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A SPECTRUM OF INTERNATIONAL CRIMINAL PROCEDURE: SHIFTING PATTERNS OF POWER DISTRIBUTION IN INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Jessica Peake*

THERE IS A WEALTH OF SCHOLARSHIP the independent influence of the adversarial and inquisitorial systems on both substantive and procedural international criminal law¹ and the tensions² that have resulted from attempting to apply both in one new amalgamated procedural system in the international criminal law arena.³ This article seeks to embrace the influ-

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¹ See e.g. Kai Ambos, *The Structure of International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?*, in *INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* 429-503 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972236 (last visited Jul 5, 2012); Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 *J INT’L CRIM. JUST.* 603–17 (2003); Megan Fairlie, *Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit, The*, 4 *INT’L CRIM. L. REV.* 243 (2004); Rupert Skilbeck, *Frankenstein’s Monster Creating a New International Procedure*, 8 *J INT’L CRIM. JUST.* 451–62 (2010).

² See, e.g. Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 *J. INT’L CRIM. JUST.* 1037 (2005); Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 *UCLA J. INT’L L. & FOREIGN AFF.* 391 (2001).

³ See, e.g. Fairlie, *supra* note 1; Maximo Langer, *Rise of Managerial Judging in International Criminal Law, The*, 53 *AM. J. COMP. L.* 835 (2005); Maximo Langer & Joseph W. Doherty, *Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 *YALE JOURNAL OF INTERNATIONAL LAW* 241 (2011); Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 *DUKE L.J.* 637 (2009); Frederic Megret, *Beyond Fairness: Understanding the Determinants of International Criminal Procedure*, 14 *UCLA J. INT’L L. FOREIGN AFF.* 37 (2009); Caianiello, *infra* note

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ence 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,⁴ 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,⁵ 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 Rules of Procedure and Evidence (RPE's) of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC), and the Extraordinary Chambers in the Courts of Cambodia (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, which embrace mechanisms employed in both

204; Kress, *supra* note 1.

⁴ M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (1 ed. 2005); Ralph Zacklin, *Some Major Problems in the Drafting of the ICTY Statute*, 2 *J Int'l Crim. Just.* 361–67 (2004); Dermot M. Groome, *Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials*, 25 *Penn St. Int'l L. Rev.* 791 (2006); Mireille Delmas-Marty, *Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, *The*, 1 *J. Int'l Crim. Just.* 13 (2003); Ambos, *supra* note 1; Fabian O. Raimondo, *General Principles of Law as Applied by International Criminal Courts and Tribunals*, 6 *Law & Prac. Int'l Cts. & Tribunals* 393 (2007); Tsvetana Kamenova, *Different Legal Cultures and Global Judicialization at the End of the 20th and the Beginning of the 21st Century*, 62 *RHDI* 617 (2009).

⁵ Kress, *supra* note 1 at p 605.

the adversarial and inquisitorial systems. To fully understand these power 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 to by scholars,⁶ 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.⁷ 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 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

⁶ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process and the Search for an Alternative to the Adversarial*, 90 *CORNELL L. REV.* 1181, 1210 (2005); Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 *AM. J. COMP. L.* 839 (1997); Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT'L L.J.* 1 (2004).

⁷ John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy*, 7 *J. INT. CRIMINAL JUSTICE* 17–39 (2009); Goran Sluiter, *Law of International Criminal Procedure and Domestic War Crimes Trials*, *The*, 6 *INT'L CRIM. L. REV.* 605 (2006); Megret, *supra* note 3; Ambos, *supra* note 1; Langer, *supra* note 3. A secondary justification for this starting point is the author's primary training in the adversarial model of procedure.

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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.

Looking at the degrees of shift discernable at these courts and tribunals allows us to see which elements of both the adversarial and inquisitorial power structures have been extracted, and which procedural devices employed, to form the new model(s) of ICP seen across the three courts.⁸ It is more appropriate to think of three separate models of ICP, rather than a single model applicable across all the international courts and tribunals, as each of the three courts displays unique characteristics with no precise uniformity in each court's rules. What is evident from these models 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.

The extent to which a convergence around power structures is apparent can teach us about the scope of the spectrum of procedure found in the international courts and tribunals, and where the three courts fall 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. Second, it is not possible to identify a single unified system of ICP as the international courts and tribunals have not adopted identical procedures. Indeed, while several similarities and broad convergences around power restructuring is apparent across the courts, the exact mechanisms by which each court has achieved this power rebalance has differed. The significance of this lies in the fact of convergence around power distribution between the parties. Through 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 adver-

⁸ Ambos, *supra* note 1; Megret, *supra* note 3 at 6; M. Findlay, *Synthesis in Trial Procedures? The Experience of International Criminal Tribunals*, 50 INT'L COMP. L. Q. 1 (2001); CHRISTOPHER J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE (2001).

serial 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. 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 structural and procedural shifts that have taken place at those courts onto the spectrum of procedure identified in part I (c), before concluding, in Part VI, with what these shifts teach us about the convergence of adversarial and inquisitorial mechanisms and the development of 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, and the pure adversarial system in particular forms the baseline for this paper's subsequent analysis of how power distribution between the main actors in the international criminal sys-

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tem has played out.⁹ 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"¹⁰; second, in the descriptive context in which the models are used in this article 'pure' also means ideal,¹¹ i.e. *if* such a pure system existed it would have identical characteristics to an ideal model. Because these pure models of the adversarial and inquisitorial systems are merely ideals, 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."¹² 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 de-

⁹ Here the word "tradition" is used in the comparativist 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, *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, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1985).

¹⁰ Langer, *supra* note 3, at 884.

¹¹ GLENDON & OSAKWE, *supra* note 9 at 10.

¹² Kessler, *supra* note 6, at 1187; Langer, *supra* note 3; Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445 (2008); Louise Ellison, *Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison*, *The*, 3 INT'L J. EVIDENCE & PROOF 29 (1999); Andrew Hall, *Where Do the Advocates Stand When the Goal Posts Are Moved*, 14 INT'L J. EVIDENCE & PROOF 107 (2010); Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409 (2012); Richard E. Myers, *Adversarial Counsel in an Inquisitorial System*, 37 N.C.J. INT'L L. & COM. REG. 411 (2011); Michael Pawlik, *Criminal Judge as Modern Inquisitor*, 10 GERMAN L.J. 1274 (2009); Allard Ringnalda, *Inquisitorial or Adversarial - The Role of the Scottish Prosecutor and Special Defences*, 6 UTRECHT L. REV. 119 (2010); Giulio Illuminati, *Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, *The*, 4 WASH. U. GLOBAL STUD. L. REV. 567 (2005); Nico Steytler, *Making South African Criminal Procedure More Inquisitorial*, 5 L. DEMOCRACY & DEV. 1 (2001); Gavin MacKenzie, *Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism*, 9 CAN. J. L. & JURISPRUDENCE 33 (1996).

scribe 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 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.¹³ Each disputing party is imbued with 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.”¹⁴ 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.¹⁵ Under the adversarial model, the initial investigation is conducted by the police without supervision,¹⁶ and is followed by the parties - prosecution and defense - actively investigating and gathering evidence to support their respective cases.¹⁷ Neither the police nor the prosecution is obligated to investigate exculpatory evidence for the defense;¹⁸ instead that burden rests with the defense counsel.¹⁹ The prosecution and defense compete with each other, both forcefully and comprehensively investigating their cases, interviewing witnesses, and collecting evidence, in order to prove the guilt or innocence of the accused.²⁰ The

¹³ Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1973).

¹⁴ Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 581 (1972).

¹⁵ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 373 (1st ed. 2003).

¹⁶ SAFFERLING, *supra* note 8, at 55.

¹⁷ CASSESE, *supra* note 15, at 367.

¹⁸ *Id.* at 75.

¹⁹ Renee Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 818 (2001).

²⁰ Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: An-*

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judge knows nothing of the facts of the case prior to trial, and only becomes acquainted with the facts through presentations of evidence by the parties.²¹ Each side has sole discretion over the presentation of evidence to prove their case,²² and vies with the other by presenting the evidence most favorable to it.²³ Each side 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.²⁴

There are a number of procedural devices available to the parties in the adversarial. First, the prosecutor has broad prosecutorial discretion and holds the power to determine what charges should be entered against an accused.²⁵ The corollary of this discretion is that the prosecutor is also able to determine when a dispute is over,²⁶ which can occur in a number of ways; either by concluding that there isn't enough evidence to proceed with a case,²⁷ through plea-bargaining with the defense,²⁸ or by deciding how much evidence to enter in order to prove the crimes charged.²⁹ 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.³⁰ The judge is bound to accept the plea agreement reached by both sides and no more proof concerning the guilt of the accused is required.³¹

When the case does come to court it is presided over by a "passive umpire,"³² an independent judge whose primary func-

glo-American and Continental Experiments, 45 AM. J. COMP. L. 847 (1997).

²¹ CASSESE, *supra* note 15, at 373.

²² *Id.* at 369.

²³ Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 525 (1972).

²⁴ Damaska, *Uncertain Fate*, *supra* note 20, at 847.

²⁵ CASSESE, *supra* note 15 at 367.

²⁶ Langer, *supra* note 3 at 843.

²⁷ Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW 643–664, 645 (2002).

²⁸ CASSESE, *supra* note 15, at 370.

²⁹ SAFFERLING, *supra* note 8, at 221.

³⁰ *Id.* at 272.

³¹ *Id.* at 272.

³² Langer, *supra* note 6, at 840; Gerald Walpin, *America's Adversarial*

tion 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.³³ 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.³⁴ 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).³⁵ 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.³⁶

In the pure adversarial court, the judge ensures the application of the rules of evidence, which are particularly detailed.³⁷ These rules of evidence act as a filter to determine what the trier of fact (the jury) is permitted to see.³⁸ In following these comprehensive, formal, rules the judge settles disputes between the parties relating to admissibility and credibility of witnesses and evidence,³⁹ with the goal of ensuring that prejudicial evidence is not presented to the trier of fact.⁴⁰

In this pure system, the roles played by each party are very distinct. The prosecutor and defense are equal competitors in the dispute,⁴¹ 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

and Jury Systems: More Likely to Do Justice, 26 HARV. J. L. & PUB. POL'Y 175, 176 (2003); Damaska, *supra* note 6, at 850.

³³ Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, II in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1427 (2002).

³⁴ Walpin, *supra* note 32, at 176.

³⁵ CASSESE, *supra* note 15, at 368.

³⁶ *Id.* at 369.

³⁷ *Id.* at 374.

³⁸ Orie, *supra* note 33, at 1428.

³⁹ *Id.* at 1451.

⁴⁰ CASSESE, *supra* note 15, at 375.

⁴¹ Goldstein, *supra* note 13, at 1014.

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that burden has been extinguished through the prosecutor's presentation of the facts.⁴² Each has a duty to independently raise all pertinent evidence,⁴³ and to rigorously cross-examine evidence presented by the other side.⁴⁴ 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.

b. The Pure Inquisitorial Model

At the other end of the procedural spectrum lies the pure inquisitorial system, which is significantly structurally and procedurally different from the adversarial model. While both systems are invested in determining the truth,⁴⁵ the adversarial system is more interested in a "just outcome,"⁴⁶ whereas the inquisitorial system pursues the objective truth.⁴⁷ It attempts to get at this objective truth through an official investigation conducted by impartial public officials.⁴⁸

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 discovering the truth.⁴⁹ 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.⁵⁰ In other, less traditional, inquisitorial systems, the prosecutor retains the investigatory power, and is subject to judicial

⁴² *Id.* at 1016.

⁴³ SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 222, 224 (2001).

⁴⁴ *Id.* at 283–84.

⁴⁵ Damaska, *Evidentiary Barriers supra* note 23, at 513.

⁴⁶ *Id.* at 581.

⁴⁷ William Pizzi & Luca Marafioti, The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, 17 *YALE JOURNAL OF INTERNATIONAL LAW* 1, 7.

⁴⁸ Damaska, *supra* note 23, at 26; Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 *WEST* 799, 800–801 (1998).

⁴⁹ Damaska, *Evidentiary Barriers supra* note 23, at 580–583.

⁵⁰ Lerner, *supra* note 19, at 802; Goldstein, *supra* note 13, at 1018.

monitoring of that investigation.⁵¹

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; she ultimately determines whether there is sufficient evidence to take a case to trial.⁵² If the investigating official is a prosecutor, that decision may be subjected to review by judges.⁵³ 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.⁵⁴ Because of this principle, the concept of a guilty plea is foreign to an inquisitorial system,⁵⁵ and the judge can find that a defendant's confession alone is not enough to substantiate the truth and can instead proceed with a full trial.⁵⁶

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.⁵⁷ 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. Because of this perception of the defense it does not collect its own evidence as the "state organs bear responsibility during the process for the well-being of the accused."⁵⁸ The defense is able to suggest the collection of certain evidence and request the investigating official interview specific witnesses.⁵⁹

Unlike the bifurcated court of the adversarial system, in the inquisitorial system there is a unitary court, one where the

⁵¹ Pizzi and Marafioti, *supra* note 47; Goldstein, *supra* note 13, at 1019; Damaska, *supra* note 6 at 843.

⁵² Damaska, *supra* note 23, at 559.

⁵³ Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO LAW REVIEW 261, 366 (1976); Pizzi and Marafioti, *supra* note 47.

⁵⁴ CASSESE, *supra* note 15, at 367.

⁵⁵ *Id.* at 370.

⁵⁶ ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 370 (2003 ed.).

⁵⁷ Lerner, *supra* note 19, at 802.

⁵⁸ Safferling, *supra* note 8, at 75.

⁵⁹ Lerner, *supra* note 19, at 802–803.

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judge is the decider of fact and of law.⁶⁰ The concept of a lay-jury is alien,⁶¹ and instead the system is hierarchical, with a professionalized judiciary comprised of legal professional decision makers.⁶²

One of the central procedural devices employed in the inquisitorial system is the *dossier*.⁶³ The compilation of the *dossier* is an indispensable part of the pre-trial process, as it records all the information gathered all procedural activity and forms the basis of the trial itself; it is a fundamental part of the "instruction maxim" of the inquisitorial system.⁶⁴ The *dossier* affords the judge advance knowledge of the facts and evidence of case,⁶⁵ which allows her to effectively conduct the trial proceedings and exercise the powers allocated to her as an investigating official in the inquisitorial system.⁶⁶

Equipped with the *dossier*, the inquisitorial judge controls proceedings and determines what evidence to produce and witnesses to call and in which order; generally the order is dictated by what the judge deems to be most helpful to the progression of the case.⁶⁷ The judge takes the lead in questioning⁶⁸ 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.⁶⁹ The accused is generally given the opportunity to speak first, and then questioned by the judges on his narrative testimony.⁷⁰ In an inquisitorial process there is no dispute to address, instead, only one case is presented by the impartial investigator in order to determine

⁶⁰ Pizzi and Marafioti, *supra* note 47, at 7.

⁶¹ GERHARD O. W. MUELLER & FRE LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* 5 (1969).

⁶² MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 42 (1986).

⁶³ Damaska, *Evidentiary Barriers*, *supra* note 23 at 533.

⁶⁴ MUELLER AND POOLE-GRIFFITHS, *supra* note 61 at 7.

⁶⁵ Orie, *supra* note 33, at 1451.

⁶⁶ Pizzi and Marafioti, *supra* note 47, at 7; DAMASKA, *The Uncertain Fate* *supra* note 20, at 850.

⁶⁷ Pizzi and Marafioti, *supra* note 47, at 7.

⁶⁸ Damaska, *Evidentiary Barriers*, *supra* note 23 at 525.

⁶⁹ CASSESE, *supra* note 15 at 373.

⁷⁰ Goldstein, *supra* note 13 at 1018; Damaska, *supra* note 23, at 527; Lerner, *supra* note 19, at 828.

the truth, and if the defense wishes to have certain evidence produced he must request it of the judge.⁷¹

In contrast to the adversarial system, there are few formal rules of evidence.⁷² 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.”⁷³ 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,”⁷⁴ 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 procedure.”⁷⁵ 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

⁷¹ CASSESE, *supra* note 15 at 373.

⁷² Orie, *supra* note 33 at 1452; Pizzi and Marafioti, *supra* note 47 at 7.

⁷³ Pizzi and Marafioti, *supra* note 47, at 7.

⁷⁴ Kessler, *supra* note 6 at 1187.

⁷⁵ Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 at 852.

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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

	Pure Adversarial Model	Pure Inquisitorial Model
Nature of the proceedings	A dispute between two active parties conducting cases in competition with one another (prosecution and defense).	A unified Official Investigation conducted by impartial officials (prosecutor and judge) to determine the truth.
Role of the judge	To act as an impartial "passive umpire" to the dispute put to them by the two adversaries (prosecution and defense).	To investigate the truth, and to actively pursue independent lines of investigation and evidence.
Nature of the court	Bifurcated court that relies on 'lay' decision makers of fact to determine guilt. Judge determines sentencing.	Unitary court which relies upon professional decision makers (judges) to determine both guilt and sentencing.
Role of the prosecutor	To actively investigate and prosecute his case.	A public official tasked with investigating both inculpatory and exculpatory evidence to determine the truth.
Role of the defense	To actively investigate and defend the accused. Prosecutor and defense have formal powers.	The target of the investigation.
Procedural powers during	Both prosecution and defense have equal procedural powers.	Exculpatory evidence is passed from the official investigator to the

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investigation		defense. Defense can request the official investigator to gather evidence on its behalf.
Discretion in charging	The prosecutor has broad prosecutorial discretion and is able to decide when a dispute concludes.	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.
Particular procedural devices	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.	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.
Evidentiary standards	Embraces detailed rules of evidence to evaluate evidence admissibility in order to monitor what the lay decision makers are exposed to.	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.
Oral v. written evidence	Historically has preferred oral evidence, to avoid requiring lay jurors to read reams of written statements.	A written <i>dossier</i> documents all procedural activity and evidence gathered.

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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 that 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 Kessler⁷⁶ and Langer,⁷⁷ 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.”⁷⁸ 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. All of these power shifts are underlined by procedural devices that incorporate mechanisms from both the adversarial and procedural cultures in order to effectuate the reallocation 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

⁷⁶ See Kessler, *supra* note 6. .

⁷⁷ See Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3.

⁷⁸ *Id.* at 840.

initially founded towards a more inquisitorial model.

The hypothesis of shifting power dynamics will be tested through employing the pure model of the adversarial system as a baseline. This model will be used to look at the statutes 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 the 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.

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. A 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 across the three courts.

II. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

a. Procedural History of the ICTY

During the initial drafting of the Statute of the International Criminal Tribunal for the Former Yugoslavia⁷⁹ and

⁷⁹ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Statute of the International

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RPEs⁸⁰ reference was made to both the adversarial and inquisitorial models⁸¹ and, although the “draft statute [of the ICTY] – which the Security Council approved without changes – did not have a clear adversarial slant,”⁸² the adopted RPE’s had “a clear adversarial inclination.”⁸³ 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.”⁸⁴ Consequently, the responsibilities and powers assigned to the prosecutor and the defense followed adversarial lines, with the judges espousing the role of passive umpires,⁸⁵ and all actors in the system adopted, at least to some extent, the adversarial model in their dealings with the court:

There were two reasons for this: First, because the judges were

Criminal Tribunal for the Former Yugoslavia, Adopted on 25 May 1993, Security Council Resolution 827.

⁸⁰ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, Adopted on 11 February 1994, U.N. Doc: IT/32

⁸¹ Michael Asimow, *Popular Culture and the Adversary System*, 40 *LOY. L. A. L. REV.* 653 (2006); Langer, *supra* note 3; Michael Asimow, *Popular Culture and the American Adversarial Ideology*, in *LAW AND POPULAR CULTURE* 712 (Michael Freeman ed., 2004) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=481282 (last visited Jul 16, 2012).

⁸² Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 at 856.

⁸³ *Id.* at 857; Hervé Ascensio, *The Rules of Procedure and Evidence of the ICTY*, 9 *LEIDEN J. INT’L L.* 467-78, 467 (1996); Fairlie *supra* note, 1, at 243, 245.

⁸⁴ Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 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).

⁸⁵ Langer, *Rise of Managerial Judging in International Criminal Law* *supra* note 3 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.

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.⁸⁶

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,⁸⁷ and the defense had “similar procedural powers to the prosecution for developing its own case, calling its own witnesses, interrogating its witnesses and the witnesses of the prosecution.”⁸⁸

Unfortunately, the ICTY was plagued by excruciatingly slow processing times,⁸⁹ which was attributed to the adversarial structure adopted under the Tribunal’s early RPEs.⁹⁰ The failings of the 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

⁸⁶ *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)

⁸⁷ *Id.* at 861.

⁸⁸ *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)

⁸⁹ D. Wippman, *The Costs of International Justice.*, 100 AM. J. INT’L L. 861 (2006); Constantinos Hotis, *Fair and Expeditious Trial: A Reappraisal of Slobodan Milosevic’s Right to Self-Representation before the International Criminal Tribunal for the Former Yugoslavia, A*, 6 CHI. J. INT’L L. 775 (2005).

⁹⁰ Langer, *supra* note 3 at XX.

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according to the dispute model.”⁹¹ 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.”⁹² This often led to the prosecution presenting much more evidence than was necessary, resulting in delays and lengthy proceedings.⁹³ The second, 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.⁹⁴

Given that the ICTY was the first international court since Nuremberg, created to hold individuals criminally responsible,⁹⁵ it was understandable that the ICTY 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 provided to it,⁹⁶ 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.⁹⁷

b. Structural Shifts and Power Distribution at the ICTY

With the introduction of the inquisitorial mechanisms, such as increased pre-trial management and the judge being able to limit the amount of witnesses called by the parties, came a structural shift, redefining the roles of the parties and the power allocation between them. Alongside the structural reforms between parties, there was a visible shift towards us-

⁹¹ Langer, *supra* note 3, at 872.

⁹² *Id.* at 872.

⁹³ 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 4 at 801.

⁹⁴ Langer, *supra* note 3, at 873.

⁹⁵ 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 3 at 8; Groome, *supra* note 4 at 792.

⁹⁶ Robinson, *supra* note 2, at 573–588.

⁹⁷ Langer, *supra* note 3, at 879–880.

ing procedural devices familiar to the inquisitorial system. From its creation, the ICTY shared with the inquisitorial system a “preference for the professionalization of the legal process,”⁹⁸ and this did not alter with the introduction of more inquisitorial mechanisms. Rather, as a result of the ICTY’s structural reforms, the relationship between the prosecution and defense altered. 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.⁹⁹ The new rules, such as Rule 65 *ter*, 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 party cooperation.¹⁰⁰ This was an abrupt shift in procedure at the ICTY, as it required the parties to play a dual role alien to the adversarial system; they must prosecute their own case with the utmost fervor while at the same time assisting the court.¹⁰¹ 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

⁹⁸Langer, *supra* note 3, at 881.

⁹⁹ Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 at 880 .

¹⁰⁰ Langer and Doherty, *supra* note 3 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 92*bis* 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).

¹⁰¹ Langer, *supra* note 3 at 890.

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inquisitorial system.

In accordance with the reformed procedure at the ICTY the Office of the Prosecutor (OTP) issues an indictment after they have conducted an investigation.¹⁰² 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.¹⁰³ The Judge is able to request more information from the OTP to make that decision, and can ultimately accept or reject the indictment.¹⁰⁴ Once the indictment is confirmed, the pre-trial judge, designated within seven days of the initial appearance of the accused,¹⁰⁵ 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.¹⁰⁶ Under these reforms, the pre-trial judge is required to become intricately acquainted with the facts to enable them to extinguish these responsibilities adequately.¹⁰⁷ To assist the judge the parties are required to submit pre-trial briefs to the court before the opening of the trial, by order of Rule 65 *ter*(E).¹⁰⁸

Under the reformed rules open communication between the parties became paramount.¹⁰⁹ The prosecution is required to disclose its case strategy,¹¹⁰ and must cooperate with the defense on settling issues of fact.¹¹¹ 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

¹⁰² 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 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” ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV.46 Rule 68 (2011).

¹⁰³ *Id.* Rule 47(E).

¹⁰⁴ *Id.* Rule 47(F).

¹⁰⁵ ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV. 45 Rule 65 *ter* (A) (2010).

¹⁰⁶ ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV.46 Rule 65 *ter* (D)(ii) (2011).

¹⁰⁷ Langer, *supra* note 3 at 891.

¹⁰⁸ ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV.46 Rule 65 *ter* (E).

¹⁰⁹ *Id.* Rule 65 *ter* (B).

¹¹⁰ *Id.* Rule 65 *ter* (E)(i).

¹¹¹ Langer, *supra* note 3 at 892.

will appear in person or by written statement.¹¹² The prosecution must give a time estimate for each witness, and an estimate of the total time for their case.¹¹³ 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.¹¹⁴ Like the prosecution, prior to the start of the defense case they must submit a list of witnesses and exhibits.¹¹⁵ Failure to meet their obligations under these rules can result in sanctions upon the violating party.¹¹⁶

Following the submission of their pre-trial briefs, the process is passed from the Pre-Trial Judge to the Trial Chamber, and the Trial Chamber is required to hold a pre-trial conference with the parties prior to the opening of the trial.¹¹⁷ It is during these conferences that the shift in power dynamic from the parties to the judges is most pronounced, as it is at this stage that the judge can alter the proposed activities of each party during the proceedings: the court can request that the parties shorten the estimated time of examination-in-chief for witnesses;¹¹⁸ require the parties to call fewer witnesses, and¹¹⁹ select particular crime sites or incidents as representative of the crimes charged.¹²⁰ As discussed, the impetus for many of these procedural reforms was to shorten the amount of time it took cases to be processed at the court,¹²¹ and in furtherance of

¹¹² ICTY Rules of Procedure and Evidence, IT/32/Rev.46 Rule 65 *ter*(E)(ii)(e).

¹¹³ *Id.* Rule 65 *ter* (E)(ii).

¹¹⁴ *Id.* Rule 65 *ter* (F).

¹¹⁵ *Id.* Rule 65 *ter* (G).

¹¹⁶ *Id.* Rule 65 *ter* (N).

¹¹⁷ ICTY Rules of Procedure and Evidence, IT/32/Rev. 45 Rule 73 *bis* (2010).

¹¹⁸ ICTY Rules of Procedure and Evidence, IT/32/Rev.46 Rule 73 *bis* (B) (2011).

¹¹⁹ *Id.* 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.

¹²⁰ *Id.* Rule 73 *bis*.

¹²¹ Langer and Doherty, *supra* note 3. In assessing the managerial judging reforms at the ICTY, Langer and Doherty conclude that the promise of managerial judging (a mechanism used in U.S. domestic civil procedure, which refers to an apparatus that encourages judicial activism to promote expediency by requiring judges to play an active role in both pre-trial and

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that goal the reformed RPEs permit the court to exercise control over the mode and presentation of witnesses and evidence, to ensure no time is wasted.¹²² Similarly, the Court also has discretion to hold a pre-defense conference prior to the start of the defense case,¹²³ during which the Trial Judge has the same powers of limitation as with the prosecution case, and can require the limiting of witnesses,¹²⁴ reducing the time for examination-in-chief of witnesses called¹²⁵ and determine the time for presenting evidence.¹²⁶ 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 was permitted under the earlier adversarial processes, 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 the 'file' under Rule 65*ter*(L)(i),¹²⁷ the functions of which are familiar to the inquisi-

trail proceedings) has 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.

¹²² ICTY Rules of Procedure and Evidence, IT/32/Rev. 45 Rule 73 *bis* (F) (2010).

¹²³ ICTY Rules of Procedure and Evidence, IT/32/Rev.46 Rule 73 *ter* (2011).

¹²⁴ *Id.* Rule 73 *ter* (C).

¹²⁵ *Id.* Rule 73 *ter* (B).

¹²⁶ *Id.* 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

¹²⁷ ICTY Rules of Procedure and Evidence, IT/32/Rev. 45 Rule 65 *ter* (L)(i) (2010)

torial *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.¹²⁸ A second 'file' incorporating the pre-trial brief and list of witnesses submitted by the defense supplements the first 'file'.¹²⁹ 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.¹³⁰ 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."¹³¹ 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 roadmap 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 to the judges. The judges subsequently chose to incorporate broad evidentiary standards, which permit the admission of any relevant evidence of probative value, unless it is significantly outweighed by the need to ensure a fair trial.¹³² 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

¹²⁸ *Id.* Rule 65ter(L)(i).

¹²⁹ *Id.* Rule 65 ter (L)(ii).

¹³⁰ See Langer, *supra* note 3 at 887.

¹³¹ Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 at 898.

¹³² ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV. 45 Rule 89 (C)–(D) (2010).

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preference for written evidence, in certain specified instances.¹³³ Interestingly, although this is a procedural device is 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.¹³⁴

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.”¹³⁵ 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.¹³⁶

As is evident from the foregoing discussion, although the

¹³³ *Id.* Rule 92 bis; *See also* Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 at 901; *See also* Langer and Doherty, *supra* note 3 at 273-274.

¹³⁴ ICTY RULES OF PROCEDURE AND EVIDENCE, IT/32/REV. 45 Rule 92 bis (2010); “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, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 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 3 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.

¹³⁵ Langer, *Rise of Managerial Judging in International Criminal Law*, *supra* note 3 at 901.

¹³⁶ *See e.g.* John D. Jackson, *Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment*, *The*, 68 *MOD. L. REV.* 737, 758 (2005); Megret, *supra* note 3; *See generally* Gregory S Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 *COLUM. J. TRANSNAT'L L.* 635 (2006).

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 model. Under the reformed system, the power to structure proceedings has increasingly shifted away from the hands of the parties and into the hands of the judge. To effectuate this, 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).

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.¹³⁷ 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”¹³⁸ 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

¹³⁷ See e.g. Michael P. Scharf, *Politics behind U.S. Opposition to the International Criminal Court*, 6 BROWN J. WORLD AFF. 97 (1999); John Dugard, *Obstacles in the Way of an International Criminal Court*, 56 CAMBRIDGE L.J. 329 (1997); M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49 (1995).

¹³⁸ Kress, *supra* note 1.

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from the different systems.¹³⁹

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 the Court, the judges may draw up provisional Rules to be applied until adopted, amended or rejected by the next ordinary or special session of the Assembly of States Parties.¹⁴⁰ 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.

b. Structural Shifts and Power Distribution at the ICC

Once again, if we take the pure adversarial model as our baseline then an examination of the Rome 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 has a heavy inquisitorial influence.

At the ICC the Office of the Prosecutor (OTP) is responsible for all initial investigation,¹⁴¹ playing a role somewhat familiar to the official investigator. As in the inquisitorial system, the OTP is obliged to investigate all inculpatory and exculpatory evidence,¹⁴² which moves it beyond the requirements of incumbent on the OTP at the ICTY and places an active requirement on the ICC OTP to unearth any exculpatory evidence.¹⁴³ Unlike at the ICTY, which had a very specific mandate from the Security Council, the ICC has the power to investigate in 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 *pro-*

¹³⁹ Kress, *supra* note 1 at 605.

¹⁴⁰ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 51(3), July 17, 1998.

¹⁴¹ *Id.* art. 53

¹⁴² *Id.* art. 54(1)(a).

¹⁴³ The defense also conducts its own investigation, which the Registrar can assist with, as appropriate. RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, ICC-ASP/1/3 Rule 20(1)(b) (2002).

prio motu.¹⁴⁴ Additionally, 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,¹⁴⁵ and whether there are other substantial reasons to consider that an investigation would not be in the interests of justice.¹⁴⁶

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; second, the Pre-Trial Chamber (PTC) must grant an authorization for that investigation.¹⁴⁷ Requiring 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. Indeed, the relationship between the prosecutor and the Pre-Trial Chamber at this stage of the proceedings has been called "one of the most striking examples of the uniqueness of the ICC procedural law."¹⁴⁸

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 between different legal traditions and values, and must be approached with utmost caution."¹⁴⁹ 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 influ-

¹⁴⁴ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 13, July 17, 1998.

¹⁴⁵ *Id.* article 17

¹⁴⁶ *Id.* art. 53(1)(a)-(c).

¹⁴⁷ *Id.* art. 15(3).; *see also* The Structure of International Criminal Procedure, *supra* note 1 at 433.

¹⁴⁸ Kress, *supra* note 1 at 606.

¹⁴⁹ The Structure of International Criminal Procedure, *supra* note 1 at 443 *citing* Situation in The Democratic Republic of Congo, Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, ICC-01/04 2 (9 March 2005).

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ence 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 PTC examines the request and supporting materials submitted by the prosecutor. At this stage the PTC 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,¹⁵⁰ before determining whether there is indeed a reasonable basis to proceed.¹⁵¹ In issuing their decision, the PTC must include its reasoning, and must notify the victims of the decision.¹⁵²

Hand in hand with the unique condition of judicial authorization is the procedural power of review instilled in the PTC at the ICC under Article 53 of the Rome Statute.¹⁵³ Article 53 subjects the OTP's exercise of prosecutorial discretion in deciding whether to proceed with an investigation (a pure adversarial norm) to judicial review in limited circumstances, depending on the basis upon which the prosecutor has declined the investigation. 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 system.

It must be noted that PTC'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 PTC's review power can only be triggered by the request of a State,¹⁵⁴ and it is only if a State requests such that the PTC can ask the prosecutor to review its decision not to investigate.¹⁵⁵ In this

¹⁵⁰ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 50(4).

¹⁵¹ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 15(3)–(4) July 17, 1998

¹⁵² RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 50(5).

¹⁵³ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 53 July 17, 1998.

¹⁵⁴ *Id.* art. 53(3)(a).

¹⁵⁵ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT Rule 108(2).

instance, if the prosecutor once again declines to proceed with the investigation then there is no further recourse available to the PTC to order the investigation.

The PTC has much broader powers of review when the prosecutor declines to prosecute on the basis of Article 53(3) as in that case the PTC can request on their own initiative that the prosecutor review its decision not to investigate.¹⁵⁶ If the PTC draws a contrary conclusion to the prosecutor then the decision by the OTP not to proceed is invalidated,¹⁵⁷ and the prosecutor shall be obliged to continue with the investigation or prosecution.¹⁵⁸ This provides the PTC with the means by which they can compel an investigation to take place.¹⁵⁹ This power of review by a judicial 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 complementari-

¹⁵⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 53(3)(b) July 17, 1998.

¹⁵⁷ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 53(3)(b) July 17, 1998.

¹⁵⁸ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 110(2).

¹⁵⁹ 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 oversight, over the investigatory process. When the prosecutor finds it necessary to collect evidence in the territory of a State Party she must communicate a written request to the State Party. This is not merely a procedural show, rather the Pre-Trial Chamber has some actual powers, and can invite the views of the State Party at issue, and can even hold a hearing. When coming to its decision, the Pre-Trial Chamber takes the State Party opinion into consideration and can ultimately grant or decline the authorization. RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 115.

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ty.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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.¹⁶³ Both the ultimate decision and its rationale must be communicated to the prosecutor and the State requesting the deferral.¹⁶⁴

The Rome Statute also envisages a unique investigatory tool for the Pre-Trial Chamber, which is not seen at other international courts.¹⁶⁵ This device comes into play when a situation is recognized by the prosecutor, which may not be subsequently available for the purpose of trial, whereupon the prosecutor can request from the PTC the opportunity to "take testimony or a statement from a witness, or to examine, collect or test evidence."¹⁶⁶ 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."¹⁶⁷ Such measures may include recommending or ordering a particular procedure be followed,¹⁶⁸ requiring a record be made of the proceedings,¹⁶⁹ or sending a judge to observe and make rec-

¹⁶⁰ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 18(2) July 17, 1998.

¹⁶¹ *Id.* art. 18(2).

¹⁶² *Id.* art. 18(2).

¹⁶³ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT Rule 55(1).

¹⁶⁴ *Id.* Rule 55(3).

¹⁶⁵ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 56(1)(a) July 17, 1998.

¹⁶⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 56(1)(a) July 17, 1998.

¹⁶⁷ *Id.* at Article 56(1)(b).; RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 47.

¹⁶⁸ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3, Article 56(2)(a) July 17, 1998.

¹⁶⁹ *Id.* art. 56(2)(b).

ommendations regarding the collection and preservation of evidence and questioning.¹⁷⁰ 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 at this stage of proceeding is more closely aligned to the inquisitorial process, particularly the facility enabling the judge to observe the proceedings, which, it is suggested, mirrors the judge's involvement in the inquisitorial official investigation. A secondary function of PTC involvement at the investigation stage is that it enables the Chamber to ensure the rights of the defense are upheld, otherwise the defense would have no representation in those interactions.

Another pre-trial control mechanism exercisable by the PTC at the ICC is its ability to schedule and conduct status conferences.¹⁷¹ 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. This ensures that the trial disclosure is taking place under satisfactory conditions,¹⁷² which is 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.¹⁷³ All of these judicial powers permit the judge to supervise the prosecutor and monitor the exercise of her discretion in the conduct of the investigation. In an inquisitorially influenced system where the prosecutor holds the bulk of investigatory powers, this is important in order for the defense not to feel at a chronic disadvantage. It is vital that the prosecutor's powers be kept in check and that there is supervision to ensure the prosecutor is executing her functions in the interests of both parties.¹⁷⁴

¹⁷⁰ *Id.* art. 56(2)(e).

¹⁷¹ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 121(2)(b).

¹⁷² RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 121(2)(b).

¹⁷³ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, Rule 121(2)(b).

¹⁷⁴ See generally Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003); see also Andrew J. Walker, *When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to*

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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. This is 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. 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, in contrast to the pure inquisitorial system where both the judge and prosecutor act in concert with each other in their shared role as an investigating official.

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 Chamber has moved its role in the direction of investigative judging, a far departure from the passive, adversarial judge on which the ICP was originally modeled.¹⁷⁵ During the pre-trial phase, the PTC has an array of powers at its disposal, for example, dealing with applications for interim releases pending trial by detained persons,¹⁷⁶ which shall be periodically reviewed.¹⁷⁷ The PTC is also responsible for setting the date of the confirmation of charges hearing,¹⁷⁸ where it confirms the charges on which the prosecutor intends to seek trial.¹⁷⁹

The requirement of a confirmation hearing was directly inspired by the inquisitorial French system's *chambre*

Be Insulated from International Politics and to Protect Basic Due Process Guarantees, 106 W. VA. L. REV. 245 (2004); see Jenia Iontcheva Turner, *Policing International Prosecutors*, 45 N.Y.U. J. INT'L L. & POL. 175 (2012).

¹⁷⁵ See generally Michela Miraglia, *The First Decision of the ICC Pre-Trial Chamber: International Criminal Procedure Under Construction*, 4 J. INT'L CRIM. JUST. 188, 193 (2006).

¹⁷⁶ See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 60(2), July 17, 1998.

¹⁷⁷ See *id.* art. 60(3).

¹⁷⁸ See RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, ICC-ASP/1/3 Rule 121(1) (within a reasonable time following appearance by the accused).

¹⁷⁹ See generally ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 61(1), July 17, 1998.

*d'accusation.*¹⁸⁰ 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,”¹⁸¹ and can either confirm the charges and commit the person to a Trial Chamber for trial,¹⁸² decline the charges for insufficient evidence,¹⁸³ or adjourn and request further evidence or investigation from the prosecutor. It can also suggest the prosecutor amend the charge to a different crime.¹⁸⁴ 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 states, “ICC confirmation procedure is a compromise that combines several elements of different systems of pretrial procedures but does not imitate one of them completely.”¹⁸⁵

It is not only in the Pre-trial stages that the judge is instilled with significant powers; the trial stages are also full of compromises 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 Chamber to the Trial Chamber.¹⁸⁶ The Trial Chamber confers with the parties and adopts procedures to ensure a fair and expeditious trial, 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,”¹⁸⁷ and, up until the start of trial, the Trial Chamber can schedule status conferences.¹⁸⁸ Both prior to and during

¹⁸⁰ See Kress, *supra* note 1 at 610.

¹⁸¹ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 61(7), July 17, 1998.

¹⁸² See *Id.* art. 61(7)(a).

¹⁸³ See *Id.* art. 61(7)(b).

¹⁸⁴ See *Id.* art. 61(7)(c).

¹⁸⁵ Ambos, *supra* note 1, at 455.

¹⁸⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 61(11), July 17, 1998. (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. See *id.* Rule 64(4).)

¹⁸⁷ See *Id.* art. 64(3). *Id.* art. 65(3)(c).

¹⁸⁸ See RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL

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trial, the Trial Chamber may require the attendance and testimony of witnesses and the production of documents and evidence, and require State assistance in doing so, if necessary.¹⁸⁹ The Judge may also order disclosure of documents not previously disclosed to the other party.¹⁹⁰ The Presiding Judge has the power to give directions for the conduct of proceedings,¹⁹¹ 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”¹⁹² Proceedings and the presentation of evidence generally follow the adversarial example, with 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 influence the presentation order.¹⁹³ Where the Chamber declines to give such directions, the parties retain discretion over the presentation of witnesses and evidence.¹⁹⁴

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 admits guilt, the prosecution and defense would work together to reach a compromise in sentencing to propose to the judge.¹⁹⁵ 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,¹⁹⁶ the Chamber can disregard the admission, order the trial be continued under ordinary trial procedures, and may remit the case to another Trial Chamber.¹⁹⁷ The parallels with the inquisitorial system here are noticeable, as the inquisitorial system does

CRIMINAL Court, ICC-ASP/1/3 Rule 132(2).

¹⁸⁹ See generally ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 64(6)(b), July 17, 1998.

¹⁹⁰ See *Id.* art. 64(3)(c).

¹⁹¹ See *Id.* art. 64(8)(b).

¹⁹² *Id.* art. 64(9).

¹⁹³ See generally *Id.* art. 64(8)(b).

¹⁹⁴ See generally RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, ICC-ASP/1/3 Rule 140(1).

¹⁹⁵ Cassese, *supra* note 15 at 370.

¹⁹⁶ See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 65(1), July 17, 1998.

¹⁹⁷ See *Id.* art. 65(3).

not accept guilty pleas and instead requires a full and impartial official investigation regardless of the professed guilt of the accused. However, the ICC does not entirely integrate inquisitorial norms; if the Trial Chamber *is* satisfied that the requirements of Article 65(1)¹⁹⁸ 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.”¹⁹⁹

Another inquisitorial mechanism that has found traction at the ICC is the concept of a *dossier*. At the ICC, the Registrar is tasked with compiling complete records of all the particulars of each case,²⁰⁰ and the Trial Chamber is required to ensure that the Registrar makes a complete and accurate record of the proceedings,²⁰¹ however, neither the ICC Statute nor RPEs provide for anything as comprehensive as a true inquisitorial *dossier*.

Although a case file or *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 pre²⁰² and during,²⁰³ rather than all disclosure prior to trial. This draws an interesting comparison between the adversarial and inquisitorial systems²⁰⁴ and how different international

¹⁹⁸ See *id.* art. 65(1).

¹⁹⁹ *Id.* art. 65(2).

²⁰⁰ See RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, ICC-ASP/1/3 Rule 15.

²⁰¹ See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 64(10), July 17, 1998. .

²⁰² See generally *id.* art. 61(3).

²⁰³ *Id.* art. 67(2).

²⁰⁴ See e.g., Walpin, *supra* note 32 at 176; see e.g., generally Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different*, 68 FORDHAM L. REV. 1453 (1999); see e.g., Michael K. Block, Jeffrey S. Parker & Libor Dusek, *Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes*, 2 AM. L. & ECON. REV. 170 (2000); see e.g., John C. Koski, *From Hide-and-Seek to Show-and-Tell: Evidentiary Disclosure Rules*, 17 AM. J. TRIAL ADVOC. 497 (1993); see e.g., Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C.J. INT'L L. & COM. REG. 319 (2010); see Finegan, *supra* note 12; see Langer, *supra* note 121; see e.g., Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded between*

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courts have chosen to deal with disclosure issues.²⁰⁵

Similar to 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 possess the qualification required in their respective State for appointments to the highest judicial offices.”²⁰⁶ Moreover, the ICC particularly requires that its judges have an established competence in criminal law and procedure and the relevant areas of international law, such as humanitarian law and human rights.²⁰⁷ The statute provides that the judges will be assigned to Chambers such that belie their experience,²⁰⁸ and are expected to act with impartiality.²⁰⁹ Hand in hand with the professionalized judiciary is the preference against technical rules of evidence at the ICC. Similar to the inquisitorial system, technical rules are thought to be superfluous to the procedural system of the court, as professional judges ought to be capable of ignoring inadmissible evidence. In accordance with Article 69(4) 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.²¹⁰ The judges must disregard evidence as inadmissible if obtained by violation of the Rome Statute or inter-

Partisanship and the Truth - A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice, 29 MELB. U. L. REV. 448 (2005); see e.g., Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185 (2001); see e.g., Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165 (2004).

²⁰⁵ See e.g., M. Caianiello, *Disclosure before the ICC: the emergence of a new form of policies implementation system in international criminal justice?*, 10 INT'L CRIMINAL LAW REVIEW 23 (2010); see e.g., D. Scheffer, *A review of the experiences of the pre-trial and appeals chambers of the International Criminal Court regarding the disclosure of evidence*, 21 LEIDEN JOURNAL OF INTERNATIONAL LAW 151 (2008); see e.g., Bernhard Kuschnik, *International Criminal Due Process in the Makings: New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC*, 9 INT'L CRIM. L. REV. 157 (2009).

²⁰⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 3 Article 36(3)(a), July 17, 1998.

²⁰⁷ *Id.* art. 36(3)(b).

²⁰⁸ See generally *Id.* art. 39.

²⁰⁹ *Id.* art. 40.

²¹⁰ *Id.* art. 69(4).

national 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.²¹¹ It is assumed that the judges are legally qualified to determine what is, or is not, admissible before them, and have the integrity to make a determination to the contrary when the interests of justice so require.²¹²

The Statute and RPE's of the ICC are characterized by a pull towards inquisitorially influenced mechanisms and away from the framework of the pure adversarial system that this paper is predicated on; however, as evidenced above, the ICC does not fully 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 go beyond the scale between pure adversarial and pure inquisitorial and embody an entirely new procedure, with features not found in either pure system. These developments will be compared to 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

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 than both the ICTY and the ICC. From its inception, the Court 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.²¹³

There was much political wrangling and negotiation be-

²¹¹ *Id.* art. 69(7).

²¹² See generally SAFFERLING, *supra* note 43 at 293–296.

²¹³ See generally Robert Petit, *Lawfare and International Tribunals: A Question of Definition: A Reflection on the Creation of the Khmer Rouge Tribunal*, 43 CASE W. RES. J. INT'L L. 189 (2010); see e.g., Hanna Bertelman, *International Standards and National Ownership - Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia*, 79 NORDIC J. INT'L L. 341 (2010).

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tween the Royal Government of Cambodia and the United Nations in determining 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. The United Nations (UN) demanded the reverse, insisting on an international court with national participation.²¹⁴ The UN's 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. The international community was similarly concerned that the Cambodian Government did not recognize that the UN's demands for independence, impartiality, and objectivity of the tribunal were legitimate.²¹⁵ Fortunately, those concerns were overcome and a compromise was reached. That compromise was a hybrid court, marrying both domestic and international processes and proceedings.²¹⁶

The interplay between domestic and international law is observed in the two principal founding documents of the Court; the Agreement between the United Nations and the Government of Cambodia²¹⁷ and the ECCC Law, adopted by the Cam-

²¹⁴ See generally William W. Burke-White, *Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 20, 30–41 (2002).

²¹⁵ 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 withdrew from negotiations in 2002, as their concerns were not alleviated.)

²¹⁶ See generally Kathleen Claussen, *Up To The Bar: Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 YALE J. INT'L L. 253 (2008); See generally Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. J. INT'L HUM. RTS. 165–89 (2010); See generally Neha Jain, *Conceptualising Internationalisation in Hybrid Criminal Courts*, 12 SINGAPORE YEARBOOK OF INTERNATIONAL LAW 81–95 (2008); See generally Mohamed Shahabuddeen, *Teething Phase of the ECCC*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 469–502 (2011).

²¹⁷ 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 interna-

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bodian Parliament in 2001, and amended in 2004.²¹⁸ Article 12 of the Agreement makes Cambodian domestic law the applicable procedure at the ECCC;²¹⁹ however, in anticipation of problems of interpretation and application of that law, the article provides that, “guidance may be sought [from] procedural rules established at the international level,”²²⁰ in line with, “international standards of justice, fairness and due process of law.”²²¹ There are also extensive supplemental Internal Rules of the Court, which have gone through numerous revisions since their initial adoption in 2007.²²²

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.”²²³ The Chamber has been designed within the existing court structure in Cambodia; yet, the Trial Chamber has been keen on emphasizing that it is a,

tional staff.

²¹⁸ 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, (2004).

²¹⁹ 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 216 at Art. 12.

²²⁰ *Id.* art. 12(1)

²²¹ *Id.* art. 12(2) (Cambodian criminal procedure has been reformed with the adoption with the Cambodian Code of Criminal Procedure 2007).

²²² Extraordinary Chambers in the Courts of Cambodia Internal Rules, (2007) [hereinafter “ECCC Rules”] 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.” Internal Rules, Preamble.

²²³ Office of the Co-Investigating Judges Order of Provisional Detention (KAING Guek Eav alias Duch), (2007).

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“separately constituted, independent and internationalized court,”²²⁴ 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.”²²⁵ 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.”²²⁶

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:²²⁷ a traditional inquisitorial

²²⁴ Decision of the Trial Chamber on Duch’s Request for Release, (2009) available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Order_of_Provisional_Detention-DUCH-EN.pdf.

²²⁵ Decision on request for release of Kaing Guek Eav on 15 Jun 2009, Case No. 001/18-7-2007-ECCC-TC, § 10.

²²⁶ Pre-Trial Chamber Decision on Nuon Chea Appeal Against Order Refusing Request for Annulment, ¶14 (2008) available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D55_I_8_EN_0.pdf (The Court itself has been eager to distinguish and distance itself as “entirely self-contained” from the other domestic proceedings of the Courts of Cambodia “from the commencement of investigations through to the determination of appeals.” Furthermore, the acts of the tribunal are not subject to the review of other courts, nor do they review proceedings of other domestic courts of Cambodia. Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Kiang Guek Eav alias Duch, 18–19 (2007)).

²²⁷ Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers*, 6 J. INT. CRIMINAL JUSTICE 129–51, 140 (2008) (Moreover, such an office has not been contem-

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).²²⁸ The ECCC OCIJ is an independent office within the Court²²⁹ tasked with investigating the truth and, as such, is required to identify both inculpatory and exculpatory evidence,²³⁰ playing the role of the inquisitorial investigating official; however, the OCIJ is not free to wield its power unrestricted. Rather, it must act within the confines set out by the Co-Prosecutor in its introductory submission.²³¹

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 crime sites are examined to what evidence is collected and which witnesses are interviewed).²³² During its investigation, the OCIJ has the power to interview the charged person,²³³ civil party,²³⁴ and any witness,²³⁵ and is able to control when those interviews take place. The Co-Prosecutors and the defense²³⁶ may request the OCIJ to undertake investigations or

plated at the Special Tribunal for Lebanon, which also has foundations in the inquisitorial system, Cecile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 JOURNAL 1107 (2007).

²²⁸ Acquaviva, *supra* note 226 at 135; Jerome de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, J. INT. CRIMINAL JUSTICE 402–18 (2007).

²²⁹ ECCC Rules, Rule 14(1).

²³⁰ See generally 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 216 art. 23new (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.).

²³¹ ECCC Rules, Rule 53.

²³² *See Id.* Rule 55(5).

²³³ *See Id.* Rule 58.

²³⁴ *See Id.* Rule 59.

²³⁵ *See Id.* Rule 60.

²³⁶ *Id.* Rule 58(6). (“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 does it is required to provide factual reasons for doing so.)

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make any such orders, as they consider useful for the investigation; however it is well within the power of the OCIJ to reject such a request.²³⁷

The OCIJ has an array of procedural powers at its disposal, which it may exercise at its own initiative to enable execution of its responsibilities to investigate, including issuing summons, arrest warrants and detention orders.²³⁸ The OCIJ may also delegate powers to the Judicial Police or ECCC Investigators via a Rogatory Letter to assist with their investigations,²³⁹ and those bodies remain under the supervision of the Co-Investigating Judges.²⁴⁰ The OCIJ concludes its investigation by issuing a Closing Order, in which they can either indict a Charged Person and send them to trial, or dismiss the case.²⁴¹ When an indictment is issued in the closing order, it forms the basis of the trial and limits the facts that may be considered in relation to each charge and crime base.²⁴²

The OCIJ represents one of the compromises reached between the Cambodian Government and the international negotiators when bargaining for applicable procedure before the court 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.²⁴³

²³⁷ *Id.* 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, before to the end of the judicial investigation"

²³⁸ *See Id.* Rule 55(5).

²³⁹ *See Id.* Rule 14(1); *see id.* Rule 55(9); *see Id.* Rule 62(1) (A Rogatory Letter requires investigative action by judicial police or investigators.); *see id.* Rule 62(2) ("A Rogatory Letter shall not be issued in a general form, and shall clearly specify the nature of investigative work to be done, which must relate directly to the crime or crimes under investigation. The Co-Investigating Judges shall set the time limit for compliance with a Rogatory Letter. The Rogatory Letter must be signed and dated by the Co-Investigating Judges. They may withdraw a Rogatory Letter at any time.").

²⁴⁰ *See Id.* Rule 62.

²⁴¹ *See Id.* Rule 67(1).

²⁴² *See Id.* Rule 67.

²⁴³ It is tremendously important in this confidential evidence gathering system that the judges be seen to be impartial and independent. *See* Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambo-*

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.²⁴⁴ 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.²⁴⁵ Each party to the proceedings, which at the ECCC includes Civil Parties (another inquisitorial adoption),²⁴⁶ must submit witness lists to the *Greffier* (a traditional feature of the French inquisitorial system), who communicates these lists to the Trial Chamber.²⁴⁷ 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

dian Extraordinary Chambers, 4 J. INT'L CRIM. JUST. 327 (2006).

²⁴⁴ See generally ECCC Rules § D – Pre-Trial Chamber Proceedings; see *id.* Rule 71-72, 74 (The role of the Pre-Trial Chamber at the ECCC is limited to adjudging on points of dispute between the Co-Prosecutors and Co-Investigating Judges, and to ruling on issues appealed by the parties against orders made by the OCIJ. 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.); see *id.* Rule 77(3) (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.); see *id.* Rule 77(4) (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 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.

²⁴⁵ See *id.* Rule 80.

²⁴⁶ See Caroline Ehlert & Christine Kaufmann, *Duch Trial at the Extraordinary Chambers in the Courts of Cambodia - Involving the Cambodians in the Process*, *The*, 28 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 22 (2010); see Alain Werner & Daniella Rudy, *Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law*, 8 NW. U. J. INT'L HUM. RTS. 301 (2009); see Kate Yesberg, *Accessing Justice through Victim Participation at the Khmer Rouge Tribunal*, 40 VICTORIA U. WELLINGTON L. REV. 555 (2009); see James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507 (2008).

²⁴⁷ See ECCC Rules, Rule 80(1).

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time required for the testimony of each witness.²⁴⁸ The Trial Chamber may also require the parties to submit exhibit lists with accompanying descriptions,²⁴⁹ any legal issues the parties intend to raise at the initial hearing,²⁵⁰ and a list of facts uncontested between the parties.²⁵¹ 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 of pre-trial.²⁵²

The beginning of the trial phase at the ECCC is the initial hearing.²⁵³ At this stage, 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."²⁵⁴ 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 limit what witnesses the parties may call to prevent the appearance of superfluous witnesses.²⁵⁵

The structure of proceedings at the ECCC follows inquisitorial lines. The method of case presentation is a structural departure from the adversarial method most commonly seen at the other international courts where the full prosecution case is heard followed by a full defense, and the accused cannot be required to come to the stand. Instead, at the ECCC, the case

²⁴⁸ See *Id.* Rule 80(3)(a).

²⁴⁹ See *Id.* Rule 80(3)(b).

²⁵⁰ See *Id.* Rule 80(3)(c).

²⁵¹ See *Id.* Rule 80(3)(e).

²⁵² See *Id.* Rule 87(3).

²⁵³ See *Id.* Rule 80 *bis* (1).

²⁵⁴ See *Id.* Rule 80 *bis* (2).

²⁵⁵ See *Id.* 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.")

begins with the Chamber calling the Co-Prosecutors to make an opening statement, followed by a short response from the defense;²⁵⁶ the accused is then called to the stand to allow the judges to hear his response to the opening by the Co-Prosecutors.²⁵⁷ 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.”²⁵⁸ 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 the position of being trapped between being sworn to truthfully answer questions put before him and his right to remain silent.²⁵⁹

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, which is in line with general inquisitorial practices.²⁶⁰ 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.²⁶¹ Not only can the Trial Chamber control the order in which witnesses are heard,²⁶² but the permission of the President is required before the parties may ask questions.²⁶³ Only the Co-Prosecutors and the lawyers are permitted to ask questions directly and all other parties, in-

²⁵⁶ See *Id.* at Rule 89 *bis* (2).

²⁵⁷ See *Id.* at Rule 90.

²⁵⁸ See *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 222 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.

²⁵⁹ See ECCC Rules, *supra* note 222 at Rule 21(1)(d).

²⁶⁰ *Id.* at Rule 91.

²⁶¹ *Id.* at Rule 91(1).

²⁶² *Id.*

²⁶³ *Id.* at Rule 91(2).

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cluding the accused and lawyers for the Civil Parties, must ask their questions through the President.²⁶⁴ 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.²⁶⁵

The President of the Chamber retains overall control throughout proceedings by facilitating interventions by the other judges.²⁶⁶ 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.”²⁶⁷ This power is designed to ensure that parties do not extend the case unnecessarily by calling redundant witnesses or introducing excessive 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.²⁶⁸ 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.²⁶⁹ 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 needed²⁷⁰ 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

²⁶⁴ *Id.*.

²⁶⁵ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 222 at Rule 91(3).

²⁶⁶ *Id.* at Rule 85(1).

²⁶⁷ *Id.* at Rule 85(1).

²⁶⁸ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 222 at Rule 84(3).

²⁶⁹ *Id.* at Rule 84(4).

²⁷⁰ *Id.* at Rule 91(4).

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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 when it considers that new investigations are necessary.²⁷¹ These new investigations shall be carried out by a designated judge or judges, and operate under the same conditions as the OCIJ, permitting the judge to interview witnesses, conduct searches, seize evidence, or order expert opinions.²⁷²

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 opinions on any subject deemed necessary to their investigations or proceedings before the ECCC,²⁷³ and sets the exact parameters and duration of the assignment.²⁷⁴ Other parties may request additional experts, but the OCIJ and Chambers are able to reject such a request.²⁷⁵ 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.²⁷⁶ 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 *dossier* is an integral part of proceedings. At the Court, this document collection is called the Case File. All of the evidence collected by the OCIJ during its investigation is collated into the case file, and it ultimately comprises all the results of the investigations,²⁷⁷ interviews,²⁷⁸ and site visits²⁷⁹ in

²⁷¹ *Id.* at Rule 93(1).

²⁷² *Id.* at Rule 93(2)(b)–(e).

²⁷³ *Id.* at Rule 31(1).

²⁷⁴ *Id.* at Rule 31(3).

²⁷⁵ *Id.* at Rule 31(10).

²⁷⁶ *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. *Id.* at Rule 39(2). Failure to respect time limits shall lead to the invalidity of the action in question. *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.” *Id.* at Rule 39(4).

²⁷⁷ Extraordinary Chambers in the Courts of Cambodia Internal Rules

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each case.²⁸⁰ The case file also includes the introductory submission by the Co-Prosecutors.²⁸¹ The case file becomes one of 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.²⁸²

Criticisms arise out of the fact that the judges are privy to all the evidence collected by the OCIJ,²⁸³ and it may seem abhorrent to adversarial 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 ECCC Internal Rules 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,”²⁸⁴ which means the content of the evidence at issue must have been, “summarized, read out or appropriately identified in court.”²⁸⁵ 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

(Rev. 8), *supra* note 222 at 9(5).

²⁷⁸ *Id.* at Rule 55(7).

²⁷⁹ *Id.* at Rule 55(8).

²⁸⁰ 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.

²⁸¹ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 222 at Rule 53(2).

²⁸² *Id.* at Rule 55(6); *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”).

²⁸³ 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.

²⁸⁴ Extraordinary Chambers in the Courts of Cambodia Internal Rules at Rule 87(2).

²⁸⁵ *Id.* at Rule 87(3).

allow herself to be swayed by biased evidence in drawing a finding on the basis of facts presented before the court.

Given its origins, it is unsurprising that the ECCC is the court with the most features closely aligned with the pure inquisitorial model, but it is particularly noteworthy that it is not entirely inquisitorial in practice. Indeed, the ECCC has come to embrace certain adversarial practices. The following section will examine each of the three courts discussed above and identify how converge around similar mechanisms. It will also identify where upon the scale between adversarial and inquisitorial practices each court falls.

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,²⁸⁶ and instead, adopted inquisitorial methods and processes into its procedure. None of the three courts and tribunals have entirely forfeited 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.²⁸⁷ This Latin maxim, meaning “of its own kind,”²⁸⁸ is aptly applied to a procedural system that blends elements of the two traditions into a unified system. That the three courts and tribunals have

²⁸⁶ Jackson, *supra* note 7; Goran Sluiter, *Law of International Criminal Procedure and Domestic War Crimes Trials, The*, 6 INT'L CRIM. L. REV. 605 (2006); Megret, *supra* note 3; The Structure of International Criminal Procedure, *supra* note 1; Langer, *supra* note 6.

²⁸⁷ Colin B. Picker, International Law's Mixed Heritage: A Common/Civil Law Jurisdiction, 41 VAND. J. TRANSNAT'L L. 1083 (2008); Patrick L. Robinson, Ensuring Fair and Expeditious Proceedings at the International Criminal Tribunal for the Former Yugoslavia, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 569–589 (2000).

²⁸⁸ OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/193700> (last accessed Apr. 28, 2014).

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adopted different approaches to this blending renders it 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 two traditions differently to come to rest at a position on the spectrum of procedure between the two pure models. However, in highlighting the difference between procedures adopted vis-à-vis the three courts, it is interesting to note that there are several convergences on similar methods of procedure or procedural devices.

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 falls. This article asserts that ICP as a body of procedure is characterized by shifting power dynamics between the actors in the system and so 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 particular 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 parties. 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 exhibit little uniformity and actually rest at different points on 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 the analysis of the development of ICP. Both areas where the courts differ in their mechanisms and 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”,²⁸⁹ acting independently²⁹⁰ and relying on comprehensive rules of evidence²⁹¹ to adjudge the legal issues arising in a case, and to deliver a sentence based on a lay jury finding of fact. Conversely, the inquisitorial judge is part of the “investigating official”,²⁹² with the power to actively pursue independent lines of investigation.²⁹³ The judge relies heavily on a *dossier*, comprising all of the procedural stages in the case,²⁹⁴ and has no use for comprehensive rules of evidence.²⁹⁵ The judge has the power to make a decision on both the facts and the law.²⁹⁶ 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 a much more active involvement of the judges at all stages of proceedings.

²⁸⁹ Langer, *supra* note 6, at 840; Walpin, *supra* note 32, at 176; Damaska, *Uncertain Fate*, *supra* note 6, at 850.

²⁹⁰ Orie, *supra* note 33, at 1427.

²⁹¹ CASSESE, *supra* note 15, at 374.

²⁹² DAMASKA, *supra* note 62, at 26; Van Kessel, *supra* note 48, at 800–801.

²⁹³ Lerner, *supra* note 19, at 802; Goldstein, *supra* note 13, at 1018.

²⁹⁴ Damaska, *Evidentiary Barriers*, *supra* note 14, at 533.

²⁹⁵ Orie, *supra* note 33, at 1452; Pizzi & Marafioti, *supra* note 47, at 7.

²⁹⁶ Pizzi & Marafioti, *supra* note 47, at 7.

2014] *SPECTRUM OF INT'L CRIMINAL PROCEDURE* 235*a. Structural Shifts**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,²⁹⁷ both the prosecution and defense are equipped with equal powers of investigation,²⁹⁸ and the judge does not interfere with that investigatory phase.²⁹⁹ Conversely, in a pure inquisitorial system, that investigatory power lies with the investigating official,³⁰⁰ who can be either an investigating judge or a combination of both prosecution and judiciary,³⁰¹ whose involvement is commanded from the moment a crime is reported.³⁰² 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.³⁰³ 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; how-

²⁹⁷ SAFFERLING, *supra* note 8, at 55.

²⁹⁸ Damaska, *Uncertain Fate*, *supra* note 6, at 847.

²⁹⁹ CASSESE, *supra* note 15, at 373.

³⁰⁰ Lerner, *supra* note 19, at 802; Goldstein, *supra* note 13, at 1018.

³⁰¹ Pizzi & Marafioti, *supra* note 47; Goldstein, *supra* note 13, at 1019; Damaska, *Uncertain Fate*, *supra* note 6, at 843.

³⁰² SAFFERLING, *supra* note 8 at 54–55.

³⁰³ ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102, at Rule 39.

ever, 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.”³⁰⁴ 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.³⁰⁵ In doing so, the prosecutor has many investigatory techniques at her disposal, including collecting and examining evidence and interviewing suspects, witnesses and victims.³⁰⁶ The prosecutor has a duty to investigate both “incriminating and exonerating circumstances equally,”³⁰⁷ 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.³⁰⁸ The ECCC embraces an entirely inquisitorial approach to investigation, instilling in the Office of the Co-Investigating Judges all investigatory powers,³⁰⁹ but within the confines set out by the Co-Prosecutor’s in its introductory submission.³¹⁰ 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 truth³¹¹ and, as such, is able to determine which crime sites to investigate, what evidence to collect and which witnesses to interview.³¹² 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.³¹³

We can conclude from this that in the investigatory stages there have been dynamic power shifts in two of the courts that

³⁰⁴ *Id.* at Rule 68. These disclosure obligations are limited by the exceptions contained in Rule 70.

³⁰⁵ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 139, art. 54(1)(a).

³⁰⁶ *Id.* at Rule 54(3)(a)–(f).

³⁰⁷ *Id.* at Article 54(1)(a).

³⁰⁸ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 143 at Rule 20(1)(b).

³⁰⁹ ECCC Internal Rules, Rule 55 (rev. 8) (Aug. 3, 2011).

³¹⁰ *Id.* at rules 55(2), 53.

³¹¹ *Id.* at rule 55(5).

³¹² *Id.* at rule 55(5)(a)–(d).

³¹³ *Id.* at rule 55(10).

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have increased the control that the judge has over the investigation. The court that has retained procedure closest to the adversarial roots of ICP is the ICTY with the bulk of initial investigatory power resting with the prosecutor.³¹⁴ In this way, at the ICTY, the investigation is still molded around an adversarial competition, as the prosecution zealously investigates whether there is a case to answer and uncovers facts that support that case, with the defense doing the same once the accused is indicted. Conversely, both the ICC³¹⁵ and ECCC³¹⁶ have moved towards the inquisitorial end 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.³¹⁷

There is one readily evident anomaly in the investigation stages that models neither the adversarial nor inquisitorial models; that is the *sui generis* development at the ICC of utilizing a judicial body, the Pre-Trial Chamber (PTC), in an authorization and review capacity to determine the power of the prosecutor to conduct its investigations.³¹⁸ 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 lies in the hands of the official investigator. In that sense, the ICC procedure goes beyond the spectrum between the pure adversarial and pure inquisitorial systems, and this PTC function can be seen as an outlier, falling beyond the realms of the spectrum highlighted in Part I(c).

iii. Discretion in Charging

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;³¹⁹ yet, nowhere across these three courts is that power left in those

³¹⁴ ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102 at Rule 39.

³¹⁵ ROME STATUTE, art. 54(1)(a), July 17, 1998, U.N. Doc. A/CONF.183/9.

³¹⁶ ECCC Internal Rules, Rule 55 (rev. 8) (Aug. 3, 2011).

³¹⁷ Pizzi & Marafioti, *supra* note 47, at 7.

³¹⁸ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT at Rule 53.

³¹⁹ CASSESE, *supra* note 15 at 367.

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 whether there is a *prima facie* case to answer³²⁰ before issuing an arrest warrant for an accused.³²¹ At the ICC, a confirmation of charges hearing is held before the Pre-Trial Chamber and the PTC must determine, "whether there is sufficient evidence to establish *substantial grounds to believe that the person committed each of the crimes charged.*"³²² In both instances, the reviewing judge can confirm, dismiss, or request further information,³²³ but judicial approval is required in both court systems before an indictment can be issued. 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.³²⁴ The OCIJ's functionality is as the official investigator at the ECCC, which is a direct inquisitorial construct, and helps explain why there is not a requirement of a second level of judicial review once the judicial body, the OCIJ, has made its determinations.

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, and is indicative of a move across the spectrum of procedure from a pure adversarial system to a more inquisitorial one. The ICC confirmation of charges hearing, for example, is derived from inquisitorial procedure,³²⁵ as is the ECCC Office of Co-

³²⁰ ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102 at Rule 47(E).

³²¹ *Id.* at Rule 47(H).

³²² ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 140 at Article 61(7)(emphasis added).

³²³ ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102 at Rule 47(E); ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 140 at Rule 61(7).

³²⁴ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 222 at Rule 55(4).

³²⁵ Kress, *supra* note 1 at 610.

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Investigating Judges.³²⁶ 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.³²⁷ This helps to highlight that each of the three courts have chosen to embrace inquisitorial mechanisms to different extents, and that the extent to which they have moved towards inquisitorialism is not uniform across all stages, even within a single court system.

iv. Pre-and During-Trial Party Roles

The phases of proceedings where the altered role of the judge moves away from a passive umpire is most evident during pre-trial and trial processes. 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.

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,³²⁸ but during subsequent revisions to the ICTY RPEs we witness an increasing movement towards more inquisitorial roles for the judge,³²⁹ However, 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. Indeed, 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,³³⁰ rather

³²⁶ Lerner, *supra* note 19 at 802; Goldstein, *supra* note 13 at 1018.

³²⁷ ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102 at Rule 47(E).

³²⁸ Langer, *supra* note 3 at 838.

³²⁹ *Id.* at 868.

³³⁰ *Id.*; Langer and Doherty, *supra* note 3. In fact, Langer suggests that these reforms are better categorized as instilling “managerial powers” in the ICTY judiciary.

than a deliberate move towards procedural hybridization. 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 to take the lead in questioning.³³¹ 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, the Pre Trial Chamber plays a much more inquisitorially influenced role,³³² 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.

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 preference against formal rules of evidence in favor of broad admissibility, and there is much convergence and uniformity in the application of these procedural devices across the ICTY, ICC, and ECCC.

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.³³³ Alien to adversarially trained lawyers, the requirement of a comprehensive file of all investigations 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 deci-

³³¹ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 222 at Rule 91.

³³² RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 143 at Rule 121(2)(b).

³³³ Damaska, *supra* note 14 at 533.

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sions regarding all elements of proceedings.³³⁴ 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 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. The Case File at the ECCC records *all* information pertaining to the case³³⁵ thus, playing an identical role as the inquisitorial *dossier*.³³⁶ In contrast, the ICTY file³³⁷ and ICC Registrar compiled record³³⁸ do not emulate the true inquisitorial *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 *dossier*).

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

ii. Rules of Evidence: Broad Admissibility

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.³³⁹ Both the ICTY and ICC adopt almost identical standards for admission, permitting anything that is

³³⁴ MUELLER AND POOLE-GRIFFITHS, *supra* note 61 at 7.

³³⁵ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 22 at Rule 55(6); *Id.* at Rule 86.

³³⁶ MUELLER AND POOLE-GRIFFITHS, *supra* note 61 at 7.

³³⁷ ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102 at Rule 65ter(L)(i)–(ii).

³³⁸ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 143 at Rule 15.

³³⁹ Orie, *supra* note 33 at 1452; Pizzi and Marafioti, *supra* note 47 at 7.

probative and not prejudicial to a fair trial or the fair evaluation of the testimony of a witness.³⁴⁰ The ECCC Rules provide that, “all evidence is admissible”,³⁴¹ with the conditions that decisions must be made based on evidence that has been put before the Chamber and subjected examination,³⁴² and that the Chamber must be convinced of the guilt of the accused beyond a reasonable doubt.³⁴³

Informal rules of evidence are an inquisitorial mechanism that goes to the heart of the goal of determining the truth in the inquisitorial system.³⁴⁴ It is significant that all three courts have shifted away from the adversarial preference for detailed rules of evidence³⁴⁵ 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. *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

	Pure Adversarial Model	The ICTY	The ICC	The ECCC	Pure Inquisitorial Model
Structure of the court	- Bifurcated court, which relies on	Unitary court with judge as	Unitary court, with judge as	Unitary court, with judge as pro-	Unitary court which relies upon professional

³⁴⁰ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 140 at Article 69(4); ICTY RULES OF PROCEDURE AND EVIDENCE, *supra* note 102 at Rule 89(C)–(D).

³⁴¹ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 8), *supra* note 222 at Rule 87(1).

³⁴² *Id.* at Rule 87(2).

³⁴³ *Id.* at Rule 87(1).

³⁴⁴ Pizzi and Marafioti, *supra* note 47 at 7.

³⁴⁵ CASSESE, *supra* note 15 at 374; Orié, *supra* note 33 at 1428, 1451.

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	'lay' decision makers of fact to determine guilt. - Judge determines sentencing.	professional decision maker.	professional decision maker.	fessional decision maker.	decision makers (judges) to determine both guilt and sentencing.
Role of the Trial Judge	To act as an impartial "passive umpire" to the dispute put to her by the two adversaries (prosecution and defense).	To manage the progression of the case to trial through holding conferences and requiring the parties submit specified filings adhering to time limits.	To investigate the truth and assist the parties in trial management	To investigate the truth and actively pursue independent lines of investigation and evidence.	To investigate the truth, and to actively pursue independent lines of investigation and evidence.
Role of the prosecutor	To actively investigate and prosecute his case as an adversary to the defense.	- Prosecutor and defense must cooperate with each other. - Prosecutor obliged to disclose case strategy, lists of witnesses and the basis on which those witnesses will testify prior to the start of trial.	To investigate all inculpatory and exculpatory evidence.	The Co-Prosecutor's compile the introductory submission.	A public official tasked with investigating both inculpatory and exculpatory evidence to determine the truth.
Role of the Defense	To actively investigate and defend the accused as an adversary to the	- Prosecutor and defense must cooperate with each other. - Prior to the	Conducts its own investigations to find exculpatory evi-	The target of the investigation and Counsel ensures the rights of the	The target of the investigation.

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	prosecutor.	star of defense case defense submits a list of witnesses and exhibits.	defense.	defendant are upheld.	
Investigatory powers	<ul style="list-style-type: none"> - Both prosecution and defense have equal procedural powers during the investigation. - Prosecutor is under no obligation to investigate exculpatory evidence for the defense. 	<ul style="list-style-type: none"> - 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. - Defense conducts its own investigation to find evidence to support its case. 	<ul style="list-style-type: none"> - Prosecutor conducts the investigation based on the referral of a situation. - Pre-Trial Chamber (PTC) authorization is required for the Prosecutor to proceed with an investigation. - PTC has the power to review an OTP decision not to proceed with a case. 	<ul style="list-style-type: none"> - The Office of the Co-Investigating Judges (OCIJ) is in charge of investigating all inculpatory and exculpatory evidence (within the confines of the Prosecutor's introductory submission). - The OCIJ dictates what crime sites are investigated, what evidence is collected and what witnesses interviewed. 	<ul style="list-style-type: none"> - The prosecutor is an impartial official who conducts the investigation along with the judge. - Exculpatory evidence is passed from the official investigator to the defense. - Defense can request the official investigator to gather evidence on its behalf.
Discretion in charging	The Prosecutor has broad prosecutorial discretion and is able to decide when a dispute concludes.	The prosecution presents an indictment to a judge who must look at the indictment and confirm the charges.	PTC holds a <i>confirmation of charges</i> hearing to determine whether there is sufficient evidence to establish	The OCIJ can charge anyone named in the Co-Prosecutor's introductory submission, without the requirement of approval	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 insuffi-

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			substantial grounds to believe that the person committed each of the crimes charged. - The PTC can either accept the charges, decline the charges or request additional information from OTP.	from a second judicial chamber.	cient evidence.
Procedural powers during the Pre-Trial Phase	Prosecution and defense have equal procedural powers.	- Pre-Trial Chamber can schedule status conferences and impose time limits for filings. - Trial Chamber can hold pre-trial conferences.	PTC can schedule status conferences to assist and supervise the parties in their preparation for trial.	The Trial Chamber can require the prosecution and defense to submit witness lists, the basis for testimony, exhibit lists and time estimates. All this information become part of the Case File.	All procedural information is recorded in the <i>dossier</i> , which is utilized by the judge in preparing for trial.
Procedural powers during the Trial	Prosecution and defense have equal procedural powers.	- Trial Judges may limit the number of witnesses to be called, and limit the case to specific crime sites or incidents.	- Trial Chamber can schedule status conferences. - President can give directions relating to	- The Trial Chamber dictates the order and conduct of proceedings, and determines in which order witnesses are	- The judge controls the proceedings and determines what evidence to produce and what witnesses to call and in which order. - The judge

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		- Trial Judges can also shorten the amount of time allocated to a party for its case.	the order of presentation of the case.	called. - The President of the Trial Chamber takes the lead in questioning the accused, witnesses and other party participants.	takes the lead in questioning, and any witnesses called are open to follow up questioning by prosecution and defense.
Use of a Dossier	Does not employ use of a <i>dossier</i> .	Two files are compiled, one forming all the prosecution filings, and one all the defense filings.	Registrar is required to keep a comprehensive record of all particulars of the case and an accurate record of proceedings.	Uses a Case File which records everything from beginning to end of the investigation	The <i>dossier</i> records all procedural activity and information gathered. Forms the basis of the trial itself.
Rules of Evidence	Embraces detailed rules of evidence for admission and to evaluate evidence admitted in order to monitor what the lay decision makers are exposed to.	- No detailed rules of evidence and permits anything probative, which is not against the interests of justice. - Assumes that the professional judges are capable of weeding out biased evidence.	- No detailed rules of evidence and permits anything that is of probative value and not prejudicial to a fair trial or fair evaluation of the testimony of a witness - Assumes that the professional judges are capable	- No detailed rules of evidence. Assumes that the professional judges are capable of weeding out biased evidence. - In making a decision, judge is meant to rely only on that evidence that has been tested before the court (i.e. subjected to cross examination).	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.

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			of weeding out biased evidence.		
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VI. CONCLUSION

As we can see from figure 2, while international criminal procedure has taken on various adversarial and inquisitorial iterations, individual to each court, there are broad convergences around the preference for employing increasing inquisitorially influenced mechanisms and procedural devices. In embracing this convergence, each 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, that blend is characterized by a shift in power distribution, and we can identify a pattern that illuminates the preference for increased inquisitorial style of 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 initially 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. At the same time as adopting inquisitorial mechanisms, the court has also retained mechanisms common to the adversarial tradition. Each of the courts under analysis have 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

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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.