Chapter 6

An Ending

> *Vladimir:* Let us not waste our time in idle discourse! *(Pause. Vehemently.)* Let us do something, while we have the chance! It is not every day that we are needed. Not indeed that we personally are needed. Others would meet the case equally well, if not better. To all mankind they were addressed, those cries for help still ringing in our ears! But at this place, at this moment of time, all mankind is us, whether we like it or not. Let us make the most of it, before it is too late! Let us represent worthily for once the foul brood to which a cruel fate consigned us! What do you say? *(Estragon says nothing.)*
>
> -- Samuel Beckett, *Waiting for Godot*, Act II.

As Saïd states, "'the beginning," belonging as often to myth as to logic, conceived of as a place in time, and treated as a root as well as an objective, remains a kind of gift inside language.'[475] The opening statement is the one story that is specifically drafted to be the first that is told in the courtroom. This 'gift' brings us legal logic applied to cases of mythical proportions; it treats its audiences to promises as well as paradoxes. It stays true to the unsettled fate of being a beginning, which is destined to awkwardly stay both inside and outside the narrative at once.[476] As a practice, the opening statement is awkwardly located both inside and outside of the trial; it is both more and less than law, which gives rise to its unique content and form, but also to many questions. In the introduction, I already wondered: what is the purpose of the opening statement? There are many possible answers to this question, but one stands out: from my analysis appears that the purpose of the opening statement is to state a sense of purpose. It is a very specific way of telling the story of mass atrocity. Human tragedies of this magnitude can be explained, structured, and (not) solved in multiple ways, for example through myths, science, histories, and trials. Despite the availability of such a wide variety of avenues to take, the opening statement puts forward the trial of which it is part as the most sensible solution.[477] In order to do so, emphasis must be put on the extraordinary character of the crimes while the criminal trial must be presented as the ordinary way of dealing with those crimes. The message must be solemn and simple, and constantly negotiates between the legal, the social, and the transcendental.[478] Time, place, and characters are 'juridified' and constructed in such a way that they fit into this specific narrative of the prosecution.

---

[475] Said (1975) 43.
[476] Hillis Miller (1998) 58.
[477] Sometimes blindly pushing alternatives to the margins, see Nouwen and Werner (2014).
[478] See Koskenniemi (1999) 30.

The sometimes pompous language of the opening statements that is uttered in the sterile setting of a courtroom, and the self-contradictory story that it tells, emphasizes that there is only a thin line between solemnity and absurdity. However, the absurdity of international criminal trials often seems too solemn to be acknowledged and is hardly ever openly challenged, let alone welcomed. While not directly concerning opening statements, it is worth noting one rare overt contestation of ICL's self-image that took place in the courtroom of the Extraordinary Chambers in the Courts of Cambodia. The Chamber was not amused when defence lawyer Andrew Ianuzzi referred to the proceedings at the court as 'a play' that risked turning into 'a very bad "Gilbert and Sullivan"' if it would carry on as it did.[479] Ianuzzi's 'consistent pattern of misconduct' irritated the court multiple times. Noteworthy is the instance of Ianuzzi claiming to have seen Judge Cartwright's mouth making the words 'blah, blah, blah', after which he accused her of exhibiting 'her usual manifestation of disdain for defence counsel on the Nuon Chea team'. In support of his argument he noted:

> Your Honours, despite a diligent search over the holiday, I wasn't able to find any international jurisprudence precisely on point, but a certain secondary source almost immediately sprang to mind and I suspect the younger players on this stage will be familiar with this and I'm quoting now, "Some musicians cuss at home, but are scared to use profanity when up on the microphone," and that, of course, for the uninitiated is Dr. Dre of N.W.A. from 'Express Yourself, Straight Outta Compton' 1988.[480]

This clearly disturbed the earnest courtroom setting. Ianuzzi explained the motivation behind his conduct as follows: 'Once I went beyond that point in my mind of thinking that I could affect any change in the courtroom, I thought, OK, then really, my role will be to highlight the absurdities, to draw attention to them.'[481] While the response of the Judges is understandable to a certain extent, I think that such brave and new ways of challenging the current grand narrative of international criminal justice and its façade of sacrosanctity are to be encouraged. In the same spirit, this book aimed to identify and challenge the contradictory foundations of the opening statement. Instances of absurdity in the courtroom are not confined to uncommon incidents as described above. The analysis in the previous chapters showed that absurdities are internal to the process, scripted in taken for granted forms such as an opening statement.

---

[479] ECCC, *the Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan* (Case 002; hereinafter: *Nuon Chea et al.*), 002/19-09-2007-ECCC/TC, Transcript 13 December 2012, p. 64-65.
[480] *Nuon Chea et al.*, Transcript 2 May 2012, p. 2-5. See also, ECCC, 'Decision on Nuon Chea Defence Counsel Misconduct', 002/19-09-2007/ECCC/TC, Trial Chamber, 29 June 2012.
[481] D. Otis, 'Exit Stage Left', *Southeast Asia Globe*, 7 February 2013.

The previous chapters uncovered the tensions inherent to the presentation of the narrative elements time, place, and characters, and the way in which they are deployed in a story that aims to enhance the credibility and integrity of the prosecutor's message that says: this trial is important. With regard to time, the trial is portrayed as a break with as well as a continuation of tradition, a revolutionary as well as a self-evident outcome of history. Trials help the world to overcome chaos while ongoing chaos seems not to be a reason to doubt the effectiveness of trials; a never again promise can be made ever again, previous trials are presented as successes, and new tribunals are introduced as improved versions of what was already good. The trial is an inevitable turning point that may never really turn. With regard to place, the opening statement is tasked to situate the 'international' trial in relation to 'the local' over which it is contemplating. Therefore, the local has to be ordered, simplified, abstracted, and allocated a specific meaning within the trial context. A recognizable and accepted way of doing this is through the use of maps. But a cartographic abstraction is not sufficient; it has to be imagined by way of vivifying stories in order to be understood. However, although some familiarization with the local is stimulated through these stories, it has to remain in the realm of the far-away, the strange, and the dangerous, for the trial to be presented as important intervention. The opening story needs to bridge the distance in order to appear grounded and truly concerned but it simultaneously needs to distance itself in order to appear authoritative, neutral, and necessary. The trial has to be located in multiple dimensions at once. Temporally, it has to be in the present, the past, and the future; both novel and pre-existing. Geographically, it has to exceed the local, and be the local; universal and particular at the same time, both abstract and specific.

Also in presenting its main characters, the opening statement thrives on conflicting commitments. The trial has to be framed in legal language, drawing on concepts and principles from criminal law. Simultaneously, it has to be framed in terms of the unimaginable and extraordinary character of the crimes, which warrants an international response. The statements negotiate between the personal and the de-personalized, signalling the need to introduce 'real' people as well as the inescapabilty of stereotypes. The presentation of the defendant as an inhuman human clearly shows this balancing act. The 'ideal' perpetrator needs to conform to the rational agent requirement of criminal law but also to the category of inhumane monsters. The stereotype needs to contradict itself to be able to work. It needs to be as far removed from a human being as possible but also be able to 're-enter' humanity, otherwise a trial would make no sense. The perpetrator's opposite characters, the victims of the crimes, are also portrayed as ambivalent in their humanity, not because of their acts but because of their suffering. The

opening story puts the trial forward as a means for victims to regain their human dignity, mainly through the process of uncovering and acknowledging the truth about their suffering. Victims' stories are crucial to the validity of the truth about mass atrocity that is supposed to be the outcome of the trial, but it appears to be impossible to make their stories central to the courtroom narrative. The opening statement promises truth from and to the victims, but the statement itself is a prime example of the mediated form in which the victims' stories are presented, emphasizing the persisting tension between 'pure' truth and authoritative legal truth. The victim's account must be transformed to be part of the trial, adapted to be acknowledged, silenced to be heard.

While the many conflicting elements disrupt each other's coherence, they are, in a way, constructive contradictions. By that, I mean that talking in paradoxes seems inescapable if one wants to tell an opening narrative that combines authority with compassion, rule-based ratio with incomprehensible drama. What all chapters show, is that the fundamental tensions they bring to light stem from the persistent attempt to present extraordinary horror in law's cloak of structure, rationality, and clarity. All elements in the story express the ambition of creating a stable narrative about the relevance and meaning of the trial, which results in a story that is unstable and self-contradictory. There is a certain inevitability to this; the recurrence of these tensions signals that they are so much part of the internal structure of the opening statement that it cannot do without them. If we would restructure the fundaments, which might or might not be possible or desirable, we would inevitably end up, or rather begin, with a different story.

The statement is a tool to merge the trial's divergent commitments into seemingly unequivocal promises. It remains to be seen to what extent a trial can live up to these promises, and the current analysis invites for further scrutiny of the way in which the foundational tensions of the opening statement affect the further proceedings and outcomes. Relatedly, the question comes up whether these inherently contradictory fundaments are unique to the opening statement and its aim to sing the trial into existence, or whether they are symptomatic of contradictions that are fundamental to the field of international criminal justice at large. While the tensions are amplified and exploited in the moment of beginning, the analysis in the previous chapters hints at the latter. It seems not uncommon for the deep tensions within international criminal law to be obscured or merged into a narrative about a coherent and functional judicial mechanism that is capable of addressing that what shocks humanity.[482] In a way, the opening statement functions as a

[482] Robinson (2015); Stolk and Werner (2017, forthcoming).

mouthpiece for disseminating the mantras that 'have come to constitute the tribunals' moral foundations'.[483] This study presents yet another motive to take a closer look at this body of stories and slogans, to re-examine the taken for granted, and to rethink what we know and tell about international criminal law.

International criminal trials are said to be about justice and injustice but they are also very much about freedom and captivity, in its many forms. While the opening statement is a moment to rather 'freely' express a view on the case, it is very much constrained: by history, by space, by expectations, by mores, by habits, by domination. In the legal sphere, creativity is a somewhat dirty word.[484] The pretence that international criminal law is a relatively new field gives some room for creation, development, and novelty, but this always comes with caveats that reveal some pretty fixed anchors that attempt to hold the 'project' and its legal character together. With regard to the opening statement, this means that, may it please the lawyers, there are rules. However, these are not only recognizable legal rules, but also for example genre rules and social rules. The habit of making an opening statement in a domestic setting but also the unfolding tradition of making opening statements in international criminal trials affects the way in which it is performed. As chapter 2 discussed, there is a call on history *in* the opening statement but also a history *of* opening statements.[485] This respect for and continuation of tradition signals yet another audience: the (international) legal community. As Cohen notes, '[l]awyers, as a professional group, have specific sources of political and social capital that they can use to maintain their importance and relevance in relation to other societal actors.'[486] As such, the opening statement is also, at least partly, a proof of skill, a form of impression management, a business card. It presents the trial's necessity in an institutional, professional, but also a personal discourse of legitimacy.[487] From this perspective, another valuable addition to this study would be to take a closer look at the involved individuals on the one hand and the collectives on the other, and to consider some of the dimensions of the practice that I now systematically ignored, for example the intent of the speaker and effect on the audience.

---

[483] Clarke (2011) 17.
[484] Simpson (2015).
[485] See chapter 2, p. 37.
[486] H.G. Cohen, 'Lawyers and Precedent', *Vanderbilt Journal of Transnational Law* (2013) 46 1036.
[487] This brings to mind Bourdieu's observation that '[t]he professionals create the need for their own services by redefining problems expressed in ordinary language as legal problems, translating them into the language of the law and proposing a prospective evaluation of the chances for success of different strategies.' P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', *The Hastings Law Journal* (1986) 38 834. Saïd described the beginning as 'the main entrance to what it offers', Said (1975) 3.

As said, this book did not assess the opening statement in terms of failure or success. It dissected the story that it tells, not answering whether trials can or cannot fulfil the promises they make. In general, international criminal courts and tribunals have been praised as much as they have been denounced. This study of the opening statement of the prosecution leans to the more cautious side of the spectrum and fits with an emerging call to critically approach the 'juridification' of international problems, to acknowledge the politics inherent to the international legal system, and to recognize the suppressive roots and effects of international criminal law. More than that, the analysis initiates questions about the persistent attempt to give legal meaning to situations that we can hardly understand, let alone narrate comprehensively in a language that is as specific as that of international criminal trials. The opening statement is a product of hope, believe, and a dose of legal optimism. It signals a wish to stimulate moral conduct, to solve problems, and to capture chaos in a coherently sequenced legal narrative, fighting the absurd and unimaginable character of what it wants to tame. But if we break down the narrative, its shadow side comes to the fore and the opening statement turns out to equally signal despair, disbelief, legal naivety, and absurdity. To quote Edward Saïd once more, '[f]inally, and almost inevitably, for the writer, the historian, or the philosopher the beginning will emerge reflectively and, perhaps, unhappily, already engaging him in an awareness of its difficulty.'[488] The prosecutor that performs an opening statement faces a similar challenge. The discursive attempt to overcome the trial's inbuilt tensions and difficulties at the start of the process also already reflects and acknowledges the impossibility of this endeavour. To hear a prosecutor explicating the darker side of ICL in the opening statement would be surprising to say the least, and it is no such normative recommendation I'm aiming for here. But, through this dissertation, I mean to do exactly that what the prosecutor does not: turning the certainties back into doubts, and the simplifications back into complexities. To waste some time in idle discourse and shed light on the chaos underneath the structured solemn tale of horror that escaped our attention despite, or due to, its prominence. To start a conversation about the opening statement. As a beginning.

[488] Said (1975) 35.