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International criminal trials: A normative theory

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CHAPTER 9.**OPENING STAGE OF TRIAL***

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1. INTRODUCTION

Before international and hybrid criminal courts, the hearing of a case on the merits commences with the opening statements made on behalf of the prosecution, accused, and participants, as appropriate. Found in the legal regimes of every jurisdiction, the opening phase is an essential building block in the structure of contested international criminal trials. As interventions made prior to the presentation of evidence, opening statements occupy a prominent place in the trial advocacy toolbox. To an international criminal advocate, opening statement serves as a narrative roadmap into the case enabling the party to outline the facts and issues to be litigated at trial and to provide the court with a preview of evidence to be submitted in a due course. The prosecution will normally draw the attention of the bench to the distinctive aspects of its case by providing summary information about the accused person, the alleged crimes and available evidence. The other party will use this opportunity to give the judges an introduction into its theory of the case, including setting out the main lines of defence and a skeletal outline of its evidence. Depending on whether the defence makes its statement after the prosecution's or after hearing the prosecution evidence and before opening its own case, it will seek either to challenge the coherence of the case the prosecution intends to prove or to show to the court how it intends to go about challenging the evidence presented against the accused.

The present Chapter analyses the law and practice of the tribunals relating to the opening phase of trial and offers critical remarks and recommendations for improved trial practices in international criminal proceedings. First, it discusses the comparative origins and rationales of the specific arrangements at the opening phase, by addressing the position of opening statements in national criminal trials and their added value in international criminal trials. Secondly, it gives a detailed comparative overview of the procedural standards and jurisprudence of various international and hybrid criminal courts regarding opening statements. This enables establishing a common ground between the international and hybrid criminal courts and assessing a degree of procedural divergence in this area. The particular focus is set on the topics such as: the procedural subjects vested with the right (or duty) to deliver an opening statement; the sequence of statements in the chronology of the proceedings; the requirements as to length and contents of such statements; and the scope and forms of judicial control over their delivery. Thirdly, the section provides a normative analysis of both the common-ground standards and what would appear as deviations in order to point out the perceived weaknesses and inadequacies of law and practice from the perspectives of (external) human rights standards, procedural and institutional goals, as well as the considerations of expediting and streamlining the trial process.

2. OPENING STATEMENTS IN A COMPARATIVE PERSPECTIVE

In various countries across the divide between common law and civil law, the prosecution and the defence may tender opening statements regarding the charges at an early stage of trial before witnesses are heard and other evidence presented. However, the functions these statements fulfil and the procedural actors competent to make them are not the same in different procedural systems.

In common law trials, the purpose of an opening statement is to provide a trier of fact (jury) with an effective introduction into a party's version of facts and a preview of evidence in its case.¹ Because the stage of presentation of evidence provides jurors only with a fragmented knowledge of facts, these statements serve as a narrative roadmap into the case helping them comprehend it better.² At the commencement of trial, the party with the onus of proof (the prosecution) takes the floor first. Its statement is followed by the defence, which in certain jurisdictions may choose to defer its statement until the prosecution closes its case. In the US, the defence may defer the statement until the close of the prosecution case, but a predominating view seems to be that this is not advisable; in England and Wales and in Canada the defence openings statements may only be made after the close of the case for the prosecution; but in Scotland, which is a mixed legal system, parties do not make opening

* This Chapter is an expanded and updated version of this author's section 'Opening Statements' (in G. Acquaviva *et al.*, 'Trial Process') in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 543-65.

¹ See *Arizona v. Washington*, 434 US 497 (1978) (the US Supreme Court decision confining the opening statements to instructing the jury of the nature of the case in order to facilitate their understanding of the testimony at trial); in North Dakota: *State v. Marmon*, 154 N.W.2d 55, 62 (N.D. 1967): 'The purpose of an opening statement is to inform the jury what the case is all about and to outline to it the proof which the State expects to present, so that the jurors may more intelligently follow the testimony as it is presented.' In New Zealand, the prosecution's opening statement 'covers the charges against the defendant and a summary of the facts that the prosecution intends to prove', while the defence's 'may define the issues without analysing the evidence': N. Cameron *et al.*, 'The New Zealand Jury', (1999) 62(2) *Law and Contemporary Problems* 103, at 134.

² M.R. Fontham, *Trial Technique and Evidence* 2nd edn (LexisNexis, 2002) 84 and 86 ('The opening statement functions like a picture for a puzzle; it allows the jurors to understand the fit and importance of the evidence that counsel will present.')

statements at all.³ In New South Wales (Australia), even if the Defence addresses the jury with an opening statement after the one for the prosecution, it may make another such statement before calling the jury.⁴ In New Zealand, the defence opens its case after the presentation of the prosecution evidence, entailing that it will normally be prevented from making its opening statement immediately after the statement of the prosecution (the recent reports, however, indicate a shift towards allowing the defence more freedom).⁵

In common law jurisdictions, opening statements are mostly professional business reserved to counsel and may not be made by represented defendants; the latter may normally not make any statements at all without being sworn. The only way for the accused to appear in his or her defence is to take a witness stand and be treated accordingly: to testify under oath, to be subject to (cross-)examination, and to incur liability for perjury.⁶ This is dictated by the structural need to ensure that the jurors are shielded from one-sided and potentially false information.⁷ Previously in England and Wales, the defendant was entitled to make a statement from the dock without having been sworn in on which he or she could not be (cross-)examined. However, this right was abolished by the Criminal Justice Act 1982.⁸

Since the proof referred to in an opening statement is not submitted to admissibility evaluation and examination at that stage, such statements neither contain nor amount to evidence. The principle that a jury verdict must be returned on the sole basis of evidence—rather than non-evidentiary prejudicial submissions—imposes limitations as to the contents of opening statements, for example, as to the kind of evidence that may be mentioned. For example, in the US, opening statements by each party should be confined to an outline of issues in the case and the evidence the party intends to offer which it reasonably believes in good faith will be available and admissible; referring to other evidence is unprofessional conduct.⁹ The non-evidentiary character of opening statements also entails that parties may not use them to make an argument. An effective opening address will aim to persuade the jurors by presenting a coherent picture of the evidence to come, but an important requirement is that the statement itself may not be argumentative, in contrast to closing arguments.¹⁰ Although there may be controversy on the admissible contents of opening speeches, the rule of thumb is that the same should not be turned into overt ‘opening arguments’; for example, judges in the US may enforce this rule by sustaining an objection raised by another party.¹¹

In adversarial jury trials, opening statements are made by advocates in order to prepare the jurors for subsequent arguments and to dispose them favourably towards the relevant party. Thus, litigants seek to benefit from the strength of the first impression and from the

³ N. Vidmar, ‘A Historical and Comparative Perspective on the Common Law Jury’, in *id.* (ed.), *World Jury Systems* (Oxford: Oxford University Press, 2000) 47-8.

⁴ *Ibid.*

⁵ Cameron *et al.*, ‘The New Zealand Jury’ (n 1), at 134 and n170.

⁶ A. Orie, ‘Accusatorial v. Inquisitorial Approach’, in Cassese/Gaeta/Jones (eds), *The Rome Statute 1449*.

⁷ G. Turone, ‘The Denial of the Accused’s Right to Make Unsworn Statements in *Delalić*’, (2004) 2 *JICJ* 455, at 455.

⁸ G. Boas, ‘Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility’, (2001) 12 *Criminal Law Forum* 41, at 85; Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 6), at 1449.

⁹ Standards 3-5.5, 4-7.4 and 15-3.4 (a) *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* (Washington, DC: ABA, 1993). See M.J. Ahlen, ‘Opening Statements in Jury Trials: What Are the Legal Limits?’, (1995) 71 *North Dakota Law Review* 701, at 702.

¹⁰ K.H. Snedaker, ‘Storytelling in Opening Statements: Framing the Argumentation of the Trial’, (1986-7) 10 *American Journal of Trial Advocacy* 15, at 15 (the opening statement must persuade without appearing to do so). Advising lawyers to be persuasive without being argumentative and that they should covertly ‘engage in subtle argument by telling a story’ that implants the wanted version of events into the jurors’ minds: see Fontham, *Trial Technique and Evidence* (n 2), at 85.

¹¹ Ahlen, ‘Opening Statements in Jury Trials’ (n 9), at 702, with further references to US case law. For example, in Connecticut and in the District of Columbia, federal trial judges resolved to deny opening statements to both parties and instead to receive written statements from counsel, further to be edited and read by the court to the jury along with the instructions at the beginning of the trial.

natural human inclination to draw quick initial—and, as is believed, often definitive—conclusions.¹² The objective to impress and even ‘cast a spell’ on lay jurors with view to securing a certain verdict is facilitated by the use of non-professional and emotionally charged language.¹³ With trials being a ‘struggle’ for the jurors’ minds, opening statements are not only essential advocacy tools, but also arguably the most important part of the proceedings, from an advocacy perspective.¹⁴ It is the first time when a party addresses the jury and, at the same time, the last chance for it to do so before most jurors have made their minds up as regards the due outcome of the case.¹⁵

In continental systems, parties may take the floor before witnesses are heard and other evidence presented, although the rationales and format of the initial interventions are strikingly different. Opening statements pursue more limited and pragmatic purposes. As a *pro forma* step in the process, they to a lesser extent serve as advocacy elements. The prosecution’s opening statement may effectively be presented by a court clerk: it rarely consists in more than reading out a (summary of) charges.¹⁶ The triers of fact—a fully professional bench or a mixed one involving lay assessors—will have knowledge about the case and evidence to be heard from their reading of the dossier. The defence opening statements will not necessarily be envisaged as a distinct step, but the defendant (rather than his or her lawyer) will normally make a personal opening statement, if he or she wishes to react to the indictment. Subject to the right to silence, the defendant is then interrogated by the presiding judge and may be expected to provide a coherent version of relevant facts from personal knowledge.¹⁷

Importantly, in contrast with common law, the defendant in the context of continental criminal procedure has the status of a party that is immutable and may not be fully replaced by counsel. The accused may make statements, be questioned, and submit evidence in person throughout the trial not as a witness but in his own capacity.¹⁸ He or she may not testify under oath even if he wishes to and any statements are by definition unsworn.¹⁹ So the accused is legally not precluded from tendering untruthful information (the so-called ‘right to lie’), but

¹² R.J. Crawford, ‘Opening Statements for the Defence in Criminal Cases’, (1981-2) 8 *The Litigation Manual* 26, at 26 (the purpose of an opening statement is to set the lenses through which the jury will see the entire trial); R.B. Hirschhorn, ‘Opening Statements’, (1990-91) 42 *Mercer Law Review* 605, at 605; D. Court, ‘Jury Selection and Opening Statements’, (1951) 28 *Dicta* 384, at 389 (‘In an opening statement counsel has a further opportunity at that stage to “sell” to the fact-finding body the factual ideas to be supported by the evidence later.’).

¹³ Ahlen, ‘Opening Statements in Jury Trials’ (n 9), at 701.

¹⁴ Fontham, *Trial Technique and Evidence* (n 2), at 84 and 86 (‘Given human nature, the jurors may form an initial impression of who should win by the end of the opening statements.’); A. Jennings, ‘Opening Statements’, (1965-66) 19 *Arkansas Law Review* 29, at 29 and 33 (opening statement should not be foregone because winning at that stage often means winning the case); Hirschhorn, ‘Opening Statements’ (n 12), at 606 (referring to the ‘overwhelming significance’ of this stage of trial); Snedaker, ‘Storytelling in Opening Statements’ (n 10), at 15.

¹⁵ Fontham, *Trial Technique and Evidence* (n 2), at 84; W.I. Lundquist, ‘Advocacy in Opening Statements’, (1981-2) 8 *Litigation* 23, at 23 (opening statements determine the outcome of trials in more than 50% of cases and give jury the basic feeling as to the most appropriate outcome); Crawford, ‘Opening Statements for the Defence in Criminal Cases’ (n 12), at 26; D. Vinson, ‘How to Persuade Jurors’, (1985) *American Bar Association Journal* 72-76 (claiming that over 80% of jurors do not change their minds following the opening statements).

¹⁶ See §243(3) Code of Criminal Procedure (Germany, *Strafprozeßordnung, StPO*); Art. 327 Code of Criminal Procedure (France); Art. 284(1) Code of Criminal Procedure (Netherlands, *Wetboek van Strafvordering WvSV*).

¹⁷ See §§243(4) and 136(2) *StPO* (Germany); §245 Code of Criminal Procedure (Austria, *Strafprozeßordnung, StPO*); Art. 328 Code of Criminal Procedure (France); Art. 286 *WvSV* (Netherlands).

¹⁸ On the distinction between the status of witness and that of a party as evidence-provider, see M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) 130. For a brief overview of the status of unsworn statements of accused in Continental systems, see Boas, ‘Creating Laws of Evidence’ (n 8), at 83-5.

¹⁹ Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 6), at 1449 (‘the defendant is not even allowed to take an oath, and may give unsworn statements in court on whatever subjects relevant to the case. These statements can be used as evidence. ... There is no sanction on giving false statements’).

de facto mendacity is likely to be revealed through rigorous judicial questioning and to be held against him or her. When according weight to statements made by the accused, the court will normally take into account the instinctive inclination of the accused to present facts in favourable light. Nevertheless, the accused is expected to participate in the process of establishing the truth and such contributions are welcome as a way to identify issues not in dispute and to provide the court with a personal perspective on the matters central to the case and the background and personal characteristics of the accused.²⁰

Thus, the pragmatic objective of initial statements in continental criminal procedure is to assist the court in establishing the truth. This intended functionality would be at odds with the theatrical or dramatic aspects that distinguish such statements in common law litigation. It would indeed be unnecessary and unusual for the parties to engage in advocacy at this stage or try to win the favour of the judges, given the professional or mixed character of the bench and the adjudicators' prior familiarity with the facts and evidence. The absence of jury with the exclusive competence to render a verdict in the case means that parties are not expected to compete in their advocacy skills or to impress civic conscience through their opening interventions. Such submissions should remain factual rather than argumentative: it is up to the court to discover the truth and it need not be guided (and misled) in this respect by slanted arguments. For the same reason, the emotive and flowery language typical for common law statements and meant for lay ears is less apposite in a civil law context.

3. STATUS IN INTERNATIONAL CRIMINAL PROCEDURE

3.1 IMT and IMTFE

Within the structure of trials held before the post-WW II International Military Tribunals at Nuremberg and at Tokyo, opening statements were placed following the preliminary steps that marked the formal commencement of trial, including the reading of charges and pleas. Article 24(c) of the IMT Charter provided that '[t]he Prosecution shall make an opening statement' after the indictment was read in court and each defendant would enter a plea – and before the Tribunal asked the parties to inform it about the evidence to be submitted and ruled on admissibility. Furthermore, each defendant was entitled to deliver a personal statement after the closing addresses by both parties.²¹ While Article 16(b) gave the right to the accused to give any explanation on the charges, this provision was interpreted only as giving the accused a possibility of testifying as a witness.

Although the IMTFE Charter was largely modeled on the IMT Charter, dissimilarities between these two charters on the issue of statements are striking, some of which are explained by the lack of input by the representatives of civil law systems in the drafting the Tokyo Charter. In particular, Article 15(c) of the IMTFE Charter stipulated that '[t]he prosecution and each accused (by counsel only, if represented) may make a concise opening statement'. But, as noted, the IMTFE defendants were not afforded the opportunity of a 'last word'. Further, while at the IMT trial only the prosecution was competent—and even obligated—to make an opening speech, this was not formulated as an obligation at the IMTFE, but as an entitlement of both parties. Reportedly, in practice, the application of this provision by the IMTFE was misbalanced as the prosecution was allowed three opening statements for the general phase of the case whereas the defence was allowed only one.²² The

²⁰ D.A. Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence', (2001) 14 *Leiden Journal of International Law* 367, at 373. In a similar vein on the function of statements of the accused in the Netherlands, see G.J.M. Corstens, *Het Nederlands Strafrecht*, 6 ed. (Deventer: Kluwer, 2008) 597-8.

²¹ Art. 24(j) IMT Charter; cf. Art. 15 IMTFE Charter (no similar opportunity was provided). See further Chapter 11.

²² Boister/Cryer, *The Tokyo International Military Tribunal* 91.

IMTFE Charter extended the right to an opening statement to the defence counsel for each accused or to accused if unrepresented. The represented accused would be allowed neither to take the floor where their counsel had chosen not to do so, nor to have the ‘second bite of a cherry’ by speaking in court without having been sworn in where the statement was already tendered on their behalf. Another distinctive feature of the IMTFE opening stage is the formal requirement of conciseness applicable to statements. But the judges of both tribunals had ample powers to ensure their proper length and content even without an explicit provision.²³ At the IMTFE, such a power was exercised, for example, when Japanese counsel Takayanagi Kenzo was precluded from reading a statement seeking to challenge the Tribunal’s jurisdiction under international law, on the ground that pleading questions of law would be more appropriate during the closing address and not as part of an opening statement.²⁴

If one is to judge by the black letter of the charters, the IMTFE Charter may be seen as a limited improvement from the IMT Charter in respect of the regulation of the opening stage. Given that both parties were authorized to speak, it appears more harmonious with the modern tenets of an adversarial hearing and the principle of equality of arms, which entails that parties shall have reasonable opportunities to present their cases on the conditions which do not put them in a substantially disadvantageous position as compared to that of the opponent.

3.2 ICTY, ICTR, and SCSL

3.2.1 Regulation

Under the procedural model of the *ad hoc* tribunals and the SCSL, opening statements by the parties, starting with the prosecution, are generally deemed to mark the commencement of trial.²⁵ This understanding was occasionally expressed by judges in the course of proceedings.²⁶ In accordance with ICTY and ICTR Rule 84, each party may make an opening statement before the start of the prosecution case, but the defence may elect to make it after the conclusion of the prosecution’s presentation of evidence (i.e. after the prosecution rests its case) and prior to presenting the defence evidence. The provision contrasts positively with the IMT Charter, which, as noted, only allowed the prosecution to deliver an opening statement. At the SCSL, the differently formulated Rule 84 provides that each party may make an opening statement at the start of its respective case; such statement shall be confined to the evidence the party intends to present in support of its case; and, furthermore, the Trial Chamber in the interests of justice may limit its length.²⁷

Rule 84*bis* is a unique feature of the ICTY RPE and unparalleled in the ICTR and SCSL Rules. The Rule was adopted in 1999 with a view to streamlining the trial proceedings

²³ See Art. 18(a) and (b) IMT Charter and Art. 12 (a) and (b) IMTFE Charter (the Tribunal shall ‘confine the trial strictly to an expeditious hearing of the issues raised by the charges’ and ‘take strict measures to prevent any action which will cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever’).

²⁴ Boister and Cryer, *The Tokyo International Military Tribunal* 88 (referring to transcript, at 12107-17110); K. Kobori (ed.), *The Tokyo Trials: The Unheard Defense* (Tokyo: Kodansha, 1995) 61.

²⁵ Chapter 7. See also A. Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008) 409; M. Karnavas, ‘Gathering Evidence in International Criminal Trials – the View of the Defence Lawyer’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2008) 114.

²⁶ See e.g. Scheduling Order Regarding the Prosecution Opening Statement, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, TC III, ICTY, 8 July 2008 (‘the trial shall commence immediately upon the completion of the Pre-Trial Conference with the opening statement of the Prosecution’); in the same case, Order Rescheduling Pre-Trial Conference, 19 June 2008, at 2.

²⁷ At the 2nd plenary meeting (3-7 March 2003, London) where the SCSL judges adopted the SCSL RPE, Rule 84—inherited from the ICTR—was enacted in the formulation almost identical to the current. The subsequent 1 August 2003 amendment, agreed upon at the 3rd plenary (29 July to 1 August 2003, London), changed ‘the Court’ to ‘the Trial Chamber’. The First Annual Report of the President of the SCSL for the Period 2 December 2002 - 1 December 2003 provides no specific explanation for these adjustments.

and, supposedly, it reflected the position in Article 67(1) (h) of the then recently adopted ICC Statute.²⁸ Besides, it codified the pre-existing, albeit exceptional, practice at the ICTY of allowing unsworn statements from the dock during the prosecution case.²⁹ As will be shown, this procedural device is not identical to traditional ‘opening statements’, due to its different origin and rationale as well as specific regulation. Nevertheless, it is warranted to consider it in the context of the opening stage, given its formal place in the chronology of the ICTY proceedings as a matter of law (and not always in practice since some ICTY Chambers have interpreted the Rule expansively).³⁰

In formal terms, however, Rule 84*bis* grants the accused the opportunity to make a statement after the opening statements of the parties or after the prosecution’s statement where the defence defers its statement until the start of its case. Such statement of the accused may be delivered only subject to the Chamber’s authorization and under its control. The accused shall not be compelled to make a solemn declaration and shall not be examined as to the content of the statement.³¹ Its probative value, if any, shall be determined by the Chamber.³²

To resume, in the *ad hoc* tribunals and the SCSL, the parties are free to elect whether or not to make an opening statement. But the SCSL RPE depart from those of the *ad hoc* tribunals in that they: do not guarantee the defence the freedom to choose the timing of their opening statements; expressly limit opening statements to the evidence the party intends to present; and grants judges the power to control their length. Furthermore, the ICTY model stands out in that it allows the defendant the right to address the Chamber with a statement irrespective of whether or not counsel makes an opening statement on his or her behalf.

3.2.2 Timing for the defence opening statement

While the delivery of an opening statement is a right rather than an obligation at the ICTY, ICTR, and SCSL, it is very rare that parties choose to waive it – given its tactical importance in litigation, waiver are indeed extraordinary.³³ But, as noted, the ICTY and ICTR Rule 84 provides some leeway to the defence in electing the stage at which to deliver the opening statement, whereas the less permissive SCSL Rule states that each party makes its statement ‘[a]t the beginning of his case’. The two solutions appear to reflect, respectively, the more flexible US approach and the more restrictive practice in England and Wales or Canada.³⁴

As a result of a more liberal framework, the defence practice at the ICTY and ICTR has been varied. Overall, it appears that defence counsel chose more often to make their opening statements at the beginning of the defence case, rather than immediately after the

²⁸ Rule 84*bis* ICTY RPE was adopted on 2 July 1999 at the 20th plenary session (30 June – 2 July 1999): see Sixth Annual Report of the ICTY, UN Doc. A/54/187-S/1999/846, 25 August 1999, para. 119; Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning [of the ICTY and ICTR], UN Doc. A/54/634, 22 November 1999 (‘Report of the Expert Group’), para. 87 (describing the amendment as an ‘attempt to expedite trials’ and a ‘worthwhile effort by the ICTY to improve case management’). Indicating that the amendment was inspired by the ICC Statute, see Turone, ‘The Denial of the Accused’s Right to Make Unsworn Statements in *Delalić*’ (n 7), at 456; S. Zappalà, ‘The Rights of the Accused’, in Cassese/Gaeta/Jones (eds.), *The Rome Statute* 1352.

²⁹ J.R.W.D. Jones and S. Powles, *International Criminal Practice* (Oxford: Oxford University Press, 2003) 713 (referring to the precedent of a defendant’s unsworn statement in *Kupreškić*). However, in *Delalić*, such statements were not permitted: Turone, ‘The Denial of the Accused’s Right to Make Unsworn Statements in *Delalić*’ (n 7).

³⁰ See *infra* 3.2.3.

³¹ Rule 84*bis*(A) ICTY RPE.

³² Rule 84*bis*(B) ICTY RPE.

³³ But see n 187.

³⁴ See *supra* 2.

opening address by the prosecutor.³⁵ Occasionally, judges have also made clear that they prefer to proceed in this way.³⁶ However, in a number of cases, the defence exercised their right to deliver a statement after that of the prosecution.³⁷ In the absence of a fully uniform pattern of practice, the counsel's preferences in individual cases can be explained by the background of counsel, as well as tactical considerations specific to the cases, including trial-readiness and the state of the defence case at the commencement of trial.

For judges, a possible reason for preferring that an opening statement for the prosecution be followed by the prosecution evidence is the wish to avoid the interruption of the logical flow of case presentation for one party by the intervention of the other. From a defence perspective, this tactic may also be more suitable. Delivering an opening statement at the start of one's case allows securing its stronger effect because, first, there would normally be a significant time gap between the statement and the defence evidence and, secondly, because the defence statement can take into account the prosecution evidence and react to it. Since an average international trial is by far lengthier than any domestic trial, the imprint of the statement on the minds of the judges is likely to be ironed out by the prosecution evidence by the time the defence gets to open its case. Even more importantly, unlike with domestic jury trials, international defence counsel are reluctant to commit themselves to a certain format of the defence case at an early stage, because often they will not know what exactly this case is going to be before hearing the prosecution evidence.³⁸

This is amply confirmed by the data obtained during personal interviews with defence counsel at the ICTR and SCSL.³⁹ With reference to the length of international trials, counsel

³⁵ Cassese, *International Criminal Law* (n 25), at 409. See e.g. Transcript, *Prosecutor v. Blaškić*, Case No. IT-95-14, TC, ICTY, 24 June 1997, at 53; Transcript, *Prosecutor v. Delić*, Case No. IT-04-83, TC I, ICTY, 2 July 2007, at 178-9; Transcript, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, TC, ICTY, 18 August 1998; Transcript, *Prosecutor v. Boskoski and Tarčulovski*, Case No. IT-04-82, TC II, ICTY, 30 January 2008, at 8661 *et seq.*; Minutes of Proceedings, *Prosecutor v. Karera*, Case No. 01-74-T, TC I, ICTR, 9 January 2006; Minutes of Proceedings, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-I, TC III, ICTR, 5 May 2008; Minutes of Proceedings, *Prosecutor v. C. Bizimungu et al.*, Case No. ICTR-99-50-T, TC II, ICTR, 6 November 2003, 30 August 2006, 13 August 2007 and 18 February 2008; Minutes of Proceedings, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTY-00-56-T, TC II ICTR, 16 April 2007, 16 January 2008 and 23 June 2008; Judgement and sentence, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, TC I, ICTR, 27 January 2000, para. 25; Minutes of Proceedings, *Prosecutor v. Bagozora et al.*, Case No. ICTR-98-41-T, TC I, ICTR, 11 April 2005; Minutes of Proceedings, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, TC II, ICTR, 10 July 2007; Minutes of Proceedings, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, TC III, ICTR, 29 March 2004.

³⁶ Transcript, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, TC II, ICTY, 8 June 1998, at 78-79 (before allowing—with some reluctance—the defence to proceed with an opening statement following that of the prosecution, Judge Mumba expressed a preference that the prosecution rather start with the presentation of its case on the same day and that the defence address the court later at the beginning of its case).

³⁷ See e.g. Transcript, *Prosecutor v. Tadić*, Case No. IT-94-1-T, TC, ICTY, 7 May 1996, at 50-1; Transcript, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC, ICTY, 11 July 1997, at 73; Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, TC I, ICTR, 2 September 1998, para. 17; Minutes, *Prosecutor v. Karemera et al.*, Case No. ICTR-1998-4-T, TC III, 27 November 2003; Minutes, *Prosecutor v. Renzaho*, Case No. ICTR-97-31-T, TC I, ICTR, 8 January 2007.

³⁸ Karnavas, 'Gathering Evidence' (n 25), at 114-5 ('Whereas in a jury trial it is advisable to almost always give an opening statement immediately after the prosecution's case, the converse is advisable at the ad hoc international tribunals. The cases are far too complex and the defence resources far too limited to enable the defence lawyer, in most cases, to anticipate where the case will be at the conclusion of the prosecution case.').

³⁹ Interview with Wayne Jordash, SCSL Defence Counsel, SCSL-OD-01, The Hague, 9 December 2009, at 14 ('I did not know enough about the prosecution case. ... I did not want to commit myself [and] I did not know enough about the defence case either at that point. ... You can do one or the other but you almost always do it just before you open your case. With a jury, it is more important to do it at the beginning of your case because they may have forgotten what you said at the beginning of the prosecution. But a principle which I would generally follow is to do it before the defence case. Then you get the chance to rubbish the prosecution case a bit.');

Interview with a SCSL Defence Counsel, SCSL-AD-06, Freetown, 19-20 October 2009, at 31 ('it makes more sense to do it at the start of your defence case, because at the start of the prosecution case, you probably have no idea what your defence case is going to be because you do not have any witnesses. You need to come up with what you expect the facts to be of your defence case. It puts you at a real disadvantage if you have to do it

opined that lest the passage of time would bring the tactical advantage of opening statements to naught, the defence ought to deliver their statement right before their evidence.⁴⁰ Of course, the downside for the defence of deferring their opening statement until the close of the prosecution case is that the prosecution would be presenting its evidence in its entirety unchallenged by the defence version of facts and evidence, except occasionally at cross-examination. At the same time, some interviewees at the ICTR did not exclude that reacting to the prosecution's statement immediately upon its delivery may be justified where the defence has a clearer idea of what its case is going to be about. At least one SCSL defence counsel considered this tactical choice as unimportant in principle.⁴¹ So it appears that case-specific considerations eventually control the defence's preference.⁴²

Next to the two main timing options, a third and hybrid solution was occasionally allowed in the interests of justice. In some cases, the defence is allowed to make a brief opening statement after that of the prosecution, while retaining the right to make a more detailed statement at the start of its case.⁴³ Furthermore, the Chambers held that a

after the prosecution opening, because you have got no idea. Unless you are just doing a verbal rebuttal of whatever they have said, and it does not have the depth. It is really important to some defendants, particularly if they have never been in a courtroom and they do not understand what is going on, to have that option. When they do not understand, they spend two years not saying anything before their lawyers can even speak. But legally and strategically, it makes more sense to do it at the start of the defence case.'). Interview with a member of the Defence team, SCSL-AD-05, Freetown, 20 October 2009, at 15 ('we were happy to wait on because we were so rushed during the pre-trial phase and we were not really sure what the contours of the prosecution case were going to be given the vagueness of the indictment, etc. It would be difficult, I think, at that stage to give a definitive view of what your defence witnesses are going to say and what you are going to present in your defence case when you have not even met two-thirds of your defence witnesses yet. How could you, at that early stage, commit yourself?').

⁴⁰ See e.g. Interview with Tom Moran, ICTR Defence Counsel, ICTR-PD/03, 29 May 2008, at 12 ('I want mine at the beginning of my case. The reason for that is that our first day of testimony was in November of 2003. I put on my first witness on in February 2008. I wanted the Judges to hear my opening statement before I put my witnesses on. In a domestic case, it is going to last three to five days, maximum a week. I would probably make my opening statement at the beginning, right after the Prosecutor. ... But here, there is so much of a time difference. ... The other thing is that on a long trial like this, you do not know what evidence you are going to put on, because you do not know what the Prosecution is going to put on. You have to continuously re-look at your case.').

⁴¹ Interview with a SCSL Defence Counsel, SCSL-AD-02, Freetown, 22 October 2009, at 11-2 ('I do not think it makes any difference, because what is good for the goose is good for the gander. When the Prosecution opens their case, they tell the Court what they seek to prove and then they lead the evidence and at the time they are doing it everyone thinks that the accused are guilty. Similarly, when the Defence open their case, they speak in such a way that everyone thinks that they are innocent, that they cannot hurt a fly, so it does not matter. ... The Prosecution makes an opening statement, the Defence makes the response statement and at the end of the day when the Prosecution closes the Defence opens their case, makes their statement and then the Prosecution makes a response. At each time they are both neutralized at the same time.').

⁴² Interview with John Philpot, ICTR Defence Counsel, ICTR-PD/04, Arusha, 29 May 2008, at 9 ('The timing of the opening statement could vary ..., depending on the case. We made it at the beginning, because our case was clear from the beginning what it was, and we followed our game plan. But in a case where you do not know the Prosecution's situation, and you want to hide your cards, you do it later.'). Interview with Peter Zaduk, ICTR Defence Counsel, ICTR-PD/06, Arusha, 26 May 2008, at 11 ('It is a matter of tactics. Very often, you do not want to commit yourself to a certain position before you know all of the evidence, it is often very unwise. Sometimes you want to let the court know right from the beginning what your position is, particularly if the prosecution evidence might be misleading or very one-sided, you want to get your version before the court at an early opportunity.'). Interview with Ben Gumpert, ICTR Defence Counsel, ICTR-PD/09, 22 May 2008, at 16 ('I choose to do the latter [make an opening statement at the beginning of the presentation of defence evidence]. So I made no statement in response to the Prosecutor's opening statement, but I set out clearly and relatively succinctly ... why we said the Prosecution's case was already not convincing, and what our case will be, and why it will be a convincing one, before I called the evidence.').

⁴³ See e.g. Minutes of Proceedings, *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, TC I, ICTR, 19 September 2005 (counsel for Mpambara did ultimately not make the second opening statement: Minutes of Proceedings, 9 January 2006); Minutes of Proceedings, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, TC III, ICTR, 1 April 2004 (an oral decision stating that the defence for Nzirorera may be allowed to make a

supplemental opening statement may be allowed in case the first statement had been rendered obsolete by the amendments to the indictment charging the accused under the theory unknown to the defence.⁴⁴

As noted, Rule 84 of the SCSL RPE confines opening statements to the start of each party's case, but the practice has not been uniform. The *Taylor* Chamber denied the defence the opportunity to speak before the presentation of prosecution evidence on the ground that the SCSL justices rejected the wording of ICTR Rule 84 'with an express intention of confining a defence opening statement to the opening of the defence case'.⁴⁵ However, in the *RUF* trial earlier, Trial Chamber I interpreted Rule 84 as providing only that the defence opening statement should 'normally' take place after the prosecution evidence and offered the defence to elect the timing for its statement.⁴⁶ According to defence counsel who appeared in that trial, the language of the rule was not an obstacle in providing the defence with a choice in this regard.⁴⁷

In multiple-accused trials, it has been common to hear opening statements on behalf of each accused at the start of the case for that respective accused, rather than grouping all defence statements together.⁴⁸ At the SCSL, this appears to be required by the letter of Rule 84.⁴⁹ However, where different defence teams have common witnesses, the interests of efficiency and, in particular, the need to avoid recall of the same witnesses warrants concentrating the relevant defence statements at the beginning of the defence phase of the trial and ensuring that these are made prior to the appearance of the common witness.⁵⁰

supplemental statement later on) and 21 April 2008 (counsel for Karemera delivered an opening statement before the commencement of the defence case, although one opening statement for that accused had already been made after the prosecution's statement (n 35)). See also Minutes of Proceedings, *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, TC I, ICTR, 22 June 2007 and Minutes of Proceedings, 2 June 2008.

⁴⁴ Decision on the Continuation of Trial, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, TC III, ICTR, 16 July 2004, paras 71-7 (holding, however, that the trial should proceed 'in the interests of justice' and judicial economy).

⁴⁵ Decision on Urgent and Public Defence Motion Requesting Leave For Charles Ghankay Taylor to Give An Un-sworn Statement from the Dock, *Prosecutor v. Taylor*, Case No. SCSL-03-1-PT, TC II, SCSL, 29 May 2007 ('*Taylor* unsworn statement trial decision'), at 3; see also Transcript, 7 May 2007, at 38 (Justice Sebutinde dismissing the possibility of making defence opening statement prior to the start of the prosecution case).

⁴⁶ Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, TC I, SCSL, 5 July 2004, at 16 ('The normal process would be after the Prosecution has made the opening statement and we will turn to each and every Accused and ask them if they wish to make an opening statement at this time reminding them that they don't have to.' – Justice Boutet) and 54-55 (Judge Thompson); 6 July 2004, at 1-5 (whereby Justices persist in trying to get an answer from counsel for Sesay whether an accused himself or his counsel wish to make an opening statement after that of the Prosecution's or rather to defer it until the opening of the defence case).

⁴⁷ See also Interview with Wayne Jordash (n 39), at 14; Interview with a SCSL Defence Counsel (n 39), at 31 ('Unless they changed it, when we started our trial, we could make the opening statement after the prosecution, but then we could not make it at the start of the defence case, so we had to choose. Kallon chose to do his opening statement right after the Prosecution's opening statement. Sesay and Gbao did it at the stage of the defence case.').

⁴⁸ Transcript, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, TC, ICTY, 6 August 2007, at 12868 *et seq.*

⁴⁹ Written Reasons for the Decision on Request for the Gbao Opening Statement to Be Given at the Beginning of the Presentation of Evidence for the Third Accused, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, TC I, SCSL, 3 July 2007 ('*Gbao* opening statement decision'), para. 8 ('The Chamber ... holds and directs, that in a normal situation, where in joint trial, the parties do not intend to call or to rely on common witnesses, the procedure as clearly set out in Rule 84 is that each Defence Team is expected to make its opening statement only at the opening of its case if it so desires.').

⁵⁰ *Gbao* opening statement decision (n 49), paras 6-7 ('This Chamber ... holds that subject to its discretion to vary a practice or procedure where the interests of justice demand, the law as to the application of Rule 84 particularly where the Defence Teams have indicated that they are calling common witnesses is that in joint trials opening statements on behalf of or by the Accused are to be made at the commencement of the defence phase of the trial.'). Minutes of Proceedings, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, TC II, ICTR, 31 January 2005, para. 2(e) ('if there are joint witnesses between Nyiramasuhuko and Ntahobali, and if the Defence of Ntahobali opts not to make an opening statement now, then they must make an opening statement before the joint witness is called.'). Scheduling Order for Defence Case, *Prosecutor v. Kordić and Čerkez*, Case

3.2.3 Statement by the accused

As noted, the Rule 84*bis* procedure is a distinctive element of the ICTY regime that knows no analogue at the ICTR and SCSL; furthermore, it was also historically unique at the time it was introduced because neither the IMT nor IMTFE Charters provided the accused with a right to make a personal unsworn statement at the beginning of trial.⁵¹ The principal rationale for this rule was to allow the accused to state his position on the charges early in the trial and to point out any issues not in dispute, which was expected to reduce the volume of evidence that needed to be presented.⁵² So the deliberate choice was to afford the accused the possibility of making a statement prior to the presentation of evidence, as opposed to a later stage in the proceedings.⁵³

The nature of the conditional right under Rule 84*bis* in comparative terms deserves special consideration. The absence of the requirement to give a solemn declaration under Rule 90(A) prior to giving such a statement, as well as the impossibility of examining the accused on its contents, distinguish this procedure from his or her appearance as a defence witness in his or her own case pursuant to Rule 85(C).⁵⁴ That said, it follows from Rule 84*bis* that the Trial Chamber is not precluded from authorizing the accused to precede his statement by a solemn declaration if he or she so wishes ('shall not be compelled').⁵⁵ But the fact that the statement, unsworn or otherwise, may not be followed on by examination is a true barrier to turning the accused into a regular witness and the opening stage into the proof-taking forum. The Rule 84*bis* faculty is supplementary to the right of the accused to challenge evidence

No. IT-95-14/2, TC ICTY, 23 February 2000, para. 4 ('The opening statements of the Defence pursuant to Rule 84, if any, shall be given in the following order: the Defence for the accused Dario Kordić, followed the Defence for the accused Mario Čerkez. Both opening statements shall be made prior to the leading of evidence pursuant to Rule 85 by the Defence for either accused.').

⁵¹ Art. 24(j) of the IMT Charter permitted each defendant to make a statement at the end of the trial after the parties' closing addresses. Art. 16(b) set out the right of accused to give any explanation on the charges, but this rule was only applied as giving accused a possibility of testifying as witnesses.

⁵² Report of the Expert Group (n 28), para. 87 ('Civil law experience appears to indicate that such statements by the accused can have the effect of shortening the proceedings by narrowing issues, eliminating those not disputed and clarifying matters'); Boas, 'Creating Laws of Evidence' (n 8), at 83 and 85 ('an opportunity for ... accused to narrow issues that are in dispute in the proceedings and assist the expedition of trial'); Mundis, 'From "Common Law" Towards "Civil Law"' (n 20), at 373-4 (had Rule 84 *bis* been in effect at the time of the *Blaškić* trial and had the accused used it, that trial would have been considerably shorter, as in the statement made after the close of the prosecution case, the accused admitted many of the facts the prosecution had sought to prove); Zappalà, 'The Rights of the Accused' (n 28), at 1351-2; A. Rodrigues, 'Undue Delay and the ICTY's Experience of Status Conferences: A Judge's Personal Annotations', in J. Doria *et al.* (eds.), *The Legal Regime of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2009) 216.

⁵³ E.g. *Kvočka et al.* transcript, 26 March 2001 (n 55), at 9449 (holding that an accused may not make a statement after the presentation of evidence has been completed).

⁵⁴ Decision Regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, TC III, ICTY, 12 February 2009 ('*Prlić et al.* Rule 84*bis* supplement trial decision'), para. 17: ('The purpose of this statement is to give an accused the opportunity to be heard by the Chamber without having to appear as a witness in his own case.').

⁵⁵ Decision on Praljak Defence Notice Concerning Opening Statements under Rules 84 and 84 *bis*, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, TC III, ICTY, 27 April 2009 ('*Praljak* opening statements decision'), at 7-8 and 11 (granting the accused leave to take oath before Rule 84 *bis* procedure); Transcript, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, TC I Section A, ICTY, 17 June 2004, at 10923 and Decision on Vidoje Blagojević's Oral Request, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, TC I, Section A, ICTY, 30 July 2004 ('*Blagojević and Jokić* oral request decision'), at 10 (making available the option of sworn statement under Rule 84*bis*). However, some Chambers clearly proceeded on the presumption that Rule 84*bis* statements must remain unsworn: Transcript, *Prosecutor v. Martić*, Case No. IT-95-11-T, TC, ICTY, 13 December 2005, at 296; Transcript, *Prosecutor v. Stakić*, Case No. IT-97-24-PT, TC II, ICTY, 10 April 2002, at 1562; Transcript, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, TC, ICTY, 26 March 2001, at 9452-3; Transcript, *Prosecutor v. Haxhiu*, Case No. IT-04-84-R77.5, TC I, ICTY, 24 June 2008, at 22.

against him (including testimony under Rule 85(C)) and thus not a substitute procedure to compensate for the failure to employ those.⁵⁶

The arrangements may be deemed as a hybrid or compromise between the ‘adversarial’ and ‘inquisitorial’ procedures. In keeping with the latter tradition, the accused making a statement under Rule 84*bis* is not treated as a witness but as a party that may actively participate in the process.⁵⁷ Yet, unlike defence counsel’s opening statements, the Chamber may still deem the information thus supplied to have probative value and consider it to be evidence in the proper sense, whatever its weight, despite that the proof-taking has not even commenced.⁵⁸ On the other hand, in departure from the ‘inquisitorial tradition’ and more in line with the ‘unsworn statement from the dock’ procedure at common law, the accused may not be examined about the content of the statement.⁵⁹ Not only does he enjoy what has been referred to above as the ‘right to lie’,⁶⁰ but also he or she may also not fear the embarrassment of being caught in it during the follow-up questioning. This limitation results in that the ICTY Trial Chambers would normally accord lesser weight to statements made under Rule 84*bis* than to regular witness testimony, which is sworn and followed at least by prosecution cross-examination and, possibly, by judicial questioning.⁶¹ If a Rule 84*bis* statement is preceded by a solemn declaration, its probative value, if any, is likely to be only slightly more than that of unsworn statements.⁶² The impossibility of following it up by examination is an important distinction that predetermines its sub-par probative value as compared to witness testimony.⁶³

⁵⁶ *Prlić et al.* Rule 84*bis* supplement trial decision (n 54), para. 18 (‘a statement by the accused under Rule 84 *bis* is a supplementary right granted to him, which he may exercise if he so wishes, notwithstanding his other rights under the Statute of the Tribunal and the Rules’) and 19 (‘[it] is not the appropriate procedure for requesting the admission of documents to rebut prosecution evidence’).

⁵⁷ Report of the Expert Group (n 28), para. 87; Boas, ‘Creating Laws of Evidence’ (n 8), at 83; Mundis, ‘From “Common Law” Towards “Civil Law”’ (n 20), at 373. See also *Praljak* opening statements decision (n 55), at 8 (‘the absence of cross-examination and questions from the Judges, initially manifested with the adoption of this Rule in July 1999, to allow for more active participation by the accused in the judicial debate, and thereby lay the foundation for approximating the procedure for statements by the accused ... to the approach established in most civil law systems, on the one hand, while completely preserving the accused’s right to remain silent, on the other’).

⁵⁸ Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision Regarding Supplement to the Accused Prlić’s Rule 84 *bis* Supplement, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.15, AC, ICTY, 20 April 2009 (‘*Prlić et al.* Rule 84 *bis* supplement appeal decision’), paras 15-7. In a number of judgments, some probative value was accorded to the Rule 84*bis* statements: e.g. Judgement, *Prosecutor v. Milutinović et al.*, Case IT-05-87-T, TC, ICTY, 26 February 2009, para. 44 (the Chamber taking General Ojdanić’s unsworn statement into account in the final deliberations pursuant to Rule 84*bis*(B), without indicating what weight was accorded to it); Judgement, *Prosecutor v. Limaj et al.*, Case IT-03-66-A, AC, ICTY, 27 September 2007 (‘*Limaj et al.* appeal judgement’), para. 77 (the Trial Chamber treated an unsworn statement as evidence when it said ‘the Defence ... must rely on an unsworn opening statement and *other* evidence’). Cf. Judgement, *Prosecutor v. Martić*, Case No. IT-95-11-T, TC I, ICTY, 12 June 2007, para. 23 (the Chamber determined that the accused’s Rule 84*bis* statement had no probative value).

⁵⁹ Noting this difference, see P.C. Keen, ‘Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals’, (2004) 17 *Leiden Journal of International Law* 767, at 788.

⁶⁰ *Kvočka et al.* transcript, 26 March 2001 (n 55), at 9452. See also Boas, ‘Creating Laws of Evidence’ (n 8), at 85 (observing that this is the perceived effect of Rule 84*bis* from a common law perspective).

⁶¹ Judgement, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, TC II, ICTY, 30 November 2005 (‘*Limaj et al.* trial judgement’), para. 635 (the consequence of the accused’s advancing the defence of alibi and the contention about poor health at the time by way of unsworn statement is that there is no sworn evidence providing ‘a sure and convincing foundation’ for his allegations), affirmed in *Limaj et al.* appeal judgement (n 58), para. 76; *Blagojević and Jokić* oral request decision (n 55), at 7 (‘As a statement under Rule 84 *bis* is generally unsworn and is not subject of cross-examination or inquiry from the Bench, it generally will carry somewhat less weight than the testimony given under oath that is subject to cross-examination and inquiry to from the Trial Chamber.’); *Blagojević and Jokić* transcript, 17 June 2004 (n 55), at 10924.

⁶² *Praljak* opening statements decision (n 55), at 10.

⁶³ *Ibid.* (‘such a sworn statement offers significantly less probative value than testimony given in accordance with Rule 85 (C) of the Rules’).

Although the Rule appears straightforward, its application in practice has been rather flexible. First, Rule 84*bis* limits the possibility of making an unsworn statement to the opening stage of the trial process ('[a]fter the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor'). But, as noted, on several occasions, the judges have accorded the possibility to invoke Rule 84*bis* at a later stage (qua last word),⁶⁴ or, even more generally, as the right to request to be heard 'throughout the proceedings'.⁶⁵ The Appeals Chamber embraced this liberal practice *ex post facto*. It held that the statement should take place before the presentation of the prosecution evidence to be consistent with the Rule's original rationale to 'improve case management'.⁶⁶ The Appeals Chamber deferred to the discretion of the trial court in determining the ways for the defence to exercise their rights and ruling on the admissibility of evidence.⁶⁷ It also found that in principle Rule 84*bis* procedure may be used to rebut the prosecution evidence.⁶⁸

Secondly, Rule 84*bis* authorizes the accused to make a personal statement only once. For self-representing accused, 'unsworn statement' may be a source of tactical advantage as it enables him or her to have a 'second bite of a cherry'. They may react to the prosecution opening statement under that Rule (subject to the Chamber's authorization) while still being entitled to deliver an opening statement for the defence in person under Rule 84.⁶⁹ Thus, Slobodan Milošević was allowed to make a two-day long opening statement, after having delivered two unsworn statements of 8 hours and 3,5 hours respectively, responding to the prosecution statements in connection with the Kosovo and Bosnia/Croatia indictments.⁷⁰ Besides, some Chambers have also allowed the second statement to be made under Rule 84*bis* before the opening of the defence case.⁷¹ Thirdly, although the ordinary meaning of Rule

⁶⁴ Decision on Future Course of Proceedings, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, TC III, ICTY, 9 April 2008, para. 17(1); *Blagojević and Jokić* transcript, 17 June 2004 (n 55), at 10923 ('under the exact language of the rule, an unsworn statement is generally made after the opening statement of the parties. The Trial Chamber does not find any reason to deny you the opportunity to make an unsworn statement at a later time.');

Transcript, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, TC I, ICTY, 31 August 2006, at 27500 ('Rule 84 bis says, and although ... it was not adopted as introducing the last word, but that's the way we use it'); *Kvočka et al.* transcript, 26 March 2001 (n 55), at 9448-9 (allowing accused Žigić to make a personal statement after the statement of counsel delivered at the beginning of the defence case, but not after the presentation of defence evidence).

⁶⁵ Order for Filing of Motions and Related Matters, *Prosecutor v. Stakić*, Case No. IT-97-24-PT, TC II, ICTY, 7 March 2002, para. 8 ('This right is granted from the outset whenever a witness has finalised his or her testimony and at the end of a party's presentation of a case... The right to speak himself is only an option for the accused. It is his own choice whether or not to make use of it in general or from time to time, or to make use of his right to remain silent. However, he should be aware that whatever he says in the courtroom may be held against him.'). Later on, Pre-Trial Judge Schomburg specified that the order afforded the accused the right to react to the evidence after the witness completed testimony without being placed at oath or being (cross-)examined: Transcript (Pre-Trial Conference), *Prosecutor v. Stakić*, Case No. IT-97-24-PT, TC II, ICTY, 10 April 2002, at 1560-1. See also Order for Filing of Motions and Related Matters, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, TC II, ICTY, 2 September 2002, para. 7 ('Throughout the proceedings, the accused will enjoy the right to request to be heard in person by the Trial Chamber. Rule 84 bis (A) and (B) apply correspondingly.');

in the same case, see Order for Filing of Motions and Related Matters, 13 June 2003, para. 7; Order for Filing of Motions and Related Matters, 28 November 2003, para. 7.

⁶⁶ Report of the Expert Group (n 28), para. 87.

⁶⁷ *Prlić et al.* Rule 84 bis supplement appeal decision (n 58), paras 15-7.

⁶⁸ *Ibid.*, paras 17 and 23.

⁶⁹ See e.g. Transcript, *Prosecutor v. Šešelj*, Case No. IT-03-67, TC I, ICTY, 8 November 2006, at 722-4, and Transcript, *Prosecutor v. Šešelj*, Case No. IT-03-67, TC I, ICTY, 8 November 2007 ('Šešelj unsworn statement transcript'), at 1857-947; Transcript, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, TC, ICTY, 1 March 2010, at 806 *et seq.* and Transcript, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, TC, ICTY, 16 October 2012, at 28849-82.

⁷⁰ Transcript, *Prosecutor v. S. Milošević*, Case No. IT-02-54, TC I, ICTY, 31 August 2004, at 32157 *et seq.* See also Annex 'Proceedings at Trial', Order, *Prosecutor v. S. Milošević*, Case No. IT-99-37-PT, TC I, ICTY, 11 January 2002.

⁷¹ *Praljak* opening statements decision (n 55), at 5.

84bis suggests that a personal statement should be delivered orally, the ICTY Appeals Chamber held, with reference to Article 67(1)(h) of the ICC Statute, that doing so by way of written submission is not precluded, although the admission of the statement is subject to the Trial Chamber's discretion.⁷² Fourthly, even though Rule 84bis is clear on that the accused may not be questioned on the content of the statement, one Chamber held in a contempt case that, should a sworn statement be given, the prosecution will be entitled to cross-examine thereon.⁷³

The important aspect of the Rule 84bis regime, as noted above, is that a personal statement is to be delivered subject to the authorization and under the control of the Chamber. This means, among others, that judges have discretion to deny the request under Rule 84bis ('if the Chamber so decides') and, where it has been granted, the length and content of the statements will be monitored to prevent unreasonably lengthy, political, or otherwise abusive interventions.⁷⁴ While the accused will normally intend the statement to be in his or her defence, occasionally it could also contain incriminating information. This might place the practical application of the right under Rule 84bis at tension with the right to silence and the privilege against self-incrimination.⁷⁵ For example, these rights may be violated where negative inferences are drawn from a statement that is uninformed or involuntary and/or where there has been no effective assistance by counsel. Ultimately, it is the Trial Chamber's responsibility to ensure that the accused has had access to advice by counsel and is informed about the right to remain silent. So the Chambers have routinely cautioned the accused wishing to make a statement under Rule 84bis that anything he or she says in the courtroom may be held against him or her.⁷⁶ Furthermore, the court may not draw adverse inferences from the exercise of the right to silence if the accused elects not to testify but to make a Rule 84bis statement instead.⁷⁷ Finally, the Chambers are expected to exercise their discretion under Rule 84bis(B) with caution and take into account the extra-testimonial character of an unsworn statement from the dock when weighing it.

The risk of self-incrimination and the reduced weight of Rule 84bis statements, combined with no apparent gains for the defence, were likely to make this avenue an unattractive option for the accused.⁷⁸ Although many ICTY accused have refrained from making such statements and chose either to remain silent or to testify, a significant number of others have elected to make a statement under Rule 84bis.⁷⁹ This may be explained by the fact that such a statement uniquely enables the accused to inform the court about his or her personal biography and attitude to the charges in the context of the version of facts that he or she deems accurate.⁸⁰ The inflexible setup of questioning upon testimony leaves little room

⁷² Prlić *et al.* Rule 84 bis supplement appeal decision (n 67), paras 14, 17, and 19.

⁷³ Transcript, *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, TC I, ICTY, 8 September 2008, at 21.

⁷⁴ *Blagojević and Jokić* oral request decision (n 55), at 7 ('There are no guidelines given for the length of such narrative statement, although the Trial Chamber may limit the length if your statement exceeds a reasonable length. ... [I]f necessary to stop you for your protection or for the protection of others at a certain point or in relation to certain topic, the Trial Chamber can do so.');

Kvočka et al. transcript, 26 March 2001 (n 55), at 9451 ('the statement has as its basic framework and subject the indictment itself, so it cannot step outside the frameworks of the indictment.').

⁷⁵ See *infra* 4.1.

⁷⁶ See e.g. *supra* n 65.

⁷⁷ *Limaj et al.* trial judgement (n 61), para. 635 ('Haradin Bala elected not to give sworn evidence. That is his legal right and no finding adverse to him may be made because of this.').

⁷⁸ Boas, 'Creating Laws of Evidence' (n 8), at 85-6.

⁷⁹ Including but not limited to Haradin Bala, Vlastimir Đorđević; Milan Gvero, Enver Hadžihasanović; Astrit Haraqija (contempt); Baton Haxhiu (contempt); Fatmir Limaj; Milan Martić; Slobodan Milošević; Dragoljub Ojdanić, Momčilo Perišić, Jadranko Prlić, Miroslav Radić; Vojislav Šešelj; Veselin Šlišančanin; Zoran Žigić; and Radovan Karadžić.

⁸⁰ E.g. Transcript, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, TC II, ICTY, 16 November 2004, at 384 *et seq.*; Transcript, *Karadžić*, 16 October 2012 (n 69).

for the accused to develop such a personal narrative. However, the option of making a Rule 84*bis* statement under a solemn declaration, which can be inferred from the Rule, has been exceptional in practice. This is unsurprising given the limited significance of the oath alone in the determination of the probative value of the statement—as the oath still does not preclude the accused from lying—as well as the related prospect of follow-up questioning about the content of the sworn statement.⁸¹

The SCSL defendants are formally not authorized by the Rules to deliver a statement in person, although this possibility is implied for self-represented accused. In the *RUF* case, the Trial Chamber did not object in principle to the represented accused making an opening statement in person.⁸² But the defence would be deemed to have used its right to an opening statement and be prevented from having a ‘second bite’ by way of an opening statement by counsel at the beginning of the defence case.⁸³ Nevertheless, the statement made by the accused in person under Rule 84 was considered as falling short of a proper opening statement, and the defence counsel was allowed to make such statement at the start of the defence case.⁸⁴ By contrast, the *Taylor* Chamber adopted a more rigid approach and denied the motion to allow accused to make an ‘unsworn statement from the dock’ after the prosecution’s opening address as being inconsistent with Rule 84.⁸⁵ The Chamber clarified that the accused would have a chance to address the Court at a later stage, ‘either by giving evidence under oath or through the submissions made in the Defence opening statement or by proper arguments on issues pursuant to the Rules’.⁸⁶ It thus confined the avenues available to the accused for making submissions to the court to those specifically provided for in the Rules.

Arguably, despite the absence of Rule 84*bis* in the ICTR and SCSL RPE, personal statements by the accused may be allowed with reference to Rule 54 (a power of the Court to issue any orders as necessary for the conduct of trial), should this be deemed in the interests of justice. The defence in *RUF* moved the Chamber to make use of this power thus, but the request was declined for the lack of compelling arguments.⁸⁷ The likely reasons for that are

⁸¹ Transcript, *Prosecutor v. Prlić et al.*, Case No. It-04-74-T, TC III, ICTY, 4 May 2009, at 39450 (accused Praljak is sworn in and delivers a Rule 84*bis* statement); *Praljak* opening statements decision (n 55), at 9 (the Chamber noting that it ‘has identified no precedent in the tribunal jurisprudence where an accused has given an opening statement under oath under Rule 84 *bis* of the Rules’) and 10 (‘the value of taking an oath is low’). See also *Haraqija and Morina* transcript, 8 September 2008 (n 73), at 21-2 and 26 *et seq.* (the accused delivering an unsworn statement after the Chamber held he would be cross-examined if he chose to make a sworn statement).

⁸² Transcript, *Prosecutor v. Sesay et al.*, 5 July 2004 (n 46), at 14, 17, 56, and 67.

⁸³ Gbao – Decision on Application to Withdraw Counsel, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, TC I, SCSL, 6 July 2004, paras 1-6.

⁸⁴ Transcript, *Prosecutor v. Sesay et al.*, 5 July 2004 (n 46), at 67; in the same case, see Transcript, 6 July 2004, at 3 and 17; Transcript, 20 March 2007, at 79; and Transcript, 3 May 2007, at 3-4.

⁸⁵ *Taylor* unsworn statement trial decision (n 45), at 4. On motives for wanting to deliver such a statement, see Interview with a member of the Defence team, SCSL-AD-05 (n 39), at 14 (‘before the start of the prosecution case, ...[the defendant] made a request to make no opening statement but an unsworn statement, which has been done in some other jurisdictions, and that was denied in our instance. That really came from [the] feeling that ... the Prosecution case was going to last a long time and, as it turned out, it lasted like a year-and-a-half, and during that whole year, all you hear is ... all of the terrible things he has been connected to in some form or fashion according to these prosecution witnesses. Over time, especially over such a long period of time like that and in a case that is so highly publicized, that in and of itself tends to build up a lot of prejudice against your client. What we hoped to do by ... an unsworn statement before the beginning of the prosecution case, was to let him, at that time, give an overview of what he intends to say when his own time comes. So people can have that in the back of their minds from the beginning and do not then automatically just fall in line with everything that the Prosecution and the prosecution witnesses are saying. So you are not found guilty by the time the prosecution case closes and yet you have not had ever a chance to whisper a word in your own defence, especially because their contact with the media from detention is quite limited.’).

⁸⁶ Decision on Defence Application for Leave to Appeal the 29 May 2007 ‘Decision On Urgent And Public Defence Motion Requesting Leave For Charles Ghankay Taylor to Give an Un-Sworn Statement from the Dock’, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, TC II, SCSL, 16 July 2007, at 3.

⁸⁷ Transcript, *Prosecutor v. Sesay et al.*, 5 July 2004 (n 46), at 67 (lines 19-22).

the risk that the accused would seize the opportunity for making political or otherwise inapposite speeches and cause delays, next to the intrinsically limited probative value of 'unsworn statements from the dock'.⁸⁸

3.2.4 Length, content, and judicial control

The ICTY and ICTR RPE are silent on the appropriate content and length of the opening statements. But the Trial Chamber's powers to impose such limits as are necessary for the conduct of trial could be inferred, among others, from Rule 54.⁸⁹ The determination of whether the contents and length of the statements are reasonable is related to their functions. One of them, as noted, is to acquaint the judges with a preview of the party's case and assist the court in comprehending the evidence. Secondly, the prosecution opening statements may serve as a further notice to the accused of the charges and, exceptionally, it can be relied upon to cure defects in the indictment.⁹⁰

Consequently, the contents of an opening statement must at all times remain relevant to the charges and the evidence in the case for them to be functional. The Chambers have generally been reluctant to interrupt an opening statement *proprio motu* or sustain objections on it, but submissions deemed irrelevant may be cut short.⁹¹ With respect to Rule 84*bis* statements, the Trial Chamber exercises a supervisory role. This implies, among others, a power to moderate the contents and length of the Rule 84*bis* personal statements. But at the same time, it should be considered that such statements are delivered by the accused in a personal capacity and do not need to relate to the evidence in the case in the same strict sense as the defence's opening statements.

Besides the judicial control exercised interactively in the course of the hearing, compliance with the requirements of relevance and reasonable length is enforced through

⁸⁸ For some examples of politicized statements, see *infra* note 93.

⁸⁹ Rule 54 ICTY, ICTR, and SCSL RPE ('At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders ... as may be necessary ... for the preparation or conduct of the trial.').

⁹⁰ Decision on Defence Motion to Exclude Prosecution Witnesses BWM, BWN, BXB, BXC, BXD and BXL, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, TC III, ICTR, 24 June 2008, para. 5; Judgement, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16, AC, ICTY, 23 October 2001, para. 114 (a defective indictment can in some instances be cured if the prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her); Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, AC, ICTY, 28 February 2005, at 46; Judgement, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34, AC, ICTY, 3 May 2006, para. 26; Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, AC, ICTY, 17 December 2004, para. 169. See also Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, AC, 18 September 2006, para. 35. See also Interview with the member of the ICTR OTP, ICTR-AP-05, Arusha, 21 May 2008, at 7-8 ('In some instances, an opening statement can be one of the materials that can be relied upon as a post-indictment communication of information in the context of conveying information to the accused. ... [T]here are instances where the indictment was general, or suffered from some generalities or defects. An opening statement can be one of the avenues where some defects in the indictment are addressed. The accused is provided more information on what to expect.'). Cf. Interview with Alex Obote-Odora, Chief of ALAD, OTP ICTR, ICTR-PP-06, Arusha, 21 May 2008, at 12 (disagreeing that an opening statement may be used to provide notice).

⁹¹ Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, TC II, ICTY, 3 July 2000, para. 10 ('there is no justification for the defence submission that the material in the opening statement cannot be limited. The opening statements ... are intended only to assist the Trial Chamber in understanding the evidence which is to be placed before it. Such assistance can only be provided if the material in the opening statement is limited to the issues raised by the charges against the accused and any issues which the accused may legitimately raise in their defence. Should the defence seek to introduce in their opening statement material which has no relevance to those issues, the Trial Chamber will exercise its powers to exclude it at that time.'). See also Transcript, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, TC, ICTY, 26 March 2001, at 9451-52; Transcript, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, TC, ICTY, 7 July 2006, at 345-48.

scheduling orders, allocating a certain amount of time to each party.⁹² Scheduling ensures that parties focus on the most relevant and strong aspects of their case and are an effective tool to enhance efficiency. Even so, the ICTY practice has seen statements exceeding one full trial day and occasionally crossed into the domain of political arguments, which was more characteristic for statements delivered by (self-represented) defendants themselves.⁹³

By contrast, Rule 84 in the first (7 March 2003) version of the SCSL Rules confined opening statements to the evidence the party intends to present as part of its case and made an explicit stipulation to the effect that their length may be limited in the interests of justice. In practice, the SCSL Trial Chambers strived to exercise stringent control over the scope of opening statements, as can be seen from their interventions in the process of delivery of such statements by the parties. In *RUF*, the Chamber clarified that the parties may refer to particular pieces of evidence, but an opening statement is merely a ‘declaration of intentions’ that may not be used for discussing and analyzing evidence in detail.⁹⁴ In *CDF*, the Chamber held that the opening statements may not aim to make an overt argument, unlike closing arguments.⁹⁵

The *RUF* case also offers examples of statements containing inappropriate content and intervention by the bench in order to curb such attempts. The justices emphasized that the Rule 84 procedure may not be hijacked to make political speeches and repeatedly enforced this rule by interrupting the speaker.⁹⁶ As to the general tone of the opening statements, the SCSL Chambers accepted the possibility of using emotive language since their content is not strictly evidence. Trial Chamber I sustained an objection by the defence to the use by their opponent of denigrating metaphors and extravagant expressions (‘dogs of war’, ‘hounds from hell’ etc.) and reminded the prosecution of the requirement of Rule 84.⁹⁷ The incident during the prosecution statement in *RUF* is notorious and, quite understandably, serves as a guidepost for both defence and prosecution counsel and as a classic example of bad practice.⁹⁸

⁹² E.g. Scheduling Order Regarding Opening Statements and Presentation of Evidence, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-PT, TC I, ICTY, 13 December 2006, at 3 (allocating two hours to Prosecution and one hour to the Accused, unless otherwise decided, for their opening statements).

⁹³ Respectively, Transcript, *Prosecutor v. S. Milošević*, Case No. IT-02-54, TC I, ICTY, 31 August 2004 and 1 September 2004 (2 court days); Šešelj unsworn statement transcript (n 69), at 1857 *et seq.* (plainly arguing the illegitimacy of the ICTY and its anti-Serb orientation).

⁹⁴ Transcript, *Prosecutor v. Sesay et al.*, 5 July 2004 (n 46), at 6 and 8; Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, TC I, 2 May 2007, at 31.

⁹⁵ Transcript, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, TC I, SCSL, 19 January 2006, at 28-9 (‘To argue about the validity and trustworthiness or otherwise of a witness for the Prosecution is not part of what is normally contained in an opening statement, as such. It is to be confined to the evidence you intend to lead. If you intend to lead evidence to show this witness should not to be trusted, fine. But now you are arguing this witness is not to be believed and so on, which I suggest to you is quite proper for you to do and fully in your closing arguments, not in opening arguments.’: Judge Boutet).

⁹⁶ Transcript, *Prosecutor v. Sesay et al.*, 5 July 2004 (n 46), at 5 (‘the occasion to make opening statements is not an occasion to make political declarations’ – Presiding Justice Mutanga Itoe), 14 (‘[the Prosecution] will only be permitted to make an opening statement relating to the evidence, not to any political ramifications of this trial’ – Justice Thompson) and 69. See *ibid.*, at 69-70 and, in the same case, Transcript, 6 July 2004, at 7-10 (judges interrupting the accused Sesay’s and Gbao’s opening statements going to the question of legality of the SCSL and its political nature). For an analysis of these courtroom interactions, see T. Kelsall, ‘Politics, Anti-Politics, International Justice: Language and Power in the Special Court for Sierra Leone’, (2006) 32 *Review of Legal Studies* 587, at 594 and 596.

⁹⁷ Transcript, *Prosecutor v. Sesay et al.*, 5 July 2004 (n 46), at 19-20. But cf. Šešelj unsworn statement transcript (n 69), at 1860, 1864-5 and 1917.

⁹⁸ See e.g. Interview with a SCSL Defence Counsel, SCSL-AD-06 (n 39), at 31 (‘In England it is incredibly rude to object to opening speeches, it is really not done, but it is done on the basis of the fact that it is recitation of evidence, and not any law. ... It [the *RUF* statement of the OTP] has been used sometimes in law schools as an example of how not to do an opening statement because it was so full of emotion. That is not the point of an opening statement.’); Interview with an SCSL Defence Counsel, SCSL-AD-02 (n 41), at 32 (‘I have found [this] disgusting, very disgusting. ... [H]is language was so sensational, it was so emotional. He painted the accused persons who were sitting there like the very sons of Satan. Like the world has never seen such evil men as these

Unlike a jury, as the Chamber held, the bench composed of professional judges is able to separate facts and evidence from ‘rhetoric, oratory, embellishments or flourish’, while having no real means to restrict parties.⁹⁹ By comparison, Trial Chamber II dismissed as serving no useful purpose attempts to advance, as a part of opening statement, arguments about general concepts of justice.¹⁰⁰

3.3 ICC

3.3.1 Regulation

The statutory regulation of trial phase in the ICC is ‘constructively ambiguous’: the shaping of trial process is left to the judges of the Trial Chamber, in coordination with the parties.¹⁰¹ In contrast with closing statements, which are provided for by Rule 141(2), neither the ICC Statute nor the Rules contain provisions envisaging opening statements of the parties as a part of the ICC trial procedure. However, the third sentence of Rule 89(1) provides for the duty of the Chamber to specify the proceedings and manner in which victim participation is appropriate and mentions opening statements. Furthermore, Regulation 54(a) stipulates that at a status conference before the Trial Chamber the Chamber may issue an order in the interests of justice for the purposes of proceedings on, *inter alia*, ‘[t]he length and content of legal arguments and the opening and closing statements’.

These provisions indicate that opening statements were foreseen as an integral element of the trial process. The Trial Chambers have interpreted the Statute to the same effect: all trials featured this procedural phase.¹⁰² Opening statements are delivered after the close of the

people. You do not need that, you know. Lay your facts as bare as possible’); Interview with a member of the SCSL OTP, SCSL-AP-01, Freetown, 22 October 2009, at 7 (‘we have had those criticisms before. But even if you look at the opening statement of Jackson in Nuremberg, you can see it was an emotive opening statement. ... Some lawyers are very emotive, using adjectives which are strong language, which is frowned upon in another jurisdiction especially, for example, in the UK. They are ‘dogs of war’ type of thing, it may not be accepted but that does not mean it cannot be used. ... I think there has come a time where rules should be put in place outlining what an opening statement should entail. ... [W]hat is the limit the Prosecutor or Defence counsel can go and where you draw the line, that is not quite clear. But then clearly for ethical points you should be focused on the presentation of the evidence, that is what an opening means – highlight the areas of evidence you want, it is not meant to be a time where the intent is to evoke emotions.’).

⁹⁹ *Ibid.*, at 32-36. See particularly at 32 (Justice Thompson: ‘some parts of the opening statement may well be using language of an emotive nature... But wouldn’t that be more relevant in the context of a jury trial where jurors may well be carried away by the high emotive tone of an opening statement where perhaps sometimes it is difficult to know whether jurors may well determine guilt or innocence on the basis of the opening statement of the Prosecution, plus the evidence and vice versa. The objections here would seem to me to fade into insignificance considering that this panel comprises judges who, by their training and education, are expected not to be carried away by emotionalism and hyperbolic statements...’) and 33 (‘this Chamber may not even have a way of controlling the content of opening statements, whether the Prosecution and whether the Defence, except to say, that every opening statement must conform to Rule 84, but in terms of the language, how – the level of rhetoric, the kind of oratory that is adopted, I am not sure whether we can inject some kind of judicial control over that. Of course, if language is used here which is not in conformity with the fine traditions of our profession, then I think we can intervene, but at this stage wouldn’t really intervention be premature?’) Interestingly, immediately thereafter the bench precluded the prosecution from citing rather innocent poetry (*ibid.*, at 37-39).

¹⁰⁰ Transcript, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, TC I, SCSL, 19 January 2006, at 31-2.

¹⁰¹ Art. 64(8)(b) ICC Statute; C. Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’, (2003) 1 *JICJ* 603, at 613. In detail, see chapters 7 and 8.

¹⁰² E.g. Decision on opening and closing statements, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1346, TC I, ICC, 22 May 2008 (‘Lubanga opening and closing statements trial decision’); Annex, Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-1665, TC II, ICC, 20 November 2009 (‘Katanga and Ngudjolo trial directions’), para. 1; Decision on the Conduct of Trial Proceedings (General Directions), *Prosecutor v. Ruto and Sang, Situation in Kenya*, ICC-01/09-01/11-847, TC V(a), ICC, 9 August 2013 (‘Ruto and Sang trial directions’), para. 4

preliminary stage of ‘commencement of trial’ reserved for reading the confirmed charges, ensuring that the accused understands them, and providing an opportunity to admit guilt in accordance with Article 65 or to plead not guilty.¹⁰³

3.3.2 Order of opening statements

The ICC legal framework provides no guidance regarding the order of opening statements. In the first trial in *Lubanga*, the order was established as follows: the prosecution, legal representatives of the victims, and the defence.¹⁰⁴ Trial Chamber I allowed the defence to elect the timing for its statement and held that, subject to the Chamber’s leave, the defence may address the court either at the beginning of the case or prior to the presentation of its evidence.¹⁰⁵ The same order was replicated in all the following trials.¹⁰⁶ However, in *Ruto and Sang*, Trial Chamber V(a) allowed the prosecution, in deviation from a regular procedure and over the defence objection that there is no right to a second opening, an extraordinary opportunity to reply to opening statement of Ruto’s defence counsel.¹⁰⁷ Such a reply could not address evidence and was limited to the issues raised by the statement, which could amount to mischaracterization of the prosecution case.¹⁰⁸

3.3.3 Statement by the accused

The ICC trial procedure does not provide for a personal (opening) statement of the accused such as that envisaged in ICTY Rule 84*bis*, but under the Statute the accused has a general right to make an unsworn written or oral statements in his or her defence at any appropriate moment, including the opening stage.¹⁰⁹ This right has been characterized as a ‘genuine innovation’ of the ICC’s rights regime, since no parallel to it can be found in international human rights instruments.¹¹⁰ On this issue, the ICC is situated closer to the inquisitorial model than the *ad hoc* tribunals although, as noted, the equivalent procedure at the ICTY was occasionally given a broader effect and applied throughout the proceedings.¹¹¹ The ICC

¹⁰³ Art. 64(8)(a) ICC Statute.

¹⁰⁴ Transcript (status conference), *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-104-ENG, TC I, ICC, 16 January 2009, at 58-9.

¹⁰⁵ *Lubanga* opening and closing statements trial decision (n 102), para. 16. Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-107-ENG, TC I, ICC, 26 January 2009 (the OTP’s and victims’ legal representatives’ opening statements); ICC-01/04-01/06-T-109-ENG, 27 January 2009 (defence opening statement).

¹⁰⁶ *Katanga and Ngudjolo* trial directions (n 102), para. 1 and Transcript, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-80-FRA, TC II, ICC, 24 November 2009; *Bemba* trial directions (n 102), at 9 *et seq.* (OTP), 35 *et seq.* (legal representatives), 50 *et seq.* (defence); Joint Submissions by the Office of the Prosecutor and the Defence regarding the Procedures to be adopted for the Presentation of Evidence, *Prosecutor v. Banda and Jerbo, Situation in Darfur*, ICC-02/05-03/09-166, OTP and Defence, ICC, 27 June 2011 (‘*Banda and Jerbo* joint submissions’), para. 9; *Ruto and Sang* trial directions (n 102), para. 4 (‘The opening statements from each party will be presented in the following order: (1) Prosecution, (2) Legal Representative, (3) Ruto Defence, (4) Sang Defence.’).

¹⁰⁷ Transcript, *Prosecutor v. Ruto and Sang, Situation in Kenya*, ICC-01/09-01/11-T-28-ENG, TC V(a), ICC, 11 September 2013, at 36-41, especially at 40 (Judge Eboe-Osui referring in support to Regulation 24 on written submissions and stating: ‘It is accepted and the tradition of adversarial litigation that the principle is: A party makes submissions, a responding party responds, and the first party that spoke may exercise a right of reply on any new matters arising from what the responding party had said.’).

¹⁰⁸ *Ibid.* (‘it will be fair to correct any mischaracterisation of the case in terms of what the case is about and what the case is not about. It also assists the Defence, in my view, in knowing the parameters or the contours of the case.’).

¹⁰⁹ Art. 67(1)(h) ICC Statute. Cf. Art. 21 ICTY Statute and Art. 20 ICTR Statute providing no such right.

¹¹⁰ W.A. Schabas, ‘Article 67’, in Triffterer (ed.), *Commentary on the Rome Statute* 1268.

¹¹¹ See n 65.

approach reflects a more liberal approach to giving the accused voice in the courtroom, harking back to the continental tradition.

From early on, the *Lubanga* Trial Chamber recognized that no restrictions apply as to the timing or form of the unsworn statements of the accused; furthermore, the accused shall not be compelled to make them and has a right to remain silent.¹¹² Furthermore, Trial Chamber I affirmed that making such a statement is a privilege of the accused that may not be compelled to do so, in keeping with the right against self-incrimination.¹¹³ With the Chamber's leave, the accused may make an opening statement as early as 'at the beginning of the case' or 'prior to presenting his evidence'.¹¹⁴ These directions have generally been adhered to in subsequent cases. The Chambers held that, whenever the accused wishes to make an unsworn statement, he or she shall inform the Chamber for the determination of the timing and modalities for doing so.¹¹⁵ In the ICC trial practice, some accused have exercised their right under Article 67(1)(h) of the ICC Statute. For example, in *Lubanga* and *Katanga and Ngudjolo* trials, unsworn statements were delivered by way of a last word, while in *Ruto and Sang* one defendant delivered a short personal statement as part of the defence statement.¹¹⁶ Finally, the ICC Statute and Rules do not indicate whether such statements have any probative value, but the Chambers may decide to treat them as evidence.¹¹⁷

3.3.4 Statements by victims

According to ICC Rule 89(1), the Chamber shall specify, in relation to the persons whose applications for participation as victims under Rule 89(2) are granted, the proceedings and manner in which participation is considered appropriate, 'which may include making opening and closing statements'. Furthermore, Rule 141(2) only establishes the right of the parties to make closing statements and mentions no such statements by the victims.¹¹⁸ This ambiguity (or drafting omission) was resolved in practice by allowing the victims' legal representatives to make opening (and closing) statements both at the confirmation and trial stages. The *Lubanga* Pre-Trial Chamber held that 'under Rule 89 (1), it is possible for victims to make opening and closing statements at hearings to which they are invited'.¹¹⁹ Furthermore, in a

¹¹² *Lubanga* opening and closing statements trial decision (n 102), paras 14-16 ('It is for the accused to decide whether he or she wishes to make an unsworn written or oral statement during the trial (Article 67 (1) (h) of the Statute) or a closing statement after the prosecution (Rule 141 (2) of the Rules)').

¹¹³ *Lubanga* opening and closing statements trial decision (n 102), paras. 15-16: 'he or she cannot be compelled to testify or to confess his or her guilt, and he or she is entitled to remain silent during the trial without that stance having any impact on the Court's determination of his or her guilt or innocence. ... They are entitled to sit silently, leaving it the prosecution to prove its case.'

¹¹⁴ *Ibid.*, para. 16.

¹¹⁵ *Katanga and Ngudjolo* trial directions (n 102), para. 12 (nothing in its directions is intended to limit the right of the accused to make an unsworn oral or written statement in his or her defence); Decision on Directions for the Conduct of the Proceedings, *Prosecutor v. Bemba, Situation in the CAR*, ICC-01/05-01/08-1023, TC III, ICC, 19 November 2010, para. 21; see also a joint submission by the parties to the same effect in the fourth trial: Joint Submissions by the Office of the Prosecutor and the Defence regarding the Procedures to be adopted for the Presentation of Evidence, *Prosecutor v. Banda and Jerbo, Situation in Darfur*, ICC-02/05-03/09-166, OTP and Defence, ICC, 27 June 2011, para. 10. Cf. *Ruto and Sang* trial directions (n 102), para. 4 (mentioning statements of the accused under the rubric 'Opening Statements').

¹¹⁶ See Transcript, *Prosecutor v. Ruto and Sang*, 11 September 2013 (n 107), at 29-34. On closing statements, see Chapter 11.

¹¹⁷ Art. 69(4) ICC Statute. Likewise, Turone, 'The Denial of the Accused's Right to Make Unsworn Statements in *Delalić*' (n 7), at 455-6.

¹¹⁸ The point made by the Defence for *Lubanga*: Decision on Victims' Participation, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008 ('*Lubanga* victim participation trial decision'), para. 54.

¹¹⁹ Decision on the arrangements for participation of victims a/0001/06, a/0002/06 and a/0003/06 at the confirmation hearing, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-462, PTC I, ICC, 22 September 2006, at 6 and 8.

comprehensive decision on the victim participation at trial, Trial Chamber I adopted the view that ‘Rule 89(1) of the Rules is clear in its effect when it provides that victims’ participation may include opening and closing statements, particularly given this is not inconsistent with any other part of the Rome Statute framework’.¹²⁰ The same approach was adopted in the *Katanga and Ngudjolo Chui* proceedings, whereby the legal representatives of the victims were allowed to make opening statements at the beginning of the hearing on the merits.¹²¹ In subsequent trials, Rule 89(1) was similarly interpreted as expressly authorizing victims to make opening statements.¹²²

3.3.5 Content and length of opening statements; judicial control

The ICC legal framework sets no limits regarding the contents and length of the statements, but only a power of the Trial Chamber to rule thereon at a status conference.¹²³ The rationale for the opening statements as formulated in *Lubanga* (‘in order to explain their respective cases’) provides limited guidance in this regard.¹²⁴ After confirming initially that it may issue further orders,¹²⁵ the *Lubanga* Trial Chamber ruled orally that it agreed to the length of the statements submitted by the participants.¹²⁶ Additional notice was given to the victims’ legal representatives that the length of their speeches would be controlled closely.¹²⁷ The length of the opening statements in *Katanga and Ngudjolo* was decided upon at a status conference held prior to the commencement of the trial – the Chamber accepted the estimates by the parties and the participants.¹²⁸ Trial Chamber III set the length of the opening statements in *Bemba* at a status conference held in the preparation for the trial.¹²⁹ The trial directions in *Ruto and Sang* established the maximum length of opening statements of the parties and participants and left the allocation of the time between the two teams to the defence.¹³⁰ In terms of the judicial control over the content of the statement, it is worthwhile that in the *Lubanga* trial, the Presiding Judge of Trial Chamber I pointed to the legal representatives *ex post facto* that certain ‘devices of oratory’ had not been fully appropriate, and emphasized the

¹²⁰ *Lubanga* victim participation trial decision (n 118), para. 117.

¹²¹ *Katanga and Ngudjolo* trial directions (n 102), para. 1.

¹²² Decision on the Modalities of Victim Participation at Trial, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-1788-tENG, TC II, ICC, 22 January 2010, para. 68; Transcript, *Prosecutor v. Bemba, Situation in the CAR*, ICC-01/05-01/08-T-30, TC III, ICC, 21 October 2010, at 6; Decision on victims’ representation and participation, *Prosecutor v. Ruto and Sang, Situation in Kenya*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, paras 71 and 73 (authorizing a common legal representative of the victims to make an opening and closing statement at trial and victims who participate personally to express views and concerns in person during such statements).

¹²³ Regulation 54(a) Regulations of the Court.

¹²⁴ *Lubanga* opening and closing statements trial decision (n 102), para. 1.

¹²⁵ *Lubanga* opening and closing statements trial decision (n 102), para. 17.

¹²⁶ Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, 16 January 2009 (n 104), at 58. The length of the opening statements agreed earlier was one and a half hours for the OTP; 3 hours for the defence; and 15-20 min. per each legal representative: Transcript (status conference), *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-101-ENG, TC I, ICC, 12 January 2009, at 9-10.

¹²⁷ Transcript, *Prosecutor v. Lubanga*, 16 January 2009 (n 104), at 61.

¹²⁸ See *Katanga and Ngudjolo* trial directions (n 102), para. 1; Transcript, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-T-76-Red-ENG, TC II, ICC, 3 November 2009, at 26 (granting 1 hour to the OTP; 40 min. to legal representatives (to be divided equally between themselves); 30 min. to Katanga’s defence team; and 45 min. to the defence team of Ngudjolo Chui).

¹²⁹ Transcript, *Prosecutor v. Bemba*, 21 October 2010 (n 122), at 5-6 (granting the time requested: a maximum of 90 min. the OTP and the defence each, as well as one hour and fifteen minutes to the legal representatives and the OPCV).

¹³⁰ *Ruto and Sang* trial directions (n 102), para. 4.

need for the interventions to be focused on the evidence and charges.¹³¹ The same considerations certainly apply to the parties.

While the *ad hoc* tribunals normally did not require the parties to disclose their opening statements beforehand,¹³² this issue was litigated in *Lubanga*. The Trial Chamber invited the parties and the victims' representatives to make submissions on whether and when these should be disclosed.¹³³ The ICC Trial Chamber was split on the matter. The majority ruled in support of the requirement for disclosure on the ground that '[i]n the exercise of the Chamber's case-management powers under Regulation 54(a) of the Regulations of the Court, this is likely to provide a highly useful tool for opening and closing statements'.¹³⁴ Without specifying how that tool would function, the Chamber ordered the parties who intended to make an opening statement to provide itself, the other party and the participants with an outline seven days in advance.¹³⁵

In his dissent, Judge Blattmann advanced three reasons why such a requirement should not be installed. First, the advance disclosure is unnecessary in order for the Chamber to manage the case: this can effectively be done through scheduling and by indicating subjects to be covered, as was the practice before the *ad hoc* tribunals.¹³⁶ Secondly, disclosure imposes an additional burden on the parties and participants. It limits the rights of the accused unnecessarily as it narrows the 'possibility [of the defence] to react upon the intended case-line of the prosecution' and 'limit[s] the freedom of defence to form or adjust their intended line of defence'.¹³⁷ Thirdly, this requirements implies an intention to regulate the statements of the parties in court, which takes away 'an important element of spontaneity' and thus 'undermine[s] the goal of the trial to search for truth'.¹³⁸ These arguments did not convince the other judges but reflect the contentious character of the requirement in issue.

Finally, the *Lubanga* Chamber authorized the use of visual aids by the parties and participants during opening statements just as during the presentation of testimony and closing statements, insofar as it enhances the presentation of the previously disclosed evidence.¹³⁹ Similarly in the *Ruto and Sang* trial, the parties were ordered to disclose the copies of the materials (audiovisual aids) they intended to use during opening statements.¹⁴⁰

¹³¹ Transcript, *Prosecutor v. Lubanga*, 26 January 2009 (n 105), at 70-1 ('I know it was to a very large extent something of a flourish of oratory, but ... we've got to be very careful about in this case in that the ambit of participation by the victims in this case must be focussed, must be really directed at the evidence that we're going to be dealing with in this trial and, in particular, the charges which this accused faces. So it was not a significant or a serious transgression, and I'm only using this as an example of territory which we really shouldn't visit. ... [C]an we please not in future have counsel directly addressing their remarks at the accused. Indeed, remarks should not be addressed at anyone apart from the Bench. I'm afraid it has the potential for raising the temperature in the case wholly artificially and in a very bad way.')

¹³² However, in the *Dokmanović* case, TC II ordered both parties to file their opening statements alongside their pre-trial briefs: Boas, 'Creating Laws of Evidence' (n 8), at 45.

¹³³ Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1083, TC I, ICC, 13 December 2007, para. 1(D).

¹³⁴ *Lubanga* opening and closing statements trial decision (n 102), para. 17.

¹³⁵ *Ibid.*, paras 17 and 19. An outline of the prosecution closing statement, if any, would also have to be disclosed seven days ahead, whereas the deadline for the defence were to be set at a later stage.

¹³⁶ Separate and Dissenting Opinion of Judge René Blattmann, *ibid.*, paras 2 and 6.

¹³⁷ *Ibid.*, paras 2, 4 and 8.

¹³⁸ *Ibid.*, paras. 2 and 5.

¹³⁹ Decision on the use of visual aids, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1528, TC I, 2 December 2008, para. 20.

¹⁴⁰ *Lubanga* opening and closing statements trial decision (n 102), para. 19(a); *Ruto and Sang* trial directions (n 102), para. 4.

3.4 SPSC

The Transitional Rules of Criminal Procedure did not foresee the possibility for either party to make an opening statement early in the trial. The substantive part of trial commenced with providing the accused with the option of admitting guilt, along with making any other statement regarding the allegations.¹⁴¹ Where the accused decided to make a statement, subject to notice of the right to silence,¹⁴² he could be questioned on it by the panel and, if invited to do so, by the Public Prosecutor and the legal representative of the accused.¹⁴³ Section 30.7 of the TRCP authorized the accused ‘to address the Court regarding any issue raised during the hearing, provided that such issue is relevant to the proceedings’. Section 33.1 gave the statements of the accused the pride of place in the three-step sequence of the presentation of evidence: if given, they were to precede the presentation of the prosecution and defence evidence. The statement of the accused was considered evidence proper and could be accorded weight, given the flexible regime for admission and evaluation.¹⁴⁴

The actual trial practice of the SPSC often deviated from the ‘law in the books’ (i.e. the TRCP). The judges allowed parties leeway to adopt pleading practices they were most comfortable with. Therefore, opening statements were regularly made in the SPSC trials despite the legal gap on this matter. In the *Lolotoe* case, the prosecution made its statement at the beginning of the trial and prior to the statement by the accused under Section 30.4.¹⁴⁵ The defence eventually made no such statement due to plea of guilty, but such a possibility was not precluded. Similarly, in *Jose Cardoso Ferreira*, the defence delivered an opening statement at the beginning of its case.¹⁴⁶ However, these adjustments in the trial structure as envisaged in the TRCP did not go as far as to modify the evidentiary regime. In *Los Palos*, the defence’s request to allow the accused to deliver a statement under oath was denied on formal grounds of inconsistency with the TRCP.¹⁴⁷

Finally, the TRCP did not endow victims participating in the proceedings under Section 12 with the right to make an opening statement. Nor did it rule out this possibility: Section 12.5 allowed participating victims to be heard at stages other than review hearings and conditional release hearings as set out in Section 12.3.

3.5 ECCC

The ECCC trial scheme, as amended on 5 September 2008 (Rev.2), entitles the Co-Prosecutors to make a brief opening statement of the charges against the accused and the accused or his/her lawyers to respond briefly before any Accused is called for questioning.¹⁴⁸ Before the ECCC, the round of opening statements takes place not at the very start of the trial (i.e. the initial hearing) but at the substantive hearing, after a series of preliminary steps, including the official opening by the President, the reading of the charges and, if ordered,

¹⁴¹ Section 30.4 TRCP.

¹⁴² Sections 6.3(h) and 30.4 TRCP.

¹⁴³ Section 30.5 TRCP.

¹⁴⁴ Section 34.1 TRCP.

¹⁴⁵ Judgement, *Prosecutor v. João Franca da Silva*, Case No. 04a/2001, SPSC, Dili District Court, 5 December 2002 (‘*Lolotoe* trial judgment’), paras 32 and 38 and the summary of unofficial transcripts in JSMP, ‘The Lolotoe Case: A Small Step Forward’, Report, Dili, East Timor, July 2004, at 9. See also Judgement, *Prosecutor v. Joni Marques et al.*, Case No. 09/2000, SPSC, Dili District Court, 11 December 2001 (‘*Los Palos* trial judgment’), para. 13.

¹⁴⁶ Judgement, *Prosecutor v. Jose Cardoso Ferreira*, Case No. 04c/2001, SPSC, Dili District Court, 5 April 2003, paras 33 and 49. This trial involved litigation on the issue of whether the defence may make an opening after the close of the prosecution case, which was allowed by the judges despite the lack of the relevant provision. See JSMP, Weekly Summary 17-21 March 2003.

¹⁴⁷ *Los Palos* trial judgment (n 145), para. 13 (at 7-8).

¹⁴⁸ Rule 89bis(2) ECCC IR.

factual analysis in the indictment.¹⁴⁹ In the *Duch* trial, these steps occupied one full trial day, so in the first trial in Case 002, only the charges (instead of the full factual analysis) were read out since the three accused had already been put on notice regarding incriminating facts.¹⁵⁰ Neither the Co-Prosecutors' statement nor the defence's response appears obligatory.¹⁵¹ The rule that the defence *responds* to the opening statement of charges means that this right depends on whether the Co-Prosecutors choose to make a statement, although a waiver in this respect is theoretical.

Only the Co-Prosecutors and the accused (or their lawyers) are entitled to making a statement. In *Duch* the accused was allowed to respond to the opening statement by the Co-Prosecutor in person. In his remarks, Duch acknowledged a variety of incriminating facts and responsibility.¹⁵² Rule 89bis(2) prescribes that the response may be made by the accused *or* his/her lawyers, but Duch's response was supplemented by the statements of both defence co-lawyers.¹⁵³ The Chamber denied the civil parties' the opportunity to respond to the statement of the Co-Prosecutors, on the ground that Rules 89bis(2) and the 2007 Cambodian Code of Criminal Procedure confer no such right.¹⁵⁴ In the first segment of trial in Case 002, the Chamber ruled to the same effect.¹⁵⁵

The *Duch* Trial Chamber enforced the brevity requirement of Rule 89bis(2) by allocating to the Co-Prosecutors and the co-lawyers for the accused two hours per party for their opening statements.¹⁵⁶ It held initially that it might interrupt the speaker on limited grounds and would not accept challenges to opening statements by any person or party, but this directive was applied flexibly during the trial.¹⁵⁷ The Trial Chamber declined the co-prosecutors' request to take the floor to react to the lawyers' responses given that the aim of

¹⁴⁹ Rules 80bis and 89bis(1) ECCC IR.

¹⁵⁰ Transcript (Trial Day 1), *Kaing Guek Eav*, Case No. 001/18-07-2007-ECCC/TC, TC, ECCC, 30 March 2009; Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, TC, ECCC, 18 October 2011 ('*Nuon Chea et al.* opening statements scheduling order'); Transcript of Trial Proceedings (Trial Day 1), *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, TC, 21 November 2011.

¹⁵¹ Transcript (Trial Day 1), *Kaing Guek Eav* (n 150), at 71 (the Presiding Judge asking the Co-Prosecutors if they wish to make a brief opening statement).

¹⁵² Transcript (Trial Day 2), *Kaing Guek Eav*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 31 March 2009, at 65-73, e.g. at 67 ('I would like to acknowledge my responsibility through legal means, legally. I mean, I would like to emphasize that I am responsible for the crimes committed at S-21, especially the tortures and execution of the people there.').

¹⁵³ *Ibid.*, at 73-83 (response by the national lawyer) and 84-92 (response by international lawyer). The TC declined the Co-Prosecutors' request to take the floor to react to the lawyers' responses, given that the aim of the opening stage is not to present evidence: *ibid.*, at 92.

¹⁵⁴ Decision on the Request of the Co-lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, *Kaing Guek Eav*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 27 March 2009, paras 6-11. The TC noted that Civil Parties do not hold rights identical to those enjoyed by the defence or the Co-Prosecutors and, given that their responsibility in relation to the charges against the Accused is limited to supporting the prosecution, are not supposed to play autonomous role at the stage of the opening statements. The request by the Civil Parties to the same effect made during the trial was denied: Transcript (Trial Day 2), *Kaing Guek Eav* (n 152), at 106.

¹⁵⁵ *Nuon Chea et al.* opening statements scheduling order (n 150), at 3 ('pursuant to Internal Rule 89bis, opening statements by the Lead Co-Lawyers or responses to the statements of other parties are not contemplated and will not be authorized by the Chamber.'). and, in the same case: Trial Chamber response to Lead Co-lawyers and Civil Party Lawyers' Request to make a brief Preliminary Remarks on behalf of Civil Parties, 15 November 2011, at 1 (denying, for want of legal basis, the request 'to make brief preliminary remarks on behalf of the consolidated group of Civil Parties to "express their views and concerns" which would otherwise, according to them, "not be fully reflected in the Co-Prosecutors' opening statement.').

¹⁵⁶ Direction Regarding Opening Statements dated 10 March 2009 and Direction on the Scheduling of the Trial, *Kaing Guek Eav*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 20 March 2009 ('*Duch* trial direction'), para. 4.

¹⁵⁷ *Ibid.* The TC allowed interruption following the objection by the defence to the production of video footage during the Co-Prosecutors' opening. See Transcript (Trial Day 2), *Kaing Guek Eav* (n 154), at 15-23.

the opening stage is not to present evidence.¹⁵⁸ By contrast, in the first trial in Case 002, the Co-Prosecutors were allocated a total of two days to deliver their opening statement.¹⁵⁹ Despite the division of the proceedings into a series of mini-trials, their statement covered all charges and factual allegations against the accused in the indictment because the first trial was supposed to lay a general foundation for all possible later trials in the case.¹⁶⁰ Thereafter, each accused and his lawyers had an opportunity to respond by making a statement up to one half-day per defence team.¹⁶¹ Except for its approach towards the civil parties' participation in the opening statements phase of trial, the ECCC Trial Chamber's evinced pragmatism and flexibility in exercising its discretion in structuring the proceedings.

3.6 STL

STL Rule 143 accords the right to make an opening statement to each party (the prosecutor and the defence) and to victims participating in the proceedings.¹⁶² Drawing upon ICTY and ICTR Rule 84, this Rule allows the defence to elect to make its statement either after the prosecution's statement or before the presentation of the defence evidence. The opportunity for the accused to deliver an *opening* statement in person is explicitly provided for, but the accused may be heard by the Trial Chamber at any stage of the proceedings on the condition of relevance to the case.¹⁶³ Similarly to the ICC regime and the ICTY occasional practice, the right of the accused before the STL to be heard is not limited to the opening stage but may be exercised throughout the proceedings, under the control of the Chamber. The accused may be questioned by the trial judges *proprio motu* or at the request of a legal representative of a victim, subject to notice of the right to remain silent.¹⁶⁴ The accused shall not be compelled to make a solemn declaration before making a statement or answering questions, but he or she may elect to do so, and this may be relevant for the judicial determination of the probative value of the statements or answers.¹⁶⁵ This option is provided to the accused over and above the possible role as a witness in his or her defence.¹⁶⁶ Thus, the STL RPE embody the most diversified and flexible regime for the provisions of the Trial Chamber with the information and/or evidence by the accused found among the courts surveyed. This flexibility enables the court to receive the statements and answers of the accused in a way that maximizes its probative value as compared to the analogous ICTY Rule 84*bis* procedure. While the circumstance that the accused has made a solemn declaration before giving the statement or answers the judges' questions does not guarantee truthfulness, the possibility of judicial questioning at any stage of the proceedings would reduce the risk of mendacious statements.

Finally, neither the STL Statute nor the Rules set the requirements regarding the length or content of the opening statements. These matters will be determined by the Trial Chamber on a case-by-case basis via scheduling and/or by oral rulings during the trial. The

¹⁵⁸ Transcript (Trial Day 2), *Kaing Guek Eav* (n 152), at 92.

¹⁵⁹ Transcript of Trial Proceedings (Trial Day 1), *Nuon Chea et al.*, 21 November 2011 (n 150), at 11.

¹⁶⁰ *Nuon Chea et al.* opening statements scheduling order (n 150), at 2; Severance Order Pursuant to Internal Rule 89*ter*, *Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC/TC, TC, ECCC, 22 September 2011 (splitting Case 002 into smaller trials).

¹⁶¹ *Nuon Chea et al.* opening statements scheduling order (n 150), at 2-3.

¹⁶² The STL envisages the model of victim participation in the proceedings based on that of the ICC, i.e. the participation in their proper capacity as 'victims' rather than as 'civil parties' as is the case at the ECCC. Cf. Art. 17 STL Statute and Art. 68(3) ICC Statute.

¹⁶³ Art. 16(5) STL Statute; Rule 144(A) STL RPE. See STL Rules of Procedure and Evidence (as of 12 April 2012) – Explanatory Memorandum by the STL's President ('STL RPE Explanatory Memorandum'), para. 31 (stating that the article 'grants an accused a role typically found in inquisitorial systems').

¹⁶⁴ Rule 144(B) STL RPE.

¹⁶⁵ Rule 144(C) STL RPE.

¹⁶⁶ Rule 144(D) STL RPE ('If the accused so desires, he may appear as a witness in his own defence.').

Chamber holds a broad discretion to provide directions on the conduct of the proceedings ‘as necessary and desirable to ensure a fair, impartial, and expeditious trial’.¹⁶⁷

3.7 Summary

Openings statements by the parties and participants make an integral part of the trial process in all of the historical and contemporary international and hybrid criminal courts. The only exception is the SPSC where the Transitional Rules did not explicitly provide for this phase, but in their actual trial practice of the Panels, the parties were allowed to make such statements. Everywhere save for the Nuremberg Tribunal, both parties are (or were) entitled, rather than obliged, to deliver an opening. Although the IMT Charter denied the possibility of making a statement to the defence, at present this entitlement constitutes a universally shared practice in international criminal procedure. Due to the persisting differences between the procedural models, the law and practice are not uniform when it comes to other procedural actors, such as the accused and participating victims, addressing the court with a non-evidentiary statement at the opening stage.

In the courts allowing for victim participation in the proceedings, victims’ legal representatives generally have an opportunity to make an opening speech, subject to the authorization by the Trial Chamber. This holds especially for the courts in which victims have a *sui generis* participatory status (ICC, STL, and *de jure* SPSC). However, at the ECCC where victims participate in the capacity of *parties civiles*, the practice is the opposite: victims’ legal representatives have consistently been denied this right. By contrast, a significant number of jurisdictions including the ICTY, SPSC, ICC, ECCC, and STL allow (opening) statements to be delivered by the accused in person. The approaches in law diverge in the sense that the accused is formally allowed to speak immediately after the prosecution opening statement at the ICTY and throughout the entire trial at the ECCC, ICC, and STL. But in practice, this divergence is insignificant because some ICTY Chambers have interpreted Rule 84*bis* as enabling the court to authorize the defendant to speak beyond the opening stage. International criminal procedure has increasingly embraced the notion of allowing the accused the right to be heard throughout, which is therefore a distinct trend in this field. However, the law has not been fully uniform given the status the ICTR and SCSL, which did not follow the suit with the introduction of ICTY Rule 84*bis*.

Similarly, the sequence of opening statements varies by tribunal. Under the ICTY, ICTR and STL Rules, as well as the ICC trial practice, both parties make their statements prior to the opening of the prosecution case, whereas the defence may also elect to make its statement at the beginning of its case. The IMTFE and ECCC embody the approach that the defence makes its opening speech *in response* to the speech by the prosecution. SCSL Rule 84, however, limits the defence statement to the beginning of its case, but the practice in that tribunal was not uniform.

The rule of thumb on the content of the opening statements is that such statements must be informed by their procedural function, i.e. serve as a roadmap into the case and explain briefly on what factual or legal issues and why certain evidence will be led. From among the courts overviewed, only the SCSL had an express provision which confines opening statements to the evidence the party intends to present in support of its case. Some Chambers at the ICTY and ICC adopted a more pro-active approach to regulating the appropriate content of the statement. But this practice has neither been uniform nor essential given that judges may ensure the relevance of the statements while delivered. It was deemed that the process should not be over-managed and the parties are to be allowed the necessary autonomy in explaining the nature of their case to the judges. Further, brevity of opening speeches has been a common and reasonable expectation in all tribunals, although it was specified as a

¹⁶⁷ Rule 130(A) STL RPE.

formal requirement only at the IMTFE, SCSL, and ECCC. It is, however, difficult to estimate an average length of a statement that would be deemed ‘reasonable’, as it depends on the nature and volume of the case. In the ICTY practice, as noted, some opening statements took a significant amount of time.¹⁶⁸

Finally, the general power of the Chamber to ensure fair and expeditious hearing of the case naturally extends to the management of the opening stage. ICTY Rule 84*bis* provides that a statement by the accused shall be made under the control of the Chamber, but the trial practice in other courts, including the SCSL, ECCC, and ICC, leaves no doubt as to the existence of the principle of judicial control. The same can be exercised, among others, through scheduling orders, *proprio motu* intervention by the bench, as well as by sustaining objections raised by parties. The advance disclosure of the outlines of the opening statements, practiced by some ICTY and ICC Chambers, is a less regular and tighter form of supervision, using which may be justified by the circumstances of the case.

4. ASSESSMENT

4.1 Fairness perspective: Drawing from human rights

International human rights law does not specifically guarantee parties in a criminal trial the right to an opening statement; nor does it regulate how such statements are to be made, received, or evaluated. In order to qualify as fair under Article 6 ECHR, the trial should not necessarily be organized along the lines adopted in civil law or common law systems. A trial by jury is neither specified in Article 6 of the ECHR, nor recognized as a right in the ECHR case law.¹⁶⁹ The fair trial provisions contained in human rights treaties generate obligations of result rather than as to modalities, as reflected in the doctrine of ‘margin of appreciation’. But human rights law, of course, remains generally relevant in any fairness evaluation of the procedural arrangements relating to who and under which conditions may deliver such statements in international criminal trials.

For instance, the equality of arms principle guarantees to each party reasonable opportunities to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis the opponent.¹⁷⁰ Since delivering an introductory statement regarding evidence is an integral part of the case presentation, it must be regarded as an essential procedural opportunity. Hence, it is arguable that there is an obligation on the court to guarantee that no party is substantially disadvantaged vis-à-vis the opponent due to unequal number and duration of opening interventions it is authorized to make.¹⁷¹ Where one party may make an opening statement, the other party should have this right and to have comparable time at its disposal to that end. Except for the IMT whose process pre-dated the modern human rights conceptions, the procedure in all international and hybrid courts complies with the ‘same conditions’ approach as far as the prosecution and the defence are concerned.

¹⁶⁸ *Supra* n 69.

¹⁶⁹ Decision as to Admissibility, *Callaghan et al. v. UK*, Application No. 14739/89, ECommHR, 9 May 1989, at 5. See B. Swart, ‘International Criminal Justice and Models of the Judicial Process’, in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009) 98.

¹⁷⁰ *Kaufman v. Belgium*, Decision as to Admissibility, Application 10938/84, ECommHR, 9 December 1986, at 155; *Foucher v. France*, Judgment, Application 22209/93, ECtHR, 18 March 1997, para. 34; *Bulut v. Austria*, Judgment, Application 17358/90, ECtHR, 22 February 1996, para. 47; *Dombo Beheer B.V. v. the Netherlands*, Judgment, Application 14448/88, 27 October 1993, para. 33.

¹⁷¹ In this sense, see S. Negri, ‘Equality of Arms – Guiding Light or Empty Shell?’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007) 16 (‘the parties involved in international proceedings are to be granted “equal opportunities”, inter alia, in terms of production of pleadings and pieces of evidence within the same terms, of submission of the same number of briefs and comments...’).

If not the opportunity in itself, then the practice relating to the personal statements by the defendant outside of the evidentiary framework might raise human rights issues. In particular, such statements could compromise the right of the accused to remain silent and not to incriminate himself where the court does not take measures to guarantee these rights in this context.¹⁷² First, the choice of the accused not to testify, but to make an unsworn statement instead must not be the basis for the court to draw adverse inferences against him or her, although this factor may be taken into consideration when determining the probative value of the statement. Secondly, the right not to confess guilt would be breached if the disclosure of self-incriminating information through the statement is ill-informed or involuntary, as a consequence of neither warnings by the bench nor effective assistance by counsel having been provided to the accused, where the statement is held against the accused. This tension will be properly addressed should the Chamber put the defendant on notice about the relevant rights and the consequences of the statement, ensure that the statement is made in consultation with the defence counsel, and exercise control over its delivery. In the tribunals where unsworn statements by defendants are allowed, judges hold ample powers to ensure effective and fair proceedings in full respect for the rights of the accused.¹⁷³ If the procedure is complied with, the statements by the defendants will not lead to fair trial violations.

Finally, a human rights objection could also be made to the opportunity for participating victims or civil parties to present opening statements where they cause delays and upset the procedural balance between the parties. The analogous domestic (particularly, continental) practices have not come under censure of the ECtHR or other court or monitoring body, and it cannot be sustained that granting victims an opportunity to actively participate in the opening stage of trial *per se* amounts to a violation of any fair trial rights. In the tribunals, the statements on behalf of victims are delivered by legal representatives and under control of the court, which may issue orders on the appropriate length and content of such statements, as attested by the ECCC and ICC practice. This is sufficient to prevent any prejudice to the rights of the accused.

4.2 Teleological perspective: Institutional goals

Next to their ordinary procedural function of familiarizing the judges with the forthcoming evidence in the case, the opening stage of international criminal trials and opening statements in particular have an additional dimension, given their rhetorical and expressive aspects. As noted, opening statements are potentially powerful advocacy tools in adversarial contexts.¹⁷⁴ In international criminal proceedings, it is not uncommon to use the opening stage of trial as a forum for advocates to address broader deliberative issues raised by the case, the crimes charged, and the alleged role in them of the accused. This additional dimension of the opening statements in international criminal trials makes them akin to the statements made in domestic 'political' trials whose function is 'not only to address the forensic issues of the case, but also to serve as a forum for the study of deliberative issues [such as] the nature of society and the social order'.¹⁷⁵

In this sense, it is relevant to recall an utterly forceful and unbeaten in elegance opening statement made by the US Chief Prosecutor Justice Robert Jackson at the Nuremberg trial. His statement went to the great historical and moral value of the Nuremberg process and emphasized responsibility the prosecution effort imposed on the victors. Clearly, it was more

¹⁷² Art. 14(3)(g) ICCPR; Art. 8(3)(g) ACHR. The ECHR contains no analogous provision. See also Art. 21(4)(g) ICTY Statute, Art. 20(4)(g) ICTR Statute; Art. 67(1)(g) ICC Statute; Section 6.3(h) TRCP; Rule 21(1)(d) ECCC IR; Art. 16(4)(h) STL Statute.

¹⁷³ Rule 84*bis* ICTY RPE; Art. 64(2) ICC Statute.

¹⁷⁴ *Supra* 2.

¹⁷⁵ Snedaker, 'Storytelling in Opening Statements' (n 10), at 43 (illustrating this point by an analysis of the opening statements in the Chicago Anarchists' trial in the US).

than mere introduction into the case and evidence – these issues were addressed by other speakers on the prosecution side. As reported by the participants of the trial, it made a profound and lasting impression on the audience within the courtroom and outside it.¹⁷⁶ By contrast, the prosecutor’s statement in the first ICC trial is an example of less successful advocacy. Rather than providing a preview of evidence relating to actual charges (enlistment and conscription of children under the age of fifteen and using them to participate actively in an armed conflict), a portion of the statement described crimes of sexual violence against girls in the UPC camps that were not charged and would not have to be proven at trial. This tactic proved to be counterproductive as it fuelled the victims’ pre-existing frustrations with the narrow formulation of the charges against *Lubanga*.¹⁷⁷

Even since Nuremberg, it has been usual for the parties in international trials to devote parts of their opening speeches to conceptual and philosophical foundations for holding trials in cases of mass atrocity and their historical significance, the unparalleled gravity of the crimes and suffering of victims, as well as the ultimate need to ensure fairness for the defendants. Paying some attention to these subjects serves to reaffirm values vindicated by the international community when establishing and running international tribunals. Since the opening statements in international trials tend to be of general interest, they may have communicative effects on the affected communities. The fact that such statements are made early in the trial process when the public and media attention to the proceedings is at its peak (unlike during the evidence-presentation phase),¹⁷⁸ renders the expressive effects even stronger. The parties in international trials are clearly aware of this and often deliberately seek to reach broader audiences, for example, by framing them in an accessible language rather than in legalese. They may also preoccupy themselves with the possibility of broadcasting the delivery of opening statements in the affected communities.¹⁷⁹ These features of opening statements may contribute to the didactic or expressive objectives of international criminal justice.

Arguably to a greater extent than many other segments of trial proceedings, opening statements may be deemed to indirectly contribute to the goals such as reconciling the sides divided by the conflict and vindicating the need of the victims to have the scale of their suffering acknowledged. In the tribunals allowing for victim participation (ICC and STL), granting legal representatives an opportunity to speak early in the trial clearly serves this purpose. The ECCC’s approach of precluding the civil parties from delivering short opening statements through their representatives is arguably inconsistent with this objective, particularly given the fact that evidence can be heard upon request, and questioned posed on behalf, of civil parties. The Co-Prosecutors may be not in a position to speak of behalf of civil parties in their opening address because they only vindicate public interests, while personal interests of civil parties are represented by the civil party lawyers. As for the defence, defence counsel may use an opening statement to express sympathy with victims’ suffering on behalf of the accused, which arguably benefits the reconciliation process. Moreover, the opportunity for the accused to speak in person at this stage may have a similar effect, provided that the content of the statement is appropriate. Many ICTY accused who have chosen to deliver a Rule 84*bis* statement did express sympathy for the victims and a wish to work for

¹⁷⁶ T. Taylor, *The Anatomy of the Nuremberg Trials – A Personal Memoir* (Boston: Little, Brown and Company, 1992) 167-72 (‘nothing said at Nuremberg thereafter matched its force, perception and eloquence. ... [N]othing else in modern juristic literature ... equally projects the controlled passion and moral intensity of many passages.’) Likewise, A. Tusa and J. Tusa, *The Nuremberg Trial* (London: Macmillan, 1983) 154-8.

¹⁷⁷ Transcript, *Prosecutor v. Lubanga*, 26 January 2009 (n 105), at 11-3.

¹⁷⁸ M. Simons, ‘International Criminal Tribunals and the Media’, (2009) 7 *JICJ* 83, at 85.

¹⁷⁹ Note the ‘public trial’ concern expressed by the defence team for Thomas Lubanga Dyilo that the opening statement it delivered was not broadcasted in Bunia (DRC), while those of the OTP and the Legal Representatives of the Victims were: Transcript, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, ICC-01/04-01/06-T-110-ENG, TC I, ICC, 28 January 2009, at 9-10.

reconciliation.¹⁸⁰ Admittedly, vigilant control by the judges over the delivery of unsworn (or opening) statements by the accused person is essential to ensure that this opportunity is not hijacked to issue threats to witnesses, exploit past hierarchies, revive ethnic animosities, or to provoke the public.

The important positive consequences of granting the accused an opportunity to address the court in person rather than through lawyers are making the voice of the accused heard in the courtroom and treating him or her as a subject rather than object of international criminal proceedings.¹⁸¹ In this sense, the value of the Rule 84*bis* procedure at the ICTY was not in enhancing the expedition but in adding the opportunity for the accused to interact with the Chamber directly and beyond the rigid adversarial framework for evidence-presentation which is limited to the questions-and-answers format.¹⁸² Subject to the Chamber's control, shifting spotlight to the accused for a short while during the trial which normally lasts for many months is necessary and should be possible in the proceedings that are said to be all about the accused's criminal responsibility. In other words, this allows putting a 'human face' onto the international criminal process.¹⁸³ A 'day in court' is likely to have a positive effect on most accused, except for those who intentionally obstruct the proceedings ones. The accused should be assured of the fairness of the proceedings and that they are being listened to and heard, in order for them to accept the process and the decision, and to share the sense that 'justice is being done'. Next to enabling the accused to speak his mind and inviting him to reappraise his past conduct, this might help the perennial legitimacy problem of international criminal justice. Some defence lawyers expressed the view that even in a very practical sense, this facilitates a smoother conduct of the proceedings. It reduces the defendant's confrontational attitude and opposition to the court as well as helps build trust.¹⁸⁴ This view, however, is not universally shared.¹⁸⁵

Finally, the goal of compiling a reliable historical record of the events leading up to, and contextual to, the commission of international crimes is arguably not helped by opening statements, even indirectly. At best, the statements provide background information about the events and the accused person and an overview of evidence to be led at trial. But they are neither evidence nor purportedly neutral information, i.e. the statements are partisan by

¹⁸⁰ E.g. Transcript, *Prosecutor v. Limaj et al.*, 16 November 2004 (n 80), at 413; Transcript, *Prosecutor v. Perišić*, Case No. IT-04-81-T, TC I, ICTY, 3 October 2008, at 431; Transcript, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, TC III, ICTY, 5 May 2008, at 27458; Transcript, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, TC II, ICTY, 23 August 2006, at 616 (Milan Gvero). Exceptionally, see *Šešelj* unsworn statement transcript (n 69), at 1865.

¹⁸¹ Boas, 'Creating Laws of Evidence' (n 8), at 86 (speaking of unsworn statements as a way for 'giving a voice to the accused and removing some of the adversarial barriers between the accused and the trial chamber'); K. Ambos, 'Structure of International Criminal Procedure', in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007) 475 ('conceptually, the accused is converted from a mere object of the trial, as known from the adversarial procedure, into an active party, familiar from civil law procedure').

¹⁸² See also Boas, 'Creating Laws of Evidence' (n 8), at 83. On efficiency, see *infra* 4.3.

¹⁸³ See also Interview with a member of the Defence team, SCSL-AD-05 (n 39), at 15 (Q: 'Would it make the proceedings more human?' A: 'I think so, especially because most international criminal law cases do take such a long time and have such a political, publicity aspect to them. ... I think giving the client a chance to talk and give his own personal feeling on something is a good compromise.').

¹⁸⁴ See also Interview with an SCSL Defence Counsel, SCSL-AD-06 (n 39), at 32 ('One of the real problems of this trial was that they would not allow the defendants to speak from the dock. I think legally the truth is that it is not always very useful. ... [B]ut I think it is quite important for the running of the trial; it is quite important in terms of building trust in the proceedings, and actually it makes everything run much more smoothly. So I would favour it, although I do not know necessarily the legal practical effect it would ever have, but I think there is room for allowing the defendants to have more voice than they did in this trial.').

¹⁸⁵ E.g. Interview with an SCSL Defence Counsel, SCSL-AD-02 (n 41), at 11 ('I think it is the other way around. Even in an international tribunal, it is always necessary and advisable that the accused testifies under oath, tells his own story and let the Judges take the chaff from the grain').

nature. Their historical value being reduced, they can hardly amount to anything close to a reliable basis for historical research – in contrast, for example, to judgments.

4.3 Efficiency perspective: Streamlining and expediting practice

Opening statements in international trials serve important procedural and practical functions,¹⁸⁶ which are relevant in their evaluation from the efficiency perspective. Indeed, allowing for a round of opening speeches unavoidably extends criminal proceedings. However, this consideration does not necessarily outweigh other relative benefits. As noted, opening statements allow parties to introduce the court into their respective cases and evidence, which assists the judges in piecing together the puzzle consisting of multiple, complex and often obscure facts and issues that need adjudication. It should not matter as much that there are no jurors in international trials: the special dimension and character of these cases arguably challenge the cognitive and analytical capacities of professional judges no less than those of lay persons. Most practitioners among defence counsel and prosecutors interviewed perceive skipping an opportunity to open the case as a serious tactical mistake.¹⁸⁷ As observed by one practitioner,

The opening statement is where you each set out the crux of the prosecution case and the crux of the defence case, in order to provide an overarching framework. It is useful because it can focus Judges and also the public's and media's minds on what they are likely to hear. It provides overarching themes, which perhaps are not immediately clear if you just start calling the witnesses. So what it does is to look at the defence case and the prosecution case and say what the themes are, what we are trying to prove. We found it very useful because a lot of defence cases are about rebutting or poking holes in the prosecution case, whereas actually our case is very much going, "The very framework by which you've put out the case, the very lens through which you're looking at this conflict is wrong." And we are putting out a completely alternative version of events. Because of that it was useful to have the time to set out what we believed our evidence would show, what conclusions that would assist the Judges, the media

¹⁸⁶ G.J.A. Knoop, *Theory and Practice of International Criminal Proceedings* (Deventer: Kluwer, 2005) 244 and 247 (the function of an opening statement is 'to anticipate the evidence that [a party] intends to present at trial in support of its case, as well as proffer some preliminary views on the case' and 'the first opportunity for the trier of fact ... to hear a comprehensive exposé on the factual claims of each party'); Fontham, *Trial Technique and Evidence* (n 2), at 84-6.

¹⁸⁷ Interview with Ben Gumpert (n 42), at 16 ('the advocate that missed the opportunity to make an opening address at either one stage or the other would be a fool, but there may be some particular strategic reason I suppose, I cannot think what it would be'); Interview with John Philpot, ICTR Defence Counsel, ICTR-PD/04, 29 May 2008, at 9; Interview with Defence Counsel Peter Robinson, ICTR, ICTR-PD/10, Arusha, 22 May 2008, at 10 ('The opening statements are very important..., because in long trials there is a lot of evidence they have forgotten. It has a great added value.');

Interview with Alex Obote-Odora, ICTR-PP-06 (n 90), at 12 ('Our practice here is that we have taken advantage of the opening statement to spell out the theory of the prosecution's case. This may sometimes not be entirely clear in the pre-trial brief, which is a huge document. In a few words, you should be able to tell the Judges that this is the view of the prosecution case, and this is how we propose to lead evidence to prove it. ... In that context, the opening statement has been used in every case...');

Interview with an ICTR OTP member, ICTR-AP-08, Arusha, 20 May 2008, at 9 ('We always take the opportunity to make an opening statement or closing argument because we think it is important. The cases normally involve a huge number of documents and a large number of witnesses. Therefore, you want to be able to tell the judges right at the beginning, in a summary fashion, what the case is about and to give them that impression in a short way.')

Interview with the ICTR OTP member, ICTR-AP-05 (n 90), at 7 ('To the best of my recollection, the Prosecutor has always made an opening statement. It is an important roadmap, identifying, among others, the case theory right from the beginning of the case.');

Interview with an ICTR OTP member, ICTR-AP-07, Arusha, 20 May 2008, at 9. But cf. Interview with a SCSL Defence Counsel, SCSL-AD-03, Freetown, 22 October 2009, at 7 ('I personally did not open my case by way of an address, you know. I waived it, I just led evidence and addressed at the end of the day. ... I felt that there was really no advantage in it. The question of opening and address is more appropriate in a jury trial. But here you are dealing with Judges who are both Judges of fact and law. I mean, they have read the proofs of evidence, they know exactly what the case is about so it would have been a waste of time.').

Chapter 9: Opening Stage of Trial

and the public in coming to. As you know, opening statements are really supposed to be statements of fact. They are not supposed to be full of hyperbole; they are not supposed to be theatrical; they are not supposed to be courtroom drama. The closing speeches are less important in a way. In some ways they are more for the public and the media and not for the Judges because the Judges have our briefs. In the same way you have the appeal hearings, they are really to highlight certain themes that you feel maybe need more highlighting or things that you do not think came up clearly enough in briefs or reflections. I think opening speeches are particularly important because it is the start of the trial and people are coming at it from a position of ignorance, even with the defence case.¹⁸⁸

It must be taken into account that international judges would have intimate knowledge of the case prior to hearing evidence, and opening statements may be an invaluable aid in comprehending evidence and putting it into perspective. But to serve practical objective and to remain efficient, opening statements may refer but not discuss or analyze particular items of evidence: statements are only declarations of intentions.¹⁸⁹ The presentation of, and argument on, evidence is reserved for subsequent phases.

Despite any possible delays, considerations of expediency may partially warrant granting the accused an opportunity of addressing the court at the beginning of the trial, such as under ICTY Rule 84*bis*, or at any time throughout the proceedings (e.g. Article 67(1)(h) of the ICC Statute). The flexible solution in STL Rule 144, which allows the accused to decide whether to make a solemn declaration and authorizes judges to question the accused on such statement, is a triumph of the modern pragmatism of international criminal procedure over the shackles of legal traditions from which it emerged. This solution enables the accused to contribute to the truth-finding process with a statement that is potentially of a greater probative value than an unsworn statement, without compromising his right to remain silent and without dissuading him from speaking by restrictions related to testimonial process. The accused are likely to have personal knowledge about the events in question and may provide the judges with useful information facilitating the understanding of the defendant's perspective and his case.¹⁹⁰ At the same time, there also exist significant legal policy objections against giving the floor to the defendant beyond the evidentiary framework, including the risk of inappropriate speeches and procedural delays.¹⁹¹ This is a partial reason why prosecutors are likely to be strongly opposed to allowing unsworn statements from the dock.¹⁹² But, arguably, these dangers will not materialize if the Trial Chamber manages the proceedings in a hands-on and effective manner.

¹⁸⁸ Interview with a SCSL Defence Counsel, SCSL-AD-06 (n 39), at 30. See also Interview with a member of the Defence team, SCSL-AD-05 (n 39), at 14 ('opening statements ... are often made more for public reasons. They obviously have no legal import. It is just to summarize, to get everyone's mind focused... ... It's a roadmap of what you should be able to expect, and in our case they have limited them to two or three hours for both the Prosecutor and the Defence and that was not really objected to.')

¹⁸⁹ See Transcript, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, TC I, SCSL, 5 July 2005, at 8 (line 22). See also *ibid.*, at 6 (lines 33-34: 'the Prosecution's opening statement does not bind the Court, it is not evidence, it is merely a statement of expectations' – Justice Thompson) and 8 (lines 11-18: 'it is one of those strategies ... to make opening statements – it's protocolish, it goes more to the shadow and not to the substance. ... the Chamber is not bound by what you would say in your opening statement. What the Chamber is going to examine is the evidence that will be adduced during examination-in-chief, cross-examination and re-examination of all the witnesses both for the Prosecution and for the Defence and of course, exhibits that are going to be tendered.' – Presiding Justice Itoe). See also Transcript, *Prosecutor v. Sesay et al.*, 2 May 2007 (n 94), at 31 ('It is not a question of reciting all the evidence or all the law... It is a question of just focusing the mind of the judges on the essentials of what your case would be and what your case is': Justice Itoe).

¹⁹⁰ Occasionally, the judges expressed appreciation of the importance of the accused's statement. See e.g. Judge Prandler's remark in Transcript, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, TC III, ICTY, 5 May 2008, at 27474.

¹⁹¹ Boas, 'Creating Laws of Evidence' (n 8), at 86; Zappalà, 'The Rights of the Accused' (n 28), at 1352.

¹⁹² Interview with a SCSL OTP member, SCSL-AP-01 (n 98), at 7 ('I am not in support of that type of introduction because you will be giving air time to an accused—and I am speaking as a Prosecutor—to make political statements. These trials are hardly unrelated to politics and you have defendants who are politicians

It should be recalled that the original rationale of Rule 84*bis* was to allow the accused to clarify matters concerning the charges with a view to reducing the scope of the contest. Of course, the possibility that such a statement would render the presentation of some prosecution evidence unnecessary cannot be discarded. But as a consequence of the managerial judging reforms undertaken at the tribunals, it is more likely than any agreements on facts would have been reached and uncontested facts identified earlier, at the stage of trial-preparation.¹⁹³ Hence, such reforms were bound to reduce any case-managerial benefits that can be expected of the Rule 84*bis* address. This raises a question to what extent this procedure has actually fulfilled the promise of expediting the trials, and whether it is able to do so in any noticeable degree.¹⁹⁴ While some accused indeed admitted facts or incidents in their unsworn statements, a glance at some trial judgments may reveal that the Chambers only refer to such statements where they are confirmed or contradicted by evidence.¹⁹⁵ The defendants' statements do not dismiss the need for the presentation of evidence, not least because in contested trials most accused are unlikely to admit incriminating facts without having been 'cornered' first by compelling evidence or by the imminence of it being presence. The low probative value of unsworn statements, especially where the defendants may not be questioned on their contents, invites one not to overestimate their potential to reduce the evidentiary scope of international trials. In this sense, the more flexible approach pioneered by the STL in its Rule 144 holds out a greater promise of removing the adversarial barrier between the Chamber and the accused. It provides the accused with several options enabling him to participate in his trial meaningfully and to contribute to truth-finding.

5. CONCLUSIONS AND RECOMMENDATIONS

The foregoing analysis of the law and practice on opening statements indicates that they do not raise fundamental concerns in light of the evaluative parameters. Provided that the current procedural standards are observed by the parties and enforced by the courts, statements by the parties and participants made early in the trial will not compromise but enhance procedural fairness or efficiency. That said, some of the past or present practices call for optimization and fine-tuning.

First, one discernible fairness issue arises from the IMT approach of extending an opportunity of delivering a statement only to the prosecution. Such a solution is not favoured under the fairness framework adopted by international tribunals—which represents renditions of international human rights standards into their context—insofar as it leads to procedural inequality. But in none of the modern tribunals this is real issue, given that both parties are entitled to make an opening statement (or to respond to the statement by the opponent) across the board. Human rights law also calls for international criminal judges to exercise care when allowing the accused to make a personal (unsworn) statement, given the risk of self-incrimination, and draws attention to the need to control closely the delivery of extra-

generally or generals or they are still head of states... Giving them such an opportunity allows them to put across a one-sided account which is unverified or uncontradicted. I do not support that at all. It gives them the liberty to restate a story, according to how they want to restate it, with no fear or respect for the oath. There is a general belief that when you make a statement under oath there is an expectation of truth behind it. When you give them the chance to make unsworn statements without taking an oath, they will say and state things they would not have said if they had been under oath. ... I feel like it will be giving them an undue advantage.')

¹⁹³ See Chapters 6 and 8.

¹⁹⁴ E.g. V. Tochilovsky, 'International Criminal Justice: "Strangers in the Foreign System"', (2004) 15 *Criminal Law Forum* 319, at 337 ('it was thought that such statements by the accused could shorten the proceeding by narrowing issues, eliminating those not disputed and clarifying matters. However, such a limited opportunity to speak is not comparable with accused rights in a civil law system.')

¹⁹⁵ E.g. Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, TC, ICTY, 2 November 2001, paras 612, 618-21, and 677-81; *Limaj et al.* trial judgement (n 61), paras 636-50, 708, and 732.

testimonial statements. But the fairness parameter is rather inconclusive on whether any actors in particular, whether the represented accused in person or participating victims through their legal representatives, are entitled to speak and, if so, when and in what order. Nor is the court prevented from following the statement by the accused up by questions, subject to the right to remain silent and not to incriminate oneself.

Second, on the balance of arguments and subject to able case-management, the consideration of institutional goals of international criminal justice speaks in favour of allowing opening interventions before evidence. Likewise, affording a personal statement to be made by the accused, whether at the start of the trial or at a later stage, may serve the useful purposes of enhancing legitimacy of the process and removing the artificial barriers between the accused and the court, provided that the fair trial rights are observed and that the statement is delivered under judicial supervision. There is a risk that the opportunity may be misused by contumacious accused for engaging in courtroom antics, political grandstanding, or insulting witnesses. In that case, the procedure would be inimical to the fundamental purposes of the enterprise, but it is arguably the responsibility of the Chamber to ensure that this does not happen. The judges have adequate powers to prevent and suppress recalcitrance by putting the accused on notice, by directing its delivery, and by retracting leave in case of non-compliance. But the potential gains of allowing the accused to address the court in person should not be sacrificed for the reasons of inherent mistrust and abundance of caution with regard to the defendant. Where victims are allowed to participate and, in particular, to present evidence, preventing their legal representatives from participating at the opening stage may be a tribute to certain domestic traditions, but not necessarily a procedurally coherent solution. Despite time-saving effects, which are of course a legitimate objective, the ECCC's restrictive approach is at odds with providing victims a procedural standing at trial, especially given the fact that they do participate in the examination of evidence.

Thirdly, in terms of procedural efficiency, the extra-evidentiary nature of opening statements raises the questions of expediency of retaining them as part of international criminal procedure. The massive volume of evidence adduced in international criminal trials, which even professional judges assisted by numerous legal officers, find challenging to process and digest, speaks in favour of the practical relevance of presenting the court with 'case roadmap' early in the trial. Further, the expected efficiency benefits of having accused comment on the charges before the presentation of evidence pursuant to ICTY Rule 84 *bis* remained fictional to a significant degree, but such comments may be important for the court to understand the personal attitude of the accused towards the charges. The analogues of that procedure in other tribunals which extend to the accused the right to be heard throughout the proceedings (ICC, SPSC, ECCC and STL) are more likely to enhance efficiency, over and above the relative advantage of making the accused a true participant in his or her own trial. This is particularly so at the STL, where there are several options in which the accused may make submissions to the court. Thus, the court is able to counteract any truth-distorting elements in the defendant's statement and, as result, accord a higher probative value to it than to any unsworn information on which the accused could not be examined.

In light of this assessment, a set of 'best practices' can be identified and recommendations made in this area. The procedural standards found in some but not all tribunals constitute progressive trends in international criminal procedure and, arguably, should (or are likely to) become mainstream practice, as a matter of *de lege ferenda*. In particular, granting the accused an opportunity to make an unsworn statement at the opening phase of trial or a conditional right to be heard in person throughout the proceedings, with leave and under the supervision of the Trial Chamber, is generally desirable in any international criminal tribunal. It aligns the procedure with the progressive trend reflected in ICTY Rule 84*bis* (and its expansive interpretations by some Chambers), Article 67(1)(h) of the ICC Statute, and Article 16(5) of the STL Statute and STL Rule 144(A). As has been argued, where the accused wishes to speak and has something of relevance to say, this is not

inconsistent with his right to remain silent and the privilege against self-incrimination. The important caveats are that the court must satisfy itself that the accused is informed about those rights and has had access to legal assistance, as well as that the Chamber should exercise close control over the delivery of the statement. Where these guarantees are in place, personal statements may assist the judges in understanding complex evidence, particularly where the accused has a first-hand knowledge about relevant events, as well as in casting the allegations in light of the defendant's personal perspective. Another important benefit is that the procedure may reduce the confrontational attitude of the accused at trial, increase his or her trust towards the court and strengthen the perceptions of fairness of the process. Overall, this makes the courtroom dynamic smoother and might enhance the perceived legitimacy of the tribunal in the affected communities.

Another example of 'good practice' is the defence opportunity to elect the timing for its opening statement, particularly where the case is presented in two evidentiary blocks each per party. While the freedom of choice is available to the defence in most of the courts (ICTY, ICTR, ICC), it was unnecessarily limited by SCSL Rule 84. The rationale for that rule is not self-evident, although it seems to follow the practice in some common law jurisdictions, including England and Wales. The complexity and volume of evidence in international criminal proceedings entail that the presentation of the prosecution case will normally be protracted and several take several months at least. In these circumstances, it may be advisable to allow the defence to respond to the prosecution statement, if it wishes to, with the possibility of delivering the second statement before the opening of its case. Otherwise, the defence will have no chance to address the court as part of its case presentation before the close of the prosecution case. Ultimately, this is a matter of the autonomy of the defence in determining its strategy. Hence the more flexible approach at the ICTY and ICTR appears preferable: the defence should be able to elect to make an opening statement before and/or after the prosecution evidence.

Finally, where victims are allowed to participate in the trial proceedings, including the presentation of evidence and making closing arguments, they should not be denied the opportunity to address the court with brief opening statements through legal representatives. Such statements should be delivered with leave of the Chamber leave and under its control. It is the responsibility of the judges to ensure that the length of any such statements is reasonable and content appropriate, i.e. focused on the charges and evidence that will be led during the trial.