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### International criminal trials: A normative theory

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**CHAPTER 11.****CLOSING STAGE OF TRIAL\***

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**1. INTRODUCTION**

In all international and hybrid criminal jurisdictions under review, the hearing of the case on the merits is concluded by a closing stage of trial, which consists of oral closing arguments by the parties and, if appropriate, by victim participants.<sup>1</sup> Oral arguments are closely interrelated with the written submissions in the form of final briefs. This stage is not evidentiary, which means that no new evidence over and above that already on the record can be submitted or heard. Closing arguments amount to a structured debate on the evidence that has been adduced in the case and in this end is an integral part of case presentation. The importance of this phase is attested by its inclusion in the rules of every international and hybrid jurisdiction regardless of the influence of any specific domestic procedural tradition.

Given their extra-evidentiary nature, closing arguments are indispensable as devices of trial advocacy. While they may be compared to opening statements in this respect, the functions of these two types of addresses in the context of litigation are very different. In relation to the evidence in the case, they correspond to an introduction and conclusion, respectively. Opening statements are a roadmap into the case and provide judges with a concise preview of evidence that will be led in the course of the trial.<sup>2</sup> Closing arguments are delivered after the conclusion of the evidence and before the bench retreats for deliberations. This is the opportunity for the parties to sum their evidence up, to respond to the evidence of the opponent, and to illustrate how the line of argument they expect the court to adopt fits in the evidentiary record. Given their purpose

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\* This Chapter is an expanded and updated version of this author's section 'Closing Arguments' (G. Acquaviva *et al.*, 'Trial Process'), in G. Sluiter *et al.* (eds), *International Criminal Procedure* 655-82.

<sup>1</sup> Chapter 7.

<sup>2</sup> Chapter 9.

of interpreting evidence, closing addresses are normally styled as arguments. The parties may openly plead judges to take, or decline to take, certain directions in the evaluation of the proof; to accord, or refuse to accord, certain items probative value; and to adopt or reject legal doctrines underlying the charges or qualifications. From a judge's perspective, an effective closing argument and particularly a written final submission will be a useful *aide mémoire* during deliberations. Final briefs contain a comprehensive summary of the positions adopted by the party on the evidence and on the merits of the case, and are often structured in the way that allows addressing topics indicated as essential by the judges in advance.

This Chapter provides an overview of and compares the law and practice of the international criminal tribunals regarding the procedure at the closing stage of trial. It then evaluates these findings in light of the agreed criteria and proposes solutions to any problems that would inform the normative theory of the trial. First, by way of background to the discussion of the status of law and practice at the tribunals, it addresses the origins of the closing arguments procedure in domestic procedural systems and looks into the rationale of this phase in that context. The Chapter then turns reviews the procedure in international and hybrid tribunals with the focus on the following areas: (i) actors entitled to deliver closing arguments and written final submissions, including the question whether the actors other than parties (e.g. accused and victim participants or civil parties) have the right to address the court or make filings at this stage; (ii) the sequence of presentations during the closing stage, including the possibility of delivering rebuttal and rejoinder arguments; and (iii) the legal regime governing the content and length of closing arguments, final briefs, and the related issue of the scope and forms of judicial supervision in this regard. Finally, the Chapter appraises the relevant standards and practices and makes limited suggestions as to how deficiencies are to be addressed should the law and/or practice warrant improvement.

## 2. CLOSING STAGE OF TRIAL: A COMPARATIVE PERSPECTIVE

The phase of closing speeches or summation following the conclusion of evidence in the case can be found in the criminal procedure of most contemporary domestic jurisdictions, regardless of whether those belong to the common law or civil law systems. But the *raison d'être* of and arrangements at the closing stage diverge widely. The individual differences dispel the illusive homogeneity that is believed to exist between countries with similar legal-historical roots. The following overview therefore proceeds under the caveat that the focus is on generalities rather than on nuances distinguishing specific countries, even though these are material.

Self-evidently, the double rationale of closing speeches—trial advocacy and structured argument—indicates their provenance in the adversarial tradition.<sup>3</sup> There, closing arguments hold a special place in an advocate's toolkit. Distinguishing a stage for final arguments on evidence may also be typical for the 'proceduralized' systems, which tend to regulate the structure of case presentation in minor detail. According to Fontham, 'summation is counsel's chance to wrap up the case, explain the evidence, synthesize conflicting facts, and tie together the facts and the law' and, furthermore, 'the attorney's last chance to speak with the jury'.<sup>4</sup> Closing arguments serve the purpose of interpreting proof on the record and thus assisting or 'leading' jurors in their deliberation, as opposed to submitting new evidence.<sup>5</sup> They are essentially a jury-oriented element of the process.<sup>6</sup>

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<sup>3</sup> M.R. Fontham, *Trial Technique and Evidence*, 2 edn (LexisNexis, 2002) 682 ('This part of trial is also a contest, in which the opposing attorneys openly attack each others' arguments.').

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, at 683.

What advocates seek to achieve by couching closing speeches in a polemical and rhetorical form, is to persuade the jurors of the strength of their evidence as well as the insufficiency or unreliability of the proof adduced by the opponent. At the advanced stage of trial, jurors will most likely have formed their opinions on the evidence and the charges. However, the party's last opportunity to impress the jury is important in advocacy no less than the first impression made by opening statements. Closing arguments in adversarial trials are 'the climactic act in the trial drama', particularly in complex cases.<sup>7</sup>

The opportunity or even the duty to deliver a closing argument is also a characteristic feature of criminal trials in continental jurisdictions whose procedure is rooted in the 'inquisitorial' tradition. This may be explained by cross-fertilization and gradual approximation between procedural cultures. As a result of the trend towards 'adversarialization' of the criminal process in the traditionally 'inquisitorial' systems,<sup>8</sup> parties were increasingly pushed to play a more active role in the examination of evidence, including raising issues concerning the case file as well as summarizing the evidence discussed during the trial. But the structural nuances of inquisitorial process, including the composition of the trial court, inform the procedural functions of closing arguments. For example, the more limited decision-making role of lay jurors sitting on the mixed benches, as compared to common law jurors who deliberate on the verdict independently from the professional judge, is bound to reduce the relevance of the advocacy aspect. A fully professional bench or the one dominated (informally) by professional judges will not be in need of partisan round-ups of evidence and final arguments.

The cognitive superiority of professional judges over lay fact-finders should not be overstated. Especially in complex or lengthy cases, closing speeches will further the understanding of the evidence and be of assistance to any adjudicator as those speeches might raise doubt about the evidence and point to its alternative interpretations. Still, the common assumption is that trained and experienced judges are capable of disregarding the legally irrelevant and inadmissible information and can more accurately determine the probative value of the evidence than lay adjudicators. Moreover, the presiding judge typically plays a leading role in determining which witnesses to call and in examining the accused, witnesses, experts and civil parties. Parties' role is merely to assist the court in establishing the truth. Given the judge's pre-existing knowledge of the evidence from the case file, the practical relevance of summations by the parties will be reduced, and it is in fact the presiding judge himself who is best placed to sum up at the end of the hearing. The fact that the rationales and importance of closing arguments in different traditions are not exactly the same has consequences for the way of presenting them.

These broad-brush differences between the common law and civil law can be illustrated by examples. In jury trials in England and Wales, prosecution counsel and defence counsel may address the jury with arguments after the conclusion of evidence. This is followed by the judge's summing up of evidence to the jury (jury instruction).<sup>9</sup> The 16<sup>th</sup> century trials in England represented one unstructured and haphazard argument between the defendant and counsel for the Crown, but the arguments were eventually

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<sup>6</sup> L.J. Merrill, 'The Limits of Prosecutorial Summation – An Overview of Permissible and Impermissible Final Arguments', (1983) 24 *South Texas Law Journal* 867, at 867 ('A closing argument in a criminal trial is used by both the prosecution and the defense to convince the jury of the significance of the evidence. Each advocate organizes and properly emphasizes the evidence for the jurors and comments on all inferences the juror may derive from the facts.' Footnote omitted).

<sup>7</sup> *Ibid.*; Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 867; R.L. Carlson and E.J. Imwinkelried, 'The Three Types of Closing Arguments', (1994-5) 18 *American Journal of Trial Advocacy* 115, at 115.

<sup>8</sup> Chapter 4.

<sup>9</sup> In detail see S. Mitchell (ed.), *Archbold Pleading, Evidence & Practice in Criminal Cases*, 40<sup>th</sup> ed. (London: Sweet & Maxwell, 1979) 425-7.

severed into the summation phase at the end of the case.<sup>10</sup> The right of parties to sum up evidence dates back to the Criminal Procedure Act 1865 (Denman's Act). According to Archbold, a speech by counsel for the Crown 'should take place after the evidence of the accused and can include comments upon that evidence', whereas the defence lawyer 'is not to be restricted merely to remarks on the evidence of his witnesses, but anything occurs to him as desirable to say on the whole case, he is at liberty to say it.'<sup>11</sup> There is no right of the defendant to make a final statement because he 'cannot have the assistance of counsel to examine witnesses and reserve to himself the right of addressing the jury'; it is furthermore impermissible for both defendant and counsel to address the jury in closing arguments.<sup>12</sup> The summation of the material aspects of the case by a judge plays an important role in jury trials insofar as it will focus the jurors' attention on the legal norms applicable to the case and indicate the issues to be decided upon. But jury instruction should merely guide the jury and may not impinge upon its independence from the court.<sup>13</sup>

In the United States, closing arguments in criminal trials have been a common practice since colonial times. They were recognized by the Supreme Court as an indispensable part of the adversarial system that is guaranteed by the Constitution.<sup>14</sup> The US Federal Rules of Criminal Procedure contain a rule which prescribes the order for closing arguments, according to which the argument for the government is presented first, followed by the defence argument, and concluded by the government's rebuttal.<sup>15</sup> The rebuttal is limited to issues raised by the defendant in his or her argument.<sup>16</sup> This order mirrors the allocation of the burden of proof: the party with the burden of proof is entitled to address the jury first and last. Individual state laws vary, but most states follow the federal system and allow a rebuttal argument by the prosecution only or extend to each party one chance to present a summation. In some states, however, the closing arguments stage starts with a summation by the defendant, who may also be entitled to the last word if he has presented no evidence other than his own testimony.<sup>17</sup> This rule, known as the 'sandwich rule', grants the defendants 'the distinct advantage of giving the first closing argument and the rebuttal argument at final summation, thereby sandwiching the prosecution's argument in between'.<sup>18</sup>

The jurisprudence and scholarly debate in the US on the subject of closing arguments has been dominated by the concern with the risk of partisan excesses during closing speeches and the ways of containing them. In particular, the proper content and

<sup>10</sup> Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 867 (referring to J. Stephens, *A History of the Criminal Law of England* (1883) 326 and 349).

<sup>11</sup> Archbold (n 9), at 425 and 427-8, citing *R. v. Wainright* (1895) 13 Cox 171.

<sup>12</sup> Archbold (n 9), at 427, citing *R. v. White* (1811) 3 Camp. 98; *R. v. Boucher* (1837) 8 C. & P. 14; *R. v. Taylor* (1859) 1 F. & F. 511 and *R. v. Pope* (1901) 18 T.L.R. 717. In *R. v. Pope*, the court ruled that the defendant may make a statement from the dock and his counsel may afterwards address the jury.

<sup>13</sup> A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings', in Cassese/Gaeta/Jones (eds), *The Rome Statute* 1443 (adding that '[t]he role of the judge in his summing up is a traditional source for appeals, claiming that the judge has inappropriately influenced the jury.').

<sup>14</sup> *Herring v. New York*, 422 US at 856-862, 863 (1975) ('The difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment.'). See Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 867.

<sup>15</sup> Rule 29.1, Federal Rules of Criminal Procedure (US) (as added 22 April 1974, effective 1 December 1975; amended 29 April 2002, effective 1 December 2002).

<sup>16</sup> N. Velasco, 'Taking the "Sandwich" Off the Menu: Should Florida Depart from Over 150 Years of its Criminal Procedure and Let Prosecutors Have the Last Word?', (2004) 29 *Nova Law Review* 99, at 119.

<sup>17</sup> See e.g. Rule 3.250, Florida Rules of Criminal Procedure ('a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury.').

<sup>18</sup> Velasco, 'Taking the "Sandwich" Off the Menu' (n 16), at 101 and 121-6 n199 (46 states follow the Federal Rules while four— Georgia, Florida, North Carolina, and South Carolina—have a 'sandwich rule').

tone of the prosecution's summation is a major issue.<sup>19</sup> Abundant jurisprudence has developed setting constraints on prosecuting attorneys' summations for the jury.<sup>20</sup> The prohibition covers arguments which go beyond facts or evidence not on the record; appeal to fears, sympathies, localism, and other prejudices or passions of the jurors; misstate the law; attack the integrity of defence counsel; comment on defendant's refusal to testify or to call witnesses in violation of the Fifth Amendment,<sup>21</sup> as well as remarks about a defendant's decision to exercise constitutional rights (e.g. by pleading not guilty); draw the jury's attention to the possibility of early release; allude to the sentence range; express personal beliefs or opinions on the weight of evidence; or call upon jury to convict as a way of fulfilling their civic duty.<sup>22</sup> It is telling that the most authoritative statement by the US Supreme Court on the role of prosecuting attorneys as 'ministers of justice' arose namely from the case of prosecutorial misconduct during cross-examination and closing arguments.<sup>23</sup> The 'safe areas' that can legitimately be explored by counsel in a closing argument are: any properly admitted facts and evidence; reasonable inferences from the evidence including the probative value; arguments made by the opposing counsel, and pleas for law enforcement.<sup>24</sup>

The adversarial system is premised on the presumption of professionalism and integrity of counsel. It therefore accords attorneys with considerable latitude in presenting their arguments.<sup>25</sup> In principle, compliance with the applicable rules regarding the proper content of closing speeches is policed and enforced judicially. But parties' performance is primarily controlled by ethical standards of professional conduct, which are comparable

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<sup>19</sup> Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 868-9; J. Lessinger, 'Criminal Law – When Bad is Bad: Prosecutorial Misconduct in Closing Arguments', (1997) 73 *North Dakota Law Review* 771; T. Borstein, 'Trespassing on Due Process: Constitutional Objections to Improper Closing Argument', (2010) 34 *Champion* 38; C.L. Cantrell, 'Prosecutorial Misconduct: Closing Argument in Oklahoma', (2006) 31 *Oklahoma City University Law Review* 379; H. Vess, 'Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument', (1973) 64 *Journal of Criminal Law and Criminology* 22; R. Nidiry, 'Restraining Adversarial Excess in Closing Argument', (1996) 96 *Columbia Law Review* 1299.

<sup>20</sup> *Berger v. US*, 295 U.S. 78 (1935) (prosecutor's prejudicial remarks meant to divert the jury's attention from evidence and facts not on the record inconsistent with his role of 'minister of justice'); *Viereck v. US*, 318 US 236, 246 (1943) (prosecutor's analogy between the jurors and US soldiers fighting against Japan found prejudicial); *Young v. US*, 470 US 1, 7 (1985) (prohibiting expression of 'personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant'); *US v. Splain*, 545 F.2d 1131, 1134 (8<sup>th</sup> Cir. 1976) (prosecutor may not express partisan or personal views as these are non-evidentiary and prejudicial); *US v. Johnson*, 968 F.2d 768, at 771-2 (8<sup>th</sup> Cir. 1992) ('A prosecutor may not urge jurors to convict ... in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.');

*US v. Solivan*, 937 F.2d 1146, 1151-2 (6<sup>th</sup> Cir. 1991) (pleading the jury to act as the community conscience permissible unless employed to appeal to passions and prejudice).

<sup>21</sup> The US Supreme Court characterized a prosecutor's comment to that effect 'a remnant of the "inquisitorial system of criminal justice"'. *Griffin v. California*, 380 US 609, 614 (1965).

<sup>22</sup> See further Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 868-76; Lessinger, 'Criminal Law – When Bad is Bad' (n 19), at 775-81; Bornstein, 'Trespassing on Due Process' (n 19), at 38.

<sup>23</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935) ('Attorney General is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is a compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.').

<sup>24</sup> This is the standard applied in Texas: *Alex v. State*, 930 S.W.2d 787, 791 (Texas Court of Appeal, 1996). See also Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 878 *et seq.*; Lessinger, 'Criminal Law – When Bad is Bad' (n 19), at 780-1.

<sup>25</sup> S. Saltzburg, 'Pejorative Closing Arguments', (2008) 23 *Criminal Justice* 49, at 49; Velasco, 'Taking the "Sandwich" Off the Menu' (n 16), at 104-5.

for the prosecution and for the defence.<sup>26</sup> Whilst the adequacy and sufficiency of those deontological standards can be questioned,<sup>27</sup> the truth is that the content of closing arguments is largely a matter of self-restraint by the parties, as well as that of mutual control to be exercised through objections and motions for mistrial.<sup>28</sup> Ultimately, it is the judges' responsibility to remedy any prejudice resulting from the violation of the applicable rules by a party. Improper remarks made by the party in a closing speech divert the jury from deciding solely on evidence and, unless duly remedied, may amount to an error reversible on appeal.<sup>29</sup> The judge may issue a curative instruction to neutralize the prejudice that may result from any ill-phrased remarks during the closing argument by the prosecution, or to declare a mistrial where the argument is so prejudicial as to deprive the accused of the very possibility of a fair trial.<sup>30</sup> A reversible error occurs where the prosecutor's statement is found to be prejudicial and where it has affected due process. This is a case-specific determination based on the cumulative effect of misconduct, the evidence in the case, and curative steps taken by the court.<sup>31</sup> This discussion demonstrates that the US trial system places a strong emphasis on the propriety of closing arguments and that their content is subject to meticulous regulation and monitoring by the trial participants, judges, and the appellate jurisdiction.

Moving briefly from the common law to civil law systems, one is struck by the limited relevance of similar concerns about partisanship and regulatory efforts to curb it in connection with closing speeches. As noted, the role of counsel in the case presentation and during final arguments in particular does not give rise to 'adversarial excesses' that should be reined in by the courts. The criminal procedure codes in Europe typically provide for the right to deliver such statements. They also stipulate the sequence of interventions. This includes the possibility of rebuttal statements and, importantly, the defendant's right to a last word, which is an essential element in the criminal process of continental jurisdictions, unlike in common law.

The French Code of Criminal Procedure provides that once the investigation at the trial hearing is completed, a civil party or his/her advocate is heard, the public prosecutor makes final submissions after which the accused and his advocate present final arguments. Civil parties and the public prosecutor may respond but the accused and his lawyer always have the final word.<sup>32</sup> Similarly, in Germany, the prosecutor and subsequently the defendant have an opportunity to present their arguments and file applications upon the conclusion of evidence.<sup>33</sup> The prosecutor may reply and the defence has the right to the last word.<sup>34</sup> In any case, the accused shall be asked by the

<sup>26</sup> Standard 3.5.8 ('Argument to the Jury), ABA Standards for Criminal Justice, Prosecution Function: ('(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury. (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.') Cf. Standard 4.7.7 ('Argument to the Jury), ABA Standards for Criminal Justice, Defense Function.

<sup>27</sup> Nidiry, 'Restraining Adversarial Excess in Closing Argument' (n 19), at 1299 n7.

<sup>28</sup> *Washington v. Hofbauer*, 228 F.3d 689, 709 (6<sup>th</sup> Cir. 2000) ('One of defence counsel's most important roles is to ensure that the prosecutor does not transgress those bounds.'). See also Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 877; Bornstein, 'Trespassing on Due Process' (n 19), at 40.

<sup>29</sup> *Young v. US*, 470 US 1, at 11-12 (1985) (prejudicial remarks justify reversal only if they had prejudicial effects on the jury); *US v. Splain*, 545 F.2d 1131, 1134 (8<sup>th</sup> Cir. 1976) (no reversible error if a plausible definition of the epithet used by the prosecution is supported by substantial evidence).

<sup>30</sup> Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 877-8.

<sup>31</sup> Lessinger, 'Criminal Law – When Bad is Bad' (n 19), at 781; Merrill, 'The Limits of Prosecutorial Summation' (n 6), at 877-8.

<sup>32</sup> Art. 346 Code of Criminal Procedure (France).

<sup>33</sup> Section 258(1) Code of Criminal Procedure (Germany, *Strafprozeßordnung, StPO*).

<sup>34</sup> Section 258(2) Code of Criminal Procedure (Germany).

court whether he or she personally has anything to add to the defence statement.<sup>35</sup> Likewise, the Dutch Code of Criminal Procedure envisages that following the interrogation of the defendant and hearing of witnesses and experts, the prosecutor may address the court—orally and in writing—with a demand (*repliek*) specifying the recommended sentence, if any, to which the defendant is entitled to respond.<sup>36</sup> The prosecution then has a right to respond (*dupliek*), but the defendant will have the absolute right to speak last under the threat of procedural nullity.<sup>37</sup> This right may be exercised even where the prosecution chooses not to present a *repliek*.<sup>38</sup>

This overview confirms the earlier observation about the differences between the countries belonging to the same procedural traditions in respect of specific arrangements at the closing stage of trial. But there are also features shared among them that are worth noting. The common law position neither asserts the defence's entitlement to a rejoinder nor provides the defendant with an absolute right to a last word. But these elements are recurrent in continental jurisdictions and are deemed to constitute guarantees of fairness. Some common law jurisdictions, in particular the United States, have developed rich jurisprudence and stringent requirements with regard to the appropriate form and content of closing arguments of prosecution attorneys. These issues are perhaps not totally irrelevant in civil law settings, but certainly they are not even closely as important.

### 3. STATUS IN INTERNATIONAL CRIMINAL PROCEDURE

#### 3.1 IMT and IMTFE

In setting forth the sequence of the trial, the IMT Charter provided that the phase of interrogation and cross-examination of witnesses was to be followed by closing addresses of the parties to the court, first by the defence and then by the prosecution.<sup>39</sup> The IMT interpreted this provision in the way that counsel for each of the defendants and each of the organizations were entitled to deliver their speeches.<sup>40</sup> Moreover, during the trial, the IMT ordered, in a slight departure from the letter of the Charter, that after the conclusion of the evidence and before the closing addresses by the defendants' counsel pursuant to Article 24(h), a closing speech on common legal issues arising out of the indictment and the Charter was to be delivered by one counsel on behalf of all accused.<sup>41</sup> Subsequently, the IMT ruled that it would allocate '[f]our hours . . . at the beginning for argument on the general questions of law and fact, and [that] counsel should co-operate in their

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<sup>35</sup> Section 258(3) Code of Criminal Procedure (Germany).

<sup>36</sup> Art. 311(1) and (2), Code of Criminal Procedure (Netherlands, *Wetboek van Strafvordering*, WvSV).

<sup>37</sup> Art. 311(3) and (4) Code of Criminal Procedure (Netherlands).

<sup>38</sup> G.J.M. Corstens, *Het Nederlands Strafrecht*, 4 edn (Deventer: Kluwer, 2002) 578 (the right to the last word emphasizes the 'human element' in criminal proceedings).

<sup>39</sup> Art. 24(h) and (i) IMT Charter.

<sup>40</sup> D.A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account, Vol. II* (Lanham: University Press of America, 1999) 1232 ('The Defense regarded the closing statements as especially significant since there was no provision for opening statements by the defense.').

<sup>41</sup> 'Sixty-Sixth Day, Saturday, 23 February 1946', in *Trial of the Major War Criminals Before the International Military Tribunal, Vol. VIII* (Nuremberg: International Military Tribunal, 1947) 159–60, para. 7 ('Order on Dr. Stahmer's memorandum of 4 February 1946 and the Prosecution's motion of the 11th of February 1946': 'In addition to the addresses of each defendant's counsel under Art. 24(h), one counsel representing all the defendants will be permitted to address the Tribunal on legal issues arising out of the Indictment and the Charter which are common to all defendants, but in making such address [counsel] will be held to strict compliance with Art. 3 of the Charter. This address will take place at the conclusion of the presentation of all the evidence on behalf of the defendants, but must not last more than half a day. If possible, a copy of the written text of the address shall be delivered to the General Secretary in time to enable him to have translations made in the English, French, and Russian languages.').



arguments in such a way as to avoid needless repetition'.<sup>42</sup> The statement on 'juridical question of breach of peace' was delivered eventually by Dr. Jahrreiss, counsel for defendant Jodl.<sup>43</sup>

As for the closings for the accused organizations, the defence had preferred that closing arguments for individual defendants be heard after the evidence regarding the organizations, but the IMT decided to postpone that stage and to move on to defence closing addresses directly. This appeared more logical and the defence for the organizations was not ready to present evidence and would need another ten days for preparation after the presentation of evidence for individual defendants.<sup>44</sup>

Upon the prosecution's address, each defendant had a right to make a final statement to the Tribunal.<sup>45</sup> This concluded the case presentation and marked the moment at which the Tribunal was to retreat for deliberations on the judgment. The option for the defendants' last word is an atypical element in the adversarial framework. As noted previously, the accused in an adversarial process normally may only give sworn-in testimony as a witness, subject to examination and cross-examination. The Nuremberg solution was important exception in the adversarial template of the trial: each accused addressed the court in their personal capacity and unshackled by the rules on evidence and questioning. Before the trial, Justice Robert H. Jackson reported to the US President that '[a]t least one of the procedural divergences among the conferring nations worked to the advantage of defendants. ... [T]he charter resolved these differences by giving defendants both privileges, permitting them not only to testify in their own defense but also to make the final statement to the court.'<sup>46</sup> For these reasons, American participants saw this entitlement as a 'bonus' for the accused. And with reason so, given that this right—next to defence's closing address and the opportunity to testify as a witness—went far beyond what was allowed in any common law jurisdiction back in the time and subsequently.<sup>47</sup>

This liberal element in the procedure—echoing the continental practice—was accepted by the Americans and British during the negotiations in London only because the defendants' statements were to be made after the entirety of evidence had been heard, so that they could not derail the trial.<sup>48</sup> The architects of the Charter intended this to be an opportunity for the defendants to express their sentiments about the evidence and the whole trial and, possibly, remorse. To a great extent, these expectations were fulfilled.<sup>49</sup> Drexel Sprecher, who was the member of the prosecution team, wrote that the defendants' final statements 'turned out to be one of the most striking features of the entire Trial' – the final statements amounted to 'solo performances, free from any

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<sup>42</sup> 'One Hundred and Sixty-Third Day, Tuesday, 25 June 1946', in *Trial of the Major War Criminals Before the International Military Tribunal, Vol. XVIII* (Nuremberg: International Military Tribunal, 1948) 2.

<sup>43</sup> 'One Hundred and Seventy-First Day, Thursday, 4 July 1946', in *Trial of the Major War Criminals Before the International Military Tribunal, Vol. XVIII* (Nuremberg: International Military Tribunal, 1948) 458-94.

<sup>44</sup> T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992) 473.

<sup>45</sup> Art. 24(j) and (k) IMT Charter.

<sup>46</sup> *Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, London, 1945* (Washington, DC: U.S. Government Printing Office, 1949) xi.

<sup>47</sup> J.A. Bush, 'Lex Americana: Constitutional Due Process and the Nuremberg Defendants', (2001) 45 *Saint Louis University Law Journal* 515, at 526-27 ('Only Georgia of the then forty-eight American states and a handful of other common law jurisdictions permitted unsworn statement in 1945, and in the years to come, where the right had not lapsed into desuetude, it was abolished save only in a few Australian states.').

<sup>48</sup> Taylor, *The Anatomy of the Nuremberg Trials* (n 44), at 535 ('Arguments about law and evidence were not in keeping with the occasion, which was intended as an opportunity for the defendants' apologies. ... For the first and only time the defendants would not be answering questions thrown at them by the prosecution and defense lawyers; they would be speaking for themselves.').

<sup>49</sup> *Ibid.*, at 535-45 (recapitulating how the Nuremberg defendants used this procedural this opportunity).

question by prosecutors or judges'.<sup>50</sup> For defendants Hess and Frick, who had not testified, the final personal statements became 'a last opportunity to make some kind of impression upon the Tribunal, and to do this without anxiety about later cross-examination'.<sup>51</sup> The experience with the practice of Nuremberg defendants' last words was fairly positive.<sup>52</sup>

In Tokyo, the accused had a right to address the Tribunal through counsel upon the conclusion of case presentation. But the opportunity to make a closing statement in person was extended only to unrepresented defendants.<sup>53</sup> The prosecution was entitled to address the Tribunal after the defence, upon which the trial hearing was concluded, and the deliberation on the judgment and sentence could begin.<sup>54</sup> In fact, the order of final arguments at the Tokyo trial was adjusted 'in the general interest', allowing the prosecution to deliver a summation first, whereafter the defence took the floor, followed by the 'final reply' of the prosecution.<sup>55</sup> By contrast, neither in law nor in practice were the parties at Nuremberg provided with the right to respond to final speeches, although the defendants might try to use their last word to react to the points raised in the prosecution final speeches. The latter point was another essential difference between the IMTFE and the IMT: the Tokyo defendants were not allowed the last word. This was in line with the practice in the US, which had been the sole major influence on the structure of the Tokyo trial.

Neither the IMT Charter nor the IMTFE Charter expressly limited the content of closing speeches, even though the Tokyo Charter added a qualification that *opening statements* must be 'concise'.<sup>56</sup> Both courts possess the necessary powers to restrict closings addresses as appropriate in order to ensure the expeditious hearing of the case.<sup>57</sup> With view to preventing an unnecessarily lengthy closing stage and with reference to its authority under Article 18, the IMT ruled that the defence closings for all individual defendants should take no longer than 14 court days in all including a statement on common legal issues, and that defence counsel should apportion this time among the teams by agreement.<sup>58</sup>

The point of departure in this calculation was that the prosecution had voluntarily limited the length of their closings to three days; hence the defence was expected to do the same because their statements did not have to be 'a detailed analysis of the evidence but a concise review of the main matters'.<sup>59</sup> This ruling proved to be contentious with several defence counsel. Based on the status in the national procedure, they strongly objected to the set length of speeches as insufficient in light of the amount of evidence to be summed up.<sup>60</sup> The request by the defence to be granted 20 days for their closing

<sup>50</sup> Sprecher, *Inside the Nuremberg Trial* (n 40), at 1309.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, at 1327 (recounting the trial participants' positive assessments of the final statements).

<sup>53</sup> Art. 15(f) IMTFE Charter.

<sup>54</sup> Art. 15(g) and (h) IMTFE Charter.

<sup>55</sup> Boister and Cryer, *The Tokyo International Military Tribunal* 91-2.

<sup>56</sup> Art. 15(c) IMTFE Charter.

<sup>57</sup> See Art. 18(a)-(b) IMT Charter and Art. 12(a)-(b) IMTFE Charter (the Tribunals shall 'confine the trial strictly to an expeditious hearing of the issues raised by the charges' and 'take measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind.').

<sup>58</sup> 'One Hundred and Fifty-Fourth Day, Thursday, 13 June 1946', in *Trial of the Major War Criminals Before the International Military Tribunal, Vol. XVI* (Nuremberg: International Military Tribunal, 1948) 141 (noting that '[t]his will allow the Defense double the time taken by the Prosecution, both in opening and in summing up' and that 'the Tribunal would prefer that [the Defense] make the apportionment rather than make the apportionment itself').

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at 142-6 (counsel for Keitel and Von Neurath objected to the time granted, referring to the differences between the procedures in American courts, on the one hand, and German military courts as well as international courts, on the other).

speeches was denied.<sup>61</sup> The Tribunal insisted on the need for ‘some voluntary restriction’ and, while anticipating a few exceptions for defendants whose cases were of a ‘very wide scope’, allotted half a day to each defendant’s counsel for the delivery of their closing speeches.<sup>62</sup> The Tribunal added that it would not allow counsel ‘to deal with irrelevant matters or to speak for more than one day in any case’.<sup>63</sup>

The IMT also requested the defence to file a translation of each argument in French, Russian, and English at the beginning of the argument and ruled that such statements would not be subject to advance disclosure.<sup>64</sup> The reason for requiring the defence to submit the translated statements in writing before the argument was that the judges wished to facilitate their comprehension of the statements and to ensure in advance that the topics to be covered by counsel were relevant. In his statement, counsel for Hess, who had not submitted his translated argument on time, digressed into the matters deemed irrelevant by the Tribunal, namely the alleged unfairness of the Versailles Treaty. Dr. Seidl was repeatedly interrupted by President Lawrence, who in the end asked him counsel to rewrite and resubmit his translated speech.<sup>65</sup> After he complied, the Tribunal was still not content with the statement. It therefore deleted the problematic passages and ordered that a marked copy containing the deletions be handed to the counsel, which became the statement he eventually delivered.<sup>66</sup> The average length of defence statements for individual defendants was a little over four hours and, in excess of the time allocated, the twenty-two closing speeches for the defendants took almost sixteen court days.<sup>67</sup>

By contrast, the prosecution’s speeches on individual defendants were delivered in the course of little more than two court days.<sup>68</sup> The four prosecutors decided to deliver their addresses independently of one another and without advance exchange of drafts, despite the fact that this might have led to overlaps.<sup>69</sup> Given that the evidence going to the guilt and innocence as well as the information relevant to the determination of sentences was heard jointly,<sup>70</sup> some prosecution speeches touched upon the appropriate sentences, albeit without elaborate or reasoned submissions.<sup>71</sup>

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<sup>61</sup> *Ibid.*, at 551-6 (the President asking all defence counsel to give estimates of the time needed for closings). The estimates by counsel for each defendant varied between three and eight hours, but granting the time requested would have meant spending over 21 days of court time: Sprecher, *Inside the Nuremberg Trial* (n 40), at 1233.

<sup>62</sup> ‘One Hundred and Sixty-Third Day, Tuesday, 25 June 1946’ (n 42), at 2.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> ‘One Hundred and Seventy-Second Day, Friday, 5 July 1946’, in *Trial of the Major War Criminals Before the International Military Tribunal, Vol. XVII* (Nuremberg: International Military Tribunal, 1948) 554-5.

<sup>66</sup> ‘One Hundred and Eighty-Sixth Day, Thursday, 25 July 1946’, in *Trial of the Major War Criminals Before the International Military Tribunal, Vol. XIX* (Nuremberg: International Military Tribunal, 1948) 331 (noting that the rewritten argument by Dr. Seidl ‘still contains many allusions to the unfairness of the Versailles Treaty, irrelevant material, quotations not authorized by the Tribunal’).

<sup>67</sup> Sprecher, *Inside the Nuremberg Trial* (n 40), at 1233.

<sup>68</sup> See transcripts of 26-27, 29, and 30 July 1946: *Trial of the Major War Criminals Before the International Military Tribunal, Vol. XIX* (Nuremberg: International Military Tribunal, 1948) 397-618 and *Vol. XX*, at 1-14; Sprecher, *Inside the Nuremberg Trial* (n 40), at 1254.

<sup>69</sup> Sprecher, *Inside the Nuremberg Trial* (n 40), at 1253.

<sup>70</sup> Art. 24(k) IMT Charter and Art. 15(h) IMTFE Charter.

<sup>71</sup> When summing the case against Speer, Sir Hartley Shawcross (UK) mentioned the accused’s support of the retention of French workers in France as a ‘mere matter of mitigation’: ‘One Hundred and Eighty-Eighth Day, Saturday, 27 July 1946’, in *Trial of the Major War Criminals before the International Military Tribunal, Vol. XIX* (Nuremberg: International Military Tribunal, 1948) 524. The French and Soviet Prosecutors, represented by M. Dubost and Gen. Rudenko, respectively, called upon the IMT to sentence all defendants to the ‘supreme penalty’. See ‘One Hundred and Eighty-Ninth Day, Monday, 29 July 1946’, in *ibid.*, at 568 and ‘One Hundred and Ninetieth Day, Tuesday, 30 July 1946’, in *Trial of the Major War*

The Nuremberg Tribunal also stipulated the length of the prosecution and defence closing addresses concerning the accused organizations.<sup>72</sup> Such statements were delivered separately after the closing arguments for individual defendants and after the evidence was led regarding the accused organizations – i.e. before the last word by the defendants.<sup>73</sup>

Finally, the IMT also stipulate the duration and content of the final statements of the defendants in advance. In several early announcements to the parties, the Tribunal limited last words under Article 24(j) to additional matters unaddressed by the evidence on the record.<sup>74</sup> Like in respect of closing arguments by counsel, the court monitored the length and relevance of the defendants' final statements during their delivery. It felt compelled to intervene on one occasion only.<sup>75</sup> President Lawrence interrupted defendant Hess when he was 20 minutes into his closing speech—the longest delivered from the dock—in order to give his co-accused an opportunity to exercise their right under Article 24(j).<sup>76</sup> Due to these measures of streamlining the last word phase, all twenty-one final statements were heard in the course of one court day.

### 3.2 ICTY, ICTR, and SCSL

In the *ad hoc* tribunals and the SCSL, the final statements by parties in the closing stage of trial are labelled 'closing arguments'.<sup>77</sup> The term itself indicates that closing speeches may legitimately be styled as 'arguments', rather than neutral presentations. The present version of ICTY Rule 86(A) provides that after the presentation of all the evidence, the prosecutor may present a closing argument and so may the defence; then the prosecutor

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*Criminals Before the International Military Tribunal*, Vol. XX (Nuremberg: International Military Tribunal, 1948) 14.

<sup>72</sup> 'One Hundred and Eighty-Sixth Day, Thursday, 25 July 1946', in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XIX (Nuremberg: International Military Tribunal, 1948) 353 ('the closing speeches of counsel for the Prosecution and Defense ought to be short, not exceeding one-half day in each case. If this time is thought likely to be exceeded, a special application must be made to the Tribunal, stating the grounds for such extension of time').

<sup>73</sup> See transcripts of 22-23, 26-30 August 1946: *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XXI (Nuremberg: International Military Tribunal, 1948) 450-632; *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XXII (Nuremberg: International Military Tribunal, 1948) 1-365. The closing arguments for the organizations took up about seven days of court time in total: Sprecher, *Inside the Nuremberg Trial* (n 40), at 1233.

<sup>74</sup> 'Sixty-Sixth Day, Saturday, 23 February 1946' (n 41), at 161, para. 8 (Order on Dr. Stahmer's memorandum of 4 February 1946: 'In exercising his right to make a statement to the Tribunal under Art. 24(j), a defendant may not repeat matters which already have been the subject of evidence or already have been dealt with by his counsel when addressing the Court under Article 24(h), but will be limited to dealing with such additional matters as he may consider necessary before the judgment of the Tribunal is delivered and sentence pronounced'). See further 'One Hundred and Eighty-Fourth Day, Tuesday, 23 July 1946', in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XIX (Nuremberg: International Military Tribunal, 1948) 202 ('if it is the defendants' desire to make any further statements, it will be only to deal with matters previously omitted. The defendants will not be permitted to make further speeches or to repeat what has already been said by themselves or their counsel but will be limited to short statements of a few minutes each to cover matters not already covered by their testimony or the arguments of counsel').

<sup>75</sup> Sprecher, *Inside the Nuremberg Trial* (n 40), at 1326.

<sup>76</sup> 'Two Hundred and Sixteenth Day, Saturday, 31 August 1946', in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. XXII (Nuremberg: International Military Tribunal, 1948) 372 and 384 ('The Tribunal has made its order that the defendants shall only make short statements. The defendant Hess had full opportunity to go into the witness-box and give his evidence upon oath. He chose not to do so. He is now making a statement and he will be treated like the other defendants and will be confined to a short statement.'). See also Sprecher, *Inside the Nuremberg Trial* (n 40), at 1312.

<sup>77</sup> Rule 86 ICTY, ICTR, and SCSL RPE.

may present a rebuttal argument, which entitles the defence to present an argument in rejoinder.<sup>78</sup>

The present text results from an overhaul of Rule 86 at the plenary in March 1998, which first appeared in the ICTY RPE as an amendment of July 1998.<sup>79</sup> Prior to this amendment, the same Rule referred to the prosecutor's closing argument as an 'initial argument' and to the defence's closing as a 'reply'. Under a textual interpretation, this precluded the defence from presenting an argument in case the prosecution had decided not to make theirs.<sup>80</sup> Moreover, no second round of arguments was envisaged, although the practice of allowing rebuttal and rejoinder arguments existed even before the 1998 amendment.<sup>81</sup> By the same amendment of 1998, sub-Rule 86 (B) was inserted, providing for the duty of the parties to file a final trial brief not later than five days before presenting a closing argument.<sup>82</sup>

Furthermore, the requirement was introduced that the parties *shall* also address matters of sentencing in their closing arguments. This was the way to enable the parties to make their sentencing submissions prior to the judgment in the case, given the removal of separate sentencing hearings in cases other than guilty pleas around the same time.<sup>83</sup> Even before in the *Dokmanović et al.* case, the Trial Chamber already ordered the parties to file written submissions and materials relevant for the determination of sentence prior to the closing arguments and to integrate their oral arguments regarding sentencing therein, thus unequivocally expressing a preference for written over oral submissions.<sup>84</sup> As was held in *Blagojević and Jokić*, the general rationale for filing final briefs is to give each party 'an opportunity to present its theory of the case based on the evidence that has been adduced during trial' and to respond to arguments put forward in the brief of the opposing party during the closing argument.<sup>85</sup>

The ICTR Rule 86—from the outset identical to the respective ICTY Rule—underwent similar amendments. In June 1998, the terminology 'initial argument' and 'reply' was replaced with the present language that underscores the independent nature of the defence's right to a closing address. Furthermore, the parties were placed under an obligation to file their final trial briefs no later than five days before the presentation of the closing arguments, as well as to address sentencing matters in their arguments. Again, this was a consequence of limiting separate sentencing hearings for submitting

<sup>78</sup> Rule 86(A) ICTY RPE.

<sup>79</sup> The amendments to the Rule were agreed in March 1998 at the 17<sup>th</sup> plenary session: see Fifth Annual Report of the ICTY, UN Doc. A/53/219-S/1998/737, 10 August 1998, para. 107. Note that the same Report indicates in para. 108 that the Rule was also amended on 10 July 1998 at the 18<sup>th</sup> plenary session and the subtitle in the ICTY RPE also indicates the latter date as the date of the amendment. The explanation may be that the consolidated text ICTY RPE following the 17<sup>th</sup> plenary was not published, and the relevant amendments first appeared in the 10 July 1998 version of the RPE.

<sup>80</sup> J.R.W.D. Jones and S. Powles, *International Criminal Practice* (Oxford: Oxford University Press, 2003) 720 (noting that the rule was amended 'to make clear that the defence could present a closing argument whether or not the Prosecutor did so').

<sup>81</sup> Cf. Rule 86(A) ICTY RPE (IT/32/Rev. 12, 12 November 1997). For instance, the rebuttal and rejoinder arguments were allowed already in *Tadić*: Transcript, *Prosecutor v. Tadić*, Case No. IT-94-1-T, TC, ICTY, 27 November 1996, at 8699 and Transcript, *Prosecutor v. Tadić*, Case No. IT-94-1-T, TC, ICTY, 28 November 1996, at 8828 *et seq.* and 8877 *et seq.*

<sup>82</sup> Cf. Rule 86(B) ICTY RPE (IT/32/Rev. 13, 10 July 1998). The subsequent amendment of 1 and 13 December 2000 (at the 23<sup>rd</sup> and extraordinary plenary session) deleted the superfluous qualification in the original rule that the final trial brief must be filed with the TC.

<sup>83</sup> Rule 100 on pre-sentencing procedures was amended on 10 July 1998 (18<sup>th</sup> plenary session) to abolish separate sentencing hearings other than in guilty plea cases: Fifth Annual Report of the ICTY (n 79), para. 108.

<sup>84</sup> Scheduling Order, *Prosecutor v. Mrkšić et al.*, Case No. **IT-95-13a**, TC, ICTY, 8 June 1998 ('*Mrkšić et al.* scheduling order').

<sup>85</sup> Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, TC I Section A, ICTY, 28 September 2004.

information relevant to the determination of an appropriate sentence to guilty plea cases.<sup>86</sup>

The SCSL's Rule 86 departs from the respective Rules of the *ad hoc* tribunals in several important respects. Already the first version of the SCSL Rules (7 March 2003) provided that the prosecutor *shall* and the defence *may* present a closing argument; moreover, no possibility of rebuttal and rejoinder arguments was provided.<sup>87</sup> This contrasts with the ICTY and ICTR Rule 86, which entitles rather than obligates both parties to present closing arguments. Moreover, the initial SCSL Rule 86(B) provided for the parties' right—instead of a duty—to file a final trial brief before the day set for the presentation of that party's argument. By the amendment of May 2005, the submission of the written brief was rendered obligatory and the limit of five days prior to the oral argument was installed.<sup>88</sup> Furthermore, SCSL Rule 86(C) imposes on the parties an obligation to 'inform the Court of the anticipated length of closing arguments' and, secondly, empowers the court to limit the length of closing arguments in the interests of justice. Like other innovations in the SCSL procedure, this provision clearly aims at expediting the process and prodding the judges to exercise stricter control over the parties' interventions. Finally, the SCSL judges decided to retain a separate sentencing procedure in uncontested as well as contested trials.<sup>89</sup> Consequently, Rule 86 does not provide for an obligation of parties to address sentencing matters in their closing statements.

The Rules of the *ad hoc* tribunals do not provide guidance on the length and content of closing arguments and rebuttal and rejoinder arguments. As clarified by the ICTY, a closing speech must focus on the unaddressed issues raised by other parties' final briefs and should not amount to an oral rendition of arguments contained in the party's own final brief.<sup>90</sup> The parties may wish to react, in their oral arguments, to the points raised in the opponent's final trial brief, given that they may not be able to anticipate all such points at the time of submission of their own brief. In practice, the tribunals also allowed the parties to file responses to each other's final briefs prior to the presentation of oral arguments.<sup>91</sup> This allows the scope of oral submissions to be further reduced, serving the goal of a streamlined hearing.

In numerous cases, the Trial Chambers provided parties with general guidelines regarding issues they wished the parties to address.<sup>92</sup> Some Chambers adopted a more

<sup>86</sup> See Third Annual Report of the ICTR, UN Doc. A/53/429-S/1998/857, 23 September 1998, para. 15 (mentioning the joinder into a single procedure of the trial and sentencing phases as a way to expedite proceedings).

<sup>87</sup> Rule 86(A) SCSL RPE (adopted in London on 7 March 2003).

<sup>88</sup> Cf. Rule 86(B) SCSL RPE, as amended on 14 May 2005 at the 6<sup>th</sup> Plenary Meeting of the SCSL. See Third Annual Report of the President of the Special Court for Sierra Leone, at 16.

<sup>89</sup> Rule 100 SCSL RPE.

<sup>90</sup> Decision on Prosecutor's Motion Concerning Closing Arguments, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, TC I Section A, ICTY, 23 October 2002 ('the parties shall not read or repeat the content of their final briefs, but sum up their cases'); Decision on Motion for Additional Time for the Presentation of Closing Arguments and Guidance Concerning Rebuttal and Rejoinder Arguments, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, TC II, ICTY, 28 August 2009 ('*Popović et al.* closing statements decision'), at 2.

<sup>91</sup> E.g. Order Setting a Date for the Closure of the Defence Case and Dates for Filing of Final Trial Briefs and the Presentation of Closing Arguments, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, TC II, SCSL, 22 October 2010, at 2.

<sup>92</sup> See e.g. Transcript, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, TC I, ICTY, 9 July 2008, at 26764-5 ('the parties may consider addressing any controversial matter on which further argument or review of all the arguments is likely to be of assistance to the Trial Chamber; secondly, may consider addressing points made in other briefs that were not fully addressed in their brief; and thirdly, and this is a very general direction, to simply do whatever in your professional judgement would most effectively advance your client's case. Now, beyond that we do not see that it's for us to interfere in how parties choose to frame the closing arguments.').

hands-on approach and provided even more specific instructions.<sup>93</sup> This is good practice and in the interest of the parties as it helps them to make focused submissions that can be used during judicial deliberations. The rule of thumb regarding the approximate contents of the final briefs and oral arguments is that the former ought to address all material issues raised by evidence in relation to each count in the indictment, whereas the latter are to be confined to responses to the opposing party's observations regarding the case, as well as to any final unaddressed matters raised by the evidence.<sup>94</sup> It is accepted in the jurisprudence that the general tone of closing addresses to be argumentative and polemical, as opposed to opening statements.<sup>95</sup>

The purpose of rebuttal and rejoinder arguments is even more limited than that of initial arguments. According to one Trial Chamber, a rebuttal argument 'must be related to the significant issues arising directly out of the defence final brief and closing argument which could not have reasonably been anticipated. The prosecution could not repeat what has already been said in its final brief and closing argument with the sole purpose to reinforce its case.'<sup>96</sup> The same rule applies to the rejoinder argument of the defence.<sup>97</sup> The time allocated for the presentation of rejoinders tends to be limited and is tied to the time taken by the prosecutor to make a rebuttal argument.<sup>98</sup>

Except for SCSL Rule 86(C), rules do not provide for an obligation on the parties to notify the court of the anticipated length of closing arguments. However, orders to that effect are not precluded at the ICTY and ICTR, whose judges hold a general power to control proceedings and to issue such orders as necessary for the conduct of trials pursuant to Rule 54. Already in the early practice of the ICTY, the judges requested the parties to submit information on the intended content and length of closing speeches.<sup>99</sup>

<sup>93</sup> Transcript, *Prosecutor v. Stakić*, Case No. **IT-97-24**, TC II, ICTY, 28 March 2003, at 1-6 (providing guidance on the issues to be addressed in final trial briefs and/or closing arguments).

<sup>94</sup> Omnibus Order on Matters Arising out of Status Conference on the Defence Case, *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, TC, ICTY, 22 April 2005; Order for Filing of Final Trial Briefs and Presentation of Closing Arguments, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, TC II, SCSL, 30 October 2006 ('*Brima et al.* order'), at 3-4 ('The final trial brief by each party shall be presented as a brief set of arguments or propositions as to why a particular count should be upheld or rejected, addressing specific allegations in each count and the responsibility of the Accused, and shall include references to the testimony of witnesses and exhibits with transcript page references made either in footnotes or brackets. ... During the presentation of closing arguments, a party may orally respond to the written submissions of the other and may bring any other final matters before the Trial Chamber as they consider to be essential to their case.');

Order for Filing Final Trial Briefs and Presenting Closing Arguments, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, TC I, SCSL, 29 September 2006, at 4.

<sup>95</sup> E.g. Transcript, *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, TC I, SCSL, 19 January 2006, at 28-9 ('you are arguing. This is an argument that you can put forward at the time of your closing arguments. Not in the opening statement. ... [N]ow 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'). See also *ibid.*, at 31 (dismissing the counsel's attempt to expound a general legal philosophy argument at opening statement, whilst indicating the appositeness of doing so at the closing arguments).

<sup>96</sup> Transcript, *Prosecutor v. Naletilić and Martinović*, Case No. **IT-98-34**, TC I Section A, ICTY, 30 October 2002, at 16820-1 (Judge Liu).

<sup>97</sup> *Ibid.*

<sup>98</sup> E.g. Transcript, *Prosecutor v. Prlić et al.*, Case IT-04-74-T, TC III, ICTY, 1 March 2011, at 52902-3 (allocating from 5 to 50 minutes to each defence team for rejoinder and/or the statement of the accused, i.e. 2 hours 35 minutes in total); Transcript, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, TC, ICTY, 15 September 2009, at 34872-911 (granting four (out of seven) defence teams about one and a half hours in total for rejoinder and/or statements by the accused); Transcript, *Prosecutor v. Nyiramasuhuko et al.*, Case ICTR-98-42-T, TC II, ICTR, 30 April 2009, at 48 (allocating 30 minutes to each defence team for rejoinder and to each accused to address the Chamber).

<sup>99</sup> *Mrkšić et al.* scheduling order (n 84), para. 2; Transcript, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, TC, ICTY, 19 July 1999, at 11392-3 (Judge Cassese requesting the parties to provide 'some sort of skeleton arguments in writing, however, if possible, with specific and accurate references to the relevant parts or sections or pages of the transcript', to be elaborated in the oral closing statements); Transcript, *Prosecutor v. Aleksovski*, Case No. **IT-95-14/1**, TC I, ICTY, 22 March 1999, at 4103-5.

Moreover, the Chambers have routinely used scheduling as the way to streamline the closing arguments stage.<sup>100</sup> The time allocated for rebuttal and rejoinder arguments is normally more limited, given their limited purpose of focusing on the issues raised in the other party's final brief and unanticipated matters arising from its closing argument.<sup>101</sup> The difficulty of determining, before the closing statements are heard, whether rebuttal and rejoinder arguments would be necessary, regular practice has been to defer the decision on the length of the second round of arguments until the defence delivered its closing argument.<sup>102</sup>

Finally, in contrast with the IMT Charter, the procedural frameworks of the ICTY, ICTR, and SCSL do not expressly provide the accused with an opportunity to address the court in person, next to the closing statement made on his or her behalf by counsel. However, in actual practice of both the ICTY and the ICTR, the accused were sometimes given a chance to address the court in person at the end of trial.<sup>103</sup> As noted, the ICTY Trial Chambers have interpreted Rule 84*bis* liberally as allowing the defendant to request to make a personal statement beyond the opening stage of trial.<sup>104</sup> In line with the continental practice, Krajišnik was allowed to make an unsworn closing statement after the final argument by the defence counsel, as the concluding step in the presentation of the defence case.<sup>105</sup> Providing this opportunity through an extension of Rule 84*bis* regarding opening statements to the domain covered by Rule 86 is an example of an utterly flexible approach by the judges in interpreting the RPE.<sup>106</sup> The defendant was allowed to have a 'last word' on the basis of Rule 84*bis*, although he had already made a brief opening statement earlier in the trial.<sup>107</sup> The Chamber explained to the defendant that the statement would be made under its control and would normally not be interrupted; the defendant would neither have to make a solemn declaration nor be examined on its content; and the Chamber would decide on its probative value.<sup>108</sup>

<sup>100</sup> E.g. Order on Final Trial Briefs and Closing Arguments, *Popović et al.*, Case No. IT-05-88-T, TC II, ICTY, 27 March 2009 (allocating 9 hours to the prosecution and 2.5 hours to each defence team); Order on Allocation of Time for Closing Arguments, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, TC, ICTY, 30 July 2008 ('*Milutinović et al.* closing arguments order'), para. 3 (allocating the same amount of hours); Decision on the Defence of Milan Lukić Request for Additional Time for Final Brief and Closing Argument..., *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, TC III, ICTY, 22 April 2009, at 6 (allotting one hour per each party); Scheduling Order with Regard to Closing Briefs and Closing Arguments, *Prosecutor v. Hategkimana*, Case No. ICTR-00-55B-T, TC II, ICTR, 19 October 2009, at 2 (allocating two hours to each party for presenting closing arguments and one hour each for the rebuttal/rejoinder argument); *Brima et al.* order (n 94), at 6 (allocating 3 hours to the prosecution and two hours to each defence team for presenting their closing arguments).

<sup>101</sup> Decision on Prosecutor's Motion Concerning Closing Arguments, *Prosecutor v. Naletilić and Martinović* (n 90) ('rebuttal and rejoinder argument will be allowed only in a limited timeframe').

<sup>102</sup> *Popović et al.* closing statements decision (n 90), at 2; *Milutinović et al.* closing arguments order (n 100), para. 4.

<sup>103</sup> See n 98. See also Minutes, *Prosecutor v. Rukundo*, Case No. ICTR-01-70, TC II, ICTR, 20 February 2008.

<sup>104</sup> See Chapter 9.

<sup>105</sup> See e.g. Transcript, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, TC I, ICTY, 30 August 2006, at 27364-27446 (closing statement by Mr. Krajišnik's defence counsel); Transcript, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, TC I, ICTY, 31 August 2006, at 27474-86 (a rejoinder argument by Mr. Krajišnik's Defence counsel) and 27502-34 (Mr. Krajišnik's last word).

<sup>106</sup> Transcript, *Prosecutor v. Krajišnik*, 31 August 2006 (n 105), at 27500 (Judge Orić: 'Rule 84 bis says, and although ... it was not adopted as introducing the last word, but that's the way we use it, but it's still a statement under Rule 84 bis.').

<sup>107</sup> Transcript, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, TC I, ICTY, 4 February 2004, at 386-7.

<sup>108</sup> Transcript, *Prosecutor v. Krajišnik*, 31 August 2006 (n 105), at 27500-2 ('That statement is still under control of the Trial Chamber, although we hope that the way in which it was prepared allows us to not intervene at any moment and just to listen to you rather than to interfere with your statement. It is an unsworn statement, which means that you don't take an oath for that. ... No one will be in a position to put any questions to you about it. ... At the same time, the Chamber, as the Rule says, shall decide on the probative value, if any, of the statement. That means that you should be fully aware that if you say



Consequently, the defendant's last word was to be made in keeping with Rule 84*bis*. It appears that the approaches have varied by the Chamber and some statistical calculations may be needed to determine whether the 'last word' practice has been exceptional or mainstream at the *ad hoc* tribunals. But as a matter of law, although the defendants before *ad hoc* tribunals are not as such entitled to the 'last word', the Trial Chamber may use their discretion to grant this opportunity.

### 3.3 ICC

The ICC Statute contains no specific provisions on the closing stage, but Rule 141 stipulates that the Presiding Judge shall declare when the submission of evidence is closed and invite the prosecutor and the defence to make their closing statements.<sup>109</sup> The *pro forma* closing procedure is a remaining trace of the early plan to provide an exhaustive regulation of the process in the Rules.<sup>110</sup> The drafters of the ICC RPE chose not to adopt the *ad hoc* courts' terminology ('closing arguments'), although the reasons for and implications of this modification are unclear. It is a duty on the Trial Chamber to invite parties to deliver their statements at the closing stage, but it is up to each party to decide whether to use this opportunity. Sub-Rule 141(1) is clear in providing that the defence's right to deliver a closing statement is independent of whether the same right has been exercised by the prosecutor: the defence's statement is thus not a reply. The second sentence of sub-Rule 141(2) guarantees the defence an opportunity to speak last. It can be inferred that the drafters did not exclude the possibility of oral responses to the opponent's closing speech, by analogy with the procedure for rebuttal and rejoinder arguments in the *ad hoc* tribunals.

Rule 141 only mentions the prosecutor and the defence as actors with the right to speak at the closing stage. However, Rule 89(1) specifies closing statements as an appropriate proceeding for, or manner of, victim participation.<sup>111</sup> While the parties hold an unconditional right to a closing statement, the victims' legal representatives may deliver them upon leave of the Chamber, which may explain the omission of victims from Rule 141. The ICC RPE do not specifically provide for the right of the accused to address the Court with a 'last word', but, as noted, the accused holds a right to make written or oral unsworn statements at any time during the proceedings.<sup>112</sup> Finally, Regulation 54 envisages the power of the Trial Chamber to rule, *inter alia*, on the length and content of closing statements.

The ICC Trial Chambers have already had the opportunity to implement this legal framework in practice. The *Lubanga* Trial Chamber held that the accused is entitled to present a closing statement in person under Article 67(1)(h) of the Statute, given that this Article does not restrict the right to make submissions to any specific stage.<sup>113</sup> The

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something, ... we could, during our deliberations, ... use that in whatever direction; against you, in favour of you. ... [I]t's not only that you admit something ..., but also if you say something which is very much consistent with the evidence we received, ... we see that you're consistent in your approach of the case. But it's also possible that if you come up with something, ... which would be difficult to understand in view of the evidence we have, we might also draw negative inferences out of that.')

<sup>109</sup> Rule 141(1) and (2) ICC Statute.

<sup>110</sup> P. Lewis, 'Trial Procedure', in R. Lee *et al.* (eds), *The International Criminal Court: Elements of Crimes and the Rules of Procedure and Evidence* (Ardley: Transnational Publishers, 2001) 551 n21 (pointing that the formality under sub-Rule 141 (1) is 'a remnant of a much more ambitious idea to provide a complete regulation of the proceedings in the Rules, which was raised but disbanded at the Siracusa meeting.')

<sup>111</sup> Rule 89(1) ICC RPE ('the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.')

<sup>112</sup> Art. 67(1)(h) ICC Statute. See also Chapter 9.

<sup>113</sup> Decision on opening and closing statements, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1346, TC I, ICC, 22 May 2005 ('*Lubanga* opening and closing statements decision'), para. 14.

Chamber emphasized the relevance of the presumption of innocence (Article 66(1)) and the right to not incriminate oneself and to remain silent throughout the trial (Article 67(1)(g)) in the context of closing statements.<sup>114</sup> It also ruled that making a statement is a right of the accused under Rule 141(2) and rejected the prosecution claim that the defendant could be compelled to deliver it.<sup>115</sup> Similarly, the *Katanga and Ngudjolo* Trial Chamber interpreted Rule 141(2) as entitling the accused to an oral declaration under Article 67(1)(h) in the form of the ‘last word’.<sup>116</sup> In both the *Lubanga* and *Katanga and Ngudjolo* trials, the accused indeed delivered oral final statements.<sup>117</sup> The ICC trial practice thus approximates the ‘inquisitorial’ arrangements in providing the defendants with the opportunity to address the court last in the trial.

With respect to the victims’ standing at the closing stage, the ICC Trial Chambers have interpreted Rule 89(1) as allowing participating victims to deliver closing statements through their legal representatives in keeping with the ICC legal framework and when so authorized by the Court.<sup>118</sup> The legal representatives of victims were not mentioned among actors entitled to seek a right to reply and, indeed, no repeated interventions by the victims’ representatives have taken place in the trials that have reached the closing stage.

As for the sequencing the closing phase, the *Katanga and Ngudjolo* Chamber established it in advance, ruling that, by analogy with the order of opening statements, the victims may deliver their closing statements after the prosecution and before the defence.<sup>119</sup> In due course, the *Lubanga* Chamber adopted the same structure for the closing stage.<sup>120</sup> In that trial, the prosecution’s oral reply to the defence statement and the defence’s rejoinder were not specifically envisaged by the Chambers and, in the end, did not take place.<sup>121</sup> However, in the *Katanga and Ngudjolo* trial, the Chamber allowed the parties to ‘seek a right to reply and rejoinder, subject to the Chamber’s discretion’.<sup>122</sup> The

<sup>114</sup> *Ibid.*, para. 15.

<sup>115</sup> *Ibid.*, para. 16.

<sup>116</sup> Ordonnance relative aux modalités de présentation des conclusions orales, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-3274, TC II, ICC, 20 April 2012 (‘*Katanga and Ngudjolo* closing statements order’).

<sup>117</sup> Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-357-ENG, TC I, ICC, 26 August 2011, at 48–9 (Lubanga delivering a short personal statement); Transcript, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-T-340-ENG, TC II, ICC, 23 May 2012, at 47 et seq. (TC II limited the defendant’s final statements to 30 minutes each).

<sup>118</sup> *Lubanga* opening and closing statements decision (n 113), paras 14 and 18; 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. 117; Decision on the Modalities of Victim Participation at Trial, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-1788-tENG, TC II, ICC, 22 January 2010 (‘*Katanga and Ngudjolo* victim participation trial decision’), para. 68; Directions on the Conduct of Trial, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-1665-Corr, TC II, ICC, 1 December 2009 (‘*Katanga and Ngudjolo* trial directions’), para. 2; 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*, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012, paras 72-3 (authorizing the common legal representatives to make representations in person at ‘critical junctures involving victims’ interests, notably opening and closing statements’).

<sup>119</sup> *Katanga and Ngudjolo* victim participation trial decision (n 118), para. 68; *Katanga and Ngudjolo* trial directions (n 118), para. 2.

<sup>120</sup> Order on the timetable for closing submissions, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-2722, TC I, ICC, 12 April 2011 (‘*Lubanga* closing submissions order’), para. 7.

<sup>121</sup> *Ibid.*; Transcript, *Prosecutor v. Lubanga*, 26 August 2011 (n 117), at 48 (the final statement by the accused followed immediately after the defence counsel’s statement).

<sup>122</sup> Order on the arrangements for the submission of the written and oral closing statements (regulation 54 of the Regulations of the Court), *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-3218-tENG, TC II, ICC, 15 December 2011 (‘*Katanga and Ngudjolo* order on the arrangements for closing statements’), para. 14; *Katanga and Ngudjolo* closing statements order (n 116), para. 9 (‘Le

‘second-round’ opportunity was fully enjoyed by the parties.<sup>123</sup>

The distinctive feature of the practice of oral closing submissions before the ICC has been the possibility for the Chamber to pose questions to the parties and participants on their oral and written submissions.<sup>124</sup> In the two first trials in the *Situation in the DRC*, the Chambers indeed requested clarifications and asked the parties and participants questions after their presentations.<sup>125</sup>

The ICC Trial Chambers have employed all means at their disposal to streamline the closing stage of trial. Thus, the *Lubanga* Chamber limited the time available to the parties and legal representatives for making their oral submissions.<sup>126</sup> Likewise, the *Katanga and Ngudjolo* Chamber provided a schedule and order for submissions under Rule 141.<sup>127</sup> It also used its authority under Regulation 54(a) to direct the parties to focus on the aspects of the case which had emerged from their written closing submissions as most contested: the prosecutor and legal representatives were to concentrate principally on the points in the defence briefs which called for response on their part, whereas each of the defence teams would be expected to incorporate responses to the others’ oral submissions in their own oral closings.<sup>128</sup> Trial Chamber II identified the following mandatory matters for consideration: (i) the contentious issue of qualification as international of the armed conflict of which the Bogoro attack was part, and (ii) the related possibility of a modification of the legal characterization of facts in light of the *Lubanga* judgment.<sup>129</sup>

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Procureur puis la Défense de chaque accusé pourront enfin solliciter, sous le contrôle de la Chambre, un droit de réplique et de duplique’).

<sup>123</sup> Transcript, *Prosecutor v. Katanga and Ngudjolo*, 23 May 2012 (n 117), at 24-46; Transcript, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-T-339-ENG, TC II, ICC, 22 May 2012, at 60 (allocating each party one hour for their rebuttals).

<sup>124</sup> *Lubanga* closing submissions order (n 120), para. 8 (‘The parties and participants should be prepared to entertain questions from the Bench when their closing statements are delivered. It follows that for each team at least one counsel should be present in court with a detailed knowledge of the facts and issues in the case, having been present in court throughout the majority of proceedings (regardless of which counsel present the final closing statement).’); *Katanga and Ngudjolo* order on the arrangements for closing statements (n 122), para. 14; *Katanga and Ngudjolo* closing statements order (n 116), paras 7 and 9; Transcript, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-T-336-ENG, TC II, ICC, 15 May 2012, at 3 (TC II reminding parties and participants that it ‘would appreciate brief, concise, specific and useful responses that will allow [judges] to better understand your positions or your remarks, any remarks that might require further clarification’).

<sup>125</sup> Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-356-ENG, TC I, ICC, 25 August 2011, at 53–6. The number of questions on final submissions asked by TC II was more significant: Transcript, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-T-337-Red-ENG, TC II, 16 May 2012, at 1-35 (the OTP responding to the TC’s questions included on the list provided in advance); Transcript, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-T-338-Red-ENG, TC II, ICC, 21 May 2012, at 1-5 (legal representatives answering the TC’s questions); Transcript, *Prosecutor v. Katanga and Ngudjolo*, 23 May 2012 (n 117), at 2-17 (the defence’s answers to the Chamber’s questions).

<sup>126</sup> *Lubanga* closing submissions order (n 120), para. 7 (allocating the prosecution and the defence up to two hours each for their oral closing submissions and allowing the two legal representatives’ teams and the OPCV up to 40 minutes each).

<sup>127</sup> *Katanga and Ngudjolo* closing statements order (n 116), paras 5-10 (allocating three and a half hours to the OTP, 40 minutes and one hour 20 minutes to each of the two legal representatives; and three and a half hours to each defence team).

<sup>128</sup> *Katanga and Ngudjolo* closing statements order (n 116), para. 12. See further Transcript, *Prosecutor v. Katanga and Ngudjolo*, 15 May 2012 (n 124), at 10 (‘the Chamber wishes to avoid a purely academic presentation . . . [and] allow each party and participant to focus on the main points and to respond in the concluding arguments to passages in the closing briefs that seem to require clarification, and if that is not sufficient to us we are going to put questions to the parties in question.’).

<sup>129</sup> *Katanga and Ngudjolo* closing statements order (n 116), paras 13-4 (the Chamber invited parties and participants to make observations on the fairness of the possible resort to Regulation 55 at that procedural stage and requalification of the nature of the armed conflict as the issues to be settled in the judgment).

It can be recalled that before the commencement of the *Lubanga* trial, Trial Chamber I addressed the question of whether it could order the parties to disclose a memorandum or outline of their closing statements, should they intend to make such statements.<sup>130</sup> The Chamber inferred the power to do so from its competence to manage the trial, and more specifically from Regulation 54(a), and considered such outlines to be ‘a highly useful tool’.<sup>131</sup> Judge Blattmann dissented and opined that the prior disclosure of such statements is unnecessary, disproportionate, and counterproductive.<sup>132</sup> Against the backdrop of the *ad hoc* tribunals’ practice, the debate might appear as a ‘storm in a teacup’. Its relevance was overshadowed by the subsequent developments and actual trial practice. The Chambers’ prerogatives to manage the closing stage and to request detailed submissions from the parties and participants, including directions to focus on certain questions in written briefs or oral arguments, have since not generated particular controversy or litigation.<sup>133</sup> At the same time, the practice has proven Judge Blattmann right. The majority may have overestimated the value of the proposed outlines of oral submissions as helpful trial management tools. This is because the ICC Trial Chambers have adopted the practice of final trial briefs and limited oral final submissions to contested issues arising out of the briefs and *ex spontaneo* during the other party’s oral submissions. This complicates the advance disclosure of contents of the—to some extent spontaneous—oral submissions.

The Trial Chambers’ approach to organizing the parties’ written final submissions deserves pausing upon. Such submissions are truly important as a trial management tool, a point of departure for any oral submissions, and a source of reference for the judges during deliberations on the judgment. The *Lubanga* Trial Chamber issued detailed guidelines on written closing statements, stipulating the order of submissions and page limits for each filing as well as the legal and factual issues to be covered.<sup>134</sup> It ordered the prosecutor to file his submission first, given that, in view of how the case had developed, the ‘accused is entitled to know, once the evidence has closed, the legal and factual basis on which the Prosecutor maintains he is guilty’.<sup>135</sup> The defence was requested to file its closing submissions after the prosecution and the legal representatives had filed theirs, for the reason that ‘the logic underlying Rule 141(2) [sic] of the Rules that establishes the right of the defence to examine witnesses last also applies to these final written submissions’.<sup>136</sup> Thereafter, each party could file a reply and final reply, respectively.<sup>137</sup>

Similarly, Trial Chamber II instructed the parties and participants in *Katanga and Ngudjolo* trial what issues to tackle in their final briefs.<sup>138</sup> In addition, the Chamber

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Furthermore, it authorized the defence to file a motivated request for the submission of supplementary evidence under Regulation 55(3) ICC Regulations of the Court).

<sup>130</sup> See also Chapter 9.

<sup>131</sup> *Lubanga* opening and closing statements decision (n 113), para. 17.

<sup>132</sup> Separate and Dissenting Opinion of Judge René Blattmann, *Lubanga* opening and closing statements decision (n 113), para. 2. In detail on this contention, see Chapter 9.

<sup>133</sup> E.g. *Katanga and Ngudjolo* closing statements order (n 116), para. 11 (requesting the parties and participants to inform the Chamber of the main themes to be covered in their oral submissions and the approximate duration of each intervention).

<sup>134</sup> *Lubanga* closing submissions order (n 120), paras 2-6.

<sup>135</sup> *Ibid.*, para. 2 (‘In this particular case, the lack of clearly identified bases could, potentially, result in the defence responding to evidence that is no longer relied on.’).

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*, paras 2-3.

<sup>138</sup> *Katanga and Ngudjolo* order on the arrangements for closing statements (n 122), para. 10 (requesting them ‘to set out their legal and factual submissions concerning the contextual elements of the crimes against humanity and war crimes, the elements of the crimes contained in the decision on the confirmation of charges, and the criminal responsibility of the Accused’ on issues which are most in dispute.). It also imposed time and page limits on written submissions, which were subsequently extended: *ibid.*, para. 12; Decision amending the arrangements for the filing of the written submissions, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-3238-tENG, TC II, ICC, 14 February 2012; Decision on

ordered each defence team to identify undisputed facts for each part of the prosecutor's brief.<sup>139</sup> Unlike in the *Lubanga* trial, the filing of replies and rejoinders was deemed unnecessary because the oral closing statements under Rule 141 would enable the parties and participants to deliver their final arguments, and sufficient time would be allocated to them for that purpose.<sup>140</sup> Ultimately, Trial Chamber II also accommodated a request to enable them to take into consideration the *Lubanga* trial judgment when it was delivered, by allowing the prosecutor and legal representatives to file written submissions and the defence to include any observations thereon in their closing briefs, as appropriate.<sup>141</sup>

### 3.4 SPSC

Section 38 of the TRCP, which applied to the proceedings before the Special Panels for Serious Crimes in the Dili District Court of East Timor, established a duty of the court to request first the prosecutor and then the accused or his or her legal representative to make final statements upon the presentation of all the evidence. The right of the accused to address the court in person independently of the statement made on his behalf by the lawyer, like in the ICC regime, may be inferred from the statutory right of the accused to address the court regarding any relevant issue.<sup>142</sup> No second round of closing speeches was foreseen. Nor was there a provision allowing the possibility for the participating victims to deliver a closing, although theoretically the panels had a power to allow this form of participation under Section 12.5 of the TRCP.<sup>143</sup>

Although the actual practice of the SPSC often departed from the 'letter' of the TRCP, a review of trial judgments evinces that closing statements were normally allowed by the court and delivered by the parties.<sup>144</sup> But minor departures from the text of Section 38 did occur in some cases. Although that section envisages that a closing statement is to be delivered either by the accused *or* by counsel, the panels allowed both to address the court, implicitly giving effect to Section 30.7.<sup>145</sup> Furthermore, the usual form of presenting oral arguments by the parties was to read out the written final submissions they had previously filed with the court.<sup>146</sup>

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the requests of the parties and participants for an extension of the page limit for their written closing submissions, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-3249-tENG, TC II, ICC, 17 February 2012.

<sup>139</sup> *Katanga and Ngudjolo* order on the arrangements for closing statements (n 122), para. 10.

<sup>140</sup> *Ibid.*, para. 13.

<sup>141</sup> Decision on the arrangements for the filing of observations by the parties and participants on the judgment handed down in *Lubanga*, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-3255-tENG, TC II, ICC, 2 March 2012.

<sup>142</sup> Section 30.7 TRCP ('The accused shall be given the opportunity to address the Court regarding any issue raised during the hearing, provided that such issue is relevant to the proceedings.').

<sup>143</sup> Section 12.5 TRCP ('A victim may request to [sic] the court to be heard at stages of the criminal proceedings other than review hearings.')

<sup>144</sup> Multiple SPSC judgments do mention closing statements: Judgement, *Prosecutor v. João Sarmiento*, Case No. 18A/2001, SPSC, 12 August 2003, para. 22; Judgement, *Prosecutor v. Umbertus Ena and Carlos Ena*, Case No. 5/2002, SPSC, 23 March 2004, para. 27; Judgement, *Prosecutor v. Augusto dos Santos*, Case No. 06/2001, SPSC, 14 May 2002 ('*Dos Santos* judgment'), para. 18; Judgement, *Prosecutor v. Miguel Mau*, Case No. 08/C.G/2003/TD.DIL, SPSC, 23 February 2004.

<sup>145</sup> E.g. Judgement, *Prosecutor v. Francisco Soares*, Case No. 14/2001, SPSC, 12 September 2002 ('*Soares* judgment'), para. 15; *Dos Santos* judgment (n 144), para. 18; Judgement, *Prosecutor v. Gaspar Leki*, Case No. 05/2001, SPSC, 14 September 2002 ('*Leki* judgment'), para. 16.

<sup>146</sup> *Soares* judgment (n 145), para. 15; Judgement, *Prosecutor v. Damião da Costa Nunes*, Case No. 1/2003, SPSC, 10 December 2003, para. 12. Judgement, *Prosecutor v. Agustinho da Costa*, Case No. 07/2000, SPSC, 11 October 2001, para. 24; *Leki* judgment (n 145), para. 16.

### 3.5 ECCC

The ECCC Rules envisage that after the examination of all evidence, the President of the Chamber shall call successively upon the following persons to make their closing statements: (a) civil party lead co-lawyers; (b) the Co-Prosecutors, for such oral submissions as they consider necessary for justice to be done; (c) the lawyers for the accused; and (d) the accused.<sup>147</sup> The Rule is formulated in the way that obliges the Chamber to invite the respective actors to make statements but imposes no obligation on those persons to accept the invitation. Effectively, the Co-Prosecutors are the only actor with a duty to make final submissions, subject to their discretion in determining that this would be necessary for justice to be done in the case.<sup>148</sup> This entails their obligation to make submissions that are impartial and correspond to their role as judicial officers, i.e. that they must refrain from seeking a conviction at all costs and a maximum sentence beyond any proportionality.

If one looks at the sequence of presentations as well as the actors entitled to speak (e.g. civil party representatives and the accused independently from the co-lawyers), it is apparent that the rule is inspired by the French and Cambodian criminal procedure.<sup>149</sup> Like during the other phases of trial, the defendant is accorded a more active role at closing statements and may have the ‘last word’, as a separate slot in the procedural sequence. Again, this reflects the ‘inquisitorial’ thinking underpinning the ECCC trial regime according to which the defendant should be the last one to speak at trial and may make submissions to the court as a full party, not as a witness.<sup>150</sup>

Furthermore, the closing statements phase may proceed in two rounds. The civil party lead co-lawyers and the Co-Prosecutors are allowed to make rebuttal statements.<sup>151</sup> The interventions will in any event be concluded by the statements of the co-lawyers and the accused person.<sup>152</sup> In contrast with Rule 89*bis*(2) on opening statements, Rule 94 does not limit the length and content of closing or follow up statements and thus leaves these issues to the Trial Chamber’s determination. Furthermore, the ECCC IR are silent on whether the Chamber may order parties to file their written closing statements in advance of an oral hearing.

The ECCC trial practice thus far resolved these questions. In both Case 001 (*Duch*) and Case 002/1 (*Nuon Chea and Khieu Samphan*), the written closing submissions were requested by the judges.<sup>153</sup> In both trials, the Chamber issued

<sup>147</sup> Rule 94(1) ECCC IR. Rule was amended twice, but changes only concerned the denomination of the civil party representatives entitled to speak. On 6 March 2009 (Rev. 3), the phrase ‘lawyers for Civil Parties’ was replaced with ‘Civil Parties’, and on 17 September 2010 (Rev. 6), it became ‘Civil Party Lead Co-Lawyers’, as a result of the comprehensive reform of the civil party representation system at the ECCC. See ECCC Press Release, ‘Eighth Plenary Session of the ECCC Concludes’, 17 September 2010.

<sup>148</sup> This is also a requirement under Cambodian criminal procedure: see Art. 336, 2007 Code of Criminal Procedure (Cambodia) (‘The Royal Prosecutor shall make an oral closing argument that he considers is in the interest of justice.’).

<sup>149</sup> Art. 336, 2007 Code of Criminal Procedure (Cambodia) (‘At the conclusion of the hearing, the presiding judge invites the following people to give their closing statements one after another: The civil party, the civil defendants and the accused can make brief statements; the lawyer of the civil party presents his closing arguments; the Royal Prosecutor presents his closing arguments; the lawyer of the civil defendant and then the lawyer of the accused present their closing arguments. The civil party and the Royal Prosecutor can make rebuttal statements. However, the accused and his lawyer shall be always the last ones to speak.’); Art. 346 Code of Criminal Procedure (France).

<sup>150</sup> For discussion, see M. Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’, (1973) 121 *University of Pennsylvania Law Review* 506, at 526-30.

<sup>151</sup> Rule 91(2) ECCC IR.

<sup>152</sup> Rule 94(3) ECCC IR.

<sup>153</sup> Direction on Proceedings Relevant to Reparations and on the Filing of Final Written Submissions, *Kaing Guek Eav alias “Duch”*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 27 August 2009. See also Co-Prosecutors’ Final Trial Submission with Annexes 1-5, 11 November 2009; by comparison with this 168-pages document, the defence submission was concise (16 pages): Final Defence Written

scheduling orders, allocating time to the parties for their closing speeches.<sup>154</sup> As a result, the *Duch* closing phase took in total five court days, including the time reserved for concluding the substantive hearing.<sup>155</sup> But in the second trial, the closing statements took at least twice as long.<sup>156</sup> As regards the appropriate content of the statements, the Trial Chamber held in Case 002/1 that since ‘the parties have had the opportunity to present the bulk of their argument in those written briefs’, closing statements ‘should be a summary of [the parties’] submissions or rebuttal of other parties’ submissions’.<sup>157</sup> In providing guidance to the civil parties in *Duch* on the appropriate content of closing statements, the Chamber ruled *ex post facto* that its previous decisions are no proper subject for a closing statement, and should a party stray into the domain unrelated to factual and legal matters, it would be interrupted.<sup>158</sup> As for the content of rebuttal statements, the Chamber required the parties to focus on ‘the object of judgment’, i.e. the factual and legal matters, to ‘respect the rights of the others, including that of the accused’, to ‘be mindful of their attitude and behaviour while making such a statement’, and to ‘uphold their ethical code of conduct and be professional’.<sup>159</sup> In Case 002, it clarified that ‘[r]ejoinder allows the defence to make a brief response to those issues addressed by the prosecution in rebuttal’.<sup>160</sup>

Regarding the appropriate content of the final statement of an accused, it was held that, despite the absence of any restrictions in Rule 94(3), ‘it is clearly meant to be a brief final statement rather than a reiteration of arguments already advanced during the time ... accorded for closing statements’ by defence lawyers and the accused.<sup>161</sup> In *Duch*, the accused made a closing statement first, addressing the facts and his role in the crimes charged,<sup>162</sup> followed by the two statements delivered by co-lawyers. The co-lawyers’ closing speeches were inconsistent. The national co-lawyers challenged the ECCC competence to try Duch in view of statute of limitations, his low rank in the Khmer Rouge hierarchy, and the defence of superior orders, thereby in essence requesting the court to acquit him, in departure from the defence’s written submissions.<sup>163</sup> The international co-lawyer acknowledged the disagreement with his colleague and focused

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Submissions, 11 November 2009. See also Adjusted Schedule for Closing Submissions (E295/1, E295/1/2, E295/1/3, E295/2 and E295/3), *Nuon Chea and Khieu Samphan*, Case File 002/19-09-2007-ECCC-TC, TC, ECCC, 22 August 2013 (‘*Case 002/1* adjusted schedule for closing submissions’), para 1.

<sup>154</sup> Scheduling Order for Closing Statements, *Kaing Guek Eav*, Case File/Dossier No. 001/18-07-2007-ECCC/TC, TC, ECCC, 30 September 2009. The order allocated 5 hours to the civil parties (through their lawyers), thus up to 1 hour and 15 minutes to each civil party group, and 5 hours to the co-prosecutors. The defence lawyers and the accused were allowed 7.5 hours. In case rebuttals would be necessary, the civil parties’ lawyers and the Co-Prosecutors were afforded 1 hour; the same amount of time was allowed to the defence lawyers and/or the accused for making the final statement. See also *Case 002/1* adjusted schedule for closing submissions (n 153), para. 6 (making the following allocation of maximum time: civil party lead co-lawyers 1 day (closing statement); OCP 3 days (closing statement), the defence co-lawyers 2 days per team (closing statement); lead co-lawyers and OCP 1 day (rebuttal); and the two co-accused 4 hours (final statements)).

<sup>155</sup> See Transcripts of trial proceedings – Kaing Guek Eav “Duch”, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 23-26 November 2009.

<sup>156</sup> See Transcripts of trial proceedings, *Nuon Chea and Khieu Samphan*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 16-18, 21-22, 25, 25, 28, and 30-31 October 2013.

<sup>157</sup> Transcript of trial proceedings (Trial Day 215), *Nuon Chea and Khieu Samphan*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 16 October 2013, at 2.

<sup>158</sup> Transcripts of trial proceedings (Trial Day 73), *Kaing Guek Eav*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 23 November 2009, at 72-3. See e.g. *ibid.*, at 53.

<sup>159</sup> *Ibid.*, at 83.

<sup>160</sup> *Case 002/1* adjusted schedule for closing submissions (n 153), para. 4.

<sup>161</sup> *Ibid.*

<sup>162</sup> Transcript of trial proceedings (Trial Day 75), *Kaing Guek Eav alias “Duch”*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 25 November 2009, at 39-73.

<sup>163</sup> *Ibid.*, at 79-80, 114, and 117. See Final Defence Written Submissions (n 153), para. 51 (signed by the international co-lawyer alone).

on the sincerity of Duch's remorse, asking the court to be lenient towards Duch at sentencing.<sup>164</sup> The rebuttal stage was used to clarify the inconsistent submissions. In the final statement, Duch confirmed that the national co-lawyer had been duly instructed as regards the plea for acquittal.<sup>165</sup>

### 3.6 STL

STL Rule 147 on the closing statements is modeled on ICTY Rule 86, subject to the structural differences of the STL process. Rule 147(A) envisages that after the presentation of all the evidence in the case, the prosecutor may present a closing argument, which may be followed by the argument of the participating victims and the defence. The victim and defence statements may be made irrespective of whether the prosecution chooses to deliver its closing address. After that, the prosecutor and the defence may make their rebuttal and rejoinder arguments, respectively.

Rule 147(A) does not entitle the participating victims to make a rebuttal. But, arguably, the Chamber may still grant them this opportunity on the basis of Article 17 of the Statute which authorizes the Chamber to permit victims to express their 'views and concerns' at the procedural stage deemed appropriate by the court. This interpretation would be consistent with the conditional right of participating victims to request the Chamber to call witnesses and tender other evidence on their behalf as well as to present evidence in rebuttal.<sup>166</sup> Moreover, it seems logical that the victims, who have a right to make closing arguments in the first place, are allowed to react to the arguments raised in the other parties' oral submissions and final trial briefs dealing with the evidence examined upon the victims' request. The STL Prosecutor may not be expected to deal with all defence arguments regarding issues arising from the closing speeches by participating victims.

In contrast with the ICTY, ICTR, and SCSL RPE, the parties (and for that purpose, participating victims) may—rather than *shall*—file a final trial brief no later than five days prior to presenting closing arguments.<sup>167</sup> Finally, Rule 147(C) entitles the accused to make a final statement on matters relevant for the trial. Similarly to the SCSL, the STL Rules do not impose an obligation to address sentencing matters in the closing statements because at the STL regime the guilt-determination and sentencing stages are separate not only in uncontested proceedings, but also in contested trials.<sup>168</sup> The information that may assist the court in determining an appropriate sentence may be submitted by the parties and victims during a separate hearing held in case of conviction.<sup>169</sup>

### 3.7 Summary

The procedural law and practice of all international criminal tribunals are uniform in providing the parties and other participants with an opportunity to address the court at the concluding stage of trial. The overview reveals that there is a number of common standards and practices in this domain in various jurisdictions as well as some notable

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<sup>164</sup> Transcript of Trial Proceedings (Trial day 76), *Kaing Guek Eav*, Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 26 November 2009, at 8-9 and 78-9.

<sup>165</sup> Transcript of Trial Proceedings (Trial day 77), *Kaing Guek Eav*, Case File No. 001/18-07-2007-ECCC/TC, TC, 27 November 2009, at 53 and 60 (the TC interpreted Duch's final statement as a request to acquit and release him).

<sup>166</sup> Rules 87(B) and 146(B)(ii) and (v) STL RPE.

<sup>167</sup> Rule 147(B) STL RPE.

<sup>168</sup> Rules 168 and 171 STL RPE.

<sup>169</sup> Rules 87(C) and 171(A) STL RPE.



divergences. First, in all courts, the parties—the prosecution and the defence (and civil parties in the ECCC)—as well as participants (victims at the ICC, through their legal representatives) are *entitled* to make closing arguments/statements, upon the presentation of all the evidence in the case.<sup>170</sup> Only the IMT Charter framed this as an obligation on both parties.<sup>171</sup> In most courts, it is a right of the parties and participants accompanied by the obligation on the Chamber to invite them to deliver closing arguments. The SCSL Rules are unique in that they turn the closing argument into a duty on the prosecutor.<sup>172</sup> Similarly, ECCC IR 94 formulates a prosecutorial obligation to make such submissions as ‘necessary for justice to be done’, which implies discretion of the Co-Prosecutors to decide whether and what kind of statement would be warranted. In all jurisdictions the defence holds an independent right to sum up its evidence which is not contingent upon the exercise of such a right by the prosecution; the initial version of the ICTY and ICTR Rule 86 that could be interpreted differently was modified early on.

There is a division between the courts on whether actors other than the prosecution and defence counsel may summate evidence at the end of the trial. In the IMT, ICC, ECCC, and STL, defendants were allowed to have a ‘last word’ independent of the counsel’s closing speech, as a matter of law and practice, if any.<sup>173</sup> The IMTFE defendants held no such right if represented by counsel.<sup>174</sup> Before the SPSC the defence formally enjoyed only one opportunity to address the court at the final stage,<sup>175</sup> but the practice there was more flexible as defendants were allowed to speak alongside their counsel. Neither at the *ad hoc* tribunals nor at the SCSL were the defendants formally accorded a right to have a ‘last word’. But in some ICTY cases, Rule 84*bis* concerning the statement of the accused was held applicable by extension to the closing stage as well. At the ICTR too, defendants have occasionally been allowed to speak after defence closing statements or arguments in rejoinder.

Where victims are allowed to participate in the (trial) proceedings, they may make closing statements alongside the parties. The exception in this respect was the SPSC: the Transitional Rules did not expressly authorize victims to make closing arguments and there was no practice confirming the existence of the right. Where victims may present closing arguments, it is possible to distinguish between the regulatory approach of the ECCC and STL where closing arguments are a right of victims,<sup>176</sup> and the ICC where this is a matter of judicial discretion.<sup>177</sup>

The second set of issues relates to the structure of the closing stage. In different courts, it varies depending on what actors are authorized to speak during the closing stage. Where the case presentation unfolds in two cases, it is first the prosecutor and then the defence counsel who are allowed to address the court. The IMT and IMTFE reverse this sequence, subject to the caveat that it was not the IMTFE’s actual practice. In the courts allowing victims to participate at trial, closing statements by or on behalf of the victims may be made at different phases. The ICC jurisprudence reserves for legal representatives the slot after the closing statements of the prosecutor and before those of the defence. The same approach is reflected in the STL Rule 147(A). By contrast, at the ECCC, the lead co-lawyers of civil parties go first,<sup>178</sup> in conformity with the French-influenced Cambodian procedure.

<sup>170</sup> Art. 24(h) and (i) IMT Charter; Art. 15(f) and (g) IMTFE Charter; Rule 86(A) ICTY, ICTR and SCSL RPE; Rule 141(2) ICC RPE; Section 38 TRCP; Rule 94(1) ECCC IR; Rule 147(A) STL RPE.

<sup>171</sup> Art. 24(h) and (i) IMT Charter.

<sup>172</sup> Rule 86(A) SCSL RPE.

<sup>173</sup> Art. 24(j) IMT Charter; Art. 67(1)(h) ICC Statute; Rule 94(1)(d) ECCC IR; Rule 147(C) STL RPE.

<sup>174</sup> Art. 15(f) IMTFE Charter.

<sup>175</sup> Section 38 TRCP.

<sup>176</sup> Rule 94(1) (a) ECCC IR; Rule 147(1)(A) STL RPE.

<sup>177</sup> Rule 89(1) ICC RPE.

<sup>178</sup> Rule 94(1) ECCC IR.

The related issue of sequencing aspect is the number of rounds of presentations during the closing stage. The historical IMTs did not allow parties to have a second round for a final debate on evidence, but the ICTY and ICTR Rules were amended specifically to allow for rebuttal and rejoinder arguments possibly to be made after the initial arguments. Although ICC Rule 141(2) does not specifically provide for the second round, the Court is not precluded from allowing it given that the second sentence of the same sub-Rule states that the defence shall always be given an opportunity to speak last. In one trial thus far, rebuttal and rejoinder arguments were indeed made. Furthermore, the most recently instituted courts, such as the ECCC and STL, do envisage rebuttals and rejoinders or their analogues.<sup>179</sup> In contrast to the ECCC though, STL Rule 147(B) is silent as to whether the right of reply is available to the participating victims.

The third area of interest is the content and length of closing addresses and the extent and forms of judicial control. The procedural frameworks of international and hybrid courts do not set forth specific requirements. Exceptionally, the ICTY and ICTR Rules specify that the parties must address sentencing matters as part of their closing arguments. As noted, general guidance is provided to the ECCC Co-Prosecutors whose statements should be such as are ‘necessary for justice to be done’.<sup>180</sup> The contents and length of closing arguments are determined by their procedural rationales – providing a conclusive overview or analysis (summation) of evidence as well as to reply to the other party’s written submissions in order to assist the Chamber in its evaluation during deliberations. The purpose of rebuttal and rejoinder arguments is then to react to the other party’s oral closing arguments and to address any other final matters with view to a structured and constructive debate on the evidence.

The procedural function of closing statements and argument—assisting the Chamber in its deliberations—is manifested clearly in the remarkable practice at the ICC whereby judges may extensively question parties on their closings in order to obtain clarification of certain points or additional information they need to deliberate on the merits. Although the judges at other courts are not precluded from posing questions to the parties on their closings, this has not been usual practice. Closing arguments have mostly been but a sequence of logically connected solo performances by counsel in which judges have little to no role to play. The ICC practice, which embodies a pragmatic approach, signifies a shift of emphasis from the ‘advocacy’ function of closing arguments to the practical and procedural functions of establishing the truth and assisting in judicial deliberations.

The parties (and participating victims, as appropriate) are under an obligation (ICTY, ICTR, and SCSL) or are entitled (STL) to file their final trial briefs shortly before the presentation of oral arguments. This requirement affects the scope of oral arguments because if the Chamber is familiar with the final trial submissions prior to the oral arguments, it is most effective to limit the oral arguments to issues not addressed in detail in the party’s written submissions as well as to issues arising from the closing briefs or oral arguments of other parties. The use of final trial briefs modifies the rationale of oral arguments and enhances their interactive and spontaneous character. The pragmatic value of the final trial briefs is that they are reasoned and well-structured final arguments of the parties that will prove highly useful to the Chamber during deliberations. At the ICTY and ICTR as well as the ECCC, where no separation between the guilt-determination and sentencing stages is foreseen, final trial briefs are indispensable sources of the information assisting the Chamber relevant for the determination of the appropriate sentence. The defence may be inhibited to submit such information along with evidence seeking to prove the innocence of the defendant.

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<sup>179</sup> Rule 94(2) and (3) ECCC IR; Rule 147(A) STL RPE. Cf. Section 38 TRCP; Rule 86(1) SCSL RPE.

<sup>180</sup> Rule 94(1)(b) ECCC IR.

Finally, only the ICC Regulation 54(a) and SCSL Rule 86 specifically allow the Chamber to limit the content and length of closing statements. But across the board, Trial Chambers may invoke their general case-management powers to do so in the interests of fair and efficient proceedings, whether through scheduling orders or intervening in the presentation of an argument by the party.<sup>181</sup> The effective management of the closing stage is easier where the court has a prior knowledge of the contents of the prospective submissions. The fact that oral submissions will be spontaneous at least in some degree entails that the advance notification by the parties cannot be comprehensive. Without exception, all courts have developed the practice of ordering the parties to file an outline of their closing addresses and an estimate of their duration. This has generally been sufficient for the judges to be able to oversee the presentations.

## 4. ASSESSMENT

### 4.1 Fairness perspective: Drawing from human rights law

As in relation to other matters falling within the organization of criminal trials, human rights law provides no specific requirements concerning the closing stage, in particular whether it should have one or two rounds, whether participating victims and accused must be allowed to speak, or whether the court may require parties to disclose arguments in advance. But in a general sense, the principle of equality of arms, the right not to incriminate oneself, and the presumption of innocence should be respected by the international tribunals in the context of closing statements procedure.

As noted, the principle of equality of arms was interpreted by the ECtHR as the right of each party to ‘a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent’.<sup>182</sup> Such interpretations were in particular made in connection with the right of the accused ‘to examine, or have examined, the witnesses against him ... under the same conditions as witnesses against him’,<sup>183</sup> not with respect to the non-evidentiary stage of closing arguments. Insofar as a closing argument, being a summation of evidence, is a part—and a crucial part—of case presentation, the equality of arms principle should be fully applicable to that stage as well.

Consequently, the defence must be given an opportunity to address the court irrespective of whether or not the prosecutor decides to do so. In this light, the 1998 amendment of ICTY and ICTR Rule 86 is a positive development as it granted the defence a procedural opportunity to sum up its evidence that is not conditional on the prosecutor’s choice in this regard. The spirit of the equality of arms requires that the

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<sup>181</sup> E.g. Art. 18(a) and (b) IMT Charter; Art. 12(a) and (b) IMTFE Charter; Rule 54 ICTY, ICTR, SCSL RPE; Rule 85(1) ECCC IR; Rule 130(A) STL RPE.

<sup>182</sup> Judgment, *Bulut v. Austria*, Application No. 17358/90, ECtHR, 22 February 1996, para. 47. Cf. *Dombo Beheer B.V. v. Netherlands*, Judgment, Application No. 14448/88, ECtHR, 27 October 1993, para. 33 (‘the requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to such cases as well as to criminal cases’; ‘as regards litigation involving opposing private interests, “equality of arms” implies that each party must be afforded a reasonable opportunity to present its case—including his evidence—under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.’).

<sup>183</sup> Art. 6(3) ECHR (‘Everyone charged with a criminal offence has the following minimum rights: ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’); Art. 14(3) of the ICCPR (‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’).

number of interventions at the closing stage extended to each party must not be unequal. In this sense, allowing the prosecutor a rebuttal argument without mirroring this by defence rejoinder, as occurred before the IMTFE, is problematic under this interpretation.<sup>184</sup> Furthermore, the Chamber must be guided by the same principle when allocating time or page limits to the parties for making their oral and written submissions, so that the requirements applicable to the prosecution and the defence are not disproportionate in the circumstances of the case. The application of the principle is of course qualified by the impossibility of extending the ‘right to a last word’ to both parties.<sup>185</sup> The interpretation favouring the defence in this regard is not inconsistent with the principle.

The presumption of innocence provides another useful assessment criterion, especially concerning the expected or obligatory content of closing speeches and briefs.<sup>186</sup> The first corollary of the presumption is that the defence may not be compelled to summate its evidence, insofar as it may not be compelled to present evidence in the first place. Otherwise, this would amount to shifting the burden to the defence.<sup>187</sup> Arguably, even where the accused has advanced defences or alibi and presented evidence in support, placing him under an obligation to sum up might come close to a reversal of the onus of proof. Even though a closing address is not evidence, it does assist the Chamber in evaluating it – thus, the defence may decide to add no further observations over and above the evidence already presented.

Secondly, in contrast with SCSL Rule 86 and STL Rule 147, ICTY and ICTR Rule 86(C) obliges the parties to address sentencing matters in their closing arguments. This requirement, which resulted from the merging of the guilt-determination and sentencing stages, is vulnerable to a criticism from the fairness perspective. Although it does not appear to infringe the equality of arms because both parties bear the respective obligation, it is arguably unfair towards the defence as it forces that party to undermine its own plea for acquittal by pleading in mitigation of the possible sentence.<sup>188</sup> Moreover, the defence is normally not in a position to provide the sentencing information meaningfully at the stage of closing arguments and before the conviction. Since the defence does not know on what charges the accused will be convicted or acquitted and on what factual basis, it may only make general and vague submissions.<sup>189</sup> The solution for this inconsistency lies beyond the legal regime applicable to closing statements: it must

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<sup>184</sup> See accompanying text to *supra* n 55.

<sup>185</sup> *Kaufman v. Belgium*, Decision as to admissibility, Application no. 10938/84, ECommHR, 9 December 1986, DR 50, p. 110, at 115-6.

<sup>186</sup> Art. 6(2) ECHR (‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.’); Art. 14(2) ICCPR (‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.’); Art. 8(2) ACHR (‘Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.’).

<sup>187</sup> See also *Lubanga* opening and closing statements decision (n 113), para. 16 (‘the Chamber is unpersuaded by the prosecution’s contention that the defendant can be compelled to make an opening or closing statement. They are entitled to sit silently, leaving it to the prosecution to prove its case.’).

<sup>188</sup> Jones and Powles, *International Criminal Practice* (n 80), at 720 (‘If the defence case is correct, the accused should not be convicted and so there will be no sentencing, and no punishment, at all. To order the defence to address matters of sentencing in their closing speeches is, therefore, to force them into contradicting, and thus undermining, their own case that the accused is not guilty.’); A. Cassese, *International Criminal Law* 2<sup>nd</sup> edn (Oxford: Oxford University Press, 2008) 412, note 17 (observing that a multi-layered defence argument containing references to mitigating factors ‘does not sound very convincing as a closing speech – the protestation of innocence is undercut by what sounds like admissions by the accused’).

<sup>189</sup> Jones and Powles, *International Criminal Practice* (n 80), at 720-1 (providing an example of alternative charges for direct perpetration under Art. 7(1) ICTY Statute and for command responsibility under Art. 7(3) ICTY Statute, which invite the submission of different sets of mitigating circumstances from the Defence).

rather be sought in the bifurcation between the judgment and sentencing phases. In this light, the requirement under the ICTY and ICTR RPE that the parties must address sentencing matters in their closing makes the case for a reform, and indeed, at the ICC and the STL, the parties may make their sentencing submissions at a separate hearing to be held in case of conviction.

Finally, the privilege against self-incrimination and the prohibition to draw inferences of guilt from the exercise of the right to remain silent<sup>190</sup> should inform the practice of closing arguments. Although the ECHR does not codify the privilege, it is recognized as a fundamental requirement of fairness in the Strasbourg case law.<sup>191</sup> In case the defendant wishes to address the court in person at the closing stage, the courts has a duty to ensure that he or she has been properly informed of the right to remain silent before he starts delivering the final statement. The second relevant aspect is that the privilege has certain effects on the content of the closing argument by the prosecution. The prosecutor should not be allowed to refer to the inadmissible evidence inconsistent with the privilege against self-incrimination. In *Saunders v. UK*, the ECtHR found a violation of the privilege against self-incrimination under Article 6 in the scenario where the statements obtained from the accused person who had not benefited from the protection conferred by the right to remain silent, were referred to in the prosecution's closing speech as a way to refute the accused's testimony.<sup>192</sup>

#### 4.2 Teleological perspective: Institutional goals

It is uncertain what links, if any, can be drawn between the institutional goals of the tribunals, on the one hand, and the procedural regime governing closing statements and final submissions by the parties to international criminal trials. The issues such as the structure of that phase, actors authorized to participate in it, and the court's duties and powers are mostly technical matters of the administration of international criminal justice and the broader goals of the enterprise would seem to have only limited import here.

Their procedural functions may only be remotely related to the achievement of the ambitious institutional goals of restoring peace and reconciliation, deflecting revisionism, and the like. Closing arguments are not strictly evidence but parties' own interpretations and summaries of that evidence that do not substitute for independent judicial evaluation. However, being a mixture of law and fact, closing submissions serve an important epistemic objective of summing up and debating the proof for the court and facilitating an open debate on evidence by the parties. Therefore, final arguments can enhance the court's comprehension of evidence, guide it through the process of deliberations, and lead to more efficient and accurate decision-making. In turn, to the extent these procedural

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<sup>190</sup> Art. 8(2)(g) and (3) ACHR ('During the proceedings, every person is entitled, with full equality, to... the right not to be compelled to be a witness against himself or to plead guilty... A confession of guilt by the accused shall only be valid only if it is made without coercion of any kind.');

Art. 14(3)(g) ICCPR ('In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... Not to be compelled to testify against himself or to confess guilt.').

<sup>191</sup> *Funke v. France*, Judgment, Application no. 10828/84, ECtHR, 25 February 1993, para. 44 (finding a violation of 'the right of anyone "charged with a criminal offense", within the autonomous meaning of this expression in Art. 6 (art. 6), to remain silent and not to contribute to incriminating himself'); *Saunders v. UK*, Judgment, Application No. 19187/91, ECtHR, 17 December 1996, para. 68 ('although not specifically mentioned in Art. 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Art. 6'); *John Murray v. UK*, Judgment, Application No. 18731/91, ECtHR, 8 February 1996, para. 45; *Serves v. France*, Judgment, Application No. 20225/92, ECtHR, 20 October 1997, para. 46; *Quinn v. Ireland*, Judgment, Application No. 36887/97, ECtHR, 21 December 2000, para. 40; *Allan v. UK*, Judgment, Application No. 48539/99, ECtHR, 5 November 2002, para. 44.

<sup>192</sup> *Saunders* judgment (n 784), paras 31 and 72-6.

objectives are aligned with the socio-political mandates of the tribunals, closing arguments may be deemed an indispensable element of the tribunals' procedural systems.

The tribunals' cases are adjudicated by professional benches and—for better or for worse—there is no place for juries in international criminal trials. Even so, final arguments are crucial because such cases are invariably complex: they involve multiple facts and tremendous evidentiary record, as well as span over extensive periods of time that are unparalleled in the national context. The task of presenting an effective and coherent summation is challenging even for highly experienced counsel. Besides perfect mastery of the case's ins and outs, a 'winning' closing argument calls for an ability of counsel to be persuasive on the basis of the evidence examined in court.<sup>193</sup> But the epistemic benefit of having parties present in court their concise and accurately sewn summations arguing the crucial factual and legal issues in the case and addressing both strengths and weaknesses of the evidence presented cannot be overestimated. Closing arguments assist the judges in deliberations and may contribute to the establishment of the forensic truth – and, possibly in the long term, of the historical truth as well.

As noted, the closing stage is the only opportunity for the parties to engage in a structured debate regarding facts and evidence and to react to each other's visions of the relevant historical events. The dynamics of direct interaction in the courtroom between the proponents of different versions of truth serves to defragment the evidence and debate in the essentially binary (two-case) adversarial proceedings. It is conducive to the emergence of a more balanced and inclusive—as opposed to one-sided and unilateral—narrative. More than any other part of proceedings, it reflects the endeavour to get to the core of the matters and to establish the truth. It could further the production of a credible and truthful historical record as the basis for the prevention of similar crimes in the future and reconciliation.

By the same token, the opportunity for the parties to present rebuttal and rejoinder arguments, as the need be, is aligned with the same goals, as it turns the process from a series of juridical monologues into a transparent and lively debate on charges and evidence. This increases the chance that the truth will be discovered and that the court's decision will amount to a broader consensus on the contentious historical events, or at least acknowledge alternative versions, rather than handing down conclusions necessitated by a 'master narrative'. Lacking rebuttal and rejoinder arguments, the evidentiary debate at the trial's closure would remain inconclusive.

The consideration of the special goals of international criminal justice may assist in determining whether actors other than prosecution and defence ought to be allowed to address the court with closing speeches. First, the opportunity for the defendant to present a final statement, such as provided by law or in practice to the accused before the IMT, ICTY, ICC, ECCC, and STL, enables the accused to express his personal opinion on the evidentiary record and the trial itself. Like during the opening stage, allowing a defendant to have his last word arguably reinforces the human dimension of international criminal adjudication. It counteracts the 'depersonalization' of the proceedings and the sidelining of the accused, which are bound to result from the long months of domination of the courtroom interactions by lawyers in the framework of formal evidentiary process and technical legal debates. Allowing the voice of the accused to be heard at the conclusion of his trial may be beneficial from several perspectives. The accused could provide final clarification of the facts and evidence. Where the accused has earlier made a personal

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<sup>193</sup> Summation for the Prosecution by Justice Robert Jackson, 26 July 1946, reprinted as: R.H. Jackson, 'Closing Arguments for Conviction of Nazi War Criminals', (1946-7) 20 *Temple Law Quarterly* 85, at 85 ('An advocate can be confronted with few more formidable tasks than to select his closing arguments where there is great disparity between his appropriate time and his available material. ...It is impossible in summation to do more than outline with bold strokes the vitals of this trial's mad and melancholy record, which will live as the historical text of the Twentieth Century's shame and depravity.').

statement, the Chamber would be in a position to assess whether his views have changed since. In *Duch*, the last word of the defendant was usefully employed to clarify his position regarding the plea, which was obscured by contradictory submissions by his co-lawyers.<sup>194</sup>

As noted, for some IMT defendants, the last word was the only opportunity to speak directly to the court during the trial without submitting himself to examination. Similarly to opening statements, this injects an important personal perspective of the accused on the crimes, his role therein, and on the questions of guilt and accountability.<sup>195</sup> To an even greater extent than an opening address, the final word by the defendant would in many cases maximize the dignity of the proceedings and reinforce the authority and legitimacy of the tribunal.<sup>196</sup> The opportunity of a last word often occasions messages of a constructive and reconciliatory nature that serve to promote the tribunal's institutional remote goals. Admittedly, a final statement may contain abusive or derogatory remarks directed at the tribunal, counsel or witnesses. But the court may manage this risk by exercising control over the conduct of the proceedings. Such risks exist throughout the process and are not in themselves sufficient reason to deny the defendant a last opportunity to speak before the verdict is rendered.

Where victims partake in the trial and are allowed to contribute to the evidentiary process by presenting evidence and questioning witnesses, it appears conceptually inconsistent to preclude them from summing up the evidence from their perspective. The goal of promoting the legitimate interests of victims favours granting them this opportunity in the way consistent with a fair trial and the interests of justice. The law and practice of the victim-participation courts (ICC, ECCC, and STL) demonstrate that this modality is an accepted practice. Permitting legal representatives of victims to present closing statements promotes the victim-serving goal of international criminal justice and increases the victim satisfaction with the process of justice, as it enables them to underscore the relevant aspects of the evidence, to draw conclusions on the proceedings, and to address issues relevant to reparations. This mode of participation at trial empowers victims, may have therapeutic effects, and, possibly, facilitate reconciliation. In some courts, victims are allowed to contribute to case presentation and evidence—for example, by delivering an opening statement, questioning witnesses and calling evidence—and thus they have a case to argue. Particularly in such cases, it appears conceptually inconsistent and procedurally illogical not to extend to them an opportunity to deliver a closing statement. The court that disallows summation accepts the risk of causing the secondary traumatization of the victims concerned (by the criminal justice system itself). Arguably, the effects of such a detour on the victims and on their confidence in the court and in the proceedings may be more detrimental than if the victims would be more detrimental than if the victims had not been allowed participatory rights in the first place. This should be avoided in the international criminal justice system if it is to continue regarding individual victims and their communities as its constituencies and refers to redress for the victims as its goal.

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<sup>194</sup> See *supra* n 165.

<sup>195</sup> Sprecher, *Inside the Nuremberg Trial* (n 40), at 1327 ('The statements had given the defendants a last chance—without cross-examination—to put the best face they could on their participation in Hitler's Third Reich.').

<sup>196</sup> This was the case with some of the final statements by the Nuremberg defendants: see *ibid.* For a more recent example, see a moving and dignified statement by Germain Katanga: Transcript, *Prosecutor v. Katanga and Ngudjolo*, 23 May 2012 (n 117), at 48-53.

### 4.3 Efficiency perspective: Streamlining and expediting practice

The efficiency parameter lends itself to several considerations as to the utility of the closing arguments. Closing arguments are non-evidence and oratory whose main purpose is persuasion rather than the discovery of truth. It may be questioned if this stage is necessary in international trials, run by a professional bench that is able to make its independent evaluation of the trial record and reach its own conclusions on that basis. An extra round of rebuttal and rejoinder arguments, let alone allowing the accused and victims to address the court, could be deemed inefficient, especially in light of the excessive length of international criminal trials. But such considerations do not necessarily compel the bypassing of the closing stage because there are also efficiency-related arguments which favour retaining them as a part of international criminal proceedings. As noted, summations of evidence and rebuttals of those summations may further clarify salient issues discussed during the trial and build up the argumentation-base which will be a useful starting point in judicial deliberations. This procedural rather than 'trial advocacy' function of closing arguments has an undisputable pragmatic value in international criminal proceedings. Those proceedings involve complex and voluminous cases with tremendous quantities of evidence presented that may be difficult even for the professional judges, assisted by legal officers, to digest, comprehend, and to accurately evaluate.

The functionality of closing arguments is clearly enhanced by the current practice in all international and hybrid courts of requiring the submission of final trial briefs providing a detailed and structured overview of evidence presented at trial as well as key legal arguments, as they relate to specific alleged facts and counts in the indictment. This provides the court with indispensable *aides-mémoires* to be consulted during deliberations on the judgment. It also allows the parties to limit their oral submissions to final issues unaddressed in their written submissions and to respond to unanticipated matters arising from the opponent's oral statements. This allows addressing the concern with the procedural delay caused by having closing arguments as a part of process. The efficiency is furthered by the practice of the Chamber indicating in advance what issues of fact and law it expects submissions on at the end of trial. This provides the parties with a better idea of the matters on which the judges need their input and enables them to focus their submissions accordingly. Moreover, the practice of follow-up judicial questioning and request for clarification which has been employed by the ICC Trial Chambers deserves full endorsement. It enhances the practical value of the closing speeches and submissions, and their potential to set the record straight and prepare the court for deliberations. This is an example of practice which would be beneficial in any other international court as well.

From the efficiency perspective, it would not be practical to oblige (rather than entitle) the parties and participants to make their closing arguments. For this practice to serve its purpose well, the decision on whether to use the opportunity of summation should rest with the respective actor. The practical considerations favour having a party with a burden of proof, i.e. the prosecutor, address the court first and the defence to follow it up by its own argument, where the defence elects to present it at all. This order correspond to the sequence of presenting evidence in international criminal trials and provides the defence with the opportunity to speak last, which the legal folklore regards as a decided tactical advantage. Where a rebuttal argument is allowed, the same rationale warrants granting the defence the right to a rejoinder argument or last word. In order to avoid wasting time, the court's role is to keep an eye on the process of presenting both initial and follow-up arguments, ensuring that the parties neither venture into irrelevant areas nor unnecessarily rehearse their written submissions. The court ought to clarify to the parties the rules of thumb regarding the expected scope of oral closing arguments and follow-up arguments.



The need for expedited process requires the bench to exercise strict control over the length and content of closing arguments by means of imposing time limits, issuing orders for the provision of outlines or other information, and, if the need be, arguments in full. The judges also need to manage the presentation of the arguments during the trial. In other words, both scheduling and live control are essential techniques for streamlining the closing stage. The question arises about the optimal correlation, from the practical perspective, between oral closing arguments and final trial briefs. The latter instrument, which the parties are required or may be ordered to furnish in the ICTY, ICTR, SCSL, ICC, ECCC, and STL, has consequences for the rationale and scope of oral arguments. In the interests of expediency, oral closing arguments should be limited in length and have a different focus than written submissions. This allows avoiding an unnecessary overlap between the two that might render an oral statement redundant. Detailed briefs remove the need for counsel to be comprehensive at the hearing and allow him or her to focus on the fundamental issues raised by the case. This decreases the attention to be paid in an oral submission to technical evidence-related discussion and may have an effect of strengthening the ‘advocacy’ element of the closing argument. Instead of a full summation of evidence and arguments, which is more effectively done in the final trial brief, the oral statement should address final matters and react to the opponent’s written and oral arguments.

Thus, similarly to the possibility for judges to pose final questions during the closing hearing, the requirement for the parties to file briefs furthers efficiency and is indisputably good practice. Next to reducing the length of oral arguments, they enable parties to present detailed, substantiated, and comprehensive statements of their definitive positions concerning evidence and charges. Their format (a structured discussion of evidence and each other’s arguments) and timing (after the close of all evidence and immediately before deliberations) enhances their value as reference sources facilitating the drafting of the judgment.

But it is important to consider that time-saving at an oral hearing of closing speeches necessitates according parties with sufficient time to prepare their final trial briefs. So the efficiency-gains are not absolute. The need or obligation to submit an extensive final brief places a serious burden on the parties who are heavily involved in the trial litigation until the end of the evidence-presentation stage. Often, parties find it difficult to file briefs shortly after the close of evidence, given their intensive work during trial hearings. This results in regular requests for adjournment for up to several months after the close of all the evidence to allow the parties to draft the closing briefs and arguments. Hence, applications for postponement of deadlines for the respective filings are symptomatic.<sup>197</sup> On the balance of arguments, however, this does not detract from the expediency of final trial briefs and the current requirements in terms of their degree of detail and comprehensiveness, given their useful functions in the process of deliberation and drafting of the judgment.

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<sup>197</sup> E.g. Decision on the Defence of Milan Lukić Request for Additional Time for Final Brief and Closing Argument..., *Prosecutor v. Lukić and Lukić*, (n 106); Consolidated Decision on Motion on Behalf of Milan Gvero Seeking an Adjournment and Popović’s Request for an Extension of the Deadline for the Final Brief, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, TC II, ICTY, 27 May 2009; Decision on Defence’s Motion for Enlargement of Time for Filing the Final Trial Brief, *Prosecutor v. Martić*, Case No. IT-95-11-T, TC I, ICTY, 23 November 2006; Decision on Defence Motion for an Extension of Time for the Filing of its Closing Brief, *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-T, TC III, ICTR, 11 February 2010; Decision Regarding Motions for Extension of Time to File Closing Briefs and to Present Closing Arguments, *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, TC II, ICTR, 13 January 2010; Decision on Defence Extremely Urgent Motion for Extension of Time Limit to File Its Closing Brief, *Prosecutor v. Munyakazi*, Case No. ICTR-9 7-36A-T, TC I, ICTR, 2 December 2009; Decision on the Parties Oral Motions to Review the Timeframes and Length of Closing Briefs of the 2 July 2008 Scheduling Order, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, TC II, ICTR, 29 August 2008.

## 5. CONCLUSIONS AND RECOMMENDATIONS

At this juncture, concluding observations are in order regarding whether the standards and practices at the international criminal tribunals relating the closing stage of trial are optimal and adequate in light of the chosen normative criteria. The preceding discussion makes it clear that such parameters are oftentimes inconclusive or pull the assessment in opposite directions.

Closing arguments after the presentation of all of the evidence in the case extended to parties (and participants) are a typical element of criminal procedure not only in domestic jurisdictions (including both common law and civil law), but also in the international tribunals, from the post-World War II IMTs to the more recent forms of hybrid justice. Closing speeches are both an indispensable advocacy tool, which enables parties to effectively argue a case, and a highly functional element of process, which facilitates an in-depth discussion of evidence and informs deliberations. Given their value, litigants will ordinarily not decline to make a closing argument. But obliging them to do so, whether orally or in writing, is not advisable and, as far as the defence is concerned, problematic in light of the presumption of innocence and the privilege against self-incrimination. The possibility for the defence of making a closing argument should not depend on the prosecutor's decision to deliver his.

The goals of international criminal justice may justify the extension of the right to participate in the closing stage to the victims, a right they may best exercise through their legal representatives. This consideration is specific to courts in which victims are allowed to participate in the trial proceedings by way of making opening statements and examination of evidence. Similarly, international criminal procedure is non-uniform on the issue of whether a defendant may have a last word independent of his counsel's closing argument. This Chapter has argued that extending this right to accused before all tribunals is generally desirable, subject to the caveats associated with the need for close judicial control. The opportunity of last word promotes the truth-finding function of the trial and assists its smooth conclusion in a most practical sense, as the accused may provide useful clarifications regarding the case and address final matters. Indirectly, the goals of international criminal justice will also be promoted by giving the accused an opportunity of the last word. However, a vigilant approach on the part of the bench is required in order to prevent and effectively deal with situations in which the defendant might inadvertently incriminate himself or tries to misuse the opportunity of delivering his last word to obstruct the process or to undermine the authority of the tribunal.

There is a common ground between the courts and tribunals as regards the fine structure of the closing stage, which follows the order of presenting evidence at trial: namely, the prosecution makes its speech first, to be followed by the argument of the defence. This is also an order suggested by the spirit of the presumption of innocence. Where victims are allowed to participate at the closing stage through their legal representatives, the status of law diverges among victim-participation tribunals in part of the sequencing of their statements. At the ECCC, legal representatives are heard first and before the prosecution, whereas at the ICC and STL their closing speeches are to be delivered after the prosecutor's argument. In any event, such interventions must take place before the defence's closing argument, which reflects the consensus among the relevant tribunals.

In most jurisdictions in issue, the second round of closing arguments is foreseen, except for the post-War World II military tribunals and the SCSL. The provision of rebuttal and rejoinder arguments is justified in view of their ability to ensure a more structured, transparent, and conclusive debate on evidence and facts. Ultimately, the follow-up arguments may serve the purposes of providing the trial bench with a more

coherent and complete base for deliberations and, possibly, enhancing the quality of adjudication. The question of extending the opportunity to present rebuttal argument to the victims' legal representatives is only relevant to the courts allowing for victim participation. Where victims are entitled or allowed by the court to present opening statements, participate in the presentation and examination of evidence, and to make a closing argument, they should arguably be able to present a rebuttal argument as well. The STL may thus be recommended to reflect on amending its Rule 147(A) which does not envisage such opportunity (although in practice such follow-up arguments may still be allowed). The considerations flowing from the victim-serving goal provide support for the amendment.

As concerns the appropriate length and content of closing arguments and the judicial management of the closing stage, parties retain considerable discretion in defining the content of the statement, as a part of their autonomy in defining their case strategy and making the best argument possible. However, judges hold powers to moderate the closing arguments and are well-advised to exercise them whenever necessary in order to ensure streamlined proceeding and enhance the procedural value of oral and written submissions at the closing stage of trial. In particular, as the practice in all courts surveyed demonstrates, they may—and should—do so by issuing scheduling orders, requesting the submission of outlines or full texts of oral arguments, and controlling their presentation in the courtroom. Furthermore, the practice of judges asking parties questions arising from their written and oral final submissions, which has been used by an ICC Trial Chamber, is to be welcomed and can be recommended as good practice for adoption by other courts. It clarifies issues for the judges before deliberations commence and maximize the procedural value of closing submissions.

The filing of final trial briefs by parties has emerged as an important and useful element of procedure at the closing stage. It assists judges in deliberations and judgment-drafting. Although the obligation to make such submissions in advance of oral arguments increases counsel's workload, the practice is utterly beneficial to the judicial process. It provides the court with a detailed and structured exposé of the parties' factual and legal arguments and allows the duration of oral arguments to be reduced, even though this turns out an illusory advantage, given the time required for the preparation of final briefs. Finally, the ICTY and ICTR rule to the effect that closing arguments should address sentencing matters is arguably contrary to the spirit of the presumption of innocence. In a broader sense, it points that in the proceedings based on several distinct cases, it is advisable to retain the division between the stage for the determination of guilt and the stage for sentencing, which is the status at the SCSL, ICC, and STL. It is obviously too late for the *ad hoc* tribunals to undertake such a reform, but this constitutes a lesson for the future courts.

To conclude, several limited recommendations can be advanced, on the basis of the foregoing discussion, regarding the organization of the closing stage of international criminal trials. First, it is worthwhile granting the defendant an opportunity to address the court with a final statement after the presentation of closing arguments and rebuttals by the prosecutor, victims (where applicable), and defence counsel. If the defendant chooses to make such a statement, subject to notice of the right to remain silent, it may be delivered under the control of the Trial Chamber. Second, the tribunals are advised to consider adopting the practice of judges posing specific questions and seek clarifications of matters arising out of the parties' final trial briefs and closing arguments during the closing hearing. Although it may appear unusual and is of relatively recent origin (ICC), this is good practice that merits adopting because it clarifies the parties' arguments and renders closing submissions more useful for the judges at the deliberation stage.

Third, where victims participate in case presentation, including by way of making a closing argument, there is no evident reason to deny them an opportunity to do a

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rebuttal. It is unclear whether the solution embodied in the STL RPE, which omit participating victims from among actors with the right to speak during the second round of arguments, is an intended departure, and how the practice will develop. The current Rule 147(A) should be amended or, at least, it should not serve as a formal ground to refuse victims to present a rebuttal argument where they have presented a closing argument and if they so wish. Finally, as the Chapter argued, the ICTY and ICTR rule to the effect that parties *shall*—rather than *may*—address sentencing matters in their closing arguments is problematic. It should be replaced by the rule allowing parties to make such submissions if they so wish, and should not be reproduced in the procedure codes of courts in which the presentation of evidence is structured in two or more distinct cases for each party or participant. In such procedural regimes, the obligation to address sentencing issues has been experienced by the defence as impractical and prejudicial. More generally, the stages of guilt-determination and sentencing in tribunals with two-case structure of presentation at trial should be separate as to enable the parties to make tailored sentencing submissions in case of conviction.