Abstract

This chapter asks whether victims have a 'right' to the truth, and if they do, whether international trials are the appropriate vehicle for vindicating that right. Many have argued for a limited role for international criminal trials, focused exclusively on the fate of individual defendants, while others seek to subordinate criminal trials to larger, historiographic goals of constructing a definitive record of atrocities and other violations. The chapter reframes these debates around the concept of 'victim rights', especially since the Rome Statute provides a privileged place for victims in the procedural mechanics of the International Criminal Court. The argument here is then developed through discussion of four areas of doctrine: the victims' 'personal interests' in the determination of guilt, the recharacterization of charges against the defendant, the right of victims to introduce evidence, and victims' obligation to disclose exonerating evidence. The chapter concludes that these developments, combined with the role of human rights law, has ushered in an 'emerging truth regime'.

Keywords: International criminal law, International Criminal Court ICC, Right to truth, Human rights, International criminal law, victims

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I. Introduction

THE last two decades have witnessed the emergence of a new human right: the right to truth. While principally elaborated by regional human rights courts, there have lately been attempts to import this right into international criminal law (ICL), in particular via the recognition of victims' right to participate in proceedings before the International Criminal Court (ICC). This contribution exposes the little-noticed introduction of the right to truth into ICL, and suggests that it may produce significant institutional transformations in international criminal justice.

In order to set the stage, I begin by locating attempts to transplant victims' right to truth into the international criminal trial within the broader process of convergence between the fields of international human rights law (HRL) and ICL. The argument is then developed through discussion of four areas of doctrine in which lawyers and judges relied on victims' right to truth and more broadly on the 'truth-finding role' of the trial as a normative source to argue for new procedural victim rights and obligations at the ICC: the victims' 'personal interests' in the determination of guilt; the recharacterization of charges against the defendant; the right of victims to introduce evidence; and victims' obligation to disclose exonerating evidence.

The analysis of each of these areas reveals how behind the discourse of victims' right to the truth lies an
p. 474 expansion of the Court's discretionary powers. I conclude by presenting ↳ the main current explanations for these doctrinal changes. I argue in particular that they fail to engage the new truth regime being introduced into the ICC, a regime that is neither a return to ordinary criminal law nor a simple imitation of the logic of truth commissions. The argument is not that the expansion of the Court's discretionary powers is necessarily problematic. Rather, the contribution calls for an open discussion of the benefits and risks of the emerging truth regime as it affects the Court.

II. Background: The Right to Truth at the Crossroads between International Human Rights Law and International Criminal Law

The convergence between HRL and ICL has been the subject of some analysis in recent years.[2] Scholars point out that criminal law has become the dominant model for addressing human rights violations.[3] Conversely, scholars see the formation of an informal coordination between human rights law and ICL, where international criminal tribunals attempt to align their judgments with international human rights law.[4] The two fields share doctrinal concepts, leading international criminal tribunals to refer to the jurisprudence of human rights bodies in what has been seen as 'cross-fertilization' or 'judicial dialogue'.[5] The introduction of the right to truth in ICL is one manifestation of that convergence and cannot be understood without perspective about the process of convergence and the key role played by 'truth' discourse in that convergence.

In HRL, the invocation of a right to truth originated as a 'second best' alternative to criminal prosecutions, during transitions to democracy in Latin America beginning in the 1980s, when members of the prior regimes were granted broad amnesties from prosecution.[6] After struggles, the victims' demands for truth
p. 475 were partly embraced by ↳ the new regimes, which conveniently privileged truth commissions over criminal prosecutions by stressing the fragility of democratic transitions. With the establishment of the Truth and Reconciliation Commission (TRC) in South Africa, truth-seeking was eventually justified not only as 'second best' but as preferable to criminal trials under theories of restorative justice, according to which establishing the truth and altering attitudes towards victims and perpetrators were essential conditions for the return of democracy and the rule of law.[7] Proponents of this approach argued that in criminal trials the search for the truth and the role of victims are necessarily more limited due to other values such as the defendant's due process rights.

Starting in the 1990s, 'truth' became increasingly juridified in HRL, particularly in the jurisprudence of the Inter-American Court of Human Rights, to a degree that it was understood to be a legal right of the individual victim to have the state conduct criminal prosecutions.[8] When victims turned to regional and international institutions to pressure the state to investigate and prosecute, they formulated their demand
p. 476 in terms of their right to the truth.[9] In order for the victims to appeal to the international community and ↳ rely on international law, the scope of the right to truth was expanded beyond enforced disappearances, where the claims for truth had originated.[10] In addition, in the context of human rights litigation, which positions victims in relation to the state, victims re-defined the right to truth not only as the collective right of society,[11] but also as a private right of the victim to require the state to prosecute, deriving from the right of access to justice.[12] As explained by Raquel Aldana-Pindell: 'Victims' claims to [criminal] prosecutions as a remedy have come to mean ... that prosecutions become *a justiciable right* that victims should be able to claim against the state'.[13] The Inter-American Court of Human Rights further recognized participation rights of victims in domestic criminal proceedings.[14] The result is a dramatic change: in HRL as well as in the field of transitional justice,[15] truth-seeking is viewed no longer as an alternative but as complementary with criminal prosecutions of the most serious human rights violations.[16] Thus, the right to truth contributed to blurring the distinction between HRL and criminal law, enabling the later penetration of the right to truth in ICL.

While these developments are often praised for increasing accountability,[17] recent writing questions some
p. 477 of the implications of this convergence for HRL, highlighting ↳ the irony of human rights activists becoming champions of criminal justice,[18] and pointing to the dangers for processes of democratization at the heart of the field of transitional justice.[19] What are the implications of this convergence for international criminal law and justice? In the remainder of this contribution, I expose and critique some of the institutional implications of the importation of the right to truth from HRL into ICL.

III. The Right to Truth at the ICC

A. Truth and the International Criminal Trial

Since Nuremberg, recognition of the collective nature of international crimes has led to an expansion of the goals of the criminal trial beyond traditional objectives such as retribution and deterrence to include an autonomous didactic objective: the clarification of history.[20]

Working against the background of contested historical truth, procedural rules were changed to allow the presentation of new kinds of evidence such as expert testimony from historians who were not eye-witnesses. Under this enlarged framework of ICL, it can be said that interest in the 'truth' was understood to be collective, the interest of society as a whole as well as the international community. This understanding is evident in a 1997 UN report prepared by Joinet:

> *Every people* has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.[21]

p. 478 The search for the truth in international criminal trials was also shaped by concerns for the role of victims. The prosecution of mass crimes planned from above posed challenges in relation to eyewitness testimonies of victims, who typically witnessed only operations on the ground. In addition, the horrors and magnitude of the crimes and the traumatic experience of the victims triggered concerns that the testimonies would appear unreliable and motivated by revenge. Hence, the American prosecution at the International Military Tribunal in Nuremberg decided not to allow Jewish victims to testify at all.[22] At this point the objective 'truth' was contrasted with the subjective emotions of the victims. A decade and a half later, during the Eichmann trial in Jerusalem, over 100 Jewish survivors were given a platform to extensively tell their stories, but precisely for this reason the trial has been considered by many at the time as a form of 'victims' justice', as reflected by Hannah Arendt's famous critique.[23]

Change began in the 1990s with the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda. Feminist organizations demanded that international crimes such as crimes against humanity and genocide be redefined to include sexual violence.[24] Their critique was part of a larger victims' rights movement. Specifically, feminist activists who demanded a change in prosecutorial priorities made the link between the exclusion of women-victims and the limited historical truth emerging from international criminal tribunals. They argued that the historical truth exposed by international trials was not complete as long as it did not include the special crimes against women.[25] Although the ICTY and ICTR were attentive to such claims and came to heavily rely on victim-witnesses, victims' advocates criticized the Tribunals for failing to attend sufficiently to the needs of victims and for merely viewing them instrumentally, as witnesses for the prosecution, not as full participants in the trial. According to scholars, these criticisms, together with the movement in domestic and international law to recognize victim rights, and the case law of human rights tribunals interpreting human rights conventions as conferring standing to victims, led the drafters of the Rome Statute establishing the ICC to adopt a victim-centred perspective.[26]

p. 479 The result was that as in HRL, where the truth was juridified and individualized, in ICL the truth was gradually transformed from an overall goal of the trial into a right of the victim—first to voice and protection (ICTY/R) and later to active participation rights in the trial (ICC).[27] The drafters of the Rome Statute debated the adversarial and inquisitorial models, and opted for a compromise.[28] Thus, the ICC model adopts some civil law elements although it falls short of recognizing the victim as a full party to the trial (such as in the French or German systems).[29] Instead, the Rome Statute sees the victims as participants

whose 'views and concerns' should be given consideration but must be balanced against the right of the accused and a fair trial.[30] The statute adopts vague and open-ended terms such as 'views and concerns' and 'personal interests', leaving broad discretion to the judiciary in adopting the applicable procedures.[31] It is in this context that the right to truth as developed in HRL has been invoked as providing guidance for articulating the procedural rights of victims at the ICC.

Unlike HRL that positions the individual against the state, until recently the framework of ICL had shaped the issue of the search for the truth as a matter of balance between the rights of the accused to a fair trial on
p. 480 the one hand and the rights of victims ↳ on the other.[32] Truth was accordingly framed from the outset by limitations inherent to criminal justice and it was therefore difficult to accept evidence not related to the proof of innocence or guilt of the accused.[33] Victims' testimonies were understood to assist the prosecution in establishing the guilt of the accused, and victims' rights were meant to provide protection under an adversarial framework against the danger of secondary victimization.[34]

In what follows I expose attempts to expand truth-seeking at the ICC beyond these traditional limitations. I present several areas of doctrine in which various actors relied on the 'right to truth' and more broadly on the 'truth-finding role' of the trial as a normative source for articulating new procedural rights and new discretionary powers for the ICC. Here we can notice a subtle change from viewing victims as passive recipients of the 'truth' to active participants in the truth-seeking mechanism of the Court. My interest lies less with the legal bottom line (whether the argument was accepted or rejected by the Court) and more with the justificatory discourse that accompanied this process. This discourse is important in framing the arguments of the various players (advocates, lawyers, or judges) and allowing us to glimpse changes in their understanding of the relation between the criminal trial, victims, and the search for truth. I aim to show how the convergence (or cross-fertilization) between HRL and ICL obscured important differences between the fields, thus legitimizing structural changes in the international criminal trial without a genuine debate about their potential impact on core values of ICL.

B. Victims' 'Personal Interests' and the Determination of Guilt or Innocence

Article 68(3) of the Rome Statute provides that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

p. 481 It thus conditions the participation of victims on showing that their 'personal interests' are affected. But what constitutes a personal interest, and what procedural rights are entailed by it? These questions arose before Pre-Trial Chamber I in the case of *Katanga and Chui*, around the issue of whether the 'personal interests' of the victims encompass the results of the trial pertaining to the determination of guilt and innocence. The single judge answered in the affirmative, explaining that victims have a core interest in the determination of the facts, the identification of those responsible, and the declaration of their responsibility.[35]

Interesting for our purpose is the role played by the 'right to truth' as a human rights law concept in this decision. First, the judge relied on empirical studies conducted amongst victims of serious human rights violations that indicate that victims decide to resort to judicial mechanisms against their victimizers in order to have a declaration of the truth by a competent body.[36] Second, and more importantly, the judge resorted to the right to truth as interpreted by human rights tribunals, in order to decide the question at hand.[37] On this basis, the judge determined that:

> [W]hen [the right to truth] is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings: (1) bring clarity about what indeed happened; and (2) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.[38]

Thus, the judge concluded that the issue of guilt or innocence is inherently linked to the right to truth and that the search for the truth can be satisfied only if those responsible are declared guilty and those not responsible are acquitted so that the search for those who are criminally responsible can continue.[39]

The judge's broad interpretation of the right to truth, together with her decision to adopt a 'systemic approach' by which the court can determine that the personal interests of the entirety of the victims in the pre-trial stage are affected (rather than in relation to specific victims and specific proceedings arising during the pre-trial stage or specific pieces of evidence),[40] in effect nullifies the condition of 'personal
p. 482 interests' and thus tends to blur the functional distinction between a prosecutor and a victim. It therefore ↳ raises concerns that the adversarial principle of equality of arms between prosecution and defence is being undermined.[41]

Another implication of the judge's transplantation of the right to truth from HRL is to broaden the scope of the truth sought to be established in the criminal trial. The interests of the victims (as articulated by human rights tribunals) go beyond finding the guilty to ascertaining the 'actual truth'. This rationale was developed in the context of truth commissions originally understood to seek to clarify the broader historical truth as an alternative to criminal prosecutions. Here the same rationale is now being introduced into the criminal trial, via the right to truth of the victim, in ways that broaden the trial's goal and equip new actors as its carriers. The criminal inquiry is reinterpreted to 'close the gap' between the 'legal truth' and the 'actual truth'.

We saw that since Nuremberg, ICL has gradually introduced 'didactic' goals such as ascertaining the historical truth, alongside traditional criminal law goals of retribution and deterrence. However, relying on Article 68(3) and linking such goals to the right to truth as it emerged under HRL subsumes the didactic goals of the criminal trial under the 'personal interests' of the victim. This has the potential to bring about an individuation of the truth not present in earlier ICL jurisprudence.[42] This move thus identifies the victim with the search for the truth and obscures the victim's subjective interest as a party to the legal dispute.[43] This transplantation of HRL to ICL also ignores the fact that the recognition of victims' right to truth by human rights tribunals concerns state liability and is meant to empower the victims against a much stronger state that has failed in its duties and ensured impunity to suspected perpetrators. In contrast, the recognition of victims' participation rights within a criminal trial addressing individual criminal responsibility typically pits a group of victims against an individual defendant.

Relying on a certain interpretation of the right to truth of the victim as a normative source for recognizing
p. 483 participation rights of victims in the criminal trial is meant to ↳ overcome the limits to victim participation set by Article 68(3). Indeed, the judge's interpretation of victims' rights could change the structure of the trial and the relative powers of the parties in a way that might undermine due process.

The structural change that such interpretation entails did not go unnoticed, and was sharply criticized by Judge Pikis of the Appeals Chamber:

> The proof or disproof of the charges is a matter affecting the adversaries. The victims have no say in the matter. Their interest is that justice should be done, coinciding with the interest of the world at large that the criminal process should run its course according to law, according to the norms of a fair trial … it is not the victims' concern, as a matter directly related to the reception of evidence, to either prove or disprove charges.[44]

This view, however, remained in the minority and subsequent decisions invoke the truth-finding role of the Court to justify a broad interpretation of victims' personal interests to include an interest in the determination of guilt or innocence.[45]

C. New Charges Against the Accused

The invocation of victims' right to truth can also be found in case law concerning the possibility of changing the charges against the accused. Regulation 55 bestows on the Court discretion to re-characterize the charges against the defendant.[46] The Trial Chamber in the *Lubanga* case decided in July 2009, three years
p. 484 after the commencement ↳ of the trial, that the facts in the case were subject to 'legal re-characterization' under Regulation 55. The original charges related to gender-neutral offences of conscription, enlistment, and use of child soldiers. The re-characterization would have allowed the prosecution to charge Lubanga with the war crime and crime against humanity of sexual slavery and the war crime of cruel and inhuman treatment, as requested by the legal representatives of the victims who argued that the narrow set of charges against the defendant did not fully reflect the experience suffered by female victims, such as rape and other sexual crimes.[47] In response, the defence argued that any re-characterization of the facts at so late a stage of the proceedings would infringe upon the rights of the accused to a trial without undue delay. Significantly, the prosecution joined the defence, arguing that such a move would raise concerns about fairness. The Trial Chamber decided to give notice of possible re-characterization to the parties, but the decision was later reversed in the Appeals Chamber on 8 December 2009. Notwithstanding the end result, the arguments put forward by the victims' representatives are telling of the way in which the 'truth' is no longer linked to victims in general but to a subset of the victim group.[48]

Sexual crimes raise special difficulties for investigation, including the unwillingness among women to speak about sexual violence, due to associated cultural stigma and the fear of being ostracized by the community.[49] As a result, some evidence of sexual violence arises only belatedly during the trial. This was a common experience at the ICTY and ICTR, that at times led to amendment of charges.[50] However, the broad discretion of the ad hoc tribunals to amend charges had raised concerns about due process. The Rome Statute opted for a different remedy to address the problem of gender bias: while expanding the ICC's jurisdiction over sexual crimes it limited its discretion to amend charges.[51] The question before the ICC was how to interpret Regulation 55 in light of these restrictions. Regulation 55(1) reads:

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> In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.[52]

The victims' representatives in *Lubanga* argued that under Regulation 55 the ICC retains the power to recharacterize the facts during the trial. They argued that Regulation 55 should be read in combination with Article 69(3) of the Rome Statute that authorizes the Court to 'request the submission of all evidence necessary for the *determination of the truth*'.[53] Specifically, they argued that 'changing the characterization of the facts in this way is in the interest of international public order and the victims in *having the truth determined*'.[54] In other words, they re-interpreted the victim's 'right to truth' in the context of a criminal trial to mean a right to have the guilty 'appropriately charged' in a way that sheds light on the truth.

This change can be seen in the victims' representatives' words, when they specifically referred to HRL to support their claim:

> The right of victims to the determination of the truth is clearly one of the fundamental principles of human rights as demonstrated by the ECHR and the IACHR. This right includes specifically: (i)

> the right to determine the facts of the case; (ii) the right to identify those responsible for the crimes and (iii) the right to define the degree of responsibility of the perpetrators of the crimes.[55]

This double move of relying on the broad truth-finding role of the ICC (set in Article 69(3)) and referencing the right to truth from HRL, suggests a link between the establishment of the truth and victims' participation (here, a specific category of women victims), as it is allegedly their participation that promotes the truth in this instance.[56] ↳ A similar justification can be found in the academic scholarship that explains the gender bias reflected by the under-prosecution of sex crimes in terms of its effect on the truth:

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> [T]he omission of sex crimes would surely obstruct one of the key aims of the ICC, namely to expose and record the truth. Partial prosecution ... changes the historical and legal record of the events in question and the public narrative of the culpability of the accused. In the *Lubanga* case ... it risks erasing the distinctively female face of the devastating war in the DRC.[57]

This view casts the enhanced truth-finding powers of the ICC as a solution to gender bias, and links individual victims' right to truth as a function of full prosecution of the perpetrators with a more general construction of historical truth in particular conflicts. Indeed, recognizing a victims' right to truth would seem to allow the ICC to overcome a legacy of gender bias in international criminal law, and to monitor conflicts of interest, or at least divergences in strategies, between the prosecution and victims. However, the focus on gender bias obscures the risks created by the expansion in court authority to change the charges in all cases, whether or not related to sexual offenses. The result, were it accepted by the Court, would be a dilution of the institutional checks and balances put in place by the drafters of the Rome Statute.[58]

D. Right of Victims to Introduce Evidence

We have seen that the judges relied on the 'right to truth', imported from HRL, in order to expand victims' participation in ICC proceedings by interpreting their 'personal interests' broadly. However, the Court also increased victims' participation by relying on its expanded 'truth finding' role, provided for in Article 69(3) of the Rome Statue, according to which '[t]he parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth'.

This mode of reasoning was tested in *Lubanga*, when the Court deliberated whether to allow victims to tender evidence even though Article 69(3) recognizes such a right only to 'parties'. In answering the question in the affirmative, the Court opted for a broad teleological interpretation, despite the fact that the drafters of the Rome Statute could not agree on the issue, refrained from recognizing the victims as formal parties, and seemed to restrict the right to submit evidence to parties.[59] The Court overcame ↳ these formal obstacles by subsuming the victims' participation rights under its broad truth-finding mandate:

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> The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3) of the Statute .... It follows that victims participating in the proceedings may be permitted to tender and examine evidence *if in the view of the Chamber it will assist it in the determination of the truth*, and if in this sense the Court has 'requested' the evidence.[60]

Accordingly, the Trial Chamber held that Article 69(3) enables victims: (1) to tender evidence at trial, regardless of the fact that the onus of proof rests with the prosecutor; and (2) to challenge evidence presented by the parties.

The significance of this decision is that the ICC can allow victims to develop their own strategy of the case even when it contradicts or differs from that of the prosecution as long as the Court finds their intervention to assist in determining the truth and as long as it does not undermine the Court's obligation to assure the fair trial of the accused:

> The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.[61]

Moreover, the Court rejected the prosecution's submission that 'extraordinary circumstances' need to exist before the Article 69(3) power can be engaged. It explained that 'the only general precondition to a Trial Chamber calling for evidence under Article 69(3), ... is that it must be satisfied that such evidence is "necessary for the determination of the truth" '.[62] The Chamber's interpretive move is another example of how the invocation of the truth as the ultimate goal of the criminal trial enables the ICC to extend victims' participation. In doing so the structure of the criminal trial is gradually changed. While the Rome Statute envisions a bi-polar process with some corrections (allowing the victims to present their 'views and concerns'), the interpretation given by the ICC to Article 69(3) can be seen as transforming the international
p. 488 criminal process ↳ into a multi-party structure. In this new constellation victims are presented as a new kind of expert whose local knowledge can assist the Court.[63]

No matter how this structural transformation of the international criminal trial is justified, the Court retains the discretion to decide when and to what extent to allow victims' participation. The result is therefore different from civil law systems that recognize victims as '*partie civile*' since it subordinates victims' participation to the discretion of the Court and limits it to instances in which the Court finds such participation to support finding the truth.

It should also be noticed that the invocation of the truth to justify this transformation in the structure of the trial gives the victims' views an aura of objectivity, ignoring the victims' possible biases, in particular given the prevalent view that victims' possibility to receive compensation through the ICC is linked under Article 75(2) to a guilty verdict.[64] (We will return to this point in the next section).

The Court's jurisprudence on the right to introduce evidence is nonetheless not uniform. While the Court adopted a broad interpretation of Article 69(3) in *Lubanga* and *Bemba*, it opted for a narrower interpretation of victims' ability to introduce evidence in *Katanga*. Yet significantly, that interpretation too relied on the
p. 489 centrality of the truth: in ↳ that case, the Court explained that 'the only legitimate interest the victims may invoke when seeking to establish facts which are subject to the proceedings is that of contributing to the determination of the truth'.[65]

In conclusion we see that when the 'truth rationale' is transplanted from HRL to the ICC via Article 69(3), the emphasis changes from recognizing victims' rights to expanding the Tribunals' discretionary powers, and this without accounting for the difference and without offering institutional checks on the Court's new powers.

E. Victims' Obligation to Disclose Exonerating Evidence

Does the victims' broad right to participate entail a correlative disclosure obligation, such as the one imposed on the prosecution? In other words, is the victim also obliged to participate in the elucidation of the truth as a sort of friend of the Court and not simply join the adversarial fray with incriminating evidence? This issue was raised when the defence argued that alongside the recognition of victims' power to tender evidence, the Court should consider imposing on victims an obligation to disclose exonerating evidence in order to clarify the objective truth.

In *Katanga* the defence argued that although there is no explicit obligation on victims to disclose exculpatory evidence, it would not be fair to grant them a right to tender evidence without imposing corollary obligations of disclosure. It suggested basing this obligation on the ICC's general truth-finding role found in Article 69(3)[66] and supported its claim by reference to victims' right to truth from HRL.[67]

Important for our purposes is the tactical shift in emphasis in the defence's argument from due-process rights of the accused to human rights of the victims:

> The *accurate* determination of the guilt or innocence of persons prosecuted before the ICC is important, not only for the accused who has the presumption of innocence, but also for the wider audience, in particular for victim participants 'insofar as this issue is inherently linked to the satisfaction of their right to truth'.[68]

p. 490 However, in contrast to the benevolent view of victims' participation as a disinterested intervention to assist the Court in establishing the objective truth, the defence calls attention to the potential partiality of victims, as their right to compensation is dependent on the determination of guilt of the accused:

Yet, the question is whether victim participants are equally keen on the truth to be established if the truth does not correspond with the guilt of the accused, particularly if that would mean that they receive no financial compensation.[69]

The Court rejected the defence's request. In doing so it opted for uncharacteristically formalist reasoning, explaining that just as the Court did not recognize a *right* of victims to tender evidence, it would not recognize a correlative *obligation*. Rather, in both cases the issue is left to the discretion of the Court.[70]

We therefore see not only that the right to truth has penetrated ICL to such an extent that even the defence uses it, instead of relying solely on due-process rights of accused. We also see that the Court associates victims so much with objective truth that it sees no conflict between them and truth-seeking, and no need to impose a duty of disclosure.

IV. Reflection

Scholarship on victims' participation at the ICC has adopted the analytical framework of victim's rights. The main issue from that perspective is the impact of these changes on the adversarial process and the need to create a suitable balance with the rights of the accused and due process generally. However, it is hard to reconcile the victims' rights discourse dominating that scholarship with the actual practice of the Court. Although the right to truth, and more broadly the objective of clarifying the truth, were often the justification for the recognition of victims' procedural rights, in almost all cases in which the Court accepted the victims' argument, it did so not by recognizing an autonomous victims' right but by granting itself wide discretionary powers.[71]

p. 491 Two scholars have put forward conflicting explanations for the tension between the Court's rights discourse and actual restrictive practices toward victims' rights. Adrian Plevin calls for abandoning the interpretive framework that sees the rights of victims as elements of the inquisitorial process being inserted into the adversarial process. He claims that this framework is misleading because it masks the fact that the more profound changes are occurring with respect to the role of the Court itself. The real conflict in his view is between a narrow approach to the criminal trial in which only the traditional objective of establishing guilt or innocence is legitimate, and an expansive approach that sees a new role for the ICC—clarifying the historical truth. It is the expansive approach that justifies the development of new procedural tools. Thus, Plevin attaches particular importance to the Court's reliance on Article 69 of the Rome Statute to anchor the

creation of new procedural rights, all the while emptying the limits to victim participation set by Article 68. For Plevin, this process is an attempt to equip the judges with the necessary investigative powers to fulfil the Court's ambitious goal of truth-finding.[72] To achieve this goal the Court cannot settle for the recognition of victim rights to protect their own interests, but must possess quasi-investigative powers in order to go beyond the positions of the parties, and even beyond the personal interests of the victims, to reveal the truth.[73] Plevin endorses this new 'truth role' for the Court uncritically, maybe because he does not see any meaningful difference between the transitional justice context of truth commissions (where such 'truth' rationale was first articulated) and international criminal trials. Therefore, he is not concerned with the possibility that the broad discretionary powers assumed by the Court may actually undermine human rights protections.

An alternative explanation for the growing divergence between rights' rhetoric and practice is that the ICC is returning to a retributive justice agenda and is distancing itself from earlier restorative justice pretentions. This position, quite incompatible with Plevin's, was expressed by Sergey Vasiliev. Here again, the author's starting point is that the ICC's rulings regarding victim participation relate essentially to the question of the role of the Court and not to victims' rights as the Court's rhetoric might imply. However, in his view the competing models are the model of restorative justice imported from human rights and transitional justice and the traditional model of retributive justice for which the only legitimate purpose of the trial is the establishment of guilt and innocence. Vasiliev understands the shift in the Court's jurisprudence from Article 68 to Article 69 as a return to the traditional retributive model, as the victims are expected to meaningfully contribute to ascertainment of the legal truth—understood as the question of guilt—and not just have the truth benefit their restoration. Since Vasiliev sees these developments as a 'return' to the retributive model of criminal law he does not inquire into the significant changes in the criminal process
p. 492 entailed by the centrality of ↳ victims' participation in ICL, such as the expanded discretion of the Court in determining the truth.[74]

Thus, these two authors agree on the need to go beyond the discourse of victim rights in order to understand the more profound transformations in the role of the ICC. However, they suggest contradictory explanations for the place given to the victims' right to truth in the ICC's rulings. Where one sees the emergence of an ambitious and expansive judicial role to explore the historical truth, the other sees disillusionment and the return to a traditional conception of the criminal trial and confinement to legal truth. The two authors, for opposite reasons, refrain from offering a critical assessment of the Court's enhanced discretionary powers and fail to explore the new truth-regime that such changes might entail.

I would like to suggest another way of understanding the inconsistency and tensions in the ICC's case law. Underneath the rhetoric of convergence, international criminal judges might be aware of the difficulties in a wholesale adoption of legal concepts developed in human rights law or the restorative approach of truth commissions, and thus try to adapt them to criminal law. The main way to do this is to shift emphasis from the recognition of victims' rights to the Court's truth-finding powers under Article 69(3), which allows more discretion to the Court. In the process, a new regime of truth-seeking is being developed for ICL—a regime based on the participation of victims and the granting of broad discretionary powers to judges. While these transformations can be significant, they have been shielded from critical enquiry by the discourse of convergence with HRL and the appeal to victims' rights, which grant these legal developments an aura of progressiveness.

It is probably too early to conduct a full exploration of the emerging truth regime at the ICC. We can however already point to some potential risks and benefits as well as new questions for exploration. The link I have pointed to here, between truth and victims' participation at the ICC certainly holds the promise of opening the international criminal process to new voices and perspectives, in particular victims of sexual violence. By listening to victims, the ICC may also gain better access to evidence, reducing its dependence on the cooperation of the state in which the crimes occurred. It is also arguable that a court investigating a small

number of cases of extraordinary crimes may require broad discretionary powers, for in such exceptional cases it becomes essential to establish a broad range of facts in order to clarify history.

Yet as suggested throughout this contribution, the expanded discretionary powers of the Court also raise concerns. Through the right to truth, the ICC can be seen as creating a hybrid procedural model drawing on
p. 493 both the adversarial and inquisitorial models, ↳ but without importing the checks and balances present in each model. What is more, it is not clear that increased victim participation actually empowers victims or results in more accurate or comprehensive determinations of the legal or historical truth. In a study of proceedings before various ad hoc and special international criminal tribunals, Nancy Combs argued that 'much eyewitness testimony at the international tribunals is of highly questionable reliability'. This is due to cultural differences between court and witnesses, witnesses' lack of familiarity with trial procedures, as well as lying based on the group loyalties that often gave rise to the crimes themselves.[75] I do not purport to settle this debate. However, my contribution should encourage the readers to look beyond the prevailing rhetoric of 'victim rights' cast in a narrative of seamless progression of ICL towards ending impunity and to recognize how victims' right to truth can affect basic fundamentals of the criminal trial. I believe that in order to have a frank conversation about the risks and benefits entailed by the introduction of the right to truth to ICL, we should first expose the new truth regime suggested for the ICC, and the changing roles entailed by it to various players.

Notes

2 Naomi Roht-Arriaza, 'Editorial Note' (2013) 7 International Journal of Transitional Justice 383; Ruti Teitel, 'Transitional Justice and Judicial Activism—A Right to Accountability?' (2015) 48 Cornell Intl LJ 385.

3 Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell L Rev 1069; Alexandra Huneeus, 'International Criminal Law by Other Means: the Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 Am J Intl L 1.

4 Michelle Farrell, 'Just How Ill-Treated Were You? An Investigation of Cross-fertilisation in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law' (2015) 84 Nordic J Intl L 482, 486–99; Sergey Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-fertilisation' (2015) 84 Nordic J Intl L 371.

5 Elena Maculan, 'Judicial Definition of Torture as a Paradigm of Cross-fertilisation: Combining Harmonisation and Expansion' (2015) 84 *Nordic J Intl L* 456.

6 Naomi Roht-Arriaza, *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (University of Pennsylvania Press 2005) 101; Juan E Méndez and Francisco J Bariffi, 'International Protection of the Right to Truth' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2011), opil.ouplaw.com/home/EPIL, [10].

7 See Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, vol 1 (Truth and Reconciliation Commission 1998–2003) ch 5 [55]: 'the tendency to equate justice with retribution must be challenged and the concept of restorative justice considered as an alternative. This means that amnesty in return for public and full disclosure (as understood within the broader context of the Commission) suggests a restorative understanding of justice, focusing on the healing of victims and perpetrators and on communal restoration'; Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (CUP 2006) 1, 4; Bronwyn A Leebaw. *Judging State-Sponsored Violence, Imagining Political Change* (CUP 2011)119–44.

8 The right to truth, its scope and its relationship with the duty to investigate secret detentions and renditions, and secure accountability of officials for gross human rights violations has also been the subject of litigation in the European Court of Human Rights (ECHR). Here, the juridification of the truth was achieved by relying on European Convention on Human Rights, arts 13 (right to an effective remedy, which the ECHR found includes, beyond compensation, also effective investigation of the truth, see *Aksoy v Turkey*, App no 21987/93, 18 December 1996 [98]), 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), and 10 (freedom of expression). However, unlike the case law of the Inter-American system, the ECHR refrains from recognizing a victim's right to criminal prosecution, rather to an 'effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure' (but see recent judgment in *Nasr and Ghali v. Italy*, where the ECHR

found that a thorough investigation to uncover the truth had taken place but that the executive has unduly thwarted the conviction of the persons responsible on the grounds of 'state secrecy'. Thus the ECHR found that Italy has violated the 'procedural aspect' of art 3, namely an effective investigation. This judgment brings us closer to the Inter-American requirement of a criminal investigation and conviction. See *Nasr and Ghali v. Italy*, App no 44883/09, 23 February 2016). The ECHR also emphasizes the collective right of society for a full and effective investigation, especially when the circumstances are those of secrecy and possible illegitimate and illegal acts by the state (*Husayn (Abu Zubaydah) v. Poland*, App no 7511/13, 24 July 2014). For a recent discussion of the jurisprudence of the ECHR and the emerging 'right to accountability' see Teitel (n 1). For relevant case law of the ECHR see *Kurt v. Turkey*, App no 24276/94, 25 May 1998 [140]; *Association '21 December 1989' and others v. Romania*, App no 33810/07, 24 May 2011 [142], [144], [193]; *El-Masri v. the Former Yugoslav Republic of Macedonia*, App no 39630/09, 13 December 2012, [191]–[193], [255]; *Husayn (Abu Zubaydah)* [489], [491]; *Al Nashiri v. Poland*, App no 28761/11, 24 July 2014, [497].

9 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton 2011) 77–83.

10 UN High Commissioner for Human Rights 'Study on the Right to the Truth' (8 February 2006) UN Doc E/CN.4/2006/91 [8], 59. See also the case of *Goiburú* et al *v. Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 153 (22 September 2006) [88], in which the Court recognized a right to truth in relation to extrajudicial executions, forced disappearances and other grave human rights abuses. For a socio-legal study of the role of NGOs connected to the victims' families in these developments see Patricial Naftali, 'The Subtext of New Human Rights Claims: A Socio-Legal Journey into the "Right to Truth"' in Matthew French, Simon Jackson, and Elina Jokisuu (eds) *Diverse Engagement: Drawing in the Margins* (University of Cambridge Graduate Development Programme 2010) 118.

11 See *Azanian People Organization (AZAPO) v. The President of South Africa* [1996] ZACC 16. For further discussion of the AZAPO case as a measure of the change of HR law towards criminalization see Engle (n 2) 118–20.

12 *Bámaca Velásquez v. Guatemala* (Merits) Inter-American Court of Human Rights Series C No 70 (25 November 2000).

13 Raquel Aldana-Pindell 'In Vindication of Justiciable Victims' Right to Truth and Justice for State-Sponsored Crimes' (2002) 35 *Vanderbilt J Transnatl L* 1399,1415, referring to the case of *Bámaca Velásquez*.

14 In *Gonzalez Medina v. Dominican Republic* the Inter-American Court noted that states have an obligation to allow victims to take part in proceedings, and this is in order for victims to enjoy access to justice, learn the truth about the violations, and receive just reparations. Case *González Medina and Family v. Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 240 (27 February 2012) [251]–[54]; see also *19 Merchants v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 109 (5 July 2004), [263].

15 Roht-Arriaza (n 6) 8.

16 In *Ellacuría,* the Inter-American Commission on Human Rights explained that 'the value of truth commissions is that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail'. IACHR, Report No. 136/99, Case 10.488 *Ignacio Ellacuría et al* (22 December 1999) [229] (fn omitted). In *La Cantuta v. Perú* the Inter-American Court addressed the issue directly by explaining that notwithstanding the importance of a truth and reconciliation commission, the ' "historical truth" contained in said report does not complete or substitute the State's obligation to also establish the truth through court proceedings': Case of *La Cantuta v. Perú* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 162 (29 November 2006) [224] (fns omitted).

17 Sikkink (n 8), 129–88. Huneeus (n 2) 32–43.

18 Engle (n 2).

19 Teitel (n 1).

20 Since collective crimes occur over an extended period of time and in various locations, and since they have a group component, trying them requires an understanding of the broader historical context. Wilson argues that history becomes 'legally relevant' for such crimes: 'Demonstrating the collective aspects of crimes such as genocide requires an account of intergroup relations over time. In addition, international criminal law requires that crimes against humanity be "widespread and systematic", which implies a close examination of both the historical and social context' (Richard A Wilson, *Writing History in International Criminal Trials* (CUP 2010) 21, 18–22). Moreover, since such crimes involve large segments of society, it becomes very difficult to satisfy the retributive goals by conducting few exemplary trials, hence a new rationale for the trial has emerged—the symbolic or didactic goal of clarifying a contested, and often denied history. See Lawrence Douglas, 'Crimes of Atrocity, the Problem of Punishment and the *situ* of Law' in Predrag Dojčinović (ed) *Propaganda, War Crimes Trials and International Law* (Routledge 2012) 269; Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers 1997).

21 'Question of the impunity of perpetrators of human rights violations (civil and political)', final report prepared by Mr Joinet

pursuant to Sub-Commission decision 1996/119, UN Doc E/CN.4/Sub.2/1997/20/Rev.1., Annex I, Principle 1 (emphasis added).

22 Douglas (n 18), 78–9; Laura Jockusch, 'Justice at Nuremberg? Jewish Responses to Nazi War-Crimes Trials in Allied Occupied Germany' (2012) 19(1) *Jewish Social Studies* 107 (demonstrating the limited role of Jewish victims in both IMT and NMT).

23 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, Penguin Books 2006).

24 Kelly D Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff 1997); Judith G Gardam and Michelle J Jarvis, *Women, Armed Conflict and International Law* (Kluwer 2001); Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future* (Martinus Nijhoff 2011).

25 In addition, they also demanded changes in procedure to protect women testifying, and the establishment of a special unit for the protection of victims. See Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000–2001) 46 *McGill LJ* 217, 231–2, 238–9.

26 The ICC is seen as departing from previous ICL tribunals in, among other things, its victim-participation scheme. See, e.g., William A Schabas, *An Introduction to the International Criminal Court* (4th ed, CUP 2011) 347; Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to Criminal Law and Procedure* (2nd ed, CUP 2010), 478–81; Aldana-Pindell (n 11) 1428; Sigall Horovitz, 'The Role of Victims' in Linda Carter and Fausto Pocar (eds), *International Criminal Procedure: the Interface of Civil Law and Common Law Legal Systems* (Edward Elgar 2013) 166, 190. Compare to the Extraordinary Chambers in the Courts of Cambodia (ECCC) that provide an extensive victim participation scheme. The inspiration, however, came from the civil-law French-based system practiced in Cambodia. At the ECCC, the victim is given (not automatically) the status of a civil party with extensive participation rights. Nevertheless, since its establishment, experience has shown that the Court will not be able to operate on the exact basis of the domestic model. Therefore, significant changes in the procedure governing victim participation (mainly the addition of a court-appointed Civil Party Co-Lawyer) resolved in a limited participation scheme, some critiques equating it with that of the ICC and calling it 'more symbolic than substantive'. See Susana SáCouto, 'Victim Participation at The International Criminal Court and The Extraordinary Chambers in The Courts of Cambodia: A Feminist Project?' (2011–2012) 18 *Mich J Gender & L* 297; Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 222.

27 The 'right to truth' as a right of the victim was not recognized by the ad-hoc tribunals. These tribunals understood their role in terms of clarifying the historical truth and allowed the expert testimonies of historians. See Wilson (n 18).

28 Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of Unique Compromises' (2003) 1 *J Intl Crim Justice* 603, 604. The adversarial and inquisitorial models, in addition to having different views on the place of victims in the trial, also have different views on the notion of truth. See Thomas Weigend, 'Is the Criminal Process about Truth?: A German Perspective' (2003) 26 *Harvard J Law & Public Policy* 157. This may explain the broader approach to truth-finding in the ICC that incorporates some inquisitorial elements. See for example art 69(3) of the Rome Statute that will be discussed later.

29 Leyh (n 26) 234.

30 The Dutch delegation recommended that a limitation be added to art 68(3) which states that participation shall take place in 'a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. ibid 237.

31 This approach was dubbed 'constructively ambiguous' and a 'fundamental compromise formula'. See Sergey Vasiliev, 'Victim Participation Revisited: What the ICC is Learning about Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015), 1133, 1143–4.

32 See Thomas Weigend, 'Is the Criminal Process about Truth? A German Perspective' (2003) 26 *Harvard J Law & Public Policy* 157, 158–61.

33 Dermot Groome, 'The Right to Truth in the Fight against Impunity' (2011) 29 *Berkeley J of Intl L* 175, 186.

34 The ICTY and ICTR respective statutes direct the judges to adopt rules and procedures for, *inter alia*, the protection of victims and witnesses (art 22 and art 21, respectively). The respective Rules of Procedure and Evidence of each tribunal provide for the establishment of a victims and witnesses support unit, and contain other protection measures such as non-disclosure of victim identity if they are in danger or at risk (rule 69). International Criminal Court for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 49 (2013), entered into force 14 March 1994, amendments adopted 22 May 2013; International Criminal Court for Rwanda, Rules of Procedures and Evidence, U.N. Doc. ITR/3/Rev. 49 (2013), entered into force 29 June 1995, amendments adopted 10 April 2013.

35 *Prosecutor v. Katanga & Chui* (Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case) Pre-Trial Chamber I ICC-01/04–01/07–474 (13 May 2008) ('Katanga victims' rights decision') [32], [35]–[36], [42].

36 ibid [31].

37 See ibid [32]: 'the Single Judge underlines that the victims' core interest in the determination of the facts, the

identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights'. Here, the judge referred mainly to the case law of the Inter-American Court of Human Rights (*Bámaca Velásquez v. Guatemala, Barrios Altos v. Peru, Masacre de Mapmpân v. Colombia, Almohacid-Arellano* et al *v. Chile*) as well as to case law of the European Court of Human Rights (*Hugh Jordan v. UK*. See n 55).

38 ibid [34].

39 ibid [35]–[36].

40 ibid [45]–[51].

41 Although outside the scope of this article, I will mention that there is an evident oscillation between the way different chambers of the ICC have interpreted art 68(3) generally and 'personal interests' in particular, including in which stages of the proceedings these are affected. Thus one can find statements such as 'the personal interests of victims in general are affected at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered' (*Situation in the DRC* (Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) Pre-Trial Chamber I, ICC-01/04–101 (17 January 2006) [63]); as well as: 'Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations … an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor' (*Prosecutor v. Lubanga* (Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007)) Appeals Chamber, ICC-01/04–01/06–925 (13 June 2007) 28. For elaboration see Vasiliev (n 31).

42 In later decisions the Court 'collectivized' the personal interest, by demanding that the victim's personal interest be representative of a larger group of victims, see Vasiliev (n 31), 38.

43 See Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views And Concerns Of An ICC Trial Judge' (2011) 44 Case Western Reserve J Intl L 475, 487–8.

44 *Prosecutor v. Lubanga Dyilo* (Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) Appeals Chamber, ICC-01/04-01/06-1432 (11 July 2008) Partly Dissenting opinion of Judge GM Pikis [19].

45 e.g., 'The Chamber considers that requesting the submission of incriminating or exculpatory evidence pursuant to 69(3) of the Statute would be a means for the victims to express their "views and concerns" within the meaning of article 68(3) of the Statute. Accordingly, it will allow them this possibility, subject to certain conditions set out below. In the Chamber's view, making it possible for the Legal Representatives of the Victims to propose the submission of evidence would in fact assist it in its implementation of article 69(3) of the Statute, and hence in its search for the truth'. *Prosecutor v. Katanga & Ngudjolo*, (Decision on the Modalities of Victim Participation at Trial) Trial Chamber II, ICC-01/04–01/07-1788-tENG (22 January 2010) [82]. As pointed out by Vasiliev, 'in all cases to date, the ICC Trial Chambers have allowed the legal representatives to present [evidence on the guilt or innocence of the defendant] and to challenge its admissibility, subject to the Chamber's authorization and the Article 68(3) requirements ….The Trial Chambers have uniformly done so with reference to their power to require the submission of all evidence considered necessary for the determination of the truth pursuant to Article 69(3)'. Vasiliev (n 31) 1168–9.

46 Regulation 55(2) reads: 'If, at any time during the trial, it appears to the Chamber that the legal characterization of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change' (Regulations of the Court 2004).

47 *Prosecutor v. Lubanga Dyilo* (Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the *Regulations of the Court*) Trial Chamber I, ICC-01/04-01/06-1891-tENG (22 May 2009). See also *Prosecutor v. Lubanga Dyilo* (Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court) Trial Chamber I, ICC-01/04-01/06-2049 (14 July 2009).

48 *Prosecutor v. Lubanga Dyilo* (Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009) Trial Chamber I, ICC-01/04-01/06-2173-tENG (23 October 2009) (hereafter 'Lubanga Observations from the Legal Representatives').

49 Sienna Merope, 'Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC' (2011) 22 *Crim L Forum* 311, 319 and references there.

50 Such was the case in *Akayesu* where evidence of rape emerged during the testimony of a witness and the Court responded by amending the indictment. *Prosecutor v. Akayesu* (Trial Judgment) Trial Chamber I, ICTR-96-4-T (2 September 1998) [687], [690] (referred to by Merope, n 49, fn 33). See also Copelon (n 23).

51 Article 74(2) of the Rome Statute provides that the final decision of the Trial Chamber must be based on an evaluation of the evidence and 'must not exceed the facts and circumstances in the charges'. Article 61(9) reserves the power of amendment exclusively to the Pre-Trial Chamber. This restriction on the Court's discretion, together with the complete codification of the indictable crimes in the Rome Statute (arts 5–8) both improve the situation of the defence in comparison with the Statutes of the Ad Hoc tribunals and make the ICC closer to due process guarantees in domestic criminal systems. See Kai Ambos and Dennis Miller, 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective' (2007) 7 Crim L Rev 335, 358.

52 Regulations of the Court (n 46).

53 Lubanga Observations from the Legal Representatives (n 48) [41].

54 ibid.

55 ibid, fn 78 and accompanying text, referring to Inter-American Court case law *Bàmaca Velasquez v. Guatemala, Barrios Altos v. Peru, Mapiripán Massacre v. Colombia, Almohacid Arellano et al v. Chile*; ECHR case law *Hugh Jordan v United Kingdom*; and scholarly writing.

56 A similar link was found in an empirical research project about victims' right to truth in the ICC, in which truth is being linked with victim participation. Various stakeholders who were interviewed thought the new truth-promotion goal of the Court affects the participation of victims in the trial: 'the provisions of the Rome Statute which relate to the participation of victims need to be interpreted, developed and even adjusted (by amendment) to facilitate this end' [i.e., promotion of truth. L.B.]. See H Davis and M Klinkner, 'A Victim's Right to Truth and the ICC', Summary Report (Nuffield Foundation 2013) 2.

57 Merope (n 49) 323.

58 Indeed, a similar reliance on art 69(3) to allow a re-characterization of the charges to fulfill the truth-finding function of the ICC in the *Katanga* case has generated a strong dissent by Judge Van den Wyngaert. *Prosecutor v. Katanga & Chui* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) Trial Chamber II, ICC-01/04–01/07-3319-tENG/FRA (21 November 2012), Dissenting Opinion of Judge van den Wyngaert [33]–[35], [54]–[56].

59 Leyh (n 26) 296.

60 *Prosecutor v. Lubanga* (Decision on victims' participation) Trial Chamber I, ICC-01/04-01/06-1119 (18 January 2008) [108]. The Appeals Chamber upheld the Trial Chamber's decision on this point and clarified the difference between the role of 'parties' and the participation of victims in the trial. On the one hand, the Appeals Chamber emphasized that victims' participation under art 68(3) should be meaningful, hence the permission to tender evidence pertaining to guilt or innocence: [97]. On the other hand, victims' participation rights are not 'unfettered' and will be examined on a case-by-case basis: [99]. See *Prosecutor v. Lubanga Dyilo* (n 44).

61 Ibid [121].

62 Adrian M. Plevin, 'Beyond a "Victim's Right": Truth-Finding Power and Procedure at the ICC' (2014) 25 Crim L Forum 441, 445, referring to *Prosecutor v. Bemba* in fn 20.

63 According to Trial Chamber II, victims may assist the Court to ascertain the truth by 'providing it with their knowledge of the background to the case or by drawing its attention to relevant information of which it was not aware'. That is, the victims are seen as 'local experts' of truth providing socio-cultural background but are not permitted to question witnesses about the guilt of the accused. *Katanga and Ngudjolo* (Decision on the Modalities of Victim Participation at Trial), Trial Chamber II, ICC-01/04–01/07-1788-tENG (22 January 2010), [60]. See Leyh (n 26) 300. This view on victims' role is also supported by the results of an empirical research project, where various stakeholders explained that victims better understand the social and cultural context given that the proceedings in ICC are remote from where the alleged crimes happened. See 'A Victim's Right to Truth and the ICC' (n 56) 7.

64 The notion that a guilty verdict is necessary in order for the Court to order reparations for victims was raised in the decision of the Appeals Chamber regarding reparations in the Lubanga case. There, the chamber decided that 'reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence': *Prosecutor v. Lubanga Dyilo* (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012) Appeals Chamber, ICC-01/04–01/06–3129, 3 March 2015 [65]. In the Ruto and Sang case, Judge Fremr reiterated this and stated 'a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty': *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Decision on Defence Applications for Judgments of Acquittal) Trial Chamber V(a), ICC-01/09–01/11-2027-Red-Corr (5 April 2016) [149]. In the same decision Judge Eboe-Osuji opined that the principle that a conviction is

pre-requisite to reparations is unnecessary and undesirable: Reasons of Judge Eboe-Osuji [199]–[202]. He added that in international law a state may be found responsible for reparations in case of committing an internationally wrongful act and asked whether Kenya's meddling in the case to the point that it had to be dropped against the accused could not amount to an internationally wrongful act: ibid [207]. He left unanswered the question whether the ICC is placed to adjudicate such reparations but hinted that this might be the case under these circumstances: ibid [208]–[210]. Judge Fremr's reasoning was reiterated in a subsequent decision in this case, when the same chamber denied the legal representative and the Trust Fund for Victims' requests as the case has already been terminated; hence, victims can no longer express views and concerns in this matter: *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Decision on the Requests regarding Reparations) Trial Chamber V(a)ICC-01/09–01/11–2038 (1 July 2016).

65 *Katanga and Ngudjolo,* ibid.

66 *Prosecutor v. Katanga* (Defence for Germain Katanga's Additional Observations on Victims' Participation and scope thereof) Defence, ICC-01/04–01/07–1618 (10 November 2009) [10].

67 Among others the defence refers to things said by Mr Louis Joinet—the special rapporteur who was in charge, *inter alia*, on the publication of the 'Set of principles for the protection and promotion of human rights through action to combat impunity' in 1997, as an expert in an ICTY case, when he held that 'the truth triumphs over other conflicting interests because the ultimate purpose of international justice is to find the truth'. ibid [24]. Likewise, the defence asks the Court to decide in accordance with the disclosure obligations imposed on victims in human rights courts: 'Complainants who wish to tender evidence before the Inter-American Court of Human Rights must also disclose information concerning the source, authenticity, and chain of custody'. ibid, [28].

68 ibid [11], referring to Katanga victim's rights decision (n 35).

69 ibid [17].

70 'It notes further that, since the victims do not have the right to present evidence, only the possibility of applying to the Chamber for leave to present evidence, there is no justification for obliging them generally to disclose to the parties any evidence in their possession, whether incriminating or exculpatory'. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the Modalities of Victim Participation at Trial) Trial Chamber II, ICC-01/04-01/07-1788-tENG (22 January 2010) [105].

71 This conclusion is also supported by the findings of the empirical research project: 'One of the major themes emerging from the data is the difficulty for participants at the ICC to make victim participation effective, a challenge that is expressed by the proposition that victim participation is little more than a gesture'. 'A Victim''s Right to Truth and the ICC' see note 56, at 7; and: 'Some interviewees see victim participation as a façade … within the judicial truth-finding process as their participatory rights are kept to a minimum taking on predominantly the role of a spectator … to date victim participation has provided very little opportunity to influence the processes and with it the realization of the right to truth'. ibid 10.

72 Plevin (n 62) 448, 464: 'Truth-finding is a legally distinct process and its outcomes need not necessarily be limited to achieving the same results as criminal trials … the truth-finding mechanism offers the hope that more comprehensive, more historically accurate trial records will be produced'.

73 Plevin (n 62) 450–1.

74 However, in a recent article on cross-fertilization Vasiliev arrives at a similar conclusion to our article—that underneath the rhetoric of normative cross-fertilization (informally subordinating ICL to HRL) one can notice a process of adaptation and change intended to fit the transplanted HRL norm to the ICL context. Thus, he ends the article with a call to recognize and study the 'creative process of constructing a new legal sub-field—a branch of [international human rights law] for international criminal jurisdiction … [that] led international criminal judges to autonomously produce and refine [international human rights law] for the purposes of international criminal justice'. Vasiliev (n 31) 402–3.

75 Nancy A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (CUP 2010) 4.