A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution

Jessica S Peake, University of Pennsylvania

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There is a wealth of scholarship on the independent influence of the adversarial and inquisitorial systems on both substantive and procedural international criminal law and the tensions that have resulted from attempting to apply both in one new amalgamated procedural system in the international criminal law arena. This article seeks to embrace the
influence of both the adversarial and inquisitorial models of procedure in the creation of international criminal procedure (ICP) in its modern conception as a new body of procedural law, yet to move beyond existing literature to identify a spectrum of ICP falling between the absolute adversarial model and absolute inquisitorial model. The idea of a sliding scale between the two pure systems is not new, but this article seeks to establish this scale in concrete terms and to contribute to this discussion by plotting three of the international courts and tribunals onto this scale, to identify convergences, similarities and differences in the procedures adopted across those courts.

As its principal claim, this article asserts that ICP is characterized by a fundamental structural shift in the allocation of power between the actors in a criminal trial – the judges, Prosecution and defense - away from that traditionally ascribed under an adversarial system and towards the power distribution structure more common to the inquisitorial system. By looking at the Statutes and RPEs of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia


6 Kress, supra note____ at p 605.
(ECCC), it is possible to identify varying degrees of power shifts in each court: across each we see a convergence around the transferal of procedural powers away from the individual parties and into the hands of the judge(s), shifting the power structure away from adversarial norms in favor of more traditional inquisitorial role assignments. It also becomes evident that underlying these fundamental structural power shifts are several procedural devices, embracing mechanisms employed in both the adversarial and inquisitorial systems independently. To fully understand these shifts, and the role specific procedural devices play, it becomes necessary to think of the procedural spectrum between the two pure models as encompassing two different strata: the first relates to the actual power distribution between the main actors in the system, while the second highlights the procedural devices employed to animate those powers.

This article takes as its starting point the model of an absolute, or pure, adversarial criminal trial. That there is no such thing as a pure adversarial model or pure inquisitorial model is widely agreed by scholars,7 however the adversarial system is a logical starting point when examining the development of ICP as, beginning with Nuremberg and during the early years of the ICTY, international criminal procedure was predicated upon the adversarial system.8 It should be made clear at this juncture that this article will not be concerned with the question of why this blending has occurred - that question is reserved for an examination of the causal

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8 Jackson, supra note___; Goran Sluiter, Law of International Criminal Procedure and Domestic War Crimes Trials, The, 6 INT’L CRIM. L. REV. 605 (2006); Megret, supra note___; The Structure of International Criminal Procedure, supra note___; Langer, supra note___. A secondary justification for this starting point is the author’s primary training in the adversarial model of procedure.
justifications in a subsequent work – instead this discussion is concerned with how such blending has occurred in practice looking at the Statutes and Rules of Procedure and Evidence (RPEs).

In order to assess the procedural developments that have taken place in ICP, this article will sketch a spectrum of procedure within the theoretical framework between the pure adversarial and pure inquisitorial models. Using the concept of the pure adversarial model as a baseline, this article will then examine the Statutes and RPEs of three of the international courts and tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) – to explore where on the procedural spectrum each court falls.

This discernable degrees of shift evident at these courts and tribunals are worthy of exploration in order to illuminate the aspects of power distribution and procedural devices, originating from which system, have been employed in the new model(s) of ICP seen at these three courts. To call them models of procedure is more appropriate that talking of a single model applicable across all the international courts and tribunals, as each displays unique characteristics and with no precise uniformity in each court’s rules. What are evident are convergences around structural ideas relating to the power relationships between the three main actors in the system, and the adoption of devices in furtherance of the overall goal of each court of having the judge as an active participant in proceedings.

9 The Structure of International Criminal Procedure, supra note___; Reamey, supra note___; Megret, supra note___ at 6; M Findlay, Synthesis in Trial Procedures? The Experience of International Criminal Tribunals, 50 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1; CHRISTOPHER J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE (2001).
The extent to which a convergence is apparent it can teach us about the scope of the spectrum of procedure found in the international courts and tribunals, between the adversarial and inquisitorial models. Two primary observations can be drawn from this analysis: first, ICP in general has embraced neither a solely adversarial nor solely inquisitorial approach to handling international criminal law cases. Secondly, it is not possible to identify a single unified system of ICP as the international courts and tribunals have not adopted identical procedures; while several similarities and broad convergences around power restructuring is apparent, the exact mechanisms by which each court has achieved the power rebalance has differed. The significance of this lies in the fact of convergence around power distribution between the parties, as by understanding that the international courts and tribunals have chosen to imbue the judges with a more active role in proceedings than found under a pure adversarial system, it becomes apparent that ICP has found more utility in inquisitorial role assignments.

To frame the analysis of the development of ICP the first part of this article will identify the procedural spectrum and the pure procedural models situated at either end. Part I (a) will discuss the structural and procedural composites of the pure adversarial model, and part I (b) will outline the structural and procedural composites of the pure inquisitorial model, and highlight key distinctions from the adversarial model, in particular relating to the power allocation between the parties, and any procedural tools necessary for those parties to fulfill their roles. Part I (c) will outline the spectrum of procedure between the two pure models and suggest that the optimum way to trace where upon this scale each court falls is to look at
power distributions between the parties and specific procedural devices employed to awaken those powers.

Using the pure adversarial model expounded in part I (a) as the baseline for analysis, Parts II, III and IV of this article will explore the procedural evolution that has taken place at the International Criminal Tribunal for the Former Yugoslavia (II), the International Criminal Court (III) and the Extraordinary Chambers in the Courts of Cambodia (IV). Part V will then plot the power restructuring and procedural shifts that have taken place at those courts onto the spectrum of procedure identified in part I (c) and will conclude with an explanation of why this analysis is important, and what we can learn from the structural and procedural shifts towards a convergence of the adversarial and inquisitorial systems in international criminal procedure.

I. The Procedural Spectrum: The Adversarial and Inquisitorial Models and Everything in Between

In order to understand the degrees of power shifts that have taken place at the ICTY, ICC and ECCC, it is necessary to clearly conceptualize what is meant by the two terms ‘adversarial’ and ‘inquisitorial’, in their purest sense. These two legal traditions comprise opposite ends of the procedural spectrum upon which this analysis is based and the pure adversarial system in particular forms the baseline for subsequent analysis of how power distribution between the
main actors in the international criminal system has played out.\textsuperscript{10} Describing these models as ‘pure’ has dual meaning: first they are “pure in the sense that their defining features do not overlap between them, but rather each has an opposing feature to the other” and;\textsuperscript{11} second in the descriptive context in which the models are used in this article ‘pure’ also means ideal,\textsuperscript{12} i.e. if such a pure system existed it would have identical characteristics to the ideal model. As previously mentioned, the pure models of the adversarial and inquisitorial systems are merely ideals, and it is widely considered that “the models of adversarial and inquisitorial systems of justice are precisely that – models to which no actual legal system precisely corresponds”.\textsuperscript{13} It must be understood that a historical overview of how these two models have developed is outside the scope of this article, as is a thorough exploration of the different iterations of each model found in domestic systems, instead this paper seeks to describe the central features of each system in its broadest sense. Developing a basic understanding of the pure forms of each system is crucial for the subsequent analysis of ICP, as it is only through this basic

\textsuperscript{10}Here the word ‘tradition’ is used in the comparitivist sense, meaning that instead of invoking imagery of a “frozen and static past” it actually “denotes a vital, dynamic, ongoing system.” Mary Ann Glendon & Christopher Osakwe, \textit{Comparative Legal Traditions: Text, Materials, and Cases on Western Law} 23 (2007); John Henry Merryman suggests that this idea of a tradition refer to “a set of deeply rooted, historically conditions attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied perfected and taught,” John Henry Merryman, \textit{The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America} (1985).

\textsuperscript{11}Langer, \textit{supra} note\textsuperscript{___} at 884.

\textsuperscript{12}Geldon and Osakwe, \textit{supra} note\textsuperscript{___} at 10.

understanding that the points of convergence in ICP are illuminated.

a. The Pure Adversarial Model

At one end of the procedural spectrum is the pure adversarial model. This system is primarily characterized by a dispute between two parties, the prosecution and defense, and pits the two sides against each other in competition, imbuing in each formal procedural powers in order for them to discharge their respective duties of presenting the strongest possible case, with the goal of achieving a “just settlement of the dispute”. The goal of the pure adversarial system is not to actively seek the truth, but rather to determine whether the prosecution’s evidence proves that the accused committed the crimes with which he is charged. Under the adversarial model the initial investigation is conducted by the police without supervision, and is followed by the parties - prosecution and defense - actively investigating and gathering evidence to support their respective cases. Neither the police nor prosecution is obligated to investigate exculpatory evidence for the defense; instead that burden rests with the defense counsel. The prosecution and defense compete with each other, both forcefully and comprehensively investigating their cases, interviewing witnesses and collecting evidence, in

16 ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 373 (2003 ed.).
17 Safferling, supra note___ at 55.
18 Id. at 75.
order to prove the guilt or innocence of the accused.\textsuperscript{20} The judge knows nothing of the facts of the case prior to trial, and only becomes cognizant of them through party presentations of evidence.\textsuperscript{21} Each side has sole discretion over the presentation of evidence to prove their case and vies with the other by presenting the evidence most favorable to it. Each tries to negate the other party’s’ arguments by calling its own witnesses and presenting its own evidence to refute that put forward by the other side.\textsuperscript{22}

There are a number of procedural devices available to the parties in the adversarial system to allow them to discharge their obligations. Firstly, the prosecutor has broad prosecutorial discretion and holds the power to determine what charges should be entered against an accused.\textsuperscript{23} The corollary of this discretion is that the prosecutor is also able to determine when a dispute is over, which can occur in a number of ways; either by concluding that there isn’t enough evidence to proceed with a case, through plea-bargaining with the defense,\textsuperscript{24} or by deciding how much evidence to enter in order to prove the crimes charged.\textsuperscript{25} Plea-bargaining in particular is an important weapon in the adversarial arsenal, as it allows the parties to negotiate their position outside of the courtroom, without the input of a judge, and to try to reach a resolution without going through a full trial in court.\textsuperscript{26} The judge is bound to accept the

\begin{footnotesize}
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\item \textsuperscript{20} Damaska, \textit{supra} note\textsuperscript{___} at 847.
\item \textsuperscript{21} \textit{Casse}, \textit{supra} note\textsuperscript{___} at 373.
\item \textsuperscript{22} Damaska, \textit{supra} note\textsuperscript{___} at 847.
\item \textsuperscript{23} \textit{Casse}, \textit{supra} note\textsuperscript{___} at 367.
\item \textsuperscript{24} \textit{Id.} at 370.
\item \textsuperscript{25} \textit{Safferling}, \textit{supra} note\textsuperscript{___} at 221.
\item \textsuperscript{26} \textit{Id.} at 272.
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plea agreement reached by the two sides and no more proof is required of the guilt of the accused.\textsuperscript{27}

When the case does come to court it is presided over by a “passive umpire”,\textsuperscript{28} an independent judge whose primary function to is to ensure that there is fair play between the prosecution and defense in their competition, and that standards of due process are met.\textsuperscript{29} In discharging her obligation of upholding fairness in proceedings the judge must decide on disputes presented to her by the prosecution and defense. In this way the judge is reactive to what is presented to her, rather than being proactive in molding the direction of trial, which is more commonly found in a pure inquisitorial system.\textsuperscript{30} The pure adversarial system adopts a bifurcated court structure, which combines both a lay organ as a decider of fact (a jury of peers) and a professional organ as the trier of law (the judge).\textsuperscript{31} Due to the emphasis on laypersons as the trier of fact the adversarial system has historically preferred oral evidence at trial, so as to avoid burdening the lay jury with reams of written statements to wade through.\textsuperscript{32}

In the pure adversarial bifurcated court the judge ensures the application of the rules of evidence, which are particularly detailed,\textsuperscript{33} and which act as a filter to determine what the trier

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\item \textsuperscript{27} \textit{Id.} at 272.
\item \textsuperscript{28} Langer, \textit{supra} note\textsuperscript{___} at 840; Gerald Walpin, \textit{America’s Adversarial and Jury Systems: More Likely to Do Justice}, 26 HARV. J. L. & PUB. POL’Y 175, 176 (2003); Damaska, \textit{supra} note\textsuperscript{___} at 850.
\item \textsuperscript{30} Walpin, \textit{supra} note\textsuperscript{___} at 176.
\item \textsuperscript{31} CASSESE, \textit{supra} note\textsuperscript{___} at 368.
\item \textsuperscript{32} \textit{Id.} at 369.
\item \textsuperscript{33} \textit{Id.} at 374.
\end{itemize}
of fact is permitted to see.\textsuperscript{34} Through following these comprehensive, formal rules the judge settles disputes between the parties relating to admissibility and credibility of witnesses and evidence,\textsuperscript{35} with the goal of ensuring that prejudicial evidence is not presented to the trier of fact.\textsuperscript{36}

In this pure system the roles played by each party are very distinct. The prosecutor and defense are equal competitors in the dispute,\textsuperscript{37} and in this contest both prosecution and defense are zealous advocates of their case. The prosecution has the burden to prove that the accused committed the crimes with which he is charged and must persuade the judge that that burden has been extinguished through the prosecutor’s presentation of the facts.\textsuperscript{38} Each has a duty to independently raise all pertinent evidence and to rigorously cross-examine evidence presented by the other side. Each side attacks the evidence presented by their opponent, and offers alternative interpretations and applications of the law relied upon by that opponent. Consequently, what emerges is a critical examination of the law applied to the facts, and the trier of fact must determine which side has been the most effective adversary and most persuasively presented its case and rule in its favor.

\textbf{b. The Pure Inquisitorial System}

\textsuperscript{34} Orie, \textit{supra} note\textemdash at 1428.
\textsuperscript{35} \textit{Id.} at 1451.
\textsuperscript{36} C\textit{ASSESE, supra} note\textemdash at 375.
\textsuperscript{37} Goldstein, \textit{supra} note\textemdash at 1014.
\textsuperscript{38} \textit{Id.} at 1016.
At the other end of the procedural spectrum lies the pure inquisitorial system, which is significantly structurally and procedurally different to the adversarial model. While both systems are invested in determining the truth\textsuperscript{39} the adversarial system is more interested in a “just outcome”,\textsuperscript{40} whereas the inquisitorial system pursues the objective truth.\textsuperscript{41} It attempts to get at this objective truth through an official investigation conducted by impartial public officials.\textsuperscript{42}

Rather than being an individual party to the case the prosecutor is considered an impartial official, along with the judge, and both are tasked with the goal of truth discovery. In a pure, traditional, inquisitorial system, the prosecutor initiates an inquiry and passes this to the investigating judge, who then pursues all lines of inquiry he considers useful in order to determine the truth.\textsuperscript{43} In other, less traditional, inquisitorial systems the prosecutor retains the investigatory power, and is subject to judicial monitoring of that investigation.\textsuperscript{44}

This investigating official has primary responsibility for directing and supervising the gathering of evidence in the case, questioning witnesses and suspects and exploring all pertinent lines of inquiry and ultimately determines whether there is sufficient evidence to take a case to trial.\textsuperscript{45}

\textsuperscript{39} Damaska, supra note\____ at 513.
\textsuperscript{40} Id. at 581.
\textsuperscript{42} Damaska, supra note\____ at 26; Gordon Van Kessel, European Perspectives on the Accused as a Source of Testimonial Evidence, 100 WEST 799, 800–801 (1998).
\textsuperscript{43} Lerner, supra note\____ at 802; Goldstein, supra note\____ at 1018.
\textsuperscript{44} Pizzi and Marafioti, supra note\____; Goldstein, supra note\____ at 1019; Damaska, supra note\____ at 843.
\textsuperscript{45} Damaska, supra note\____ at 559.
If the investigating official is a prosecutor that decision may be subjected to review by judges.\textsuperscript{46} However, unlike prosecutorial discretion in the adversarial system, in the inquisitorial system there is a ‘legality principle’ that presumes a prosecution should take place wherever sufficient evidence exists to prove the guilt of the accused.\textsuperscript{47} Because of this principle, the concept of a guilty plea is foreign to an inquisitorial system,\textsuperscript{48} and the judge can find that a defendant’s confession alone is not enough to substantiate the truth.

The method of official investigation requires that the prosecutor gather both inculpatory and exculpatory evidence and share it with the defense, rather than be the antagonist as in the adversarial system.\textsuperscript{49} Instead of being viewed as a procedural equal as in the adversarial system, under inquisitorial procedures the defense is seen as the target of the investigation and so does not collect its own evidence because the “state organs bear responsibility during the process for the well-being of the accused.”\textsuperscript{50} The defense is able to suggest the collection of certain evidence and request the investigating official interview specific witnesses.\textsuperscript{51}

Unlike the bifurcated court of the adversarial system, in the inquisitorial system there is a unitary court, one where the judge is the decider of fact and of law.\textsuperscript{52} The concept of a lay-jury

\textsuperscript{46} Rudolf B. Schlesinger, \textit{Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience}, 26 \textit{Buffalo Law Review} 261, 366 (1976); Pizzi and Marafioti, \textit{supra} note\___.
\textsuperscript{47} \textit{Cassese}, \textit{supra} note\__ at 367.
\textsuperscript{48} \textit{Id.} at 370.
\textsuperscript{49} Lerner, \textit{supra} note\__ at 802.
\textsuperscript{50} \textit{Safferling}, \textit{supra} note\__ at 75.
\textsuperscript{51} Lerner, \textit{supra} note\__ at 802–803.
\textsuperscript{52} Pizzi and Marafioti, \textit{supra} note\__ at 7.
is alien, and instead the system is hierarchical, with a professionalized judiciary comprised of legal professional decision makers.

One of the central procedural devices employed in the inquisitorial system is the dossier. The compilation of the dossier is an indispensible part of the pre-trial process, as it records all the information gathered and procedural activity and forms the basis of the trial itself and is a fundamental part of the “instruction maxim” of the inquisitorial system. The dossier affords the judge advance knowledge of the facts and evidence of case, which allows her to effectively conduct the trial proceedings and exercise the powers allocated to her as an investigating official in the inquisitorial system.

Equipped with the dossier, the inquisitorial judge controls proceedings and determines what evidence to produce and witnesses to call and in which order, generally that which she deems most helpful to the progression of the case. The judge takes the lead in questioning and, whilst there is no formal cross-examination, any witness summoned by request of the judge is open to follow up questioning by both prosecution and defense. The accused is generally given the opportunity to speak first, and then questioned by the judges on his narrative.

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55 Damaska, supra note at 533.
56 MUeller AND POOLE-GRIFFITHS, supra note at 7.
57 Orie, supra note at 1451.
58 Pizzi and Marafioti, supra note at 7; DAMASKA, supra note at 850.
59 Pizzi and Marafioti, supra note at 7.
60 Damaska, supra note at 525.
61 CASSESE, supra note at 373.
testimony.62 In an inquisitorial process there is no dispute to address, instead only one case is presented and if the defense wishes to have certain evidence produced he must request it of the judge. In contrast to the adversarial system, there are few formal rules of evidence.63 This sits in line with the truth determining function of the pure inquisitorial system as “fixed evidentiary rules might lead to the exclusion of important probative evidence.”64 The preference for a professional judge rather than a lay-jury alleviates the need for extensive evidentiary rules as it is assumed that a professional judge is able to weigh all evidence according to merit in making her determination of the guilt or innocence of the accused.

c. A Spectrum of Procedure between the Pure Models

An outline of the two pure models highlights the stark differences between them across all phases of procedure. Several ways to distinguish between the two models are suggested in the literature, for example Kessler has suggested that the distinction rests on three elements of litigation “initiating the action, gathering the evidence, and determining the sequence and the nature of proceedings”,65 while Langer suggests that they are distinguishable on four separate levels, offering “two different techniques to handle criminal cases [and] two different procedural cultures”, with both having distinct “different legal identities [and offering] two different ways to distribute powers and responsibilities between the main actors in criminal

62 Goldstein, supra note___ at 1018; Damaska, supra note___ at 527; Lerner, supra note___ at 828.
63 Orie, supra note___ at 1452; Pizzi and Marafioti, supra note___ at 7.
64 Pizzi and Marafioti, supra note___ at 7.
65 Kessler, supra note___ at 1187.
procedure”. In thinking about how ICP has developed, all of these distinctions become extremely important when looking at where, and to what extent, ICP has converged on a general body of procedural law.

Once we understand the pure models and their distinctions we can begin to think about them as embracing either end of a spectrum of procedure. Figure 1 (below) contrasts the two models directly with each other across several different planes, from which we can see that each system has an opposing feature to the other. We can think about the space between each of the opposing features as embracing a spectrum, within which it is possible to envisage many variations between the two.

Fig. 1 The Two Pure Forms of Procedure

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<tr>
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<th>Pure Adversarial Model</th>
<th>Pure Inquisitorial Model</th>
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<tbody>
<tr>
<td><strong>Nature of the proceedings</strong></td>
<td>A dispute between two active parties conducting cases in competition with one another (Prosecution and defense)</td>
<td>A unified Official Investigation conducted by impartial officials (prosecutor and judge) to determine the truth</td>
</tr>
<tr>
<td><strong>Role of the judge</strong></td>
<td>To act as an impartial “passive umpire” to the dispute put to her by the two adversaries (Prosecution and defense)</td>
<td>To investigate the truth, and to actively pursue independent lines of investigation and evidence</td>
</tr>
<tr>
<td><strong>Nature of the court</strong></td>
<td>Bifurcated court, which relies on ‘lay’ decision makers of fact to determine guilt. Judge determines sentencing.</td>
<td>Unitary court which relies upon professional decision makers (judges) to determine both guilt and sentencing</td>
</tr>
<tr>
<td><strong>Role of the Prosecutor</strong></td>
<td>To actively investigate and prosecute his case</td>
<td>A public official tasked with investigating both inculpatory and exculpatory evidence to determine the truth</td>
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<tr>
<td><strong>Role of the Defense</strong></td>
<td>To actively investigate and defend the accused</td>
<td>The target of the investigation</td>
</tr>
<tr>
<td><strong>Procedural powers</strong></td>
<td>Both prosecution and defense have</td>
<td>Exculpatory evidence is passed from the</td>
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66 Langer, *supra* note___ at 852.
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<th>during investigation</th>
<th>equal procedural powers</th>
<th>official investigator to the defense. Defense can request the official investigator to gather evidence on its behalf</th>
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<tr>
<td>Discretion in charging</td>
<td>The Prosecutor has broad prosecutorial discretion and is able to decide when a dispute concludes</td>
<td>The discretion to dismiss a case lies with the judge. The Prosecutor’s role is to determine the truth and can only decline to proceed where there is insufficient evidence.</td>
</tr>
<tr>
<td>Particular Procedural Devices</td>
<td>Several devices permit the parties to negotiate between themselves to end a case without the involvement of the judge, including guilty pleas, stipulations and plea bargaining</td>
<td>Judge has the final word on the investigation and thus can find that the defendant’s confession alone does not constitute proof of guilt beyond a reasonable doubt</td>
</tr>
<tr>
<td>Evidentiary standards</td>
<td>Embraces detailed rules of evidence for admission and to evaluate evidence admitted in order to monitor what the lay decision makers are exposed to</td>
<td>Rejects detailed evidentiary rules and generally admits all relevant evidence, based on the assumption that a professional judiciary can weigh prejudicial evidence and exclude from decision making where necessary.</td>
</tr>
<tr>
<td>Oral v Written Evidence</td>
<td>Historically have preferred oral evidence as lay jurors cannot be asked to read reams of written statement</td>
<td>A written dossier works as a tool that interconnects all the professionals involved. This document documents all procedural activity. Allows everyone to know at every stage what the case is about and the existing elements of proof</td>
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If we assume that the pure adversarial system splits power equally between the prosecution and defense, with the judge as an independent passive umpire, and the pure inquisitorial system combines the judge and prosecutor into a unified official investigator, with the defense as the target of prosecution, then it is possible to imagine a sliding scale between those two extremes of power distribution.

It is the contention here that the ICP across the ICTY, ICC and ECCC has each adopted a position upon this spectrum between the two extremes, converging upon a movement towards inquisitorial mechanisms as the norm in ICP. This paper asserts that, underlying the distinctions
suggested by Kessler\(^{67}\) and Langer,\(^{68}\) the definitive characteristic of this convergence rests on the power distribution between the main actors in the system. Taking the traditional pure adversarial system as our baseline, the primary structural shift we see across all the international courts is the removal of power out the hands of the parties (prosecution and defense) and into the hands of the judge. This redistribution is embodied by increased procedural powers that permit the judge to become a more active participant in proceedings, representing a shift away from the judge as a “passive umpire”.\(^{69}\) These increased procedural powers necessarily place additional burdens on the prosecution and defense, again more akin to those found in an inquisitorial system. This shift in power dynamics, and moving powers away from the prosecution and defense and into the hands of the judge, is evident to differing extents across each stage of proceedings at the international courts: from investigatory powers to indictment, and permeating all pre- and during trial proceedings, and these power shifts are underlined by procedural devices that incorporate mechanisms from both the adversarial and procedural cultures in order to effectuate that re-allocation of power. This article asserts that the roles ascribed the parties in ICP represent a paradigm shift away from adversarial process upon which international criminal procedure was initially founded towards a more inquisitorial model. In moving structural powers into the hands of the judge, we see increased cooperation between the parties than would be seen under a pure adversarial system where the prosecution and defense are adversaries in competition with each other.

\(^{67}\) Kessler, supra note____.  
\(^{68}\) Langer, supra note____.  
\(^{69}\) Id. at 840.
The hypothesis of shifting power dynamics will be tested through employing the pure model of the adversarial system as a baseline and looking at the Statute’s and the RPEs of the three courts to show how far the procedural systems in those courts and tribunals have moved across the spectrum away from a pure adversarial tradition and towards inquisitorial procedure. The subsequent analysis will look at power shifts between the parties and will identify power distributions and particular procedural devices upon which the different courts have converged in their usage. Mapping these power shifts and structural changes across the procedural spectrum and identifying where there are similarities and differences illuminates which elements of the two diverse models of procedure have come to be relied upon in the international system. It is interesting that, while each court has come to a position more closely aligned with inquisitorial mechanisms, the precise mechanisms that each court has chosen to employ to get there has differed, and from this we can draw conclusions about the practical application of procedure to large-scale trials found in the international criminal arena, which will be explored fully in Parts V and VI.

The following three sections will examine the ICTY, ICC and ECCC. In each section a brief procedural history of each court will first be introduced followed by a discussion of the procedural devices incorporated into that court’s Statute and RPE’s, and an identification of the pure model from which those devices are drawn. Full comparative analysis of the power structures and devices employed by the three courts is reserved for Part V, whereupon this article will plot the developments of each system onto the procedural scale and identify any convergences between the three courts.
II. The International Criminal Tribunal for the Former Yugoslavia

a. Procedural History of the ICTY

During the initial drafting of the ICTY’s Statute and RPEs reference was made to both the adversarial and inquisitorial models\(^{70}\) and, although the “draft statute [of the ICTY] – which the Security Council approved without changes – did not have a clear adversarial slant”,\(^{71}\) the adopted RPE’s had “a clear adversarial inclination”.\(^{72}\) This proclivity can be attributed to the heavy influence of the United States during the drafting process, and the fact that the “majority of judges favored a predominantly adversarial system...[b]ased on the limited precedent of the Nuremberg and Tokyo Trials, and in order for... judges, to remain as impartial as possible”\(^{73}\). Consequently, the responsibilities and powers assigned to the prosecutor and the defense followed adversarial lines, with the judges espousing the role of passive umpires,\(^{74}\) and all actors in the system adopted, at least to some extent, the adversarial model in their dealings with the court:

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\(^{71}\) Langer, *supra* note___ at 856.


\(^{73}\) Langer, *supra* note___ at 858, quoting President of the Tribunal Antonio Cassese, Statement by the President made at a Briefing to Members of Diplomatic Missions, Summary of the Rules of Procedure at the International Criminal Tribunal for the Former Yugoslavia, (1994).

\(^{74}\) Langer, *supra* note___ at 858. There was broad prosecutorial discretion regarding whether to investigate and bring charges. Structurally, the case was organized as a dispute between prosecution and defense, with each side in contest with each other. The evidence belonged either to one party or the other, and the traditional adversarial methods of direct, cross, re-direct and rejoinder were utilized.
“There were two reasons for this: First, because the judges were convinced that the Rules had enacted a predominantly adversarial procedure, they generally tried to behave according to that system – even those from civil law jurisdictions. Thus, legal actors who came from inquisitorial backgrounds generally accepted that many of their internal dispositions did not apply in this international context. Second, since there is a certain interdependence between a number of features of each of these systems, the predominance of the adversarial system initially prevented, or at least weakened, the development of inquisitorial practices within it.”

Although not a pure adversarial system, the emphasis was on a competition between adversaries, with both prosecution and defense as procedural equals. The prosecutor was not required to search for both inculpatory and exculpatory evidence, and the defense had “similar procedural powers to the prosecution for developing its own case, calling its own witnesses, interrogating its own witnesses and the witnesses of the prosecution.”

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75 Id. at 859–860. Langer analyzes the choices made by the drafters as embodying two distinct patterns: “Choosing between the dispute and official investigation models, the judges chose the dispute one. Choosing how to organize authority, the judges struck a much more even balance between the hierarchical and coordinate models. But the latter choice to blend the hierarchical and coordinate models reflect not the relative power of actors with adversarial or inquisitorial dispositions, but the shared convictions of judges and policy-makers, including even those from common law jurisdictions.” (Id. at 868)

76 Id. at 861.

77 Id. at 861. One nod to the inquisitorial was the dispensation of technical rules of evidence common to the adversarial system, but preference still remained for the adversarial method of evidence delivery by oral testimony. (Id. at 867-868)
Unfortunately, the ICTY was plagued by excruciatingly slow processing times, which was attributed to the adversarial structure adopted under the Tribunal’s early RPEs. The failings of this adversarial structure for trials of this magnitude presented itself in two ways: “The first problem was in the structure of the adversarial process itself, organized according to the dispute model.” This model placed the burden of proof on the Prosecution and in order to discharge the burden it was necessary for the prosecutor to “gauge in advance how much evidence will be enough to persuade the decision-maker.” This often lead to the prosecution leading much more evidence than was necessary, resulting in delays and lengthy proceedings. The second, directly related, problem was the presence of often hundreds of witnesses in proceedings, directly attributable to the ICTY’s preference for oral testimony common to the adversarial system, which again resulted in delays and lengthy proceedings.

Given that the ICTY was the first international court since Nuremberg created to hold individuals individually criminally responsible, it was understandable that it would have adopted its predecessor’s procedure during its early years. However, as it became clear that the Tribunal was ill equipped to discharge its duties employing the adversarial tools originally

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79 Langer, supra note___ at 872.
80 Id. at 872.
81 This is a common problem in jury trials, where the Prosecutor, unable to converse with the Jury, labors a point of which they are convinced, spending time that could be better spent elsewhere on persuading them of an argument they are less sure of. Groome, supra note___ at 801.
82 Langer, supra note___ at 873.
83 The issue of what procedural laws and principles to apply in the context of an international criminal trial first arose at Nuremberg Richard May & Mareike Wierda, Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha, 37 COLUMBIA JOUR 725 (1999); Langer, supra note___ at 8; Groome, supra note___ at 792.
provided to it, those criticisms became the impetus for procedural change and led to the incorporation of more inquisitorial mechanisms into the procedural structure. These reforms were characterized by a “re-definition and re-signification” of those procedural features found in the adversarial and inquisitorial systems.

b. Structural Shifts and Power Distribution at the ICTY

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84 Robinson, supra note ___ at 573–588.
85 Langer, supra note ___ at 879–880. Maximo Langer has suggested that the hybrid system at the ICTY mirrors managerial judging (Langer, supra note ___; Langer and Doherty, supra note ___), a mechanism used in US domestic civil procedure,(Judith Resnik, Managerial Judges, 96 HARVARD LAW REVIEW 374-448, 378 (1982)) which refers to an apparatus that encourages judicial activism to promote expediency,(Id. at 415; Judith Resnik, Managerial Judges and Court Delay: The Unproven Assumptions, 23 JUDGES J. 9 (1984)), requiring that the judge, rather than being a passive observer as in the true adversarial model, instead play an active role in both pre-trial and trial proceedings. Langer argues that the managerial model was adopted by the ICTY to fulfill the same goal of expediting process as in US domestic civil procedure; unfortunately Langer and Doherty deem that it has been a failure in this regard (Langer and Doherty, supra note ___ at 243, 269)

The term managerial judging was introduced in US domestic civil procedure by Judith Resnik in 1982,(Resnik, supra note ___) and the rationale behind the adoption of this mechanism was the implementation of the Federal Discovery Rules in 1938, under which judges soon found that they needed to become more involved in a case even prior to trial. The new rules mandated that parties were entitled to the Court’s assistance in getting information from the other side; access to much more information than they had previously been privy to prior to the discovery reforms. This led to increasing burdens on the trial judges to become knowledgeable of the case before them, to facilitate their active management in the process which in turn led to the introduction of various forms of ‘systems management’ to assist the judge in its new pre-trial role. (Id. at 398). These amendments “effectively enhanced judicial control over civil cases by codifying the concept of managerial judging and that enlarged attorneys’ responsibilities to act as officers of the court,”( Carl Tobias, Salute to Judge William W. Schqarzer, A, 46 HASTINGS L.J. 675, 676 (1994)) heralding a significant shift from the traditional operation of trial proceedings, (Resnik at 390) whereby the judge played a passive role in the progression of cases. Under that system, the judge was a reactive participant to the parties’ claims, whereas under the new system judges were required to roll up their sleeves and get their hands dirty with the facts of the case. (Id. at 391)

Under this managerial model the two main spheres of managerial influence were pre and post trial. Pre-trial was within the purview of judges, whereas post-trial came through the request of the parties. (Id. at 403) The overall goal of pre-trial managerial judging was, and continues to be, to expedite the process to settlement or trial, and to improve the overall litigation process by instructing the attorneys to follow a particular course and by instituting timelines and work schedules. Post-trial managerial judging, on the other hand, is actioned by one of the parties. It can come on request from the winner of a case to implement the judgment delivered, or the “loosing’ defense attorneys return hoping to have adverse court orders modified.” (Id. at 405)

In Resnik’s analysis the key consideration for managerial judging is the scope of information the judge must be privy to at all stages of the case, from pre-trial onward. Judges are required to be highly knowledgeable of the facts of the case and surrounding circumstances, and must enmesh themselves in the story and acquaint themselves with the key players. They must not remain “silent auditors of retrospective events retold by first-person storytellers. Instead, judges remove their blindfolds and become part of the saga themselves.” (Id. at 408) All judicial management techniques lie in the discretion of the particular judge to call upon those elements he finds most useful. A judge cannot discharge his managerial duties by doing otherwise and remaining a passive umpire.
With the introduction of these inquisitorial mechanisms came the structural shift of redefining the roles of the parties and the power allocation between them and alongside this a discernable shift towards procedural devices familiar to the inquisitorial system. From its creation, the ICTY had taken a decisive step away from the adversarial system, instead sharing with the inquisitorial system a “preference for the professionalization of the legal process,” and this did not alter with the structural reforms implemented with the introduction of more inquisitorial mechanisms. What did alter was the relationship between the prosecution and defense and, instead of the emphasis on competition between the parties as seen in the adversarial system and under the early formulations of the RPE’s, more collaboration and cooperation was encouraged between the two. The new rules did not go so far as instituting an official investigation in the pure inquisitorial sense, but rather moved case management powers out of the hands of the individual parties and placed them in the hands of the judge who was now imbued with increased powers to manage and facilitate the cooperation. This was an abrupt shift in procedure at the ICTY, as it required the parties to play a dual role alien to the

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86 Id. at 881.
87 Langer and Doherty, supra note ___ at 260–265. The introduction of Rule 65 ter met the objective of having judicial management pre-trial in order to increase the efficiency of trial preparation, and consequently to expedite the process of the trials. Unfortunately, as Langer and Doherty indicate in their empirical study, this objective was not met, and actually oftentimes had the opposite effect of lengthening procedure. They tested the effect of the reforms on pretrial proceedings and found that “The effect was substantially and statistically significant. During the period before reforms or after only a few reforms were in place (zero to three reforms) there was an eighty percent probability that the pretrial phase would have ended before the seventh hundred day. After all or nearly all the reforms were in place (eight to nine reforms) there was only a forty percent probability that the pretrial phase would have ended by the seventh day” (Id. at 260). It must be noted that these statistics encompass not only the reforms introduced by Rule 65 ter, but also those allowing, amongst other things, less use of live testimony (Rule 89 amended and 92bis adopted), permitting the trial chamber to fix the number of crime sites and incidents, and various measures under Rule 65 bis relating to status conferences (Id. at 299).
adversarial system; they must prosecute their own case with the utmost fervor while at the same time assisting the court.

These reforms also signaled a shift away from the passive, disengaged judge under the adversarial model towards increased judicial involvement and management extremely familiar to an inquisitorial system. Under the procedure at the ICTY, the Office of the Prosecutor issues an indictment after they have conducted an investigation. The indictment is then reviewed by a judge who examines each count and supporting documentation and determines whether a *prima facie* case exists against a suspect, in accordance with Article 19(1) ICTY Statute. The Judge is able to request more information from the Prosecutor to make that decision, and can ultimately accept or reject the indictment. Once the indictment is confirmed, the pre-trial judge, designated within seven days of the initial appearance of the accused, is vested with the power to establish a work-plan for the parties in order to assist them in preparing for trial in a timely manner. Under these reforms the pre-trial judge is required to become intricately acquainted with, and a master of, the facts to enable them to extinguish these responsibilities adequately. To assist the judge the parties are required to submit pre-trial briefs to the court in advance of the opening of the trial by order of Rule 65ter(E).

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88 When conducting an investigation the Prosecutor is not under an obligation to investigate exculpatory evidence, however they do have a duty to “disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence” ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV.46 Rule 68 (2011).
89 *Id.* at Rule 47(E).
90 *Id.* at Rule 47(F).
91 ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV. 45 Rule 65 ter (A) (2010).
92 *Id.* at Rule 65 ter (D)(ii).
Under the reformed rules open communication between the parties became paramount. The prosecution is required to disclose its case strategy, and must cooperate with the defense on settling issues of fact. The prosecution is also required to provide a detailed list of witnesses, the factual basis on which the witnesses will testify, and whether that witness will appear in person or by written statement. The prosecution must give a time estimate for each witness, and an estimate of the total time for their case. Similarly, the defense is required to submit a pre-trial brief, indicating any defenses to be relied upon, and any issues the defense has with the prosecution’s case as indicated in its pre-trial brief, and reasons for those issues. Like the prosecution, prior to the start of the defense case they must submit a list of witnesses and exhibits. Failure to meet their obligations under these rules can result in sanction upon the violating party.

Following the submission of their pre-trial briefs the process moves from the Pre-Trial Judge to the Trial Court, and the Trial Court is required to hold a pre-trial conference with the parties prior to the opening of the trial. It is during these conferences that the shift in power dynamic from the parties to the judges is most pronounced at the ICTY, as it is at this stage that the judge can alter the proposed activities of each party during the proceedings: the court can

93 Id. at Rule 65 ter (B).
94 ICTY RULES OF PROCEDURE AND EVIDENCE, supra note  at Rule 65 ter (E)(i).
95 Id. at Rule 65ter(E)(ii)(e).
96 Id. at Rule 65 ter (E)(ii).
97 Id. at Rule 65 ter (F).
98 Id. at Rule 65 ter (G).
99 Id. at Rule 65 ter (N).
100 Id. at Rule 73 bis.
request that the parties shorten the estimated time of examination-in-chief for witnesses;\(^{101}\)

require the parties to call fewer witnesses and;\(^{102}\) select particular crime sites or incidents as representative of the crimes charged.\(^{103}\) As discussed, the impetus for many of these procedural reforms was to shorten the amount of time cases were taken to process at the court,\(^{104}\) and in furtherance of that goal the reformed RPEs permit the court to exercise control

\(^{101}\) Id. at Rule 73 bis (B).

\(^{102}\) Id. at Rule 73 bis (c). The Trial Chamber judge can make these limitations “in light of the file submitted to the Trial Judge pursuant to Rule 65 ter (L)(i)” and after having heard the prosecutor.

\(^{103}\) Id. at Rule 73 bis.

\(^{104}\) Langer and Doherty, supra note __. In his follow-up paper, written with Joseph W. Doherty, Langer and Doherty identify that the promise of managerial judging been unfulfilled, and has in fact had the opposite effect of expediency, impeding upon the quick resolution of cases through the introduction of many extra procedural steps. (Id. at 243) Langer and Doherty identified two main reasons for this failure through their quantitative analysis of the proceedings at the ICTY: firstly, that “judges either did not use their managerial powers or used them ineffectively” and; secondly, “because the prosecution and defense resisted the reforms.” (Id. at 269)

With regard to the judges failing to use their powers, Langer and Doherty found that judges failed to utilize their power to allow the parties to make agreements on disputed issues of fact, nor did they use status conferences to get information about the case prior to the proceedings. Neither did they utilize newly introduced rules to narrow or resolve issues in the pre-trial phase. (Id. at 272) Another failing, was the lack of reduction in the number of oral witnesses being replaced by written testimony, with Langer and Doherty identifying judges’ resistance to such a mechanism. (Id. at 273) Where judges were using this power, they were doing so indiscriminately, and requesting each side to “reduce their list of live witnesses by one third regardless of the characteristics of the case”, (275) which constitutes an abuse of that power.

Langer and Doherty identify many reasons for the resistance by judges to the exercise of their managerial powers. Firstly, by adopting the new rules allowing for judicial management the judges could be seen to be responding to criticisms regarding the length of trials at the court. By adopting the rules, and then not using them, the judges placate the criticism while still maintaining the status quo. (Id. at 280) Second, as the judges are only employed for the duration of the existence of the court, or indeed a particular case in the instance of ad litem judges, it is in their own interest to prolong the trial as long as possible. (Id. at 280)

There were also more structural problems with the implementation of managerial powers, such as “limited information about the case... that prevented ICTY judges from using their managerial powers.” (Id. at 283) Langer and Doherty identify that “like in a pure adversarial system, the parties in a managerial judging system are in charge of running their own pretrial investigations and trial cases.” (Id. at 283) This necessarily means that the parties are privy to far more information than the judges, and consequently the judges are disadvantaged, as the parties will only reveal those facts that are most advantageous to them. This has the effect that judges have been reluctant to fully utilize their managerial powers, as there is a risk that their decisions “may expedite the process but generate higher costs in terms of accuracy, fairness, or any of the other goals of the legal process”, something all judges are keen to avoid. (Id. at 284)

The ICTY has also suffered through lack of an implementation strategy for the managerial reforms. These reforms have constituted a “major restructuring of the ICTY as an organization, importing a conception of the judge that was different from the predominant conception in most civil and common law countries.” (Id. at 285) Furthermore, the parties themselves have been resistant to the introduction of more active judicial management. The Prosecution has been reluctant to embrace the new system, as it removes power from their hands previously held under the adversarial system. Moreover, the Prosecution has been opposed to reducing the number of
over the mode and presentation of witnesses and evidence, to ensure no time is wasted.\textsuperscript{105} Similarly, the Court also has discretion to hold a pre-defense conference prior to the start of the defense case,\textsuperscript{106} during which the Trial Judge has the same powers of limitation as with the prosecution, and can require the limiting of witnesses,\textsuperscript{107} reducing the time for examination-in-chief of witnesses called\textsuperscript{108} and determine the time for presenting evidence.\textsuperscript{109} These reforms all embrace procedural techniques that are not available under a pure adversarial system, and have the effect of shifting power away from both the prosecution and defense in favor of the judges. The consequence of these reforms is to significantly empower the judge to exercise much more control over the progression of the prosecution and defense cases than permitted under the early adversarially influenced ICTY, by restricting witnesses, evidence and crime sites and thus giving the judges the power to shape how the parties present their cases. These powers embody inquisitorial traits as under that pure system the judge, as an official investigator, is empowered with similar discretions.

In order to effectuate the transfer of procedural powers from the parties to the bench, one of the most important procedural devices adopted by the ICTY is ‘file’ under Rule 65ter(L)(i), the

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\textsuperscript{105}ICTY RULES OF PROCEDURE AND EVIDENCE, supra note\ldots at Rule 73 bis (F).
\textsuperscript{106}Id. at Rule 73 ter.
\textsuperscript{107}Id. at Rule 73 ter (C).
\textsuperscript{108}Id. at Rule 73 ter (B).
\textsuperscript{109}Id. at Rule 73 ter (E). The defense is also permitted, if it considers it to be in the interests of justice, to file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called, once the defense case has commenced (Id. Rule 73 ter (D)).
\end{flushright}
functions of which are familiar to the inquisitorial dossier. Compiled after the prosecution has filed its pre-trial brief, the ‘file’ consists of that brief and the prosecution’s witness and exhibits list, all the filings of the parties to date, transcripts of status conferences and any minutes of other meetings held.¹¹⁰ A second file incorporating the pre-trial brief and list of witnesses submitted by the defense supplements this.¹¹¹ As a whole, these files provide the trial court with considerable information about the case and allow the judges to actively manage the case during the proceedings. A pre-trial dossier is germane to the inquisitorial system, however Langer distinguishes the ICTY managerial file from that, as the inquisitorial dossier documents and impartially records all previous activity between the parties prior to trial. Conversely, at the ICTY, the file mainly consists of the pre-trial briefs of the parties and is provided to give the judges the knowledge to become “active expediting managers, rather than active investigators.”¹¹² This is a key distinction between the reformed system under the revised RPEs at the ICTY and a pure inquisitorial system. Unlike in an inquisitorial system where the official investigator conducts impartial investigations to achieve the fulfillment of the truth determining function of that system, the file compiled by the pre-trial judge acts as a road-map for the court, to assist the trial judges in their goal of becoming knowledgeable and informed managers of the trial proceedings.

Article 15 of the Statute of the ICTY left the adoption of the rules of evidence up to the judges, who subsequently chose to incorporate broad evidentiary standards permitting the admission

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¹¹⁰ Id. at Rule 65ter(L)(i).
¹¹¹ Id. at Rule 65ter(L)(ii).
¹¹² Langer, supra note ___ at 898.
of any relevant evidence of probative value, unless the it is significantly outweighed by the need to ensure a fair trial.\textsuperscript{113} This mirrors the inquisitorial preference for non-detailed rules of evidence, in reliance of the professionalism of the judiciary to weigh evidence accordingly. Another procedural development at the Tribunal has been an adoption of the preference for written evidence, in certain specified instances.\textsuperscript{114} Interestingly, although this is a procedural device heavily employed in the inquisitorial system, Langer has been keen to emphasize, “Judges have not introduced these reforms out of a bureaucratic preference for documentation as in the hierarchical model of the inquisitorial system. Rather, as ICTY judges have expressly acknowledged, they have perceived the increasing introduction of written evidence at trial as a way to speed it up, even at the expense of fairness and truth determination.”\textsuperscript{115} Lamentably, the inquisitorial method of collecting written evidence pre-trial by impartial officials has not been followed, and “in the context of the ICTY, as a consequence of the party-driven investigations, written statements admitted at trial include statements not gathered in such an impartial fashion.”\textsuperscript{116} This is emblematic of issues that can arise when blending inquisitorial and adversarial mechanisms, while not ensuring that due process and the fundamental protections of rights of individuals under each system are met.\textsuperscript{117}

\textsuperscript{113}ICTY RULES OF PROCEDURE AND EVIDENCE, supra note\(\_\_\) at Rule 89 (C)–(D).
\textsuperscript{114}Id. at Rule 92 bis.; Langer, supra note\(\_\_\) at 901; Langer and Doherty, supra note\(\_\_\) at 273; Id. at 274.
\textsuperscript{115}ICTY RULES OF PROCEDURE AND EVIDENCE, supra note\(\_\_\) at Rule 92 bis; “judges have not introduced these reforms out of a bureaucratic preference for documentation as in the hierarchical model of the inquisitorial system. Rather, as ICTY judges have expressly acknowledged, they have perceived the increasing introduction of written evidence at trial as a way to speed it up, even at the expense of fairness and truth determination.” Langer, supra note\(\_\_\) at 901; Regrettably, Langer and Doherty found that despite these reforms “the number of live witnesses remained relatively steady [which] suggests that the introduction of Rule 92 bis did not reduce the number of live witnesses at trial”, Langer and Doherty, supra note\(\_\_\) at 273; moreover their findings suggest “Rule 92 bis statements have been introduced mainly on top of, and not instead of, live witnesses”. Id. at 274.
\textsuperscript{116}Langer, supra note\(\_\_\) at 901.
\textsuperscript{117}Fairlie, supra note\(\_\_\); Noah Weisbord & Matthew A. Smith, Reason behind the Rules: From Description to Normativity in International Criminal Procedure, The, 36 N.C.J. INT’L L. & COM. REG. 255, 263 (2010); John D. Jackson,
As is evident from the foregoing discussion, although the ICTY has not embraced all aspects of inquisitorial procedure the structural reforms that have taken place at the ICTY have had the effect of moving the procedural system away from its adversarial roots to a system more closely aligned with the inquisitorial. Under the reformed system power has increasingly shifted away from the hands of the parties and into the hands of the judge in structuring trial proceedings, and the ICTY has adopted several devices familiar to the inquisitorial system, including extensive use of a dossier and a preference for written evidence over live testimony. Nevertheless, the procedure at the Tribunal still retains some measure of its adversarial origins as the investigation stage remains party-driven, and the prosecution and defense set their own course of investigation - clearly differing from the official investigation of a true inquisitorial system. As will be addressed in Part V, this is significant for placing this court within the procedural spectrum outlined in Part I(c).

This article will now move to identify and discuss in similar detail the procedure adopted at the ICC (Part III) and ECCC (Part IV), before looking at each system in comparison in Part V and assessing where on the procedural scale between pure adversarial and inquisitorial each court fall.

III. The International Criminal Court

a. Procedural History at the ICC

The ICC was borne out of entirely different circumstances from the ICTY and, instead of being a reactive, *ad hoc*, tribunal, years of planning, debate and discussion were invested regarding the formation of a single international court capable of holding individuals criminally responsible for individual acts.\(^{118}\) Perhaps the most striking characteristic of the International Criminal Court and its procedure is that, since its inception and in contrast to the ICTY, it has been a unique compromise between adversarial and inquisitorial systems. The drafters of the Rome Statute chose to leave the exact details of the compromise to be determined by the judges, giving them wide capacities to select the most appropriate procedural tools from the different systems.\(^{119}\)

The authority for judge-led creation of rules is found in Article 51 of the Rome Statute, which provides that in urgent cases, and where the Rules do not provide for a specific situation before


\(^{119}\) Kress, *supra* note ___ at 605.
the Court, the judges may draw up provisional Rules to be applied until adopted, amended or rejected by the next ordinary or special section of the Assembly of States Parties.\textsuperscript{120} On its face, this is a limited power, but in practice the judges enjoy very broad authority to create appropriate rules of procedure befitting the circumstances before it.

\textbf{b. Structural Shifts and Power Distribution at the ICC}

Once again, if we take the pure adversarial model as our baseline for the starting point in international criminal procedure then an examination of the Statute and RPEs of the ICC evidences a significant shift in favor of inquisitorial practices. This is so of the roles ascribed the individual parties, and especially the judge. What are particularly interesting are the dual roles of the Prosecutor and Pre-Trial judge during the investigation stage, which draws heavily on inquisitorial influences.

At the ICC the Office of the Prosecutor (OTP) is responsible for all initial investigation, playing a role somewhat familiar to the official investigator. As in the inquisitorial system, the Prosecutor is obliged to investigate all inculpatory and exculpatory evidence,\textsuperscript{121} which moves it beyond the requirements of disclosure incumbent on the Prosecutor at the ICTY and places an active requirement on the ICC OTP to unearth any exculpatory evidence.\textsuperscript{122} Unlike at the ICTY, which had a very specific mandate from the Security Council, the ICC has the power to investigate in

\textsuperscript{121} \textit{id.} at Article 54(1)(a).
\textsuperscript{122} The defense also conducts its own investigation, which the Registrar can assist with, as appropriate. \textit{RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT}, ICC-ASP/1/3 Rule 20(1)(b) (2002).
number of different instances. The investigative power of the OTP can be triggered one of three ways under Article 13 of the Rome Statute, either by referral by a State Party, referral by the Security Council or via an investigation \textit{proprio motu},\textsuperscript{123} and when deciding whether to initiate an investigation the Prosecutor must consider whether the information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, whether the case would be admissible under Article 17 of the Rome Statute, and whether there are other substantial reasons to consider that an investigation would not be in the interests of justice.\textsuperscript{124}

The procedure at the ICC has a two-fold approach to investigation: first the Prosecutor has the capacity to decide whether to proceed with an investigation but, second, a grant of authorization from the Pre-Trial Chamber is required for that investigation.\textsuperscript{125} Necessitating this authorization from a judicial body significantly restrains the discretion of the Prosecutor, a discretion that would be in the Prosecutor’s exclusive domain in an adversarial system, and Kress describes the relationship between the Prosecutor and the Pre-Trial Chamber at this stage of the proceedings as “one of the most striking examples of the uniqueness of the ICC procedural law”.\textsuperscript{126}

The Prosecutor has described the “interplay between the Pre-Trial Chamber and the prosecution [as] a sensitive matter that lies at the heart of the compromise reached in Rome

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{123}] \textsc{Rome Statute of the International Criminal Court, supra} note\textsuperscript{___} at Article 13.
\item[\textsuperscript{124}] \textit{Id.} at Article 53(1)(a)–(c).
\item[\textsuperscript{125}] \textit{Id.} at Article 15(3); \textsc{The Structure of International Criminal Procedure, supra} note\textsuperscript{___} at 433.
\item[\textsuperscript{126}] Kress, \textsc{supra} note\textsuperscript{___} at 606.
\end{enumerate}
\end{footnotesize}
between different legal traditions and values, and must be approached with utmost caution."

Imbuing in the judge the power of authorization is one of the striking examples in ICC procedure of the power shift that has taken place in ICP. Requiring authorization as a prerequisite for an investigation to proceed moves exclusive discretion of investigation and prosecution out of the hands of the Prosecutor in a pure adversarial system. Instead the judge is given enormous power to influence which cases move to the full investigation stage, which is more aligned with the active role of a judge as official investigator in an inquisitorial system.

During this judicial authorization request process, and in making its determination of viability, the Pre-Trial Chamber examines the request and supporting materials submitted by the Prosecutor, and may request additional information from the Prosecutor as well as any victims who make representations, and may even hold a hearing if they consider it necessary, before determining whether there is indeed a reasonable basis to proceed. In issuing their decision, the Pre-Trial Chamber must include it’s reasoning, and must notify the victims of the decision.

Hand in hand with the unique condition of judicial authorization is the procedural power of review instilled in the Pre-Trial Chamber at the ICC under Article 53 of the Rome Statute. This is another prominent example of a power shift along the spectrum in ICP, and one which places more power in the hands of the judicial organ than would ever be found in a pure adversarial

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127 The Structure of International Criminal Procedure, supra note ___ at 443 citing Office of the Prosecutor, PROSECUTOR’S POSITION ON PRE-TRIAL CHAMBER I’S 17 FEBRUARY 2005 DECISION TO CONVENE A STATUS CONFERENCE 2 (2005).
128 RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Rule 50(4).
129 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Article 15(3)–(4).
130 RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Rule 50(5).
system. Once again, this represents a shift on the spectrum between the two pure models, subjecting the OTPs exercise of prosecutorial discretion (a pure adversarial norm) in deciding whether to proceed with an investigation to judicial review in limited circumstances, depending on the basis upon which the Prosecutor has declined the investigation.

It must be noted that Pre-Trial Chamber’s power of review is not absolute. For example, when the Prosecutor declines to investigate based on Article 53(1) or (2) of the Rome Statute, the Pre-Trial Chamber’s review power can only be triggered by the request of a State, and it is only if a State requests such that the Pre-Trial Chamber can ask the Prosecutor to review its decision not to investigate. In this instance, if the Prosecutor once again declines to proceed with the investigation then there is no further recourse available to the Pre-Trial Chamber.

The Pre-Trial Chamber has much broader powers of review when the Prosecutor declines to prosecute on the basis of Article 53(3) as in that case the Pre-Trial Chamber can request on their own initiative that the Prosecutor review its decision not to investigate. If the Pre-Trial Chamber draws a contrary conclusion to the Prosecutor then the decision by the OTP not to proceed is invalidated, and the Prosecutor shall be obliged to continue with the investigation or prosecution. This provides the Pre-Trial Chamber with the means by which they can compel an investigation to take place. The rationale behind this review power of a judicial

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135 Although the Prosecutor is the arbitrator of a large measure of the investigatory powers, it is obliged to request certain measures from the Pre-Trial Chamber. In this way, the Pre-Trial Chamber retains some power, or at least
chamber has its origins in the inquisitorial system and represents a transfer of power from the Prosecutor to that judicial organ. Under a pure inquisitorial system, the judge is one of the arms of the ‘official investigator’ and therefore has the power to compel that a case be tried before the court. While these ICC Pre-Trial Chamber powers under Article 53 do not entirely embody a pure inquisitorial model (because the PTC is not part of the ‘official investigation’ body), echoes of inquisitorial logic can be found in the purpose of the Article 53 power.

A further interesting competence of the PTC at the ICC relates to its ability to override the principle of complementarity. This is one of the unique operating principles of the ICC and requires the Prosecutor to notify the State that would normally exercise jurisdiction over the issue when a situation is referred to it and to defer to State investigation if the State requests it. In certain circumstances the OTP may request to continue an investigation despite a domestic investigation and the PTC has the power to grant that request. In acting on the Prosecutor’s request, the Pre-Trial Chamber decides on the procedure to be followed, and can elect to have a hearing. Both the ultimate decision and its rationale must be communicated to the Prosecutor and the State requesting the deferral.

136 Rome Statute of the International Criminal Court, supra note___ at Article 18(2).
137 Rules of Procedure and Evidence of the International Criminal Court, supra note___ at Rule 55(1).
138 Id. at Rule 55(3).
The Rome Statute also envisages a unique investigatory tool for the Pre-Trial Chamber, which is not seen at the other international courts. This device comes into play when a situation is recognized by the Prosecutor, which may not be available subsequently for the purposes of trial, whereupon the Prosecutor can request the Pre-Trial Chamber the opportunity to “take testimony or a statement from a witness, or to examine, collect or test evidence”.\textsuperscript{139} The Prosecutor is only permitted to exercise this function with the approval of the Pre-Trial Chamber, and the Pre-Trial Chamber may “take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defense.”\textsuperscript{140} Such measures may include recommending or ordering that a particular procedure be followed,\textsuperscript{141} requiring that a record be made of the proceedings,\textsuperscript{142} or even sending a judge to observe and make recommendations regarding the collection and preservation of evidence and questioning.\textsuperscript{143} Again, this is a function entirely unfamiliar to the pure adversarial system. Neither is it a feature commonly found in the inquisitorial system, but the judicial involvement in at this stage of proceedings is more closely aligned to the inquisitorial process, particularly the facility enabling the judge to observe the proceedings, which, it is suggested, mirrors the judges involvement in the inquisitorial official investigation. A secondary function of PTC involvement at the investigation stage is that it enables the Chamber to ensure that the rights of the defense are upheld, without which the defense would have no representation in those interactions.

\textsuperscript{139} \textsc{Rome Statute of the International Criminal Court}, \textit{supra} note\textsuperscript{___} at Article 56(1)(a).
\textsuperscript{140} \textit{Id.} at Article 56(1)(b); \textsc{Rules of Procedure and Evidence of the International Criminal Court}, \textit{supra} note\textsuperscript{___} at Rule 47.
\textsuperscript{141} \textsc{Rome Statute of the International Criminal Court}, \textit{supra} note\textsuperscript{___} at Article 56(2)(a).
\textsuperscript{142} \textit{Id.} at Article 56(2)(b).
\textsuperscript{143} \textit{Id.} at Article 56(2)(e).
Another pre-trial control mechanism exercisable by the PTC at the ICC is its ability to schedule and conduct status conferences. These conferences are similar in purpose to those held by the ICTY pre-trial judge, and are intended to enable the judge to assist with the progression of the trial and to ensure that the trial disclosure is taking place under satisfactory conditions, again a departure from pure adversarial standards. One judge from the Pre-Trial Chamber is designated to organize these conferences, which can occur at the judge’s own motion or at the request of the Prosecutor or accused person.\textsuperscript{144} All of these judicial powers are intended to permit the judge to supervise the Prosecutor and monitor the exercise of her discretion in the conduct of the investigation. This is important in an inquisitorially influenced system where the prosecutor holds the bulk of investigatory powers in order that the defense not feel at a chronic disadvantage; it is vital that the prosecutor’s powers be kept in check and there is supervision to ensure the prosecutor is executing its functions in the interests of both parties.\textsuperscript{145}

The Prosecutor’s role at the ICC is more akin to an official investigator in the inquisitorial system, as the OTP is intended to operate as an independent and impartial body, investigating both inculpatory and exculpatory evidence equally; a stark departure from a prosecutor in a pure adversarial system. However, as discussed above, the judicial authorization requirement at the ICC is a divergence from a pure inquisitorial system also. In contrast to the pure

\textsuperscript{144} RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note\textsuperscript{139} at Rule 121(2)(b).

inquisitorial system where both the judge and Prosecutor act in concert with each other in their shared role as investigating official, the system of ICP at the ICC puts the judge in a supervisory role, giving the judge the power to review the decisions of the OTP in certain circumstances.

The overall role of the Pre-Trial Chamber is inquisitorial in origin, and Miraglia suggests that the manifestation of the powers of the Pre-Trial Chambers has moved their role in the direction of investigative judging, a far departure from the passive adversarial judge on which the ICP was originally modeled.\textsuperscript{146} During the pre-trial phrase the PTC has an array of powers at its disposal, for example dealing with applications for interim release pending trial by detained persons,\textsuperscript{147} which shall be periodically reviewed.\textsuperscript{148} The PTC is also responsible for setting the date of the confirmation of charges hearing,\textsuperscript{149} during which it acts to confirm the charges on which the Prosecutor intends to seek trial.\textsuperscript{150}

The requirement of a confirmation hearing was directly inspired by the inquisitorial French system’s \textit{chamber d’accusation}.\textsuperscript{151} At this stage the ICC PTC determines whether there is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”,\textsuperscript{152} and can either confirm the charges and commit the person to a Trial

\begin{footnotesize}
\begin{enumerate}
\item ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note\textsuperscript{147} at Article 60(2).
\item \textit{Id.} at Article 60(3).
\item RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note\textsuperscript{148} at Rule 121(1). within a reasonable time following appearance by the accused
\item ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note\textsuperscript{150} at Article 61(1).
\item Kress, supra note\textsuperscript{151} at 610.
\item ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note\textsuperscript{152} at Article 61(7).
\end{enumerate}
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Chamber for trial,153 decline the charges for insufficient evidence,154 or adjourn and request further evidence or investigation from the Prosecutor, or suggest the Prosecutor amend the charge to a different crime.155 These powers are entirely unfamiliar to a pure adversarial system, which does not have the requirement of a pre-trial hearing, yet neither do they entirely emulate a pure inquisitorial system. Indeed Ambos suggests that the “ICC confirmation procedure is a compromise that combines several elements of different systems of pretrial procedures but does not imitate one of them completely.”156

It is not only in the Pre-trial stages that the judge is instilled with significant powers; the trial stages are also full of compromise between the two ends of the procedural spectrum. Following the confirmation of charges hearing the Presidency of the ICC convenes a Trial Chamber, at which stage responsibility for the conduct of proceedings passes from the ICC Pre-Trial to the Trial Chamber.157 The Trial Chamber confers with the parties and adopts such procedures to ensure a fair and expeditious trial, and can require disclosure of “documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial,”158 and up until the start of trial the Trial Chamber can schedule status conferences.159 Both prior to and during trial the Trial Chamber may require the attendance and testimony of witnesses and production of documents and evidence, and

153 Id. at Article 61(7)(a).
154 Id. at Article 61(7)(b).
155 Id. at Article 61(7)(c).
156 The Structure of International Criminal Procedure, supra note ___ at 455.
157 Rome Statute of the International Criminal Court, supra note ___ at Article 61(11), However, this does not necessarily mark the end of the Pre-Trial Chamber involvement, as the Trial Chamber may continue to refer preliminary issues to the Pre-Trial Chamber id. at Rule 64(4).
158 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Article 64(3).
159 RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Rule 132(2).
require State assistance in doing so, if necessary. The Judge may also order disclosure of documents not previously disclosed to the other party. The Presiding Judge has the power to give directions for the conduct of proceedings, and can, either on the application of a party or its own motion, rule on the admissibility or relevance of evidence, and take all necessary steps to maintain order. Proceedings and the presentation of evidence generally follow the adversarial example of the Prosecution presenting its full case followed by the presentation of the full defense case, however the Chamber is able to give directions for the conduct of proceedings, which can implicate on that presentation order. Where the Chamber declines to give such directions, then the parties retain discretion over the presentation of witnesses and evidence.

At the ICC the accused is free to admit guilt, however this is different to the concept of a guilty plea found in the adversarial system. In the adversarial system, if an accused admitted guilt then the Prosecution and Defense would work together to reach a compromise in sentence to propose to the judge. In contrast, if an accused admits guilt at the ICC and the Trial Chamber is not satisfied that the accused has made it voluntarily, cognizant of the nature and consequences of that admission, and that the guilt is not supported by the facts, the Chamber can dispense with the admission and order that the trial be continued under ordinary

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160 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Article 64(6)(b).
161 id. at Article 64(3)(c).
162 id. at Article 64(8)(b).
163 id. at Article 64(9).
164 id. at Article 64(8)(b).
165 RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Rule 140(1).
166 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note ___ at Article 65(1).
trial procedures, and may remit the case to another Trial Chamber.\textsuperscript{167} The parallels with the inquisitorial system here are obvious as that system does not accept guilty pleas either, instead requiring a full and impartial official investigation regardless of the professed guilt of the accused. However, the ICC does not entirely embody inquisitorial norms as if the Trial Chamber \textit{is} satisfied that the requirements of Article 65(1) are met the Trial Chamber can “consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.”\textsuperscript{168}

Another inquisitorial mechanism that has found traction at the ICC is the concept of a \textit{dossier}. At the ICC the Registrar is tasked with compiling complete records of all the particulars of each case,\textsuperscript{169} and the Trial Chamber is required to ensure that the Registrar makes a complete and accurate record of the proceedings.\textsuperscript{170} However, neither the ICC Statute nor RPEs provide for anything as comprehensive as a true inquisitorial \textit{dossier}.

Although a case file or \textit{dossier} is an inquisitorial mechanism, the method of collection of the relevant documents at the ICC embodies the adversarial approach to disclosure, requiring continuing disclosure throughout the trial process, include pre\textsuperscript{171} and during,\textsuperscript{172} rather than all disclosure prior to trial. This draws an interesting comparison between the adversarial and

\textsuperscript{167} \textit{Id.} at Article 65(3).
\textsuperscript{168} \textit{Id.} at Article 65(2).
\textsuperscript{169} \textit{RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra} note\textsuperscript{____} at Rule 15.
\textsuperscript{170} \textit{ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra} note\textsuperscript{____} at Article 64(10).
\textsuperscript{171} \textit{Id.} at Article 61(3).
\textsuperscript{172} \textit{Id.} at Article 64(3)(b); 67(2).
inquisitorial systems\textsuperscript{173} and how different international courts have chosen to deal with disclosure issues.\textsuperscript{174}

Like at the ICTY, and corresponding to the inquisitorial preference, the ICC relies on professional judges elected from “among persons of high moral character, impartiality and integrity who posses the qualification required in their respective State for appointments to the highest judicial offices.”\textsuperscript{175} Moreover, the ICC particularly requires that its judges must have an established competence in criminal law and procedure and the relevant areas of international law, such as humanitarian law and human rights.\textsuperscript{176} The statute provides that the judges will be assigned to Chambers such that belie their experience,\textsuperscript{177} and are expected act with impartiality.\textsuperscript{178} Hand in hand with the professionalized judiciary is the preference against technical rules of evidence at the ICC. Similar to the inquisitorial system, they are thought


\textsuperscript{175} \textit{ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT}, \textit{supra} note\textsuperscript{173} at Article 36(3)(a).

\textsuperscript{176} \textit{id.} at Article 36(4)(a).

\textsuperscript{177} \textit{id.} at Article 39.

\textsuperscript{178} \textit{id.} at Article 40.
superfluous to the procedural system of the court, as professional judges ought to be capable of ignoring inadmissible evidence. In accordance with Article 69(3) of the Rome Statute the parties may submit any evidence relevant to the case that is of probative value and not prejudicial to a fair trial or fair evaluation of the testimony of a witness. The judges must disregard evidence as inadmissible if obtained by violation of the Rome Statute or international human rights treaties, particularly if it casts substantial doubt on the reliability of the evidence, or if the admission of such would be damaging to the integrity of the proceedings. It is assumed that the judges are legally qualified to determine what is or is not admissible before them, and has the integrity to make a determination to the contrary when the interests of justice require it.

The Statute and RPE’s of the ICC are characterized by a pull towards inquisitorially influenced mechanisms and away from the framework of pure adversarialism that this paper is predicated on. However, as evidenced above, the ICC does not entirely embrace inquisitorial norms and several of the procedural developments at the ICC are unique. Some of these unique features, such as the review and authorization function of the PTC, seem to fall outside the scale between pure adversarial and pure inquisitorial and to embody an entirely new procedure. All of these developments will be compared to the other courts in Part V, immediately following a discussion of influences and developments at the ECCC.

IV. The Extraordinary Chambers in the Courts of Cambodia

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179 Id. at Article 69(4).
180 Id. at Article 69(7).
a. Procedural History at the ECCC

The establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) was approached from a different starting point to both the ICTY and the ICC as, from its inception, it was designed as a hybrid of both national and international law to combine elements of domestic inquisitorial Cambodian law with international law and legal standards.\textsuperscript{181} This final arrangement of the law at the ECCC was the result of much political wrangling and negotiation, with one of the major contentions between the two constituting parties, the Royal Government of Cambodia and the United Nations, being what law would govern the proceedings.

Throughout negotiations, the Cambodian Government insisted that the tribunal should be created within the existing national law and court system, modeled on French civil law, with international support being provided via the United Nations, while the United Nations demanded the reverse, insisting on an international court with national participation.\textsuperscript{182} The United Nations rationale for its position was the belief that the Cambodian Government was incapable of meeting the basic international standards of fairness expected from, and required by, a UN court, and they were concerned that the Cambodian Government did not recognize that the UN’s demands for independence, impartiality and objectivity of the tribunal were


legitimate. Fortunately, those concerns were overcome and a compromise was reached. That compromise was a hybrid court, marrying both domestic and international processes and proceedings.

The interplay between the domestic and international is found in the two principal founding documents of the Court; the Agreement between the United Nations and the Government of Cambodia and the ECCC Law, adopted by the Cambodian Parliament in 2001, and amended in 2004. Article 12 of the Agreement makes Cambodian domestic law the applicable procedure at the ECCC however, in anticipation of problems of interpretation and application of that law, provides that “guidance may be sought [from] procedural rules established at the international level”, in line with “international standards of justice, fairness and due process of

183 Hans Corell, Negotiations between the UN and Cambodia Regarding the Establishment of the Court to Try Khmer Rouge Leaders, Statement by UN Legal Counsel Hans Corell at a Press Briefing at UN Headquarters in New York (2002), http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm. The UN even withdraw from negotiations in 2002, as their concerns were not alleviated.


185 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea, (2003). Fundamental to the eventual Agreement was the application of both national and international law, and staffing by Cambodian nationals alongside international staff.

law”.\textsuperscript{187} There are also extensive supplemental Internal Rules of the Court, which have gone through numerous revisions since their initial adoption in 2007.\textsuperscript{188}

The result of this amalgamation of two distinct bodies of law - national and international - in a single court has been the creation of what the Co-Investigating Judges have termed a “special internationalized tribunal”.\textsuperscript{189} The Chamber has been designed within the existing court structure in Cambodia, yet the Trial Chamber has been keen to emphasize that it is a “separately constituted, independent and internationalized court”, with a “special and independent character within the Cambodian legal system... designed to stand apart from existing Cambodian courts and rule exclusively on a narrowly-defined group of defendants for specific crimes within a limited period”.\textsuperscript{190} The Court has also sought to distinguish the procedure used by the ECCC from the domestic Cambodian procedure, stating that it has a “self-contained regime of procedural law [to align with its] unique circumstances.”\textsuperscript{191}

\textsuperscript{187} Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea, supra note\textsuperscript{1} at Article 12. Cambodian criminal procedure has been reformed with the adoption with the Cambodian Code of Criminal Procedure 2007

\textsuperscript{188} Extraordinary Chambers in the Courts of Cambodia Internal Rules, (2007); The Agreement and the law were fleshed out by Internal Rules debated and adopted by a ‘Plenary’, comprising of all the permanent and reserve judges, permanent and reserve Co-Prosecutors, the head of the Defense Support Section, the head of the Victims Unit, and the head of the Office of Administration. The first set Internal Rules (“Rules”) were adopted on June 12, 2007, and since then the Rules have gone through several ‘Plenary’ sessions, resulting in multiple amendments. This has resulted in substantial development of the procedural law of the Court, and contribution to international criminal procedure as a whole. The purpose of the Internal Rules is “to consolidate applicable Cambodian procedure for proceedings before the ECCC and... to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.”(Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea, supra note\textsuperscript{1} at 4.)

\textsuperscript{189} Office of the Co-Investigating Judges Order of Provisional Detention (KAING Guek Eav alias Duch), (2007).

\textsuperscript{190} Decision of the Trial Chamber on Duch’s Request for Release, , 10 (2009).

\textsuperscript{191} Pre-Trial Chamber Decision on Nuon Chea Appeal Against Order Refusing Request for Annulment, , 14 (2008); The Court itself has been eager to distinguish and distance itself as “entirely self-contained” from the other
b. **Structural Shifts and Power Distribution at the ECCC**

Given the unique circumstances of the ECCC’s creation as an intentional national/international hybrid court, making observations using a pure adversarial baseline may seem imprudent. However, it must be recalled that the purpose of this article is to look at the developments of international criminal procedure, which has its origins in the adversarial, and it is in that context that we are examining the ECCC. An analysis of this court will provide a useful point of comparison in Part V when we examine where on the procedural scale the different courts can be charted, and which competing procedural devices they have chosen to draw upon.

Resulting from its roots in Cambodian domestic inquisitorial procedure, the ECCC has a unique feature not found in any of the other international courts: a traditional inquisitorial feature that removes investigatory powers from the prosecution and defense found in a pure adversarial system, instead placing those powers in the hands of an impartial judicial investigator – the Office of the Co-Investigating Judges (OCIJ). The ECCC OCIJ is an...
independent office within the Court tasked with investigating the truth and, as such, is required to identify both inculpatory and exculpatory evidence, playing the role of the inquisitorial investigating official. However, the OCIJ is not free to wield its power unrestricted, rather must act within the confines set out by the Co-Prosecutor in its introductory submission.

Once the introductory submission is handed to the OCIJ that office takes control of the investigatory process and from that point forward the OCIJ dictates the investigation; from which crimes sites are examined to what evidence is collected and which witnesses are interviewed. During its investigation the OCIJ has the power to interview the charged

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194 Extraordinary Chambers in the Courts of Cambodia Internal Rules, supra note____ at Rule 14(1). The UN insisted on the inclusion of international judges in the process, believing that Cambodian judges were ill equipped to ensure that international standards of fairness and judicial independence be met. This was embodied in Article 23 New of the Law of the ECCC, placing joining responsibility in the hands of two investigating judges, one Cambodian and another foreign.

195 LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, WITH INCLUSION OF AMENDMENTS, supra note____ at Rule 23 new; Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), Rule 14 (2011). The OCIJ should not be confused with more familiar ideas of pre-trial management seen at the ICTY and the ICC carried out by a pre-trial judge. The OCIJ plays a separate, very distinct role even before the pre-trial process (as understood in the traditional sense) begins; indeed it can be said they are operating pre pre-trial.

196 Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), supra note____ at Rule 53. The very first investigations were initiated following the first introductory submission filed by the Co-Prosecutors on 18 July 2007. The Co-Prosecutors requested an investigation into five suspects for crimes charged under the Law of the ECCC – based on both national and international law. Following a preliminary investigation to determine “whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses” the Co-Prosecutors collate the Introductory Submission. (Rule 50(1)). Even during this preliminary investigation, the Co-Prosecutors do not get actually carry out the investigation, instead it is “carried out by Judicial Police officers or by Investigators of the ECCC...at the request of the Co-Prosecutors”. (Rule 50(2)) It is only when the Co-Prosecutors have determined that there is reason to believe crimes have been committed within the jurisdiction of the court that they send an introductory submission to the OCIJ, outlining a summary of the facts on which their belief is based, the type of offenses they believe to have been committed, the alleged perpetrators that the CIJ should investigate, and the relevant law that criminalizes the alleged acts. (Rule 53(1)(a)-(d))

197 id. at Rule 55(S).
person,\textsuperscript{198} civil party\textsuperscript{199} and any witness,\textsuperscript{200} and it is able to control when those interviews take place. The Co-Prosecutors and the defense\textsuperscript{201} may request the OCIJ to undertake investigations or make any such orders as they consider useful for the investigation, however it is well within the power of the OCIJ to reject a request.\textsuperscript{202}

The OCIJ has an array of procedural powers at its disposal to enable it to execute its responsibilities to investigate, including issuing summons, arrest warrants and detention orders.\textsuperscript{203} These it does entirely under its own initiative. The OCIJ may also draft in and delegate powers to the Judicial Police or ECCC Investigators via Rogatory letter to assist with their investigations, and those bodies remain under the supervision of the Co-Investigating Judges.\textsuperscript{204} The OCIJ concludes its investigation by issuing a Closing Order, in which they can either indict a Charged Person and send to trial, or dismiss the case.\textsuperscript{205} This closing order forms the basis of the trial, and limits the facts that may be considered in relation to each charge and crime base.

The OCIJ represents one of the compromises reached between the Cambodian Government and the international negotiators when bargaining for applicable procedure before the court

\textsuperscript{198} Id. at Rule 58.
\textsuperscript{199} Id. at Rule 59.
\textsuperscript{200} Id. at Rule 60.
\textsuperscript{201} “At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf.” The OCIJ also has the power to reject such a request, however if it is does so it is required to provide factual reasons for doing so. (Id. at Rule 58(6)).
\textsuperscript{202} Id. at Rule 55(10). If the OCIJ rejects a request they are required to issue a rejection order “as soon as possible and, in any event, prior to the end of the judicial investigation”
\textsuperscript{203} Id. at Rule 55(5).
\textsuperscript{204} Id. at Rule 62.
\textsuperscript{205} Id. at Rule 67(1).
and was the workable solution found acceptable to both sides. Vesting investigatory powers in an independent judicial office retained that inquisitorial element in the hybrid system, and was more amenable to adversarial lawyers than having those full powers of investigation rest with the prosecutor alone.  

In keeping with an inquisitorial system of pre-trial management, the system at the ECCC also provides pre-trial procedural powers exercisable by the Trial Chamber. These powers, under Rule 80 of the ECCC Internal Rules, are intended to assist with the preparation of the trial and allow the Trial Chamber to manage the proceedings to trial. Each party to the proceedings, which at the ECCC includes Civil Parties (another inquisitorial adoption), must submit witness lists to the Greffier (a traditional feature of the French inquisitorial system), who communicates these to the Trial Chamber. In the interests of becoming immersed in the facts of the case and

206 It is tremendously important in this confidential evidence gathering system that the judges be seen to be impartial and independent. Suzannah Linton, Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers, 4 J. Int’l CRIM. JUST. 327 (2006).

207 Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), supra note ___ at Section D – Pre-Trial Chamber Proceedings. The role of the Pre-Trial Chamber at the ECCC is limited to adjudging on points of dispute between the Co-Prosecutors (ld. at Rule 71) and Co-Investigating Judges (ld. at Rule 72), and to ruling on issues appealed by the parties against orders made by the OCIJ (ld. at Rule 74). The Pre-Trial Chamber does not interact with the parties on matters of management, such as scheduling, which is a departure from other models seen at other international criminal courts, and the system more generally thought of under a managerial judging model. At the ECCC, once an appeal is referred, the Pre-Trial Chamber Greffiers receives the Case File from the OCIJ Greffiers, and the President of the Pre-Trial Chamber must verify the Case File is up to date and set a date for the hearing. (ld. Rule 77(3)). The Co-Prosecutors and lawyers for the parties may consult the case file up until the date of hearing. They are required to file their pleadings with the Greffier of the Pre-Trial Chamber (ld. Rule 77(4)) in order for the Pre-Trial Chamber to have sufficient information to rule on the dispute. Even though the role of the Pre-Trial Chamber is different to its role at the ICTY, managerial judging elements are still utilized, as the Pre-Trial Chamber judge is required to have a sophisticated level of knowledge about the proceedings in order to enable them to rule on the dispute.

to allow the judges to manage proceedings effectively the Chamber may require the parties to file additional documents, such as the factual basis of witness testimony, points of the indictment on which a witness will testify, and the estimated time required for the testimony of each witness.\textsuperscript{209} They may also require the parties to submit exhibit lists with accompanying descriptions;\textsuperscript{210} any legal issues the parties intend to rise at the initial hearing,\textsuperscript{211} and a list of facts uncontested between the parties.\textsuperscript{212} Again, many of these requirements may seem alien to an adversarial lawyer, as it means that the defense can see the cards the prosecution intends to lay on the table during trial, however, it is a common feature of an inquisitorial system and goes to the basic premise of the inquisitorial trial’s truth determining function. These all become a part of the case file, which continues to be a decisive tool in the judges’ arsenal after the opening of the trial, not merely in preparation pre-trial.

The beginning of the trial phase at the ECCC is the initial hearing. Here the Trial Chamber exercises broad management of the proceedings, and has the power to reject requests to summon certain witnesses where it “considers that the hearing of a proposed witness or expert would not be conducive to the good administration of justice.”\textsuperscript{213} This gives the ECCC Trial Chamber much more powers of control over the proceedings than is seen at the ICC and ICTY, as these rules allow the ECCC Trial Chamber to manage the list of witnesses to be called, and to

\textsuperscript{209} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note___ at Rule 80(3)(a).
\textsuperscript{210} \textit{id.} at Rule 80(3)(b).
\textsuperscript{211} \textit{id.} at Rule 80(3)(c).
\textsuperscript{212} \textit{id.} at Rule 80(3)(e).
\textsuperscript{213} \textit{id.} at Rule 80 bis (2).
limit what witnesses the parties may call, to prevent the appearance of superfluous witnesses.\textsuperscript{214}

The structure of proceedings at the ECCC follows inquisitorial lines, and is a structural departure from the adversarial method of case presentation most commonly seen at the other international courts where the full prosecution case is heard followed by a full defense, and where the accused cannot be required to come to the stand. At the ECCC the case begins with the Chamber calling the Co-Prosecutors to make an opening statement, followed by a short response from the defense; the accused is then called to the stand to allow the judges to hear his response to the opening by the Co-Prosecutors. This is a significant departure from adversarial norms where the accused cannot be compelled to take the stand and, in further contrast to adversarial standards, the ECCC judge has an active duty to question the accused and to raise “all pertinent questions, whether these would tend to prove or disprove the guilt”.\textsuperscript{215} Importantly, the accused is not permitted to give sworn statements during his testimony and the questioning does not take the form of a sworn examination. The basis for this is again inquisitorial, and is premised on the idea that an accused should not be placed in

\textsuperscript{214} Id. at Rule 84(1). In order to ensure the accused his rights, in every instance “the Accused shall have the absolute right to summon, at the expense of the ECCC, witnesses against him or her, whom the Accused was not able to examine during the pre-trial stage.”

\textsuperscript{215} Id. at Rule 90(1).; The Original Rules provided that “all the judges may ask any questions which they consider to be conducive to ascertaining the truth. In this respect, they have a duty to raise all pertinent questions, whether these would tend to prove or disprove the guilt of the Accused.” (Extraordinary Chambers in the Courts of Cambodia Internal Rules, supra note___ at Rule 90(1)). However, this was amended in the sixth revision to the Internal Rules, which eliminated the truth requirement and substituting that for the inculpatory and exculpatory questioning that is currently required.
the position of being trapped between being sworn to answer truthfully questions put before him and his right to remain silent, a fundamental fair trial right.

Another unique characteristic of the procedure at the ECCC is that the Trial Judge takes the lead in questioning the accused, the witnesses and other party participants in line with general inquisitorial practices. The ECCC Trial Judge is the sole decision maker on the progression of the case as it hears the Civil Parties, witnesses and experts in the order that it considers useful. Not only can the Trial Chamber control the order in which witnesses are heard, the permission of the President is required before the parties may ask questions. Only the Co-Prosecutors and the lawyers are permitted to ask questions directly and all other parties, including the accused and lawyers for the Civil Parties, must ask their questions through the President. The parties are permitted to challenge the utility of continued testimony of a witness, however the final decision on whether to take testimony lies with the President of the Trial Chamber.

The President of the Chamber retains overall control throughout proceedings, facilitating interventions by the other judges. The President also has the power, in consultation with the other judges, to “exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.” This power is designed to ensure that parties do not extend the case unnecessarily by calling redundant witnesses or introducing excessive

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216 Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), supra note ___ at Rule 21(1)(d).
217 Id. at Rule 91.
218 Id. at Rule 91(1).
219 Id. at Rule 91(2).
220 Id. at Rule 85(1).
documents, and has the effect, in essence, of permitting the President to limit the substance of a party’s case.

In accordance with Rule 84(3), during the trial each party may request the Chamber to hear any witnesses present in the courtroom who were not properly summoned to testify. The Chamber has the power to deny this request, which is open to appeal, but only at the same time as the Judgment of the Chamber on the merits.221 Again, the Chamber exercises its discretion in considering these requests, this could mean that the Chamber has the power to directly influence a party’s case, as it is permitted to either allow or deny requested witness appearances. Moreover, once a witness has been questioned, they remain at the disposal of the Chamber, until the Chamber decides his or her presence is no longer needed,222 thus allowing the Chamber to return to previous witnesses if it should determine that more information or inquiry is required of a particular witness. Instilling these powers in the hands of the judges represent a fundamental structural shift in process and power distribution between the parties from a pure adversarial system, removing the structure of the case almost entirely out of the hands of the parties.

Another mechanism available to the Chamber to manage the case is the ability of it to order additional investigations where it considers that new investigation in necessary.223 These new investigations shall be carried out by a designated judge or judges, and operate under the same

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221 Id. at Rule 84(4).
222 Id. at Rule 91(4).
223 Id. at Rule 93(1).
conditions as the OCIJ, permitting the judge to interview witnesses, conduct searches, seize evidence or order expert opinions.\textsuperscript{224}

Unlike in the adversarial system and the other courts examined here, the system at the ECCC permits only the OCIJ and Chambers to seek expert opinion on any subject deemed necessary to their investigations or proceedings before the ECCC,\textsuperscript{225} and sets the exact parameters and duration of the assignment.\textsuperscript{226} Other parties may request additional experts, but the OCIJ and Chambers are able to reject such a request.\textsuperscript{227} Like with the parties, the OCIJ and Chambers set time limits on the experts, and they can be dismissed or replaced for non-compliance with those limits.\textsuperscript{228} Like the ordering of additional investigation, this allows the Judges to be fully informed of all aspects of the case, and to assist in their effective management of the case.

Unsurprisingly, given its heavy inquisitorial influence, at the ECCC a \textit{dossier} is an integral part of proceedings. At the Court this document collection is called the Case File, and begins with the introductory submission by the Co-Prosecutors. All of the evidence collected by the OCIJ during its investigation in collated into the case file, and it ultimately comprises all the results of the investigations, interviews\textsuperscript{229} and site visits\textsuperscript{230} in proceedings.\textsuperscript{231} The case file becomes one of

\begin{footnotesize}
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\item \textsuperscript{224} \textit{id.} at Rule 93(2)(b)–(e).
\item \textsuperscript{225} \textit{id.} at Rule 31(1).
\item \textsuperscript{226} \textit{id.} at Rule 31(3).
\item \textsuperscript{227} \textit{id.} at Rule 31(10).
\item \textsuperscript{228} \textit{id.} at Rule 31(5).; The Judges may set time limits for filings of pleadings, written submissions and documents relating to a request or an appeal, unless the IRs provide otherwise. \textit{id.} at Rule 39(2).; Failure to respect time limits shall lead to the invalidity of the action in question. \textit{id.} at Rule 39(1).; At the request of a concerned party, the OCIJ or the Chambers may either extend any time limits set by them, or “recognize the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit.” \textit{id.} at Rule 39(4).
\item \textsuperscript{229} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note\textsuperscript{___} at Rule 55(7).
\item \textsuperscript{230} \textit{id.} at Rule 55(8).
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the central tools of the ECCC Trial Chamber, as the information it contains permits the Court to be able to more effectively utilize their powers within their expanded scope of abilities to control proceedings.\textsuperscript{232}

Obvious criticisms arise out of the fact that the judges are privy to all the evidence collected by the OCIJ,\textsuperscript{233} and it may seem abhorrent to adversarially trained lawyers, however it is a common feature of inquisitorial systems that rely on the professionalism of their judiciary in order to not be influenced. Moreover, the Rules of Procedure and Evidence attempt to dissuade bias by requiring that “any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination,”\textsuperscript{234} which means the content of the evidence at issue must have been “summarized, read out or appropriately identified in court.”\textsuperscript{235} Like the ICC and reformed ICTY the ECCC takes a liberal approach to the admissibility of evidence, dispensing with formalistic rules more familiar in the adversarial system, and permitting anything not against the principle of fairness. This is another example of the international courts and tribunals’ reliance on inquisitorial mechanisms, and shifts power in favor of the judge by assuming that she will not allow herself to be swayed by biased evidence in drawing a finding on the basis of facts presented before the court.

\textsuperscript{231} The Case File is fundamental to the preparation of their cases by the Co-Prosecutor, lawyers for the Accused and the Civil Parties, as their cases are limited by the contents of the Case File.

\textsuperscript{232} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note\textsuperscript{221} at Rule 55(6); \textit{id.} at Rule 86. The ‘Case File’ is available to both the Prosecution and Defense to enable them to build their case, and both have “equal access”. In accordance with Rule 55(6) and 86 the Co-Prosecutors and lawyers for the other parties shall have “the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC”.

\textsuperscript{233} By having access to all the evidence it is a concern that the Judges may developed pre conceived opinions on the case, the direction it should progress and the potential outcome.

\textsuperscript{234} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note\textsuperscript{221} at Rule 87(2).

\textsuperscript{235} \textit{id.} at Rule 87(3).
Given its origins, it is unsurprising that the ECCC is the court with the most features closely aligned with the pure inquisitorial model. Consequently it is particularly interesting that it is not entirely inquisitorial in practice, and it is interesting to note in the following section how the ECCC has come to embrace different elements of procedure along the scale.

V. The Procedural Spectrum: Similarities, Difference and Convergences in ICP

As we can see from the foregoing analysis of the procedures at the ICTY, ICC and ECCC each one has, to some extent, moved away from the adversarial origins of ICP found at Nuremberg and instead adopted inquisitorial methods and processes into its procedure. None of the three courts and tribunals have entirely sacrificed the adversarial system in favor of a pure inquisitorial system, but rather each court has adopted a compromise, drawing on mechanisms and procedural devices from both pure traditions, so that none of the formulations of ICP found at these three courts can be said to exactly embody either of the pure models.

The tracing of procedural developments in ICP shows several sui generis developments in international law. This Latin maxim, meaning “of its own kind”, is aptly applied to a procedural system that blends elements of the two traditions models of procedure into a unified system. That the three courts and tribunals have adopted different approaches to this

236 Jackson, supra note___; Goran Sluiter, Law of International Criminal Procedure and Domestic War Crimes Trials, The, 6 INT’L CRIM. L. REV. 605 (2006); Megret, supra note___; The Structure of International Criminal Procedure, supra note___; Langer, supra note___.

blending renders it is incorrect to think of the entire body of ICP as *sui generis*. Rather, we should think of each international court as embracing its own *sui generis* model of procedure, as each court has achieved the amalgamation of the traditions two differently to come to rest at a position on the spectrum of procedure between the two pure models.

As suggested in Part I(c) we can think about the space between the pure adversarial and pure inquisitorial models as embracing a spectrum, or sliding scale, between the two extremes of each system, and Part V will now discuss where upon this spectrum each of the international courts and tribunals under discussion fall. This article asserts that ICP as a body of procedure is characterized by shifting power dynamics between the actors in the system and because of this it is through an examination of how this power shift has occurred at each court that we can identify where on the procedural spectrum it lies. It is suggested that these altered power dynamics are most pronounced in relation to the role of the judge in international criminal proceedings, which implicates upon the other parties and commands the use of specific procedural devices.

In order to illuminate where on the procedural scale each court rests this article will now compare the similarities and differences of the procedure of each court, which, when examined side by side, will assist us in highlighting where on the procedural scale each court is situated. This section will look at the extent to which we see dynamic transfers in procedural culture across the three courts in two specific areas, (a) structural shifts and (b) the use of specific procedural devices. The structural changes in power distribution between the parties are most
usefully illuminated by looking at three stages of the proceedings: (i) the investigatory process; (ii) discretion in determining charges and; (iii) pre- and during-trial functions of the judge. From this examination, it quickly becomes evident that under the system of ICP as a whole the judge is significantly more empowered than under a pure adversarial system, however, as will be shown, the specific functions of the judicial organs across the three courts exhibits little uniformity and actually represent a wide spread across the spectrum between the pure adversarial and inquisitorial models. Underlining all these structural shifts are two procedural devices: (i) the use of a dossier or case file and (ii) broad rules of evidence, within which we see broad usage convergence across the three courts but, again, not identical application. The fact that there is not precise uniformity between the courts in how these power shifts have been enacted is not fatal to this analysis of the development of ICP within the procedural scale, as both the areas where the courts differ in their mechanisms and also those areas where there are striking similarities but achieved by different outcomes are equally illuminating for an exploration of the growth of ICP.

As was established in Part I, under a pure adversarial system the function of the judge is to be a ‘passive umpire’, acting independently, on reliance of comprehensive rules of evidence, to adjudge on the legal issues arising in a case, and to dispense with a sentence based on a lay jury finding of fact. Conversely, the inquisitorial judge is part of the ‘investigating official’.

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238 Langer, supra note___ at 840; Walpin, supra note___ at 176; Damaska, supra note___ at 850.
239 Orie, supra note___ at 1427.
240 CASSESE, supra note___ at 374.
241 Damaska, supra note___ at 26; Van Kessel, supra note___ at 800–801.
with the power to actively pursue independent lines of investigation,\textsuperscript{242} who relies heavily on a dossier comprising all the procedural stages of the case,\textsuperscript{243} has no use for comprehensive rules of evidence,\textsuperscript{244} and with the power to make a decision on both the facts and the law.\textsuperscript{245} What we see in the development of ICP both structurally and in the implementation of specific procedural devices is a strong move away from passivity in the judicial body found under an adversarial system towards much more active involvement of the judges at all stages of proceedings.

\textbf{a. Structural Shifts}

\textit{i. The Investigatory Process}

The area where we first see fundamental power shifts away from pure adversarial norms is in relation to the investigatory process. Under a pure adversarial system, following initial investigation by the police,\textsuperscript{246} both the prosecution and defense are equipped with equal powers of investigation,\textsuperscript{247} and the judge does not interfere with that investigatory phase.\textsuperscript{248} Conversely in a pure adversarial system, that investigatory power lays with the investigating official,\textsuperscript{249} who can be either an investigating judge or a combination of both prosecution and

\footnotesize{\textsuperscript{242} Lerner, \textit{supra} note\textsuperscript{___} at 802; Goldstein, \textit{supra} note\textsuperscript{___} at 1018.}
\footnotesize{\textsuperscript{243} Damaska, \textit{supra} note\textsuperscript{___} at 533.}
\footnotesize{\textsuperscript{244} Orie, \textit{supra} note\textsuperscript{___} at 1452; Pizzi and Marafioti, \textit{supra} note\textsuperscript{___} at 7.}
\footnotesize{\textsuperscript{245} Pizzi and Marafioti, \textit{supra} note\textsuperscript{___} at 7.}
\footnotesize{\textsuperscript{246} Safferling, \textit{supra} note\textsuperscript{___} at 55.}
\footnotesize{\textsuperscript{247} Damaska, \textit{supra} note\textsuperscript{___} at 847.}
\footnotesize{\textsuperscript{248} Cassese, \textit{supra} note\textsuperscript{___} at 373.}
\footnotesize{\textsuperscript{249} Lerner, \textit{supra} note\textsuperscript{___} at 802; Goldstein, \textit{supra} note\textsuperscript{___} at 1018.}
judiciary,\textsuperscript{250} whose involvement is commanded from the moment a crime is reported. Across the three international courts, to varying degrees, we see increasing involvement of judges during the investigation stage – from zero at the ICTY to sole judicial conduct at the ECCC. Indeed, it is at this stage in international criminal proceedings that we see the broadest procedural arc between the two pure models, with each of the courts falling at a different point on the spectrum between the two.

At the ICTY both the prosecutor and defense retain a large measure of the equality afforded them under a pure adversarial system. Akin to the adversarial system, there is no judicial involvement in the investigation stage; the Prosecutor is responsible for all initial investigation, and is able to summon and question suspects, witnesses and victims, and collect their statements, as well as collect evidence and conduct onsite investigations.\textsuperscript{251} Once an indictment has been issued the defense is empowered, and indeed obligated to the client, to conduct its own investigation. The ICTY OTP is not obliged to investigate exculpatory evidence on behalf of the defense, however, they do have a duty to disclose to the Defense “any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”\textsuperscript{252} Conversely, at the ICC, the OTP is required to play a role more akin to the inquisitorial official investigator, with the goal of establishing the truth.\textsuperscript{253} In doing so, the Prosecutor has many investigatory techniques at her disposal, including collecting and examining evidence and interviewing

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  \item \textsuperscript{250} Pizzi and Marafioti, \textit{supra} note\___; Goldstein, \textit{supra} note\___ at 1019; Damaska, \textit{supra} note\___ at 843.
  \item \textsuperscript{251} \textit{ICTY RULES OF PROCEDURE AND EVIDENCE}, \textit{supra} note\___ at Rule 39.
  \item \textsuperscript{252} \textit{Id.} at Rule 68, These disclosure obligations are limited by the exceptions contained in Rule 70.
  \item \textsuperscript{253} \textit{ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT}, \textit{supra} note\___ at Article 54(1)(a).
\end{itemize}
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suspects, witnesses and victims,\textsuperscript{254} but has a duty to investigate both “incriminating and exonerating circumstances equally”,\textsuperscript{255} much like the role of an investigating official in the pure inquisitorial system. Defense Counsel at the ICC also has independent powers of investigation like that at the ICTY, and can be assisted by the Registrar in certain circumstances.\textsuperscript{256} The ECCC embraces an entirely inquisitorial approach to investigation, instilling in the Office of the Co-Investigating Judges all investigatory powers\textsuperscript{257} but within the confines set out by the Co-Prosecutor’s in its introductory submission.\textsuperscript{258} Like the official investigator under the pure inquisitorial system the OCIJ is tasked with investigating all inculpatory and exculpatory evidence and must conduct an impartial investigation, conducive to determining the truth\textsuperscript{259} and, as such, is able to determine which crime sites to investigate, what evidence to collect and which witnesses to interview.\textsuperscript{260} The defense does not conduct its own investigation, instead making requests of the OCIJ to do so on its behalf, which it is able to reject, subject to appeal.\textsuperscript{261}

We can conclude from this that in the investigatory stages there has been a dynamic powers shift in two of the courts that has provided the judges with increased control. The court that has retained procedure closest to the adversarial roots of ICP on the procedural spectrum is the ICTY with the bulk of initial investigatory power resting with the prosecutor.\textsuperscript{262} In this way, at the ICTY the investigation is still molded around an adversarial competition as the prosecution

\textsuperscript{254} \textit{Id.} at Rule 54(3)(a)–(f).
\textsuperscript{255} \textit{Id.} at Article 54(1)(a).
\textsuperscript{256} \textit{RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note____ at Rule 20(1)(b).}
\textsuperscript{257} \textit{Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), supra note____ at Rule 55.}
\textsuperscript{258} \textit{Id.} at Rule 55(2), Rule 53.
\textsuperscript{259} \textit{Id.} at Rule 55(5).
\textsuperscript{260} \textit{Id.} at Rule 55(5)(a)–(d).
\textsuperscript{261} \textit{Id.} at Rule 55(10).
\textsuperscript{262} \textit{ICTY RULES OF PROCEDURE AND EVIDENCE, supra note____ at Rule 39.}
zealously investigates whether there is a case to answer and facts that support that case, with the defense doing the same when once the accused is indicted. Conversely, both the ICC\textsuperscript{263} and ECCC\textsuperscript{264} have moved towards the inquisitorial ended of the spectrum and have adopted mechanisms more familiar to such a system, emphasizing the role of the investigating official to identify exculpatory as well as inculpatory evidence to further the inquisitorial goal of determining the truth.\textsuperscript{265}

There is one readily evident anomaly in the investigation stages that models neither the adversarial nor inquisitorial models, and that is the \textit{sui generis} development at the ICC of utilizing a judicial body (the PTC) in an authorization and review capacity to determine the power of the Prosecutor to conduct its investigations.\textsuperscript{266} This models neither the adversarial system, where the decision to proceed with a case rests in the hands of the prosecutor, nor the inquisitorial system, where it lays in the official investigator, and in that sense goes beyond the capacity of the spectrum between pure adversarial and pure inquisitorial systems. This PTC function can be seen as an outlier, falling beyond the realms of the spectrum highlighted in Part I(c) as the PTC is empowered with functions outside those of an inquisitorial official investigator.

\textbf{ii. Discretion in Charging}

\textsuperscript{263} \textit{Rome Statute of the International Criminal Court}, \textit{supra} note\textsuperscript{____} at Article 54(1)(a).
\textsuperscript{264} \textit{Extraordinary Chambers in the Courts of Cambodia Internal Rules} (Rev. 8), \textit{supra} note\textsuperscript{____} at Rule 55.
\textsuperscript{265} Pizzi and Marafioti, \textit{supra} note\textsuperscript{____} at 7.
\textsuperscript{266} \textit{Rome Statute of the International Criminal Court}, \textit{supra} note\textsuperscript{____} at Rule 53.
Once the investigation stages are over, more shifts in power distribution are evident in relation to which party exercises discretion in charging an accused. In the pure adversarial system this is in the sole purview of the Prosecutor, yet nowhere across these three courts is that power left in those hands alone and instead a judicial entity is called upon to differing extents. At the ICTY, which is the system that still most closely aligns with the adversarial model, the prosecutor’s indictment is reviewed by a judge who must confirm there is a prima facie case to answer, before issuing an arrest warrant for an accused. At the ICC a confirmation of charges hearing is held before the Pre-Trial Chamber and the PTC must determine that “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. In both instances, the reviewing judge can confirm, dismiss or request further information, but judicial approval is required in both court systems before an indictment can be issued by either the court. The procedure at the ECCC differs from the ICTY and ICC in that it does not require further judicial approval beyond the OCIJ’s decision to charge. However, the OCIJ is limited in this regard to those named in the Co-Prosecutor’s Introductory Submissions. The OCIJ’s functionality is as the official investigator at the ECCC, which is a direct inquisitorial construct, and helps explain why there isn’t a requirement of a second level of judicial review, once the judicial body, the OCIJ, has made its determinations.

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267 CASSESE, supra note___ at 367.
268 ICTY RULES OF PROCEDURE AND EVIDENCE, supra note___ at Rule 47(E).
269 Id. at Rule 47(H).
271 ICTY RULES OF PROCEDURE AND EVIDENCE, supra note___ at Rule 47(E); ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, supra note___ at Rule 61(7).
272 Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), supra note___ at Rule 55(4).
Again, from this stage of the proceedings we can once again see a stark and deliberate move away from pure adversarial mechanisms in ICP, towards more involvement of the judiciary, familiar to an inquisitorial model. This is another example of shifting power dynamics in favor of the judges being indicative of a move across the spectrum of procedure from a pure adversarial system to a more inquisitorial one. The confirmation of charges hearing, for example, is a direct inquisitorial construct,\textsuperscript{273} as is the Office of Co-Investigating Judges.\textsuperscript{274} In particular, it is interesting to see that the ICTY also swings in favor of more inquisitorially influenced mechanisms at this stage in the procedure than it has done in the investigation stage.\textsuperscript{275} This helps to highlight that each of the three courts have chosen to embrace inquisitorial mechanisms to different extents, and that to the extent to which they have moved towards inquisitorialism is not uniform across all stages even within a single court system.

\textbf{iii. Pre- and During-Trial Party Roles}

The phases of proceedings where the altered role of the judge away from a passive umpire is most evident is during pre-trial and the actual trial process itself. At each court, the judge is furnished with increased procedural powers that allow her to command more control over proceedings and the formation of the case than would ever be permissible under a pure adversarial system. However, the extent to which each individual court system has embraced this shift in power dynamics continues to differ.

\textsuperscript{273} Kress, supra note\textsuperscript{___} at 610.
\textsuperscript{274} Lerner, supra note\textsuperscript{___} at 802; Goldstein, supra note\textsuperscript{___} at 1018.
\textsuperscript{275} ICTY RULES OF PROCEDURE AND EVIDENCE, supra note\textsuperscript{___} at Rule 47(E).
Again, the system where we see the least power shift from a pure adversarial framework is at the ICTY. Throughout its early years the ICTY was almost entirely reliant on more traditional adversarial role assignments, but during subsequent revisions to the ICTY RPEs we witness increasing movement towards more inquisitorial roles for the judge. However, Langer has suggested, and this author agrees, that the ICTY reforms are better categorized as instilling \textit{managerial} powers in their judiciary. Even powers which could be indicative of a more inquisitorial persuasion, such as the ability of the judge to limit the number of crime sites, witnesses called and evidence produced, actually have their origins in the desire of the tribunal to expedite proceedings and the reforms that took place were an attempt by the ICTY to give the judges more control over assisting the parties in progressing the case to trial. In comparison, the Trial Chamber at the ECCC wields enormous inquisitorial power, such that they may dictate the progression of the entire case with the President having the power to direct the order of proceedings, the order in which witnesses are called, and even to take the lead in questioning. The ICC falls somewhere in the middle of the ICTY and ECCC, as there the Trial Judge is responsible for more management functions akin to the ICTY Trial Chamber, but with the Pre Trial Chamber playing a much more inquisitorially influenced role. However, by virtue of roles and functions for the Pre Trial and Trial Chambers the ICC remains closer to the inquisitorial end of the spectrum than the ICTY.

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  \item \textsuperscript{276} Langer, \textit{supra} note\_\_\_ at 838.
  \item \textsuperscript{277} \textit{Id.} at 868.
  \item \textsuperscript{278} Langer, \textit{supra} note\_\_\_.
  \item \textsuperscript{279} \textit{Id.}; Langer and Doherty, \textit{supra} note\_\_\_.
  \item \textsuperscript{280} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note\_\_\_ at Rule 91.
  \item \textsuperscript{281} \textsc{Rules of Procedure and Evidence of the International Criminal Court}, \textit{supra} note\_\_\_ at Rule 121(2)(b).
\end{itemize}
b. Procedural Devices

The structural power shifts we see across the three courts and tribunals are underlined by the introduction of two procedural devices that display an inquisitorial preference: (i) the use of a dossier, and (ii) a preferences against formal rules of evidence, and there is much more uniformity in application of these procedural devices across the ICTY, ICC and ECC.

i. The Dossier

Each court examined here has employed the use of a dossier or case file comparable to the traditional inquisitorial device used to collate all information relating to a case.\(^{282}\) Alien to adversarially trained lawyers, the requirement of a comprehensive file of all investigation and proceedings has been transplanted into ICP and has become crucial in furtherance of the judges exercising all their expanded powers appropriately. Having all the relevant documentation assembled together allows the judge access to the intricacies of the case, and provides them with sufficient knowledge to permit them to make decisions regarding all elements of proceedings.\(^{283}\) That this inquisitorial procedural device has found traction is hardly surprising if we consider the scope of information the court must deal with when dealing with an international crimes case, however, despite choosing to embrace this inquisitorial device, there

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\(^{282}\) Damaska, \textit{supra} note at 533.

\(^{283}\) MUELLER AND POOLE-GRIFFITHS, \textit{supra} note at 7.
remain differences across the courts on how they have elected to compile this file and what is included in and excluded from it.

Again, it is at the ECCC that we see the most similarities with the traditional inquisitorial device, as the Case File at the ECCC records all information pertaining to the case\textsuperscript{284} thus playing an identical role as the inquisitorial \textit{dossier}.\textsuperscript{285} In contrast, the ICTY file\textsuperscript{286} and ICC Registrar compiled record\textsuperscript{287} do not emulate the true inquisitorial \textit{dossier} entirely, as both of those courts use their file to collect information from pre-trial forward only, excluding the investigatory documents which are traditionally a crucial part of the inquisitorial \textit{dossier}.

Although the three courts have not embraced the concept of a \textit{dossier} identically, the mere introduction of a type of case file into each of the three courts indicates a broad convergence between them in furtherance of providing the judge with more information to enable her to exercise her broader powers more effectively. In this regard, despite the differences in method of compilation, the use of a case file or \textit{dossier} is indicative of a move towards inquisitorialism across the three, and highlights the preference for the inquisitorial end of the spectrum within ICP.

\textbf{ii. Formal Rules of Evidence}

\textsuperscript{284} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note____ at Rule 55(6); \textit{Id.} at Rule 86.
\textsuperscript{285} \textup{MUELLER AND POOLE-GRIFFITHS, supra note____} at 7.
\textsuperscript{286} \textit{ICTY RULES OF PROCEDURE AND EVIDENCE, supra note____} at Rule 65ter(L)(i)–(ii).
\textsuperscript{287} \textit{RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, supra note____} at Rule 15.
A similar convergence can be seen when we examine the rules of evidence used across the three courts, as all have chosen to dispense with detailed rules of evidence in line with inquisitorial practices.\textsuperscript{288} Both the ICTY and ICC adopt almost identical standards for admission, permitting anything that is probative and not prejudicial to a fair trial rights or the fair evaluation of the testimony of a witness.\textsuperscript{289} The ECCC Rules provide that “all evidence is admissible”\textsuperscript{290} with the conditions that decisions must be made based on evidence that has been put before the Chamber and subjected examination,\textsuperscript{291} and that the Chamber must be convinced of the guilt of the accused beyond a reasonable doubt.\textsuperscript{292}

Informal rules of evidence are an inquisitorial mechanism that goes to the heart of the goal of determining the truth in the inquisitorial system.\textsuperscript{293} It is significant that all three courts have shifted away from the adversarial preference for detailed rules of evidence\textsuperscript{294} in favor of the inquisitorial end of the procedural spectrum, as it assumes that professional judges are capable of determining what is or is not prejudicial to the outcome of the case, which is again evidence in a shift in the power distribution away from adversarial norms.

As we can see, while the ICTY, ICC and ECCC have all embraced procedural shifts away from traditional adversarial norms at all phases of the case, none of them have done so identically.

\textsuperscript{288} Orie, \textit{supra} note\textsuperscript{___} at 1452; Pizzi and Marafioti, \textit{supra} note\textsuperscript{___} at 7.
\textsuperscript{289} \textit{ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT}, \textit{supra} note\textsuperscript{___} at Article 69(4); ICTY RULES OF PROCEDURE AND EVIDENCE, \textit{supra} note\textsuperscript{___} at Rule 89(C)–(D).
\textsuperscript{290} Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), \textit{supra} note\textsuperscript{___} at Rule 87(1).
\textsuperscript{291} \textit{id.} at Rule 87(2).
\textsuperscript{292} \textit{id.} at Rule 87(1).
\textsuperscript{293} Pizzi and Marafioti, \textit{supra} note\textsuperscript{___} at 7.
\textsuperscript{294} CASSESE, \textit{supra} note\textsuperscript{___} at 374; Orie, \textit{supra} note\textsuperscript{___} at 1428, 1451.
Figure 2 (below) outlines the differences and helps to illuminate where on the procedural spectrum each court falls between the pure adversarial and pure inquisitorial models at either end.

**Figure 2 – The Procedural Spectrum – Convergences, Similarities and Differences Across the Courts**

<table>
<thead>
<tr>
<th>Pure Inquisitorial Model</th>
<th>Pure Adversarial Model</th>
<th>The ICTY</th>
<th>The ICC</th>
<th>The ECCC</th>
<th>Structure of the court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unitary court which relies upon professional decision makers (judges) to determine both guilt and sentencing</td>
<td></td>
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<tr>
<td>Bifurcated court, which relies on ‘lay’ decision makers of fact to determine guilt. Judge determines sentencing</td>
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<tr>
<td>Unitary court with judge as professional decision maker</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Unitary court, with judge as professional decision maker</td>
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<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Role of the Trial Judge</th>
<th>To act as an impartial “passive umpire” to the dispute put to her by the two adversaries (Prosecution and defense)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To manage the progression of the case to trial through holding conferences and requiring the parties submit specified filings adhering to time limits</td>
<td></td>
</tr>
<tr>
<td>To investigate the truth and assist the parties in trial management</td>
<td></td>
</tr>
<tr>
<td>To investigate the truth and actively pursue independent lines of investigation and evidence</td>
<td></td>
</tr>
<tr>
<td>To investigate the truth, and to actively pursue independent lines of investigation and evidence</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Role of the Prosecutor</th>
<th>To actively investigate and prosecute his case as an adversary to the defense</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Prosecutor and defense must cooperate with each other.</td>
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<tr>
<td>- Prosecutor obliged to disclose case strategy, lists of witnesses and the basis on which those witnesses will testify prior to the start of trial.</td>
<td></td>
</tr>
<tr>
<td>To investigate all inculpatory and exculpatory evidence.</td>
<td></td>
</tr>
<tr>
<td>The Co-Prosecutor’s compile the introductory submission</td>
<td></td>
</tr>
<tr>
<td>A public official tasked with investigating both inculpatory and exculpatory evidence to determine the truth</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Role of the Defense</th>
<th>To actively investigate and defend the accused as an adversary to the prosecutor</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Prosecutor and defense must cooperate with each other.</td>
<td></td>
</tr>
<tr>
<td>- Prior to the star of defense case defense submits a list of witnesses and exhibits</td>
<td></td>
</tr>
<tr>
<td>Conducts its own investigations to find exculpatory evidence</td>
<td></td>
</tr>
<tr>
<td>The target of the investigation and Counsel ensures the rights of the defendant are upheld</td>
<td></td>
</tr>
<tr>
<td>The target of the investigation</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Investigatory powers</th>
<th>- Both prosecution and defense have equal procedural powers during the investigation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Prosecutor under no obligation to investigate exculpatory evidence for the defense</td>
<td></td>
</tr>
<tr>
<td>- Prosecutor investigates an accused. Has no duty to investigate exculpatory evidence but must disclose to the defense anything in their actual knowledge that might suggest the innocence or mitigate the guilt of the accused.</td>
<td></td>
</tr>
<tr>
<td>- Defense conducts its own investigation to find evidence to</td>
<td></td>
</tr>
<tr>
<td>- Prosecutor conducts the investigation based on the referral of a situation</td>
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<tr>
<td>- PTC authorization required for the Prosecutor to proceed with an investigation.</td>
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<tr>
<td>- PTC has the power to review an OTP decision not to proceed with a case.</td>
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<tr>
<td>- The OCIJ is in charge of investigating all inculpatory and exculpatory evidence (within the confines of the Prosecutor’s introductory submission).</td>
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</tr>
<tr>
<td>- The OCIJ dictates what crime sites are investigated, what evidence is collected</td>
<td></td>
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<tr>
<td>- Exculpatory evidence is passed from the official investigator to the defense. - Defense can request the official investigator to gather evidence on its behalf</td>
<td></td>
</tr>
<tr>
<td>Discretion in charging</td>
<td>The Prosecutor has broad prosecutorial discretion and is able to decide when a dispute concludes.</td>
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<td>---</td>
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</tr>
<tr>
<td>Procedural powers during the Pre-Trial Phase</td>
<td>Prosecution and defense have equal procedural powers</td>
</tr>
<tr>
<td>Procedural powers during the Trial</td>
<td>- Trial Chamber can hold pre-trial conferences - Trial Judges may limit the number of witness to be called, and limit the case to specific crime sites or incidents. - Trial Judges can also shorten the amount of time allocated to a party for its case.</td>
</tr>
<tr>
<td>Use of a Dossier</td>
<td>Does not employ use of a dossier</td>
</tr>
<tr>
<td>Rules of Evidence</td>
<td>Embraces detailed rules of evidence for admission and to evaluate evidence admitted in order to monitor what the lay decision makers are exposed to</td>
</tr>
</tbody>
</table>
It is interesting that although each court converged upon the shift towards more inquisitorial power divisions between the parties they have all used different mechanisms to get there, and have embraced them to different extents. While international criminal procedure has taken on various iterations individual to each court we can see broad convergences around the preference for employing increasing inquisitorially influenced mechanisms and procedural devices. In embracing this convergence, each different court adopts an individual procedure that combines elements of the two distinct pure models and blends them into a unified system specific to that court. Although each court has blended the two models differently, across all three that blend is characterized by a shift in power distribution, and we can identify a pattern that illuminates the preference for increased inquisitorial style judicial powers at all phases of proceedings.

The foregoing comparisons show us that, perhaps unsurprisingly given its origins within a domestic inquisitorial system, the ECCC is the system that most closely mirrors an inquisitorial procedure, while the ICTY remains the closest to adversarialism, particularly with regard to the investigatory powers of the prosecution and defense. The ICC falls between the two, adopting some measures of inquisitorialism, while retaining some adversarial influences.

It is important to note that ICP should not be categorized as trying to entirely escape its adversarial origins. True, the erstwhile adversarial ICTY system has succeeded in incorporating more inquisitorial elements into its procedure, however that court has not sought to adopt an
entirely inquisitorial system, and at the same time as adopting inquisitorial mechanisms has also retained mechanisms common to the adversarial tradition. Each of the courts under analysis has reached a unique compromise of adversarial and inquisitorial mechanisms, with no two having adopted identical characteristics. However, that they have all converged upon the same form of power distribution serves as a pattern to analyze procedural development. The similarities across the international courts and tribunals highlight a new type of procedure, one that extracts the most valuable elements of procedure from both traditions and marries them into a single structure, and that new procedure significantly empowers the judge at all phases of proceedings.