1) *European Journal of Crime, Criminal Law and Criminal Justice* 58

Lovett, Jo and Liz Kelly, 'Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Throughout Europe' (Centre for Independent Research, Evaluation, Training, Consultancy and Networking from a Feminist Perspective, 2009) <ewlcentreonviolence.org/IMG/pdf/Summary_Findings.pdf>

Lovric, Daniel, 'A Constitution Friendly to International Law: Germany and Its Volkerrechtsfreundlichkeit' (2006) *Australian Year Book of International Law* 75

Luetz-Binder, Eva, *Rechtswirklichkeit der Privatklage und Umgestaltung zu einem Aussoehungsverfahren [Legal Reality of Private Prosecution and Change to a Reconcilation Procedure]* (Peter Lang, 2009)

Ma, Yue, 'Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective' (2002) 12 *International Criminal Justice Review* 22

MacDonald, J, 'Australia Rejects Ruling on Asylum Seekers', *The Age* (Melbourne), 18 December 1997

Macdonald, Ros and Anne Wallace, 'Review of the Extent of Courtroom Technology in Australia' (2004) 12 *William&Mary Bill of Rights Journal* 649

Machura, Stefan, 'Interaction between Lay Assessors and Professional Judges in German Mixed Courts' (2001) 72(1-2) *Revue Internationale de Droit Penal* 451

Machura, Stefan, 'Silent Lay Judges-Why Their Influence in the Community Falls Short of Expectations' (2011) 86(1) *Chicago Kent Law Review* 769

Mack, Kathy, 'You Should Scrutinise her Evidence with Great Care' in Patricia Weiser Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 59

Maitland, F W and F Pollock, *The History of English Law* (S.F.C. Milsom, 2nd ed, 1968)

Malanczuk, Peter, *Akehurst's Modern Introduction to International Law* (Routledge, 7th ed, 1997)

Mapulanga-Hulston, Jackbeth and Paul D Harpur, 'Examining Australia's Compliance to the International Covenant on Economic, Social and Cultural Rights: Problems and Potential' (2009) 10(1) *Asia-Pacific Journal on Human Rights and the Law* 49

Marsh, Ian, John Cochrane and Gaynoer Melville, *Criminal Justice: An Introduction to Philosphies, Theories and Practice* (Routledge, 2004)

Mason, Keith and JW Carter, *Restitution Law in Australia* (Butterworths, 1995)

Mayr, Andrea, 'Chopper: From the Inside: Discourses of the 'Celebraty' Crimianl Mark Brandon Read' (2012) 2(3) *Language and Literature* 260

McCarthy, Liam, 'Victims of Crime' in Jude Wallace and G T Pagone (eds), *Rights and Freedoms in Australia* (Federation Press, 1992) 166

McConville, Michael and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007)

McDermott, Yvonne, 'Some Are More Equal Than Others: Victim Participation in the ICC' (2008) 5(1) *Eyes on the International Criminal Court* 23

McDonald, Elisabeth and Yvette Tinsley, *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, 2011)

McDonald, William Frank, 'Towards a Bicentiennial Revolution in Criminal Justice: The Return of the Victim' (1975-1976) 13 *American Criminal Law Review* 649

McDonald, William Frank, *Criminal Justice and the Victim* (Sage Publications, 1976)

McEvoy, Sebastian, 'Descriptive and Purposive Categories of Comparative Law' in Pier Guiseppe Monateri (ed), *Methods of Comparative Law*, Research Handbooks in Comparative Law (Edward Elgar, 2012)

McGonigle Ley, Brianne, *Procedural Justice? Victim Particiption in International Criminal Proceedings* (Intersentia, 2011)

McLeod, M, 'Victim Participation at Sentencing' (1986) 22 *Criminal Law Bulletin* 501

McRae, Willam 'The Development of Nuisance in the Early Common Law' (1948) 1 *University of Florida Law Review* 27

Meder, Stephen, *Rechtsgeschichte: Eine Einfuehrung [Legal History: an Introduction],* UTB fuer Wissenschaft (UTB, 3rd ed, 2008)

Melup, Irene, 'The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' in Yael Daniel, Elsa Stamatopoulou and J Clarence Dias (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publishing Company, 1998) 53

Merriam, Sharan B, *Qualitative Research: A Guide to Design and Implementation* (John Wiley & Sons, 3 ed, 2009)

Merton, Robert K, *Social Theory and Social Structure* (Free Press, 1968)

Meske, M, 'Between the Devil and the Deep Blue Sea: Crime Victims' Dilemma (Case Note) Simon & Schuster v. Members of the New York State Crime Victims Board' (1992) 67 *Washington Law Review* 1001

Michaels, Ralf, 'The Functional Method of Comparative Law' in Konrad Zimmerman and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 339

Mihai, Floroiu, 'State's Responsibility for International Illicit Acts' (2011) 2011(1) *Agora International Journal of Juridical Sciences* 1

Miles, Jeffrey, 'The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused' (1995) 19 *Criminal Law Journal* 193

Mitchell, Diane, 'Victim Impact Statements: A Brief examination of their implementation in Victoria' (1996-1997) 8 *Current Issues in Criminal Justice* 163

Mitchell, Ronald B, 'Regime Design Matters: Intentional Oil Pollution and Treaty Compliance' (1994) 48(3) *International Organization* 425

Mitchell, Ronald B, *International Oil Pollution at Sea: Environmental Policy and Treaty Compliance,* Global Environmental Accords Series (MIT Press, 1994)

Mittermaier, C J, *Die Muendlichkeit, das Anklageprinzip, die Offentlichkeit und das Geschworenengericht in ihrer Durchfuehrung in den verschiedenen Gesetzgebungen [The Principle of Orality, the Principle to Prosecute, the Principle of Public Trials and the Jury Trial and the Implementation in Different Legislations* (Cotta, 1845)

Mohr, Renate, '"Words Are Not Enough:" Sexual Assault Legislation, Education and Inforamation ' (Department of Justice Canada, 2002)

Moolman, CJ, 'Victim Rights in Anglo-American and Continental European Countries: What Can South Africa Learn?' (1997) *South African Criminal Justice* 273

Moore, Nancy, 'Conflicts of Interests in the Representation of Children' (1996) 64(4) *Fordham Law Review* 1819

Moravcsik, Andrew, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1 *European Journal of International Relations* 157

Morgan, Kathryn and Brent Smith, 'Victims, Punishment, And Parole: The Effect of Victim Participation on Parole Hearings' (2005) 4(2) *Criminology & Public Policy* 333

Morgan, Lucy, *Sexual and Gender Rights and the United Nations Human Rights Framework: Towards a Resolution of the Debate* (Master of Human Rights Thesis, The University of Sydney, 2009) <http://hdl.handle.net/2123/5323>

Mukkherjee, Kumar Satyanshu and Adam Graycar, *Crime and Justice in Australia* (Hawkins Press, 1997)

Murphy, Wendy J, 'The Victim Advocacy and Research Group: Serving a Growing Need to Provide Rape Victims with Personal Legal Representation to Proetect Privacy Rights and to Fight Gender Bias in the

Criminal Justice System' (2001) 11(1) *Journal of Social Distress and the Homeless* 123

Mouthaan, Solange, 'Victim Participation at the ICC For Victims of Gender-Based Crimes: A Conflict of Interests' (2013) 21 *Cardozo Journal of Internatioanl and Comparative Law* 619

Myers, Bryan and Edith Greene, 'The Prejudicial Nature of Victim Impact Statements-Implications for Capital Sentening Policy' (2004) 10(4) *Psychology, Public Policy, and Law* 492

Naffin, Ngaire, *An Inquiry into the Substantive Law of Rape* (Department of the Premier and Cabinet, 1984)

Neumayer, Eric, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36(2) *The Journal of Legal Studies* 397

New South Wales Task Force on Services for Victims of Crime, 'Report and Recommendations of the New South Wales Task Force on Services for Victims of Crime, Criminal Injuries Compensation in New South Wales' (1987)

New Zealand Law Commission, 'German Criminal Procedure' (2010) <http://www.lawcom.govt.nz/sites/default/files/german_criminal_procedure_0.pdf>

Niedling, Dirk, *Strafprozessualer Opferschutz am Beispiel der Nebenklage [Victim Protection in Criminal Procedure Through Private Accessory Prosecution]* (Lit Verlag, 2005)

Nsereko Ntanda and Daniel David, 'The Role of Victims in Criminal Proceedings- Lessons National Jurisdictions Can Learn From The ICC' (2010) 21 *Criminal Law Forum* 399

Oberwittler, Dietrich and Sven Hoefer, 'Crime and Justice in Germany- An Analysis of Recent Trends and Research" (2005) 2 *European Journal of Criminology*

O'Connell, Michael, 'Cloaking the truth-ex post facto the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (2010) 13(2) *The Victimologist* 6

O'Connell, Michael, 'Victims in the Sentencing Process: South Australia's Judges and Magistrates Give Their Verdict'" (2009) 4(1) *International Perspectives in Victimology* 50

O'Connell, Michael, 'Victims' Rights: Integrating Victims in Criminal Proceedings' (The Australasian Institute of Judicial Administration, 2011) <www.aija.org.au>

O'Connell, Michael, 'Implementing Victims' Rights- A Case Study on the South Australia Police' in Willem Frans Winkel et al (eds), *Victimization in a Multi-Disciplinary Key: Recent Advances in Victimology* (Wolf Legal Publishers, 2009)

O'Connell, Michael, 'Victims' Rights are Too Often Overlooked as Human Rights' (Paper presented at the Human Rights Consultation, Parliament House, Canberra, ACT, 1 July 2009)

O'Connell, Michael, 'First Annual Report for the Commissioner for Victims' Rights to Parliament' (South Australian Commissioner for Victims' Rights, 2009)

O'Connell, Michael, 'South Australian Victims of Crime Review' in Michael O'Connell (ed), *Victims of Crime. Working Together to Improve Services Conference Proceedings* (South Australian Institute of Justice Studies, Victim Support Service Inc., Justice Studies Department, Australasian Society of

Victimology, 2000) 122

O'Hara, Erin Ann, 'Victim Participation in the Criminal Process' (2005) 13 *Journal of Law and Policy* 230

O'Hear, Michael, 'Plea Bargaining and Victims: From Consultation to Guidelines' (2007-2008) 91 *Marquette Law Review* 323

O'Leary, Jodie, 'Twelve Angry Peers or One Angry Judge: an Analysis of Judge Alone Trials in Australia' (2011) *35 Criminal Law Journal* 154

Oana, Roxana and Ion Ifrim, 'Some Reflections on the Liability of States for International Illicit Acts' (2010) (1) *Acta Universitatis Danubius Juridica* 145

Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, 'Responding to Sexual Assault: The Challenge of Change' (2005)

Olasolo, H, C Stahn and K Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4(2) *Journal of International Criminal Justice* 219

Orakhelashvili, Alexander, *The Interpretation of Acts and Rules in Public International Law* (Oxford Scholarship Online, 2008)

Organisation For Economic Co-Operation and Development, 'Methodology For Assessing The Implementation of The OECD Prinicples of Corporate Governance' <www.OECD.org> (2007)

Orth, Uli, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4)

Orth, Ulrich, *Strafgerechtigkeit und Bewaeltigung krimineller Viktimisierung: Eine Untersuchung zu den Folgen des Strafverfahrens bei Opfern von Gewalttaten [Criminal Justice and Overcoming Victimisation: Research on the Consequences of Criminal Procedure on Victims of Violent Crime* (Weisser Ring, 2001)

Social Justice Research 313

Oeruecu, Esin, 'Methodology Aspects of Comparative law' (2007) 8(1) *European Journal of Law Reform* 29

Packer, Herbert, *The Limits of Criminal Sanction* (Stanford University Press, 1968)

Pakes, Francis, *Comparative Criminal Justice* (Routledge, 2nd ed, 2012)

Park, Roger C, 'Adversarial Influence on the Interrogation of Trial Witnesses' in Peter J van Koppen and Steven D Penrod (eds), *Adversarial Versus Inquisitorial Justice, Psychological Perspectives on Criminal Justice Systems* (Kluwer Academic/ Plenum Publishers, 2003) 131

Parker, Richard, 'Sexual Rights: Concepts and Action' (1997) 2(3) *2nd International Conference on Health and Human Rights* 31

Parkinson, Debra, 'Supporting Victims Through the Legal Process-The Role of Sexual Assault Service Providers ' (Australian Centre for the Study of Sexual Assault, 2010)

Parkinson, Patrick, *Tradition and Change in Australian Law* (Thomas Reuters, 4th ed, 2010)

Parsonage, William H, Frances P Bernat and Jacqueline Helfgott, 'Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study' (1992) 6(3) *Criminal Justice Policy Review* 187

Paternoster, Ray and Jerome Deise, 'A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Captial Decision Making' (2011) 49(1) *Criminology & Public Policy* 129

Pemberton, Antony et al, 'APAV Intervict Report: Implementation of the EU Framework Decision on the Standing of Victims in the Criminal Proceedings in the Member States of the European Union' (2009) <ec.europa.eu/justice/news/.../project_victims_europe_final_report_en.pdf>

Pemberton, Antony and Marc Groenhuijsen, 'Developing Victims' Rights Within the European Union: Past, Present and Future' (Paper presented at the Proceedings of the 13th World Society of Victimology Symposium, 2011)

Pemberton, Antony and Sandra Reynaers, 'The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 229

Pemberton, A and C Rasquete, 'Victims in Europe-Assessment of the Implementation of the Framework Decision on the Standing of Victims in Criminal Proceedings: Preliminary Results' in Jutta Hartmann (ed), *Perspektiven professioneller Opferhilfe: Theorie und Praxis eines interdisziplinaeren Handlungsfeldes* (VS Verlag, 2010) 99

Perry, Barbara, *In the Name of Hate: Understanding Hate Crime* (Routledge, 2001)

Perry, Barbara, *Hate Crimes: Understanding and Defining Hate Crime,* Praeger Perspectives (Greenwood Publishing Group, 2009)

Peter, Martina, 'Measures to Protect Victims in German Criminal Proceedings. A Summary With Special Focus on the Key Points of the Second Victims' Rights Reform Act' in UNAFEI (ed) *The Enhancement of Appropriate Measures for Victims of Crime at Each Stage of the Criminal Justice Process* (2010) 125

Peters, Karl, 'Die ethischen Voraussetzungen des Resozialisierungs- und Erziehungsvollzugs' [The Ethical Requirements of Re-socialising and Re-educating in the Penal System] in *Festschrift fuer Ernst Heinitz zum 70. Geburtstag (Festschrift for Ernst Heinitz for his 70th Birthday)* (De Gruyter, 1972) 501

Pfau, Elke, 'Report on Victim's Views on the Information for Victims of Crime Booklet' (Unpublished, 1989)

Philipps, Amy K, 'Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing' (1997) 35 *American Criminal Law Review* 93

Philips, John H, 'Victims of Crime, Not Forgotten but Sufficiently Remembered?' (2003) 55(1) *Revue Internationale de Droit Compare* 47

Piccone, Ted, 'The Contribution of the UN's Special Procedures to National Level Implementaiton of Human Rights' (2011) 15(2) *The International Journal of Human Rights* 206

Pinheiro, Paulo Sergio, 'Musings of a UN Special Rapporteur on Human Rights' (2003) 9 *Global Governance* 7

Pizzi, William T, 'Victims' Rights: Rethinking our "Adversary System"' (1999) (2) *Utah Law Review* 349

Pizzi, William T and Walter Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) *Stanford Journal of International Law* 37

Plater, D and L Line, 'Has the 'Silver Thread' of the Criminal Law Lost its Lusture? The Modern Prosecutor as a Minister of Justice'' (2012) 31(2) *The University of Tasmania Law Review* 56

Pollaehne, Helmut, 'Opfer im Blickpunkt- Taeter im Toten Winkel [Victims in Focus-Defendants in the Blind Angle?]' in Helmut Pollaehne and Ingrid Rode (eds), *Opfer im Blickpunkt-Angeklate im Abseits* (LIT Verlag, 2012) 5

Queensland Law Reform Comission, 'The Receipt of Evidence by Queensland Courts: the Evidence of Children' (Queensland Law Reform Commission, 2000)

Queensland Law Reform Commission, 'The Receipt of Evidence by Queensland Courts: The Evidence of Children: Discussion Paper 53' (Queensland Law Reform Commission, 1998)

Radaelli, Claudio and Anne Meuwese, 'Impact Assessment Indicators. Measuring the Quality of Impact Assessment' in K Jacob (ed), *Evaluating Integrated Impact Assessments (EVIA) Handbook* (Springer, 2009)

Raitt, Fiona E, 'Research Report for Rape Crisis Scotland: Independant Legal Representation For Complainers In Sexual Offence Trials' (Rape Crisis Scotland, 2010)

Ramcharan, Bertrand, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff Publishers, 2009)

Rapping, Elayne, 'Television, Melodrama, and the Rise of the Victims' Rights Movement' (1999-2000) 43 *New York Law School Law Review* 665

Raustiala, Kal, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387

Rechtsausschuss des Bundestags, 'Beschlussempfehlung und Bericht des Rechtsausschusses (6. Ausschuss) [Recommendations and Report of the Legal Committee (6th Committee)' German Parliament printed matter number [BT-Drucks] 10/6124 (03 October 1986)

Reckewerth, Sven, 'The Role of the Prosecution in German Criminal Procedure' (1998-199) 65 *Tilburg Foreign Law Review* 65

Reemtsma, J P, 'Was sind eigentlich Opferinteressen [What are the Vicitm's Interests?]' (2005) (15) *Rechtsmedizin* 86

Reidy, Megan, 'The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?' (2004-2005) 54 *Catholic University Law Review* 297

Reimann, Matthias and Joachim Zekoll, *Introduction to German Law* (Kluwer Law International, 2nd ed, 2005)

Reitz, John C, 'How to Do Comparative Law' (1998) 46(4) *American Journal of Comparative Law* 617

Resick, Patricia, 'Psychological Effects of Victimization: Implications for the Criminal Justice System ' (1987) 33 *Crime & Delinquency* 468

Richards, Kelly, 'Taking Victims Seriously?: The Role of Victims' Rights Movements in the Emergence of Restorative Justice' (2009) 21 *Current Issues in Criminal Justice* 302

Richter, Harald, 'Wie erleben und verarbeiten Opfer den Strafprozess [How Do Victims Experience and Work Through The Criminal Process' in Dieter Eppenstein (ed), *Taeterrechte-Opferrechte* (Weisser Ring, 1994) 57

Riedel, Claudia and Rochus Wallau, 'Das Akteneinsichtsrecht des "Verletzten" in Strafsachen-und seine Probleme' [The Right to Inspect Court Files of the "Aggrieved Person" in Criminal Matters-and its Problems] (2003) *Neue Zeitschrift fuer Strafrecht* 393

Riess, Peter, 'Gutachten C: Die Rechtsstellung des Verletzten im Strafverfahren [The Role of the Aggrieved Person in Criminal Procedure]' (55 Deutscher Juristentag, 1984) C115.

Riess, Peter, 'Der Strafprozess und der Verletzte - eine Zwischenbilanz (Criminal Proceedings and the Aggrieved Person- an Interim Result)' (1987) *JURA* 281

Riess, Peter, 'Entwicklungstendenzen in der Deutschen Strafprozessgestaltung [Developements in the Design of German Criminal Procedure]' (2009) (10) *Zeitschrift fuer Internationale Strafrechtsdogmatik* 466

Roach, Kent, *Due Process & Victims' Rights: The New Law & Politics of Criminal Justice* (University of Toronto Press, 1999)

Roach, Kent, 'A Comparison of Australian and Canadian Anti-Terrorism Laws' (2007) 30(1) *The University of New South Wales Law Journal* 53

Roberts, Julian V, 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole ' (2009) 38 *Crime & Justice* 347

Robinson, Paul H, 'Should the Victim's Rights Movement have Influence over Criminal Law Formulation and Adjudication?' (2002) 33 *McGeorge Law Review* 749

Robinson, Thomas J, 'Private Prosecution in Criminal Cases' (1968) 4 *Wake Forset Intramural Law Review* 300

Rosenfeld, Ernst Heinrich, *Die Nebenklage des Reichsstrafprozesses: Ein Beitrag zur Lehre von den Rechten des Verletzten im Strafverfahren [Private Accessory Prosecution in Criminal Procedure: a Contribution to the Study of the Rights of the Aggrieved Party in Criminal Procedure]* (J. Guttentag, 1900)

Rothwell, Donald et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2010)

Rubin, Edward L, 'Trial by Battle. Trial by Argument' (2003) (56) *Arkensas Law Review* 262

Rubin, Herbert and Irene Rubin, *Qualitative Interviewing: the Art of Hearing Data* (Sage, 1995)

Safferling, Christoph, 'Die Rolle des Opfers im Strafverfahren-Paradigmenwechsel im Nationalen und Internationalen Recht? [The Role of the Victim in the Criminal Process - A Paradigm Shift in National

German and International Law?]' (2010) 122 *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 87

Safferling, Christoph, 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law' (2011) 11(2) *International Criminal Law Review* 183

Sallmann, Peter and Duncan Chappell, 'Rape Law Reform: A Study of the South Australian Experience' (1982)

Samuels, Gordon, 'Review of the New South Wales Director of Public Prosecution ' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts' (2002)

Sanders, Andrew et al, 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447

Sanders, Andrew and Imogen Jones, 'Victim in Court' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge, 2012) 282

Sanders, Andrew, 'Involving Victims in Sentencing: A Conflict with Defendants' Rights?' in Ed Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (LAG Legal Action Group, 2004) 97

Sanders, Andrew, 'Victim Participation in an Exclusionary Criminal Justice System' in Carolyn Hoyle and Richard Young (eds), *New Visions of Crime Victims* (Hart Publishing, 2002) 197

Sanders, Andrew and Richard Young, 'Discontinuances, the Right of Victims and the Remedy of Freedom' (2001) 151 *New Law Journal* 44

Sanders, Andrew, Richard Young and Mandy Burton, *Criminal Justice* (Oxford University Press, 4 ed, 2010)

Sanders, Andrew and Richard Young, *Criminal Justice* (Oxford University Press, 3 ed, 2007)

Sanders, Andrew and Richard Young, 'From Suspect to Trial' in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (3 ed, 2000) 1034

Sankoff, Peter, 'Is Three Really A Crowd? Evaluating the Use of Victim Impact Statements Under New Zealand's Revamped Sentencing Regime' (2007) *New Zealand Law Review* 459

Sankoff, Peter and Lisa Wansbrough, 'Is Three Really a Crowd? Thoughts about Victim Impact Statements and New Zealand's Revamped Sentencing Regime' (Paper presented at the 20th International Conference of the International Society for the Reform of Criminal Law, Brisbane, 2 July - 6 July 2006)

Sarnoff, Susan Kiss, *Paying for Crime The Policies and Possibilities of Crime Victim Reimbursement* (Praeger, 1996)

Schachter, Oscar, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71(2) *The American Journal of International Law* 296

Scheumer, Maike, *Videovernehmung kindlicher Zeugen [The Possibility to Testify via Video-technology for Child Witnesses],* Goettinger Studien zu den Kriminalwissenschaften (Universitaetsverlag Goettingen, 2007)

Schmidt, Eberhard, *Einfuehrung in die Geschichte der Deutschen Strafrechtspflege [Introduction to German Cirminal Justice]* (Vandenhoeck&Ruprecht, 3rd ed, 1995)

Schneider, Hans Joachim, 'Neue Erkentnisse der Kriminologischen Verbrechensopferforschung-ihre Auswirkungen auf die Opferpolitik [New Research Findings in Criminologic Research-Their Consequences for Victim Policy]' (2010) (9) *Juristische Rundschau* 375

Schneider, Hans Joachim, 'Victimological Developments in the World During the Past Three Decades (I): A Study of Comparative Victimology' (2001) 45(4) *International Journal of Offender Therapy and Comparative Criminology* 449

Schneider, Hans Joachim, 'Victimological Developments in the World during the Past Three Decades: A Study of Comparative Victimology (II)' (2001) 45(5) *International Journal of Offender Therapy and Comparative Criminology* 539

Schneider, Hans Joachim, 'Die Gegenwaertige Situation der Verbrechensopfer in Deutschland: Eine Wissenschaftliche Bilanz [The Current Situation of Crime Victims in Germany: A Scientific Conclusion]' (2002) 57(5) *JuristenZeitung* 231

Schneider, Hans Joachim, 'Die Rechtsstellung des Verbrechensopfers im Strafrecht und im Strafverfahren [The Role of Victims in Criminal Law and Criminal Procedure]' (1989) (2) *JURA* 72

Schneider, Hans Joachim, *Viktimologie* (Mohr, 1975)

Schneider, Hans Joachim, *Das Verbrechensopfer in der Strafrechtspflege; Ausgewaehlte Referate des Dritten Internationalen Symposiums fuer Viktimologie in 1979 in Muenster/Westfalen [The Crime Victim in Criminal Justice, Seleted Papers From the 3rd International Symposium for Victimology in 1979 in Muenster/Westfalia)* (De Gruyter, 1982)

Schneider, Hans Joachim, *The Victim in International Perspective: Papers and Essays Given at the 3. International Symposium on Victimology 1979 in Muenster, Westfalia* (De Gruyter, 1982)

Schoech, Heinz, 'Die Rechtsstellung des Verletzten im Strafverfahren [The Role of the Vicitm in Criminal Procedure]' (1984) *Neue Zeitschrift fuer Strafrecht* 385

Schoech, H and H L Schreiber, 'Ist die Zweiteilung der Hauptverhandlung praktikabel? Erfahrungen mit der Erprobung eines informellen Tatinterlokuts' [Is the Division of the Trial Stage Practicable? Experiences with the Trial of an Informal Sentencing Stage (1978) *Zeitschrift fuer Rechtspolitik* 63

Schroth, Klaus, *Die Rechte des Opfers im Strafverfahren [Victims' Rights in Criminal Procedure],* Praxis der Strafverteidigung (C.F. Mueller Verlag 2005)

Schroth, Klaus, '2. Opferrechtsreformgestz- Das Strafverfahren auf dem Weg zum Parteienprozess? [The Second Victims' Rights Reform Act- Crimial Procedure on the Way to a Party Process?]' (2009) *Neue Juristische Wochenschrift* 2916

Schueler-Springorum, Horst, *Strafvollzug im Uebergang (The Penal System in Transition)* (Schwartz, 1969)

Schuenemann, Bernd, 'Zur Stellung des Opfers im System der Strafrechtspflege' [Regarding the Role of the Victim in the Criminal Justice System] (1986) *Neue Zeitschrift fuer Strafrecht* 193

Schuenemann, Bernd, 'Wohin treibt der Deutsche Strafprozess?' [Where is German Criminal Procedure Heading?] (2002) (1) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 1

Schuenemann, Bernd, 'Die Stellung des Opfers im Strafprozess [The Role of the Victim in Criminal Procedure]' (2007) 2 *The Yamanaski Gakuin University Law Journal* 75

Schuenemann, Bernd, 'Risse im Fundament, Flammen im Gebaelk: Die Strafprozessordnung nach 130 Jahren [Cracks in the Foundation, Flames in the Entablature: The Criminal Procedure Code after 130 years]' (2009) 10 *Zeitschrift fuer Internationale Strafrechtsdogmatik* 484

Scottish Executive Justice Department, 'A Consultative Paper on Whether Further Changes to the Law are Needed to Support Vulnerable Witnesses in Giving Evidence' (2002)

Scutt, J, *Rape Law Reform* (Australian Institute of Criminology, 1980)

Seifman, R and A Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64

Seipp, David J, 'The Destinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 58

Seron, Carroll, Jospeh Pereira and Jean Kovath, 'Judging Police Misconduct: "Street-Level" Versus Professional Policing' (2004) 38(4) *Law & Social Review* 665

Shapland, Joanna, 'Victims and Criminal Justice in Europe' in Giora Shlomo Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Victimology* (CRC Press, 2010) 347

Shapland, Joanna, 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 147

Shapland, Joanna and Matthew Hall, 'Victims at Court: Necessary Accessories or Principal Players at Centre Stage?' in Anthony Bottoms and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan Publishing, 2010) 163

Shapland, Joanna *UN Guide for Practitioners regarding the Implementation of the Declaration of Basic Principles Of Justice for Victims of Crime and Abuse of Power,* 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-07 September 1990) Report Prepared by the Secretariat, UN Doc A/CONF.1442/20 (1990) annex

Shapland, Joanna, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower, 1985)

Shelton, Dinah, 'Compliance with International Human Rights Soft Law' (1997) 29 *Studies in Transnational Legal Policy* 119

Siegismund, Eberhard, 'Ancillary (Adhesion) Proceedings in Germany as Shaped by the First Victim Protection Law: An Attempt to Take Stock' (Paper presented at the 112th International Training Course, Japan, 2000)

Simmons, Beth, 'Treaty Compliance and Violation' (2010) 13 *Annual Review of Political Science* 273

Sirimarco, Elizabeth, *The Cold War* (Marshall Cavendish, 2005)

Slaughter, Anne-Marie and Kal Raustiala, 'International Law, International Relations and Compliance' in Walter Carlnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (Sage Publications, 2002) 538

Smits, Jan M, 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in F Coomans, F Gruenefeld and M T Kamminga (eds), *Methods of Human Rights Research* (Intersentia, 2009) 45

Smythe, Dee 'Parliamentary Submissions to the South African Parliament by the University of Cape Town, Sexual Offences Submission Chapter 8: Legal Representation for Victims of Sexual Offences' (Western Cape Sexual Offences Working Group/Consortium on Violence Against Women, 2002)<www.ghjru.uct.ac.za/sexual-offence-bill/Legal-Representation-for-Victims-of-Sexual-Offences.pdf>

South African Law Commission, 'Sexual Offences Report Project 107' (2002)

South Australia Justice Strategy Unit, 'Victims of Crime Review (Report One)' (Justice Strategy Unit, 1999)

South Australia Justice Strategy Unit, 'Victims of Crime Review- Survey of Victims of Crime(Report Two)' (Justice Strategy Unit, 2000)

South Australia's Attorney General's Department, 'Victims and Criminal Justice' (1990)

Spencer, J R, 'Criminal Procedure: the Rights of the Victim, versus the Rights of the Defendant' in E Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (Legal Action Group, 2004) 37

Sperduti, Giuseppe, 'Dualism and Monism, A Confrontation to be Overcome' (1977) 3 *Italian Year Book of International Law* 31

Spiess, Kerstin, *Das Adhaesionsverfahren in der Rechtswirklichkeit [The Adhesion Procedure in Legal Reality]* (Lit Verlag Dr. W Hopf, 2008)

Spradley, James, 'Asking Descriptive Questions' in Mark Pogrebin (ed), *Qualitative Approaches to Criminal Justice: Perspectives from the Field* (2003) 44

Stahlmann-Liebelt, Ulrike, 'Taetigkeit im staatsanwaltschaftlichen Ermittlungsverfahren mit kindlichen und jugendlichen Verletzten [Working with Children and Youth in the Prosecutorial Investigation Stage]' in Friesa Fastie (ed), *Opferschutz im Strafverfahren* (Barbara Budrich, 2 ed, 2008) 129

Stark, Barbara, 'U.S. Ratification of the other Half of the International Bill of Rights' in David Forsythe (ed), *The United States and Human Rigths: Looking Inward and Outward* (University of Nebraska Press, 2000) 73

Starke, B C L, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Year Book of International Law* 66

State Government Victoria 'A Victim's Voice, Victim Impact Statements in Victoria- Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria' (State Government Victoria, 2009)

Statistisches Bundesamt [Federal Statistics Office], 'Rechtspflege Staatsanwaltschaften [Criminal Procedure: Prosecution]' (Statistisches Bundesamt, 2012) <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260117004.pdf?__blob=publicationFile>

Statistisches Bundesamt [Federal Statistics Office], 'Rechtspflege Strafgerichte [Criminal Procedure Criminal Courts]' (Statistisches Bundesamt, 2012)

Stein, Artuhur A, 'Coordination and Collaboration: Regimes in an Anarchic World' (1982) 36 *International Organization* 115

Stenger, Meiko, *Das Opferanspruchssicherungsgestz [The Act Securing Restitution Claims for Victims],* Berichte aus der Rechtswissenschaft (Shaker, 2006)

Stephen, James Fitzjames, *A History of the Criminal Law in England* (Macmillan and Co, 1883)

Stevens, Mark, 'Victim Impact Statements Considered in Sentencing' (2000) 2(1) *Berkeley Journal of Criminal Law* [1]

Stickels, John W, 'The Victim Satisfaction Model of the Criminal Justice System' (2008) 2(1) *Journal of Criminology and Criminal Justice Research & Education* 1

Stiebig, Volker, 'Opfersorge oder Taeterpflege?- Eine Zwischenbilanz vor dem Hintergrund des Opferrechtsreformgesetz (Victim Care or Offender Protection? An Interim Result in Light of the Victim's Rights Reform Act)' (2005) (9) *JURA* 593

Stier Adler, Emily and Clark Roeger, *An Invitation to Social Research: How It's Done* (Cengage Learning, 4 ed, 2010)

Stoffers, Kristian and Jens Moeckel, 'Beteiligtenrechte im Strafprozessualen Adhaesionsverfahren [Participation Rights in Adhesion Procedures]' (2013) *Neue Juristische Wochenschrift* 830

Strang, Heather, 'Restorative Justice Programs in Australia: a Report to the Criminology Research Council' (Criminology Research Council, 2001) <http://www.criminologyresearchcouncil.gov.au/reports/strang/index.html>

Strang, Heather, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002)

Strang, Heather and Lawrence W Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) 15 *Utah Law Review* 15

Stubbs, William, *Selected Charters and Other Illustrations of English Constitutional History From the Earliest Times to the Reign of Edward the First,* Clarendon Press Series (Clarendon Press, 2nd ed, 1870)

Subedi, Surya P, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201

Subedi, Surya P et al, 'The Role of the Special Rapporteuers of the United Nations Human Rights Council in the Development and Promotion of International Human Rights Norms' (2011) 15(2) *The International Journal of Human Rights* 155

Sucharitkul, Sompong, 'State Responsibility and International Liability under International law' (1996) 18(4) *Loyola Los Angeles International Law & Comparative Law Journal* 821

Sumner, C J, 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian & New Zealand Journal of Criminology* 195

Tampe, Evelyn, *Verbrechensopfer: Schutz, Beratung, Unterstuetzung [Victims of Crime: Protection, Advise, Support]* (R. Verlag, 1992)

Taskforce on Women and the Criminal Code, 'Women and the Criminal Code' (Queensland Government, 2000)

Taub, Nadine, 'Adult Domestic Violence: The Law's Response' (1983) 8(1) *Victimology* 152

Tavistock Institute, *The Evaluation of Socio-Economic Development* (2003)

Taylor, Natalie, 'Juror Attitudes and Biases in Sexual Assault Cases: Trends & Issues in Crime and Criminal Justice No. 344' (Australian Institute of Criminology, 2007)

Temkin, Jennifer, *Rape and the Legal Process* (Oxford University Press, 2002)

Thibaut, John and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum Associates, 1975)

Thirlway, Hugh, 'The Law and Procedure of the International Court of Justice 1960-1989: Part Eight' (1989) 67 *British Year Book of International Law* 1

Tomz, Michael, 'Interests, Information, and the Domestic Politics of International Agreement' (2004) <www.standoford.edu>

Trueblood, Christine, 'Victim Impact Statements: A Balance Between Victim and Defendant Rights' (2010) 3 *Phoenix Law Review* 605

Trumbull, Charles P, 'The Victim of Victim Participation in International Criminal Proceedings' (2008) 29 *Michigan Journal of International Law* 777

Tyler, Tom, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime & Justice* 283

Tyler, Tom and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002)

Tyler, Tom and Allen Lind, 'Procedural Justice' in Joseph Sanders and Lee Hamilton (eds), *Handbook of Justice Research in Law* (Kluwer Academic/Plenum Publishers, 2001) 65

UN African Regional Preparatory Meeting, *Report of the African Regional Preparatory Meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf.121/RPM/4 (21 February 1983)

UN Asia and Pacific Regional Preparatory Meeting, *Report of the Asia and Pacific Regional Preparatory Meeting on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf./121/RPM/2 (29 July 1983)

UN Commission on Crime Prevention and Criminal Justice, *Use and Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, ESCOR 6th sess, Agenda Item 8, UN Doc E/CN.15/1997/16 (28.02.1997)

UN Commission on Crime Prevention and Criminal Justice 'UN Crime and Prevention and Criminal Justice: 'Report of the Third Committee' 40 U.N. GAOR (Agenda Item 98)' UN Doc. A/40/881 (1985)

UN Development Program, *Human Development Report: Human Rights and Human Development* (UN, 2000)

UN European Regional Preparatory Meeting, *Report of the European Regional Preparatory Meeting on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf./121/RPM/1 (29 July 1983)

UN High Commissioner for Human Rights, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Participation in Political and Public Life by Persons with Disability, UN Doc A/HRC/19/36 (21 December 2011)

UN Human Rights Council, 19th Sess, UN Doc A/HRC/19/L.9/Rev.1 (20 March 2012)

UN Human Rights Committee, General Comment 25 (57) of the International Covenant on Civil and Political Rights, 1510th meeting, UN Doc CCPR/C/21/Rev.1/Add.7 (16 December 1996)

UN International Law Commission, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, 50th Session, Supplement No. 10 (A/56/10), available at: <http://www.un.org/law/ilc/ reports/2001/2001report.htm> (hereinafter: Report), 29-365.

UN Interregional Preparatory Meeting of Experts, *Report of the Interregional Preparatory Meeting for the 7th UN Congress on the prevention of crime and the treatment of offenders on topic 3: "Victims of crime",*' UN Doc A/Conf.121/IPM/4 (10 September 1984)

UN Interregional Preparatory Meeting of Experts, *Resolution on Justice and Assistance for Victims, Report of the Interregional Preparatory Meeting for the 7th UN Congress on the prevention of crime and the treatment of offenders on topic 3: "Victims of crime",* UN Doc A/Conf.121/IPM/4 (10.09.1984), annex 1

UN Latin American Regional Preparatory Meeting UN, *Report of the Latin American Regional Preparatory Meeting on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf.121/RPM/3 (06 December 1981)

UN Office on Drugs and Crime, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (UN, 2006)

UN Office on Drugs and Crime, *Cross-Cutting Issues, Victims and Witnesses, Criminal Justice Assessment Toolkit* (United Nations, 2006)

UN Office for Drug Control and Crime Prevention, *UN Guide for Policymakers. On the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, 1999)

UN Office for Drug Control and Crime Prevention, *UN Handbook on Justice for Victims. On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention,

1999)

UN Office of the United Nations High Commissioner For Human Rights, United Nations Special Procedures: Facts and Figures, 2009

UN Office of the United Nations High Commissioner For Human Rights, *Manual for Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Program* E/CN.4/2000/4, (18 December 1999)

UN Secretariat, *Victims of Crime* - Working Paper Prepared by the Secretariat, UN Doc A/Conf.121/6 (01 August1985)

UN Secretariat on the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *UN Report by the Secretariat on the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf.87/14/Rev.1 (1981)

UN Secretariat, *Working paper presented by the Secretariat-Crime and the Abuse of power: Offences and offenders beyond the reach of law?*, UN Doc A/Conf.87/6 (22.07.1980)

UN Secretary-General, *UN Report of the Secretary-General- Use and Application of Standards and Norms in Crime Prevention and Criminal Justice*, UN Doc E/CN.15/2009/16 (06 February 2009)

UN Secretary-General, *UN Report of the Secretary-General-Results of the Meeting of the Intergovernmental Expert Group to Develop an Information-Gathering Instrument on United Nations Standards and Norms Related Primarily to Victim Issues,* UN Doc E/CN.15/2007/3 (01 February 2007)

UN Secretary-General, *UN Report of the Secretary-General Addendum-United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice- Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc E/CN.15/1996/16/Add. 3 (10 April 1996)

UN Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Report Prepared by the Secretariat* (*Milan 26 August - 05 September 1985):* UN Doc A/Conf.121/22/Rev.1 (1986)

UN Western Asia Regional Preparatory Meeting, *UN Report of the Western Asia Regional Preparatory Meeting on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf.121/RPM/S (17 January 1984)

Unsworth, Barrie, Premier, 'Second Reading Speech, Crimes (Sentencing Speech, Crimes (Sentencing) Amendment Bill', *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 12 November 1987, 915

US Department of Justice, 'New Directions from the Field: Victims' Rights and Services For the 21st Century' (1998)

van Caenegem, R C, *Royal Writs in England From the Conquest to Glanvill* (Seldon Society, 1959)

van Caenegem, William, 'Advantages and Disadvantages of the Adversarial System in Criminal Proceedings' Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System in Western Australia, vol 1 (1999) 69-102

van den Bos, Kees, 'Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness' (2001) 80(6) *Journal of Personality and Social Psychology* 931

van den Bos, Kees and Allen Lind, 'Uncertainty Management by Means of Fairness Judgments' (2002) 34 *Advances in Experimental Social Psychology* 1

van den Bos, Kees and Allen Lind, 'When Fairness Works: Toward a General Theory of Uncertainty Management' (2002) 24 *Research in Organizational Behavior* 181

van Dijk, Jan, 'Implications of the International Crime Victims Survey for a Victim Perspective' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Ashgate, 2000) 97

van Dijk, Jan, 'Benchmarking Legislation on Crime Victims: the UN Victims Declaration 1985' in *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (United Nations Press, 2005) 202

van Dijk, Jan and Marc Groenhuijsen, 'Benchmarking Victim Policies in the Framework of European Union Law' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing, 2007)

van Dijk, Jan, John van Kesteren and Paul Smit, 'Criminal Victimisation in International Perspective, Key findings from the 2004-2005 ICVS and EU ICS' (Tilburg University, United Nations Office on Drugs and Crime, 2007)

van Genugten, Willem et al, 'Loopholes, Risks and Ambivalences in International Lawmaking; the Case of a Framework Convention on Victims' Rights' (2007) XXXVII *Netherlands Yearbook of International Law* 109

van Kessel, Gordon, 'Adversary Excesses in the American Criminal Trial' (1992) 67 *Notre Dame Law Review* 403

Verdun-Jones, Simon and Adamira Tijerino, 'Four Models of Victim Involvement during Plea Negotiations: Bridging the Gap Between Legal Reforms and Current Legal Practice' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 471

Verdun-Jones, Simon N and Adamira A Tijerino, 'Victim Participation in the Plea Negotiation Process: An Idea Whose Time has Come?' (2005) 50 *Criminal Law Quarterly* 190

Victims Support Agency, 'A Victim's Voice, Victim Impact Statements in Victoria-Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria' (Department of Justice, 2009)

Victims Support Agency Victorian Government Department of Justice, 'Community Consultation Paper For a Proposed Victims' Charter in Victoria' (2005)

Victoria Parliamentary Debates, Legislative Assembly, 31 March 1994

Victorian Law Reform Commission, 'Sexual Offences: Law and Procedure Discussion Paper' (Victorian Law Reform Commission, 2001) <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+-+Sexual+Offences+-+Discussion+Paper>

Victorian Law Reform Commission, 'Sexual Offences: Interim Report' (2003) <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Sex

ual+Offences/LAWREFORM+-+Sexual+Offences+-+Interim+Report>

Victorian Law Reform Commission, 'Sexual Offences: Final Report' (2004) <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+-+Sexual+Offences+-+Final+Report>

Victorian Law Reform Commission, 'Sexual Offences: Implementation Report' (2006) <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+-+Sexual+Offences+-+Implementation>

Victorian Sentencing Commission, 'Sentencing: Report of the Committee' (1988)

Villimow, B, 'The Application of the Victim Compensation Act in the Federal Republic of Germany' in K Miyazawa and M Ohya (eds), *Victimology in Comparative Perspective* (Seibundo Publishing, 1986) 422

Volbert, Renate, 'Welche Verbesserungen koennen durch Videovernehmung fuer Opferzeugen erreicht werden? [What Improvements Can Be Made For Witnesses Through Video-testimony?]' in Stephan Barton (ed), *Verfahrensgerechtigkeit und Zeugenbeweis: Fairness fuer Opfer und Beschuldigte*, Reihe Interdisziplinaere Studien zu Recht und Staat (Nomos-Verlag, 2002) 149

Volckart, Bern, 'Opfer in der Strafrechtspflege [Victims in Criminal Procedure]' (2005) (5) *Juristische Rundschau* 181

Volk, Klaus, 'Principles of Criminal Procedure and Post-Modern Society: Contradictions and Perspectives' (2003) <http://www.isrcl.org/Papers/Volk.pdf>

von Hertig, Hans, *The Criminal and His Victim* (Yale University Press, 1948)

Wade, Marianne, Christopher Lewis and Bruno Aubusson de Cavarlay, 'Well Informed? Well Represented? Well Nigh Powerless? Victims and Prosecutorial Decision-Making' (2008) 14 *European Journal on Criminal Policy and Research* 249

Walker, N and M Telford, 'Designing Criminal Justice: The System in Comparative Perspective' (2000)

Walklate, Sandra, 'Victim Impact Statements' in Brian Williams (ed), *Reparation and Victim Focused Social Work* (Kingsley, 2002)

Walklate, Sandra, *Criminology: The Basics* (Taylor & Francis, 2005)

Waller, Irvin, *Transcript of the Interview with Irvin Waller in Washington D.C.* (12 January 2003) Oral History of the Crime victim Assistance Field-Project", University of Akron, USA <http://vroh.uakron.edu/transcripts/Waller.php>

Waller, Peter Louis, *An Introduction to Law* (North Ryde, N.S.W.: LBC Information Services, 8 ed, 2000)

Walther, Susanne, 'Interessen und Rechtsstellung des Verletzten im Strafverfahren [Interests and Role of the Aggrieved Person in Criminal Procedure' (2008) (10) *Juristische Rundschau* 405

Walther, Susanne, 'Zum Anspruch des Deliktsopfers auf rechtliches Gehoer und auf ein faires Verfahren [The Victim's Right to be Heard and to a Fair Trial]' (2007) *Goltdammer's Archiv fuer Strafrecht* 615

Walther, Susanne, 'Victims' Rights in the German Court System' (2006) 19(2) *Federal Sentencing Reporter*

113

Walther, Susanne, 'Reparation in the German Criminal Justice System: What Is, and What Remains to Be Done?' (2000) 7 *International Review of Victimology* 265

Walther, Susanne, 'Was soll "Strafe" [Why Penalties?]' (1999) (1) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 123

Walther, Susanne, 'Victims' Rights: Procedural and Constitutional Principles for Victim Participation in Germany' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press, 2011) 97

Warner, Kate and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) (52) *British Journal of Criminology* 93

Warren, Carol A B, 'Qualitative Interviewing' in Jaber F Gubrium and James A Holstein (eds), *Handbook of Interview Research: Context & Method* (Sage, 2002)

Watchirs, Helen, 'Review of Methodologies Measuring Human Rights' (2003) 30(4) *The Journal of Law, Medicine & Ethics* 716

Waye, Vicki, 'Judicial Fact-Finding: Trial by Judge Alone in Serious Criminal Cases' (2003) 27(2) *Melbourne University Law Review* 423

Weigend, Thomas, '"Die Straftat fuer das Opfer"?- Zur Rennaisance des Genugtuungsgedankens im Straf- und Strafverfahrensrecht ["The Crime for the Victim"?-The Rennaisance of the Thought of Satisfaction in Criminal Law and Criminal Procedure]' (2010) (1) *Zeitschrift fuer Rechtswissenschaftliche Forschung* 39

Weigend, Thomas, 'Lay Participation and Consensual Disposition Mechanisms' (2001) 72(1-2) *Revue Internationale de Droit Penal* 595

Weigend, Thomas, 'Das Opferschutzgesetz-kleine Schritte zu welchem Ziel? (The Victim Protection Act-Small Steps Towards What Goal?)' (1987) *Neue Juristische Wochenschrift* 1170

Weigend, Thomas, 'Viktimologische und Kriminalpolitische Ueberlegungen zur Stellung des Verletzten im Strafverfahren [Victimological and Criminal Policy Thoughts on the Role of the Aggrieved Person in Criminal Procedure]' (1984) 96(3) *Zeitschrift fuer die Gesamte Strafrechtswissenschaft* 761

Weigend, Thomas, 'Reform Proposals on Dutch Criminal Procedure: A German Perspective' in M. Groenhuijsen and Tijs Kooijmans (eds), *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective* (Martinus Nijhoff Publishers, 2012) 155

Weigend, Thomas, 'Germany' in Kevin Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2010) 252

Weigend, Thomas, *Deliktsopfer und Strafverfahren* [Crime Victims and Criminal Procedure] (Duncker & Humboldt GmbH, 1989)

Weiner, Bernhard, 'Paragraph 406 e [Section 406 e]' in Juergen Peter Graf (ed), *Beck'scher Online-Kommentar Strafprozessordnung [Beck Online Commentary on the StPO]* (Beck Online, 12th ed, 2011)

Weiner, Bernhard, 'Paragraph 406 d [Section 406 d]' in Juergen Peter Graf (ed), *Beck'scher Online-*

Kommentar Strafprozessordnung [Beck Online Commentary on the StPO] (Beck Online, 12th ed, 2011)

Weiss, Robert Stuart, *Learning from Strangers: The Art and Method of Qualitative Interview Studies* (Simon and Schuster, 1995)

Weissbrodt, David and Connie De La Vega, *International Human Rights Law: an Introduction,* Pennsylvania Studies in Human Rights (University of Pennsylvania Press, 2007)

Welling, Sarah, 'Victim Participation in Plea Bargains' (1987) 65(2) *Washington University Law Quarterly* 301

Welling, Sarah, 'Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision' (1988) 30 *Arizona Law Review* 85

Wemmers, Jo-Anne, 'Victims' Rights are Human Rights: The importance of Recognizing Victims as Persons' (2012) *TEMIDA* 71

Wemmers, Jo-Anne, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20(4) *Criminal Law Forum* 395

Wemmers, Jo-Anne, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121

Wemmers, Jo-Anne, 'Procedural Justice and Dutch Victim Policy' (1998) 20(1) *Law & Policy* 57

Wemmers, Jo-Anne, 'The Meaning of Justice for Victims' in Giora Shlomo Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Victimology* (CRC Press, 2010) 27

Wemmers, Jo-Anne, 'Victim Participation and Therapeutic Jurisprudence: A Canadian Perspective' (Paper presented at the Workshop on Victim Participation in Justice and Therapeutic Jurisprudence: A Comparative Analysis, Onati, Spain, 2007)

Wemmers, Jo-Anne, 'Reparation and the International Criminal Court: Meeting the Needs of Victims' (Univeriste de Montreal, International Centre for Comparative Criminology, 2006)

Wemmers, Jo-Anne, *Victims in the Criminal Justice System* (Kugler Publications, 1996)

Wemmers, Jo-Anne and Marie-Marthe Cousineua, 'Victim Needs and Conjugal Violence: Do Victims Want Decision-Making Power?' (2005) 22(4) *Conflict Resolution Quarterly* 493

Wemmers, Jo-Anne and Katie Cyr, 'Victims' Perspective on Restorative Justice. How Much Involvement are Victims Looking For?' (2004) 11 *International Review of Victimology* 1

Wemmers, Jo-Anne and Anne-Marie De Brouwer, 'Globalization and Victims' Rights at the ICC' in Rianne Letschert and Jan Van Dijk (eds), *The New Faces of Victimhood*, Studies in Global Justice (Springer, 2011) 279

Werner, Alan, *A Guide to Implementation Research* (The Urban Institute Press, 2004)

Whitrod, Ray, 'Victim Participation in Criminal Proceedings- A Progress Report' (1986) 10 *Criminal Law Journal* 77

Williams, Brian, 'The Victims' Charter: Citizens as Consumers of Criminal Justice Services' (1999) 38(4) *The Howard Journal of Criminal Law* 384

Williams, Brian, *Victims of Crime and Community Justice* (Jessica Kingsley Publishers, 2005)

Williams, Paul, Adolfo Perez Esquivel and Tom Farer, *The International Bill of Human Rights* (Entwhistle Books, 2nd ed, 1999)

Wilson, Ashleigh, 'Canberra to Defy UN on "Nigger' Sign"', *The Australian* (24 April 2003)

Wilson, Larry C, 'Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services' (2005) 23(2) *Windsor Yearbook of Access to Justice* 249

Wilson, William, *Central Issues in Criminal Theory* (Hart, 2002)

Wolhuter, Lorraine, 'German and Swedish Procedures as Models for the Empowerment of Racial Minority Women in Rape Trials' (2010) 38 *International Journal of Law, Crime and Justice* 1

Wolhuter, Lorraine, Neil Olley and David Denham, *Victimology: Victimisation and Victims' Rights* (Taylor and Francis, 2008)

Wolhuter, Lorraine, Neil Olley and David Denham, *Victimology-Victimisation and Victim's Rights* (Routledge-Cavendish, 2009)

Wood, Michael, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73

Wright, Martin, *Justice for Victims and Offenders: a Restorative Response to Crime* (Waterside Press, 1996)

Wu, Kai-Yuan, *Die Rechtsstellung des Verbrechensopfers im staatlichen Strafverfahren am Beispiel der Nebenklage [The Role of the Victim in State-controlled Criminal Procedure- Private Accessory Prosecution as an Example]* (Peter Lang, 2007)

Wuerth, Anna and Frauke Lisa Seidenstein, 'Indices, Benchmarks and Indicators: Planning and Evaluating Human Rights Dialogues' (2005)

Yecies, S, 'Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights' (2011) 11(2) *Chicago Journal of International Law* 789

Young, Alan, 'Two Scales of Justice- a Reply' (1993) 35 *Criminal Law Quartely* 355

Young, Katharine, 'The Implementation of International Law in the Domestic Laws of Germany and Australia: Federal and Parliamentary Comparison' (1999) 21 *Adelaide Law Review* 177

Young, Oran R, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, 1994)

Zauberman, R, 'Victims as Consumers of the Criminal Justice System' in Jo Goodey and Adam Crawford (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000)

Zedner, Lucia, 'Comparative Research in Criminal Justice' in L Noaks, M Levi and M Maguire (eds),

Contemporary Issues in Criminology (University of Wales Press, 1995) 8

Zimmermann, Anne Katharina, 'Securing Protection and Cooperation of Witnesses and Whistle-Blowers, An Overview of the Law as it Stands in Germany' in *Fourth Regional Seminar on Good Governance for Southeast Asian Countries. Securing Protection and Cooperation of Witnesses and Whistle-Blowers* (UNAFEI, 2012) 20

Zypries, Brigitte, 'Bei der Opferrechtsreform muss es eine sachliche Debatte geben [There Has to Be an Objective Debate Regarding the Victim's Rights Reform Act]' (Paper presented at the 1st Lesung des Gesetzesentwurfs der Koalitionsfraktionen fuer ein Opferrechtsreformgesetz, Berlin, 13 November 2003) <http://www.bmj.de/SharedDocs/RedenZypries/2003/20031113_1_Lesung_Opferrechtsreform.html>

B *Cases*

1 Australia

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs [1991] HCA 64; (1992) 176 CLR 1 (8 December 1992)

Commonwealth v Tasmania (1983) 158 CLR 1

Cheung v. *The Queen* (2001) 209 CLR 1

Dietrich v The Queen [1992] HCA 57; (1992) 177 CLR 292

DPP (Vic) v Dupas [2007] VSC 305

Dupas v The Queen (2010) 241 CLR 237

Gorladenchearau v The Queen [2011] VSCA 432

Isenhood v Green (2011) WASCA 70

Morales v Minister for Immigration and Multicultural Affairs [1998] FCA 334; (1998) 154 ALR 51, 61

Minister of State for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 183 CLR 273

R v Borthwick [2010] VSC 613

R v Previtera (1997) 94 A CRIM R 76

R v Singh [2006] QCA 71

R v Willis [2000] VSC 297

R v Penn (1994) 19 MVR 367

Raccosta v The Queen [2012] VSCA 59

Ratten v The Queen [1974] HCA 35*;* (1974) 131 CLR 510

Richardson v The Queen [1974] HCA 19; (1974) 131 CLR 116

Tran v The Queen [2011] VSCA 383

Tasmanian Wilderness Society Inc v Fraser [1982] HCA 37; (1982) 153 CLR 270

Vaitaiki v Minister for Immigration and Ethnic Affairs [1998] FCA 5; (1998) 150 ALR 608

Whitehorn v The Queen [1983] HCA 42; (1983) 152 CLR 657

2 Germany

Bayerisches Oberlandesgericht [Bavarian Higher Regional Court], 1 St 746/52, 15 April 1953 reported in Neue Juristische Wochenschrift 1953, 1116 (1117)

Bundesgerichtshof [German Federal Court of Justice], 2 StR 68/55, 21 September 1956 reported in Neue Juristische Wochenschrift 1956, 1767

Bundesgerichtshof [German Federal Court of Justice], 1 StR 424/04, 11 November 2004 reported in Neue Zeitschrift fuer Strafrecht 2005, 396

Bundesverfassungsgericht [German Constitutional Court], 1 BvL 7/68 3 June 1969 reported in Neue Juristische Wochenschrift 1069, 1432

Bundesverfassungsgericht [German Constitutional Court] 2 BvR 67/06, 26 October 2006, reported in Neue Juristische Wochenschrift 2007, 1052

Landgericht Bielefeld (District Court Bielefeld), Qs 621/94 IX , 07 December 1994, reported in Wistra 1995, 118 (119)

Oberlandesgericht Duesseldorf [Higher Regional Court Duesseldrof] V 21/88, 24 September 1990 reported in Strafverteidger 1991, 202

Oberlandesgericht Koblenz (Higher Regional Court Koblenz) 2 VAs 3/88, 30 Mai 1988 reported in Strafverteidiger 1988

Oberlandesgericht Koblenz [Higher Regional Court Koblenz], 2 VAs 25/89, 09 March 1990 reported in Neue Zeitschrift fuer Strafrecht 1990, 604

3 International

Stephen Hagan v Australia (Communication No 26/2002) 20 March 2003, UN Doc CERD/C/62/D26/2002 (2003)

North Sea Continental Shelf (Federal Republic of Germany v Denmark/Netherlands) (Merits) [1969] ICJ Rep 3

Situation in Uganda (*Prosecutor v Kony et al*), Pre-Trial Chamber II, Case No ICC-02/04-01/05-252, Decision on Victims' Applications for Participation (10 August 2007)

Situation in the Democratic Republic of Congo *(Prosecutor v Lubanga Dyilo)*, Case No ICC-01/04-01/06-1119, Trial Chamber 1, Decision on Victims' Participation (18 January 2008)

C *Legislation*

1 Australia

Charter for Victims of Crime in the Northern Territory, Appendix E to the ODPP Guidelines (NT)

Charter of Rights for Victims of Crime in the version of 01.07.2011 (Tas)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Criminal Law (Sexual Offences) Act 1978 (Qld)

Criminal Law Sentencing Act 1988 (SA)

Criminal Procedure Act 1986 (NSW)

Criminal Procedure Act 2009 (Vic)

Crimes Sentencing Act 2005 (ACT)

Director's Policy Victims and Witnesses (Vic) in the version of 29.01.2007

Evidence (Miscellaneous Provisions) Act 1991 (ACT)

Evidence Act 1977 (Qld)

Evidence Act 1929 (SA)

Evidence Act Act 2001 (Tas)

Evidence Act 1906 (WA)

Sentencing Act 1995 (NT)

Sentences Act 1992 (Qld)

Sentencing Act 1997 (Tas)

Sentencing Act 1991 (Vic)

Sentencing Act 1995 (WA)

Sexual Offences (Evidence and Procedure) Act 1983 (NT)

Uniform Evidence Acts

Victims of Crime Act 1994 (WA)

Victims of Crime Act 1994 (ACT)

Victims of Crime Assistance Act 2009 (Qld)

Victims of Crime Act 2001 (SA)

Victims' Charter Act 2006 (Vic)

Victims Rights and Support Act 2013 (NSW)

2 Germany

Erstes Gesetz zur Verbesserung der Stellung des Verletzten im Strafverfahren (Opferschutzgesetz - OpferSchG) [Victim Protection Act] (Germany) 18.12.1986 entered into force 01.04.1987, BGBl I, 1986, 2496

Gerichtskostengesetz [Court Fees Act] 5 May 2004 (Federal Law Gazette I p. 718)

Gerichtsverfassungsgesetz [Courts Constitution Act] (Germany) [Kathleen Mueller-Rostin Trans, Uebersetzung des Gerichtsverfassungsgesetzes] (Juris 2011) ('GVG')

Gesetz zum Schutz von Zeugen bei Vernehmungen im Strafverfahren -ZSChG- [Witness Protection Act] (Germany) 30.04.1998 entered into force on 01.12.1998, BGBl I, 1998, 820

Gesetz zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz - 2. ORRG) [Second Victims' Rights Reform Act 2009] (Germany) 29 July 2009 entered into force 01 October 2009, BGBl I, 2009, 2280 (Nr. 48)

Gesetz zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz – ORRG) [Victims' Rights Reform Act] (Germany) 24 June 2004 entered into force 9 September 2004, BGBl I, 2004, 1354

Gesetz zur Wiederherstellung der Rechtseinheit auf dem Gebiet der Gerichtsverfassung, der Buergerlichen Rechtspflege, des Strafverfahrens und des Kostenrechts [Act to Restore the Legislation in the Area of the Court Constitution Act, Civil law, Criminal law and Costs] (Germany) 12 September 1950, Federal Law Gazette Part 1, 455

Grundgesetz fuer die Bundesrepublik Deutschland [Basic Law of the Federal Republic of Germany] (Germany)

Opferentschaedigungsgesetz [Victim Compensation Act] (Germany) 07 January 1985, BGBl. I 1985, 1

Reichs Strafprozessordnung [(Reich) Code of Criminal Procedure] (Germany) Reichsgesetzblatt (RGBl), 253, 1 February 1877 (entered into force 1 October 1879) ('RStPO')

Richtlinien fuer das Strafverfahren und das Bussgeldverfahren (RiStBV) [Guidelines for criminal procedure and summary proceedings] (Germany) 1.1.2008

Strafgesetzbuch [German Criminal Code] [Michael Bohlander trans, Uebersetzung des Strafgesetbuchs (Juris, 2009) ('StGB')

*Strafprozessordnung [*German Code of Criminal Procedure*] (*Germany) [Brian Duffet and Monika Ebinger Trans, updated by Kathleen Mueller-Rostin, *Uebersetzung der Strafprozessordnung*] (Juris, 2011) ('StPO')

3 Other

Criminal Law (Rape) Act 1981 (Ireland)

*South Carolina Statut*e 16-3-1510

D *Treaties/ International Instruments*

Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings (15 March 2001), 2001/220/JHA, OJ L82, 22.03.2001

Council of Europe Recommendation 85/ 11 of the on the Position of the Victim in the Framework of Criminal Law and Procedure (25 June 1985)

ESC Res 1990/22, UN ESCOR, Supp. No.1, UN Doc E/1990/90 (1990)

ESC Res 1998/21, Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (18.07.1998)

ESC Res 1989/57, Implementation of the Declaration of Basic Principles of Justice for Victims and of Crime and Abuse of Power, UN ESCOR, Supp No 1, at 43, UN Doc. E/1989/89 (1989)

ESC Res 2000/15, Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (27 July 2000)

ESC Res 1996/14, UN ESCOR, 1996, sess, Supp No 1, 45th mtg, UN Doc E/1996/96 (1997)

ESC Res 2006/20, UN Doc E/RES/2006/20

ESC Res 2007/21

GA Res, 40/34, UN GAOR 40th sess, 96th plen mtg, supp no 53, UN Doc A/RES/40/34 (29 November 1985)

International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN GAOR 21st sess, supp no 16, UN Doc A/6316 (1967) (entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, GA Res 2200 (XXI), UN GAOR 21st sess, supp no 16, UN Doc A/6316 (1967) (entered into force 03 January 1976)

Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90

Rules of Procedure and Evidence for the International Criminal Court, ICC-ASP/1/3 (entered into force 9 September 2002)

Treaty on European Union, opened for signature 07.02.1992 [1992] OJ C 191/1 (entered into force 1 November 1993), as amended by *Treaty of Athens [2003] C 321 E/3* (29 December 2006)

UN GA Res A/RES/56/83, 12 December 2001.

UN GA Res, 53/144, UN GAOR 53rd sess, UN Doc A/RES/53/144 (8 March 1999)

United Nations Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/Res/217 (10 December 1948)

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res, 40/34, UN GAOR 40th sess, 96th plen mtg, Supp No 53, UN Doc A/RES/40/34 (29 November 1985)

annex

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331(entered into force 27 January 1980)

E *Other Sources*

Australian Law Dictionary (Oxford University Press, first published 2010, 2012)

Bundesrat, Empfehlungen der Ausschuesse zu Punkt …der 795. Sitzung des Bundesrats am 19 Dezember 2003: Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgestz-OpferRRG) BR Drucks [German Federal Council printed matter number] 829/1/03 (8 December 2003)

Bundesrat, Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BR-Drucks [German Federal Council printed matter number] 178/09 (03 April 2009)

Bundesregierung, Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) identical with Gesetzesentwurf der Fraktionen der CDU/CSU und SPD Entwurf eines Gesetzes zur Staerkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz) BT-Drucks [German Parliament printed matter number] 16/12098 (3 March 2009)

Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsrefromgesetz- OpferRG) identitical with Entwurf eines Gesetzes zur Verbesserung der Rechte von Verletzten im Strafverfahren (Opferrechtsreformgesetz-OpferRG) der Fraktionen der SPD und B90/GR, BT-Drucks [German Parliament printed matter number 15/1976] (11 November 2003)

Bundesregierung, Begruendung der Bundesregierung zum Entwurf eines Gesetzes zur Verbesserung der Stellung des Verletzten im Strafverfahren BT-Drucks [German Parliament printed matter number] 10/5305 (10 April 1986)

Commonwealth Law Ministers, Meeting of Commonwealth Law Ministers and Senior Officers, Accra, Ghana (17-20.10.2005) Commonwealth Statement of *Basic Principles of Justice for Victims of Crime*

Dritte Verordnung zur Vereinfachung der Strafrechstpflege (3rd Ordinance to Simplify Criminal Justice) (Germany) 29 Mai 1943.

Erlass Inneminister 42-62.03.01 [Decree of the Ministry of the Interior 42-62.03.01] (Germany) 09.09.2008

Erlass Innenministerium 41-61.05.05.05 [Decree of the Ministry of the Interior 41-61.05.05] (Germany) 19.12.2008

Mariam Webster Online Dictionary <http://www.merriam-webster.com/dictionary>

Oxford University Press, *Oxford English Dictionary Online,* 3rd ed (at 25.06.2012)

Queensland Victims of Crime Assistance Bill 2009 (Qld) Bills Explanatory Notes

<http://www.austlii.edu.au/au/legis/qld/bill_en/vocab2009281/vocab2009281.html>

Victoria Victims of Crime Assistance Bill (Vic) 2009 Explanatory Memorandum
<http://www.austlii.edu.au/au/legis/vic/bill_em/vcb2006185/vcb2006185.html>