A GLOBAL STREAM FROM ADVERSARIAL JUSTICE TO NON-ADVERSARIAL JUSTICE: IS THERE A TENDENCY TO INQUISITORIAL TRADITION IN THE CRIMINAL PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT?*

İtham Ceza Adaleti Sisteminden Tahkik Ceza Adaleti Sistemine Küresel Bir Akım: Uluslararası Ceza Mahkemesinin Ceza Muhakemesinde Tahkik Geleneğine Bir Eğilim Var mı?

Sercan TOKDEMİR**

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ABSTRACT

This paper is divided into two main parts. In the first part, criminal procedural models named as inquisitorial and adversarial procedural systems and the convergence of them are analysed with a comparative perspective. In the second part, our focus will be on the criminal procedural system of the International Criminal Court (ICC). In this paper, the principal criminal procedural systems, which are adversarial system based on common law and inquisitorial system based on civil law, are examined in international courts, especially in the ICC, on a global scale concerning transitions between those traditions. Our purpose is to find an answer to the following question: To what extent is there a "drift" towards more inquisitorial justice at the ICC? To answer this question, one needs to begin with taking a closer look at the concepts of adversariality and inquisitoriality. Our aim is not only to examine the criminal procedural systems, but also to ascertain a functional and effective model considering domestic approaches. The paper puts forward to claim that a more effective criminal procedure model could be created in the cooperation of constituents in international criminal procedure. The unification of constituents in the criminal proceedings demonstrate that the court is not a battleground as in adversarial-common courts; on the contrary, the constituents in the proceedings act with a team spirit. Eventually, it seems that such a criminal procedure at the international level could be exercised within an inquisitorial tradition, which is seen as a more functional model taking into account particularly political and social global developments.

Key Words: Criminal Procedural System, Inquisitorial Justice, Adversarial Justice, Judge, Prosecutor, Victim, Restorative Justice

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* There is no requirement of Ethics Committee Approval for this study.

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ÖZET

Bu çalışma iki ana kısımdan oluşmaktadır. Birinci kısımda tahkik ve itham sistemleri olarak adlandırılan ceza muhakemesi modelleri ve birbirleriyle yakınlaşmaları karşılaştırmalı bir bakış açısıyla incelenmiştir. İkinci kısımda odak noktamız Uluslararası Ceza Mahkemesi'nin (UCM) ceza muhakemesi sistemi üzerine olmuştur. Çalışmada, uluslararası mahkemelerde özellikle UCM'de içtihat hukuku temelli itham sistemi ve Avrupa hukuku temelli tahkik sistemleri olan temel ceza muhakemesi sistemleri, evrensel (global) bir düzeyde aralarındaki geçişler de dikkate alınarak incelenmiştir. Amacımız, şu sorunun cevabını bulmaktır: UCM'de ne dereceye kadar daha çok tahkik sistemine doğru bir eğilim vardır? Bu soruyu cevaplandırmak için, itham ve tahkik kavramlarına daha yakından bakmakla başlamak gerekir. Amacımız sadece ceza adaleti sistemlerini incelemek değil, ayrıca ulusal yaklaşımları da düşünerek fonksiyonel ve etkili bir ceza adaleti sistemini araştırmaktır. Çalışmada, uluslararası ceza muhakemesindeki unsurların işbirliği ile daha etkin bir ceza muhakemesi modeli oluşturulabileceği iddia edilmektedir. Ceza muhakemesine katılanların kollektifliği itham sistemindeki gibi mahkemenin bir çatışma alanı olmadığını, aksine muhakemeye katılanların takım ruhuyla hareket ettiğini göstermektedir. Nihayetinde, global düzeyde özellikle politik ve sosyal gelişmeleri de göz önünde bulundurmak suretiyle daha fonksiyonel bir model olarak görünen tahkik geleneğinden hareketle uluslararası düzeyde bir ceza muhakemesinin kurulabileceği tespit edilmiştir.

Anahtar Kelimeler: Ceza Muhakemesi Sistemi, Tahkik Sistemi, Itham Sistemi, Hakim, Savcı, Mağdur, Onarıcı Adalet

INTRODUCTION

There have been growing concerns about international justice procedures for a perfect and functional justice model for approximately two decades. In that respect, broadly speaking, legal, sociological, and cultural deliberations by foremost jurists have emanated from the establishment of *ad hoc*[1] tribunals for Yugoslavia (ICTY, 1991)[2] and Rwanda (ICTR, 1994)[3], followed by a permanent international criminal court (ICC, 1998)[4]. The purpose of these

1 Cengiz Başak, *Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar* (1 bs, Turhan Kitapevi 2003) 28 ff; Tezcan Durmuş, M Ruhan Erdem and Murat Önok, *Uluslararası Ceza Hukuku* (6 bs, Seçkin Yayıncılık 2021) 334 ff.

2 For the development of the tribunal see Ebru Çoban Öztürk, 'The International Criminal Court: Jurisdiction and the Concept of Sovereignty' (2014) 10 European Scientific Journal 141, 144–145; Tezcan, Erdem and Önok (n 1) 335 ff. For lessons learned about the ICTY's life see Minna Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 Journal of International Criminal Justice 427, 433–434.

3 For the development of the tribunal see Öztürk (n 2) 145; Tezcan, Erdem and Önok (n 1) 352 ff.

4 The International Criminal Court <http://www.hrw.org/topic/international-justice/international-criminal-court> accessed 19 December 2022. "During the Preparatory committee meetings, a 'Like-Minded Group' of states supportive of a new court emerged, an agreement was reached to hold a conference in the summer of 1998 to finalize and conclude the treaty"; and the Rome Statute was adopted by a vote of 120 to 7, with 21 abstentions. Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 148. The Rome Statue, by which a

deliberations has been 'to set paradigmatic fair trial standards' and 'a practical model' all over the world.[5] One of the goals of the international tribunals is "to provide exemplary procedures to serve as a model for rebuilding a legal system devastated by war crimes and human rights violation".[6] These elucidations seems to be rooted in inspiring debates around two main national law systems: *Common Law and Civil Law*. Justice values are considered upon distinctive backgrounds saliently in procedural law within these traditions[7], namely 'adversariality' and 'non-adversariality'[8].

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permanent and universal criminal court, namely the ICC, was founded, came into force in 2002. The Rome Statute of the International Criminal Court <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf > accessed 19 December 2022. For the historical development of the court see Öztürk (n 2) 142–144; Hamide Zafer, 'Ulusal Hukuk Sistemlerinin Roma Statüsü Ile Uyumlaştırılması-Alman Modeli' (2007) 6 MÜHFD (Aydın Aybay'a Armağan) 289, 289–290; Tezcan, Erdem and Önok (n 1) 359 ff; Bernhard Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court' (1990) 1 European Journal of International Law 67, 2; Albin Eser and others, *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Antonio Cassese, Paola Gaeta and John RWD Jones eds, 1st edn, Oxford University Press 2002) 1535 ff. *Telli* defines the court as a "hybrid court". See Kutlay Telli, *Cezasızlık Olgusuna Karşı Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar* (1 bs, On İki Levha Yayıncılık 2015) 15. From my point of view, with the establishment of the ICC, domestic substantive and procedural criminal law has become an internationally applicable legal science going beyond the locality. For the role of national courts in comparative international law see Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57, 57–92.

5 Richard Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011) 105. See also Richard Vogler, *A World View of Criminal Justice* (1st edn, Ashgate 2005) 6 ff; Cryer and others (n 4) 425.

6 Schrag (n 2) 428. According to *Delmas-Marty*, "the criminal law appears to be both a protection and a threat for fundamental rights and freedoms or, in other words, not only 'a law which protects' but 'a law from which protection' is required". For the opinion of *Delmas-Marty* see Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 578. In brief, human rights are not only the "shield" but also the "sword" of criminal law. One can easily say that human rights have a defensive and offensive role in "neutralizing and triggering the criminal." See ibid 578, 579 ff.

7 Hereinafter: The concept of non-adversariality will be preferred instead of 'inquisitoriality' to mention these traditions.

8 John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy' (2009) 7 Journal of International Criminal Justice 17, 17 ff; Vogler, *A World View of Criminal Justice* (n 5) 24 ff, 148 ff; Arie Freiberg, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8 European Journal of Criminology 82, 82 ff; Gregory A McClelland, 'A Non-Adversary Approach to International Criminal Tribunals' (2002) 26 Suffolk Transnational Law Review 1, 1 ff; Cryer and others (n 4) 425; Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 106; Halil Cesur, 'The Analytical Value of

It is an undeniable fact that 'international justice is imperfect justice'. Thus, we need a judicial 'restorative justice system'[9] which meets some indispensable (international)[10] human rights standards, such as the equality of arms, the right to a fair trial, and the right to be heard and to be judged by an impartial and independent tribunal.[11] The issue of the international criminal procedural law

the Adversarial-Inquisitorial Dichotomy in Approaches to Proof: The Examples of England and Turkey' (2018) 6 Ceza Hukuku ve Kriminoloji Dergisi 155, 156.

9 Freiberg (n 8) 93. Restorative justice is one of the most deliberated and challenged areas of criminology in the post-modern era, especially victim-offender mediation family group conferences, healing and sentencing circles, and community restorative boards. RJ offers a new vision of criminal justice that re-orientates the current system away from retributive thought to a more transformative and comprehensive method of doing justice. There are three central questions in this system to repair the harm and emphasise empowering ordinary persons: "What happened", "what harm resulted" and "what should be done". Drawing general framework, three "key stakeholders" come into play in the process of restorative justice: the victim, the offender and the community. To maximize the participation of these stakeholders, particularly the main victims and offenders 'in the search for repairing, healing, accountability and deterrence' is one of the foundational aims of the system. It is recognised by the restorative justice paradigm that the necessity for victims, the community and even the offender is created by the crime. For more information see Sercan Tokdemir, 'Honor Crimes in Turkey: Rethinking Honour Killings and Reconstructing the Community Using Restorative Justice System' (2013) 4 Law & Justice Review 75, 257 ff. A discussion of restorative justice regarding a critical and comparative point of view dealing with the historical process, definition, mentality, applied models, main principles and aims. See Sercan Tokdemir, 'Ceza Adaleti Sistemine Yeni Bir Yaklaşım: Tamamlayıcı Bir Sistem Olarak "Onarıcı Adalet" Mekanizması' (2017) 21 Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 75, 75 ff.

10 The field of international human rights is considered as convergence of both adversarial and inquisitorial procedural systems. S Anogika Souresh, 'The Adversarial vs Inquisitorial Dichotomy in International Criminal Law: A Redundant Conversation' (2019) 5 International Comparative Jurisprudence 81, 83.

11 Jackson (n 8) 25; Mireille Delmas-Marty, 'Global Crime Calls for Global Justice' (2002) 10 European Journal Crime Criminal Law & Criminal Justice 286, 286 ff; Cryer and others (n 4) 430–436; Kelly D Askin, 'Reflections on Some of the Most Significant Achievements of the ICTY' (2002) 37 New English Law Review 903, 903 ff. The best way to protect and secure human rights is providing facilities at domestic level, one of which is individual application to the institutional court. However, not all rights are available for individual application. For example, an individual application can be made to the Turkish Constitutional Court only for the rights under the common protection of the Turkish Constitution, the ECHR and its Additional Protocols. The rights in the subject of an individual application can be exemplified as follows: right to life, freedom from torture, freedom from slavery and forced labour, freedom of thought, belief and religion, right to liberty and security, right to a fair trial, no punishment without law, respect for private and family life, freedom of expression, freedom of assembly and association, right to an effective remedy, protection from discrimination. See Seyithan Kaya, 'Anayasa Mahkemesi Kararları Çerçevesinde Bireysel Başvuruya Konu Olan Haklar' (2018) XXII Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi 57, 69–85; Seyithan Kaya, *2017 Anayasa Değişiklikleri Çerçevesinde Anayasa Yargısı* (1 bs, Adalet Yayınevi 2018) 143–158.

model has been a much-disputed subject within inquisitorial and adversarial procedural traditions.

The paper begins by laying out the procedural dimensions of the research and first gives a brief overview of terminological basis of these concepts and a detailed examination of domestic criminal justice systems[12] including a comparative analysis based on these concepts for the best 'problem-solving'[13] approach. Having evaluated the role or functions of the ICC in international criminal law in short, criminal procedural dimensions will be discussed in order to seek the best criminal procedural model for the court. Before analysing the role of three actors-the judge, prosecutor and victims-; the paper will discuss the origins of the procedural regime at the ICC; then the paper will focus on an analysis related to a substantial "fall" from adversariality into inquisitoriality. Finally, the paper has argued that the best system should be non-adversariality (inquisitoriality) mentioning the significance of the unification of constituents in the courts like a team instead of a *battleground* as in adversarial-common courts.

I. A COMPARISION OF INQUISITORIAL AND ADVERSARIAL CRIMINAL JUSTICE SYSTEMS

A. Concepts of Inquisitorial and Adversarial

The terms inquisitorial[14] and adversarial[15] are two different concepts and refer to completely different law cultures. There is a commonly held view that the 'latter' term is based on the line of 'prosecutor-victim' whilst the 'former'

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12 For an evaluation of the gap between theory and practice from a domestic approach see Elizabeth Nevins-Saunders, 'Judicial Drift' (2020) 57 American Criminal Law Review 331, 331 ff.

13 Freiberg (n 8) 89; for the concept of 'problem-solving justice' see Tyrone Kirchengast, 'Mixed and Hybrid Systems of Justice and the Development of the Adversarial Paradigm: European Law, Inquisıtorial Processes and the Development of Community Justice in the Common Law States' [2019] Revista Da Faculdade Direito Universidade Federal Minas Gerais 513, 526 ff.

14 Inquisitorial is also described as non-adversarial. For more information about the term see Freiberg, *op cit*, p. 82 ff. *Sklansky* uses interchangeable "inquisitorial" and "civil law" terms for inquisitorialism because the use of these terms externalizes "a particular understanding of the legal systems of Continental Europe". See David Alan Sklansky, 'Anti-Inquisitorialism' (2008) 122 Harvard Law Review 1634, 1639.

15 The adversarial system is called the "accusation system" because it constitutes the basis for one to be accused by another person to be punished as a criminal and the accuser must prove the guilt. Nurullah Kunter, Feridun Yenisey and Ayşe Nuhoğlu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 16. Bası, İstanbul 2008,* (16 bs, Beta Yayınevi 2008) 77. *Sklansky* uses the anti-inquisitorialism term for adversarialism to emphasise its contrary. See Sklansky (n 14) 1635 ff. *Cesur* highlights the difference between the concepts of "accusatorial' and "adversarial'. See Cesur (n 8) 157, fn 6.

term takes shape on the line of 'prosecutor-defendant'.[16] Considering these concepts from a 'terminological point' may contribute to understanding them before making some evaluations on a shift from adversarial to inquisitorial.

In that sense, *Ambos* examines the terminology and draws our attention to the Middle Age known as 'dark times'.[17] Then, the *inquisitorial procedure* was addressed as *inquisition/inquiry* and was based on *judicial control* by the judge responsible for the investigation of the cases; thus the inquisitorial concept was generally described in civil law. The inquisitorial judgements were shaped under two phases: Investigation and pre-trial, which are undertaken by *the prosecution* and/or '*examining/investigating judge*' *(juge d'instruction)*. In both systems, a state institution like the police force initiates the proceedings.[18] In that respect, *Parisi* also compares these terms to Medieval European Law. The inquisitorial procedure was prompted by a 'judicial system' named *exofficio -processus per inquisitionem* whereas adversarial proceeding was attempted merely by a 'private party' named *processus per accusationem*.[19]

However, on one hand, as *Cryer et al.* stated, there is a wrong perception that adversarial law is an 'accusatorial' model while inquisitorial is not.[20] On the other hand, *Ambos* asserts that both systems are accusatorial because the hands of an institution separate from the pre-trial judge initiate prosecution and indictment.[21] Accordingly, 'no domestic systems represent a pure model'.[22] Moreover, *Freiberg* notes that inquisitorial is a problematic concept and prefers non-adversarial instead of it.[23]

To me, it seems that the non-adversarial concept should be used instead of the inquisitorial. I would say that 'things are known through their opposites'. In

16 Teresa Armenta Deu, 'The Inquisitorial-Accusatorial Dichotomy in Criminal Proceedings: Meaning and Usefulness' (Internatıonal Associatıon of Procedural Law 2009) 1, 2; Sercan Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (Thesis of Master (unpublished), University of Sussex (Law School) 2013) 3. For a defendant as a passive subject in criminal procedural law or the authority of individual defence see Doğan Soyaslan, *Ceza Muhakemesi Hukuku* (8 bs, Yetkin Yayınları 2020) 202 ff.

17 Kai Ambos, 'International Criminal Procedure:'Adversarial','Inquisitorial'or Mixed?' (2003) 3 Third International Criminal Law Review 1, 2–4.

18 Francesco Parisi, 'Rent-Seeking through Litigation: Adversarial and Inquisitorial Systems Compared' (2002) 22 International Review of Law and Economics 193, 194–197; Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603, 604; Freiberg (n 8) 96; Jackson (n 8) 35; Vogler, *A World View of Criminal Justice* (n 5) 25–27, 28 ff; Ambos (n 17) 2–4. See also art.64/8. of the Rome Statue

19 Parisi (n 18) 194.

20 Cryer and others (n 4) 425.

21 Ambos (n 17) 3; Kai Ambos, *Internationales Strafrecht* (5 Aufl, C H Beck 2018), § 8, Rn 20-22.

22 Cryer and others (n 4) 425; Deu (n 16) 4.

23 Freiberg (n 8) 98.

other words, if adversarial concept is used as non-adversarial, which means the opposite meaning of inquisitorial, inquisitorial concept can be perceived easily. *Vice versa,* for instance, *Sklansky* uses an anti-inquisitorial term, referring to the words of William Connolly: 'contrast-model'.[24]

B. Inquisitorial and Adversarial Criminal Justice Systems: A Comparative Analysis

1. In General

There are two[25] major criminal justice systems in the world, which are opposite to each other, namely inquisitoriality and adversariality.[26] While the adversarial justice system is based on "common law tradition", the inquisitorial justice system has a relationship with "civil law tradition".[27] It is suggested that two systems should converge; however, inquisitorial and adversarial systems, as criminal procedure systems, are different from each other both in theory and in practice.[28] There is also a third system named the "cooperation system" implemented in the Continental European procedural law today.[29] With regards to the relationship between the criminal procedure authorities, three criminal procedural systems, inquisitoriality, adversariality, and cooperation are accepted.[30]

One can say that these domestic legal traditions, whose meanings and methods are different, have an important distinction and this distinction has different effects throughout the proceedings and leads to different procedures.

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24 Sklansky (n 14) 1635–1636.

25 The dichotomy, nowadays, has been a much-disputed subject within the concepts of procedural law and economics. See Alice Guerra and others, 'Deterrence, Settlement, and Litigation under Adversarial versus Inquisitorial Systems' [2022] Public Choice 1, 1; Parisi (n 18) 192 ff. For historical developments of both systems in Europe see Souresh (n 10) 82–83.

26 Albin Eser, '"Adversatorish" Versus "Inquisitorisch"- Auf Der Suche Nach Optimalen Verfahrensstrukturen', *Prof. Dr. Feridun Yenisey'e Armağan*, vol I (1 bs, Beta Yayınevi 2014) 807 ff; Cesur (n 8) 156–157. For an experimental approach in terms of deterrence, settlement and litigation under adversarial versus inquisitorial systems see Guerra and others (n 25) 1–26.

27 Christopher Osakwe, 'Modern Soviet Criminal Procedure: A Critical Analysis' (1983) 57 Tulane Law Review 439, 447; Freiberg (n 8) 83; Ambos (n 21), § 8, Rn 27, fn 53; Guerra and others (n 25) 1–2; Cesur (n 8) 156.

28 Diehm, *op cit*, p. 6. James W Diehm, 'The Introduction Of Jury Trials And Adversarial Elements into The Former Soviet Union And Other Inquisitorial Countries' (2001) 11 J. Transnational Law & Policy 1, 6.

29 Sercan Tokdemir and Özlem Çelik, 'Kamu Davası ve Toplumsal Algılar', *Prof. Dr. Feridun Yenisey'e Armağan*, vol I (Beta Yayınevi 2014) 1490; Veli Özer Özbek, Koray Doğan and Pınar Bacaksız, *Ceza Muhakemesi Hukuku* (15 bs, Seçkin Yayıncılık 2022) 43.

30 Özbek, Doğan and Bacaksız (n 29) 41.

The inquisitoriality refers to "Continental or Romano-Germanic tradition" and the adversariality implies "Anglo-American tradition". Considering that the role of the parties and, of course, judges reveal the main difference between the "procedural systems", the aim of both is to find the truth.[31] "Discovery of the truth"[32], "protection of the accused from government misconduct" and "promoting respect for the criminal justice system" can be mentioned as basic functions of criminal procedural law in this context.[33] Historically, criminal procedural law has gone through three phases in terms of its purpose, as follows, the protection of the accused, the punishment of the criminal, and the search for the truth. Revealing the material truth, ensuring the fulfilment of the principles of the democratic state of law, and ensuring legal peace can also be mentioned as the second prominent purpose of criminal procedural law.[34]

2. Fundamental Features of Systems

The characteristic features of the inquisitorial and adversarial justice systems and the differences[35] between them can be summarized as follows.

a. Inquisitorial Justice System

In the inquisitorial justice system[36], public agencies carry out the criminal investigation and trial objectively, and only one case is brought before the court.

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31 Cryer and others (n 4) 424–425. Also see Ambos (n 17) 1 ff; Ambos (n 21), § 8, Rn 27, fn 53. For the aim of criminal procedural law, see Bahri Öztürk and others, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku* (Bahri Öztürk ed, 16 bs, Seçkin Yayıncılık 2022) 31; Özbek, Doğan and Bacaksız (n 29) 39–40.

32 Eser (n 26) 823–826.

33 Exum, J. J. (2008), The Essence of the Rules: A Comparison of Turkish and U.S Criminal Procedure" in: In Turkish Criminal Procedural Code translated by Dr Yenisey, Bahçeşehir University; editors: Jelani Jefferson Exum and Ayşe Tezel, p.2-3. Jelani Jefferson Exum, *The Essence of the Rules: A Comparison of Turkish and U.S. Criminal Procedure, Turkish Criminal Procedure Code* (Jelani Jefferson Exum and Ayşe Tezel eds, Yenisey Feridun tr, 1st edn, Beta Yayınevi 2009) 2–3. Other purposes of criminal procedure are: "Accuracy", "efficiency", "respect", "fairness", "quality", adversarial", "participation", "appeals" and "justice". See Tokdemir and Çelik (n 29) 1497. Criminal procedure law is very useful as a branch of law for society because it is a tool for punishing the criminal. It is also useful for the person because his/her innocence can be proved at the end of the trial. Thus, the person is acquitted based on the decision that he is not guilty. See Soyaslan (n 16) 44.

34 Kunter, Yenisey and Nuhoğlu (n 15) 25; Feridun Yenisey and Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku Ders Kitabı* (2 bs, Bahçeşehir Üniversitesi Yayınları 2014) 71–72; Feridun Yenisey and Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku* (10th edn, Seçkin Yayıncılık 2022) 81. For the history of criminal procedural law see Öztürk and others (n 31) 33–34.

35 Cesur (n 8) 156. The basis of the difference between the two systems can be relied on 12th Century (Medieval) European Law. See Parisi (n 18) 194. According to *Eser*, criminal procedural systems can be compared critically on three points: the roles of the participants and the effectiveness of the criminal procedure, and the type and the scope of truth-seeking. See Eser (n 26) 816, 833.

36 Eser (n 26) 811–812; Guerra and others (n 25) 1 ff; Souresh (n 10) 81 ff.

Even if the interests of the defence counsel are considered in the investigation stage, there is a judicial examination (*juge d'instructio*n) under the supervision of the judge. A dossier is created for the entire case, during which the police follow the instructions of the prosecutor and the examining judge. When it comes to the trial stage, the judge has the access to the dossier, unlike the judge at the investigation stage. To find the truth, the trial judge more actively plays a very crucial and intervening role.[37] The judge takes action-*ex officio*[38]-and decides about the incident. In other words, there is no need for another organ for him/her to act.[39] The inquiry is under the control of and conducted by an impartial[40] judge who takes an active role in the inquiry. Witnesses are summoned by the court. The order of trial is determined, and the judge conducts the most of examinations. Experts are determined and examined by the judge if needed. As for lawyers etc., they play a passive role.[41] *Schabas* summarizes the role of the judge in the inquisitorial proceedings as follows:

Under the inquisitorial system, instructing magistrates prepare the case by collecting evidence and interviewing witnesses, often unbeknownst to the accused.[42]

Vogler argues that four fundamental features can be mentioned for the inquisitorial procedural model. The first crucial feature is the hierarchical structure of authority. The inquisitorial system relied upon "a hierarchical system of authority in which power is delegated downwards through a chain of subordinate officials of decreasing status". That is to say, the first and main characteristic is that this system is an authoritarian procedural model. The second feature is that the inquisitorial system has an ongoing bureaucratic process. Third, it is "the use of different forms of intolerable pressure against defendants to achieve cooperation. Finally, the "ideology and ruling dynamic of the inquisitorial system" is not based on law, and *vice versa*, on "rational deduction and forensic inquiry".[43]

Kunter et al. mention five main features of the inquisitorial procedural model. Beginning with the position of the judge that he/she is almost in the position of the plaintiff and can take the incidents on his own as soon as he/she has heard about them. Furthermore, the judge is free in the matter of collecting

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37 Cryer and others (n 4) 425. For more information see William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 251–252; Özbek, Doğan and Bacaksız (n 29) 42–43; Souresh (n 10) 82.

38 *Processus per inquisitionem* in Latin. See Parisi (n 18) 194.Par

39 Tokdemir and Çelik (n 29) 1490–1491.

40 The right to an impartial judge is a fundamental principle for due process, which requires a fair and impartial court. See Nevins-Saunders (n 12) 348.

41 Diehm (n 28) 6.

42 Schabas (n 37) 250.

43 Vogler, *A World View of Criminal Justice* (n 5) 25, 26.

evidence, that is, he/she is not bound up by the evidence collected by the prosecutor and defence counsel. When it comes to the proceeding, every stage in the process is secret and not accusatorial. That is to say, the accused has not had an active role and his/her written statement is taken. Last but not least, the accused and the judge does not get position equally and the accused might be arrested with a warrant until before the verdict.[44]

To sum up, 'what is not in the file is not in the world'. This is the main feature of the inquisitorial system.[45]

There has been a shift from the classical inquisitorial system to the neo-inquisitorial system in the historical developments. Neo-inquisitorial justice system is a distorted inquisitorial model in which the powers of the prosecutor are much more than the powers of the judge. In other words, there is a weaker judge against the prosecutor. In the mere inquisitorial system dominated in Europe until the 19th century, "a (nother) judge would enter a judgment based on an official review of the file". Under neo-inquisitoriality, the trial was conducted not by the parties, but by a judge. The judge does not establish the conviction regarding evidence orally; he/she devotes himself/herself to confirming points in a written dossier. Hereby, the pre-trial stage, namely "the production dossier" is more significant. However, at this stage defence counsel has a limited role.[46] Within this system, the state, acting objectively and on behalf of those who are involved in the case, including the accused, actively investigates the circumstances of the crime to reveal what happened. At that point, the state has the duty of collecting both exculpatory[47] and inculpatory[48] evidence.[49]

In the classic inquisitorial procedure, the two-pronged investigation is the duty of the state and a 'neutral officer of the state' conducts the investigation. In that regard, the dossier regime is the main typical feature of the inquisitorial justice style. The prosecutor opens an investigation in light of the gathered information and decides whether the evidence is satisfactory to make the first move for the procedure. In addition, the dossier of the prosecutor must include

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44 Kunter, Yenisey and Nuhoğlu (n 15) 78.

45 William Burnham and Jeffrey D Kahn, 'Russia's Criminal Procedure Code Five Years Out' (2008) 33 1, 2.

46 Peter H Solomon Jr, 'Post-Soviet Criminal Justice: The Persistence of Distorted Neo-Inquisitorialism' (2015) 19 Theoretical Criminology 159, 159, 160, 161.

47 The term means, "Involving **the** removal **of** blame **from someone".** For definition see, exculpatory<https://dictionary.cambridge.org/dictionary/english/exculpatory> accessed 19 May 2022.

48 The term inculpatory means "implying or imputing guilt, tending to incriminate or inculpate". For definition see inculpatory<https://www.merriam-webster.com/dictionary/inculpatory#:~:text=Definition%20of%20inculpatory,or%20inculpate%20an%20inculpatory%20statement> accessed 19 May 2022.

49 Burnham and Kahn (n 45) 1–2.

both *inculpatory* and *exculpatory* proofs. It means that the prosecutor has to be a 'non-partisan' in the pre-trial investigation to ensure impartiality. As for the neo-inquisitorial procedure mode, a 'directive manager' mandates inquisitorial proceedings. That is to say that the concept of neo-inquisitorial refers to a judge-oriented procedure (*judge d'instruction, or instructing magistrate*).[50]

Solomon highlights that the neo-inquisitorial system leads to "fair outcomes" only under two conditions. First, the conduct of the inquiry through pre-trial must be neutral. The second condition is that the judge must be present at the trial for impartially questioning the accusation and ruling the trial.[51]

b. Adversarial Justice System

The adversarial justice system[52], conversely, suggests two "adversarial parties" which take their case to court. Adversarial parties named prosecution and defence counsel conduct their own investigations. The judge, who intervenes in a case only in procedural matters raised by the parties, is in the position of a referee. It would not be wrong to say that this system is suitable for a jury system. In this system, parties are equal. The judge does not participate in the discussions between the parties[53] and the process of the public case develops in the presence of the parties.[54] In brief, a dispute related to a criminal case takes place between two sides in adversarial proceedings. In theory, both the prosecutor and defence counsel have equal positions before a passive and neutral adjudicator concerning the preparation of the criminal case and presentation of evidence. The task of the judge is to provide that the parties obey the procedural rules. The parties can achieve fairness by controlling their

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50 Ambos (n 17) 9; Kress (n 18) 612; Solomon Jr (n 46) 78.

51 Solomon Jr (n 46) 161.

52 Eser (n 26) 810–811; Souresh (n 10) 81 ff; Cesur (n 8) 156. The proponents accept that the adversarial justice system is the best model of criminal procedural law in terms of "protecting individual dignity and autonomy". See Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 Legal Studies 519, 525. For the disadvantages of adversariality see Özbek, Doğan and Bacaksız (n 29) 42. For important assessments about retiring from the adversarial justice system to the inquisitorial justice system in some common law countries such as America, England, Canada etc. in favour of a hybrid model taking an example of international criminal procedure see Kirchengast (n 13) 513 ff.

53 Eser (n 26) 816. The judge, as the audience listens to the parties. See Kunter, Yenisey and Nuhoğlu (n 15) 76.

54 Cryer and others (n 4) 425, 426. Also, see Souresh (n 10) 81–82. Mehmet Emin Yapar, *Ceza Muhakemesinde İddia Pazarlığı* (1 bs, Adalet Yayınevi 2013) 45. *Schabas* describes the courtroom in an adversarial system as a "battleground". Adversarial trials depend on 'Hegelian dialectic' called thesis+antithesis=synthesis. The prosecutor, the accused and the lawyer take place in the thesis+antithesis part of the formula, and the judge decides by synthesizing what was put forward by those. See Schabas (n 37) 251; Jackson (n 8) 22; Özbek, Doğan and Bacaksız (n 29) 41.

case by choosing evidence and "the issues with the trial as the battleground on which the issue of the defendant's guilt is resolved".[55]

Another striking issue could be the collection of evidence. The collection of evidence is carried out entirely by the parties of the case in terms of deciding the case. The lawyer of the prosecutor and the accused/suspect collects evidence related to the case at the beginning. The decision is based on the collected evidence and it is not possible to obtain new evidence during the trial process. The judge or the jury has no competence in collecting evidence. The main duty of the judge is to administer the case within the framework of procedural rules.[56] In other words, the judge is a passive figure who intervenes in how the parties should act in procedural matters, whether they enjoy equal rights while presenting their evidence and defending on behalf of the client, the state and the accused.[57] In this system, in conclusion, an impartial decision-maker consists of the jury or the judge. There are strict rules set by law regarding the presentation of evidence and the conduct of the trial process. The case has two adversaries and only one win at the end of the trial.[58] To sum up, 'what is not proven by first-hand evidence presented at trial is not in the world'. This is the main feature of the adversarial system.[59]

The main features of the adversarial system can be summarized as follows: In advance, the accusation is needed for the judge who acts in the position of the referee in a match, which means that he/she is not free to collect evidence and is bound up with the evidence presented by the parties. Subsequently, the accused cannot be arrested with a warrant before the definitive verdict as a consequence of the equality of the parties. In addition, there is freedom for everyone regarding accusation; and the criminal procedure has similarities with civil procedure. Lastly, the proceeding is verbal, accusatorial and open from the beginning to the end. Since the judge has a passive position, the accusation is only for the parties in this system.[60] It can be concluded in the sayings of, respectively, *Nevins-Saunders* and *Freiberg*:

> *Ultimately, the adversarial system rests on a belief that when both parties are adequately represented, the process is not only more fair but also more likely to reveal the truth.*[61]

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55 McEwan (n 52) 520. The judge is seen as a "passive arbitrator" in an ideal adversarial system. See Cesur (n 8) 157.

56 Yapar (n 54) 45.

57 Burnham and Kahn (n 45) 2.

58 Yapar (n 54) 45.

59 Burnham and Kahn (n 45) 2.

60 Kunter, Yenisey and Nuhoğlu (n 15) 77; Özbek, Doğan and Bacaksız (n 29) 41–42.

61 Nevins-Saunders (n 12) 343.

The adversarial paradigm: The parties and not the judge have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.[62]

3. A Brief Comparison of Systems

Despite the extraordinary development of the adversarial system over two decades, the inquisitorial system has been the dominant model in the world for the last eight hundred years. It can be said that the influence of this system persists tenaciously. In contrast to the adversarial system, the inquisitorial system has differences through a variety of "regional traditions".[63]

As a term, inquisitoriality has the nature of inquiry and adversariality has the nature of contest.[64] Trials in the inquisitorial system are in general shorter than the adversarial system's trials. Because most of the evidence is presented to the court before the trial begins. Adversarial trials, on the contrary, take longer and are more comprehensive. Trials under an adversarial system are complicated and very few cases move to the trial stage. Most cases end with a "reasonable compromise" between the prosecutor and the suspect before the prosecution stage, which is called "plea bargaining". This institution is not allowed in the inquisitorial system. No convictions can be given before the court evaluates the evidence collected during the investigation phase.[65] The former legal regime presents a competition between parties in bringing evidence to vanquish the opponent, which is absent or weaker in the latter legal regime. It is claimed that this competition has an effect on truth-telling and improves decision-making.[66] The truth is also sometimes interpreted differently in both. It means "objective truth" in inquisitoriality and "procedural truth" in adversariality.[67] Since the parties are the active subjects of the trial process in the adversarial system, they determine the future of the case throughout the trial; while the judge has an important role in terms of the course and outcome of the case in the inquisitorial system.[68]

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62 Freiberg (n 8) 83 (cited Australian Law Reform Commission 2000: paragraph 1.117).

63 Vogler, *A World View of Criminal Justice* (n 5) 25.

64 Diehm (n 28) 6. On this basis, the inquisitorial system differentiates from the adversarial system in terms of the source of law, exclusionary rules, investigatory and pretrial procedures, pleas of guilty and plea bargaining, and trial and appellate procedures. For instance, the inquisitorial system relies on code provisions rather than case precedent; pleas of guilty and plea bargaining are absent in this system. For detailed information, see ibid 8–15; Ambos (n 21), § 8, Rn 40; Guerra and others (n 25) 1 ff.

65 Schabas (n 37) 251.

66 Guerra and others (n 25) 2, 4.

67 Cryer and others (n 4) 426.

68 Vogler, *A World View of Criminal Justice* (n 5) 147.

While the accused/suspect is put ahead in the adversarial system[69], the judge is held superior in the inquisitorial system.[70] The cooperation system is based on the collaboration between the prosecutor, defence counsel and judge. To put in another saying, the judge does not make decisions regarding only the prosecutor and defence counsel as in the adversarial system; and he/she does not monopolise research as in the inquisitorial system. That is, the verdict is neither the dialogue of the parties nor the monologue of the judge; it is rather a colloquium held by all of them.[71] Consequently, the prosecutor prepares the indictment, the defence counsel gives counter-opinions and at the end of the trial, the judge takes all of them into consideration and renders a verdict given collectively in the criminal procedure by researching the material truth.[72]

4. The Convergence of Systems: A Drift towards a Mixed System?

It is argued that the historical development of criminal procedural law is "analogous to the evolutionary development of mankind" in a natural progression. Accusatory justice is the former model of criminal justice. This form of justice is pursued in England[73] and the United States (USA).[74] The third and more contemporary development is the mixed stage. A hybrid model combines two systems importing the efficiency[75] and the truth of the inquisitoriality and the equality arms of the adversariality.[76] *Esmein* underlines this argument as follows:

> *Three fundamental types of procedure are, in effect, distinguishable, - the accusatorial type, the inquisitorial type, and the mixed type. The criminal law of almost every nation has begun with the accusatory procedure and has changed to the inquisitorial procedure*.[77]

Osakwe rephrases this point:

> *The modern adversary (accusatorial) system is only one historical step from the private vengeance system and retains some of its characteristic*

69 Eser (n 26) 818; Guerra and others (n 25) 1 ff.

70 Guerra and others (n 25) 1–2.

71 Kunter, Yenisey and Nuhoğlu (n 15) 79.

72 Yenisey and Nuhoğlu, *Ceza Muhakemesi Hukuku Ders Kitabı* (n 34) 216; Yenisey and Nuhoğlu, *Ceza Muhakemesi Hukuku* (n 34) 248.

73 A comparative study in the adversarial-inquisitorial dichotomy in respect of proof with the examples of England and Turkey see Cesur (n 8) 156 ff.

74 Vogler, *A World View of Criminal Justice* (n 5) 146.

75 For the comparison of criminal procedural models related to the efficiency of the criminal process see Eser (n 26) 821–822.

76 Vogler, *A World View of Criminal Justice* (n 5) 146.

77 Adhémar Esmein, *A History of Continental Criminal Procedure with Special Reference to France*, vol 5 (John Murray 1914) cited in Vogler (n 12) 146. A mixed system including jury trials was adopted by judicial reforms made in 1866. Nevertheless, all reforms containing jury trial provisions were repealed after Bolsheviks came to power. See Diehm (n 28) 21–22.

> *features. By contrast, the inquisitorial system begins historically where [when] the adversary system stopped its development. It is two historical steps removed from the system of private vengeance. Therefore from the standpoint of legal anthropology, it is historically superior to the adversary system*.[78]

Vogler concludes that there is no basis for the aforementioned "developmental approach". This approach represents a fallacy. The author implies two misunderstandings, which arise from the concept of adversariality. One is the "developmental fallacy". The other is the "accusatorial fallacy" about the developmental approach. The second one arises from a "misunderstanding of the dominant mode of trial in the Anglo-American world". The historical development is adversarial rather than accusatorial. Even though it is a common misunderstanding, it comes from the interchange of accusatorial and adversarial terms. However, the adversariality, as a radical criminal procedure model in England in the 18th century, was almost not related to early accusatorial tradition.[79]

In our days[80], there is a stream from the classic neo-inquisitorial system to a modern neo-inquisitorial justice system in Western European countries. Because judicial investigation has been controversial and unfavourable, many countries have eliminated or made limitations on its use. For instance, Germany disapplied judicial examination and the duty of directing investigations carried out by police was given to the prosecutor with amendments in 1974. In Germany, a trial managed by a "powerful and impartial judge" is inquisitorial rather than adversarial.[81] As stated by *Solomon* "the conduct of the judge reflected legal demands for full independence from the parties; judges were not part of a team effort to convict the accused. The judge had the right to seek and generate evidence, but only after the sides presented their cases".[82]

When one is concerned about a modernized inquisitorial pre-trial with an adversarial trial, namely a mixed system, the criminal justice system in Italy is the first to come to one's mind. As in Germany, the prosecutor functions as an investigating magistrate and the main figure in the pre-trial stage. On one hand, the system in Italy is currently based on "the formal opening of cases" and "construction of a file"; on the other hand, the dossier prepared by the prosecutor does not send directly to the judge before/during the trial. A smaller file including merely the indictment and the list of documents-but,

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78 Osakwe (n 27) 447.

79 Vogler, *A World View of Criminal Justice* (n 5) 146.

80 An ideal procedural model does not represent criminal procedural types in continental Europe or Anglo-American procedures. See Cesur (n 8) 159.

81 Solomon, Post-Soviet Criminal Justice, p. 162. Solomon Jr (n 46) 162.

82 ibid.

not evidence- is received by the judge, which means a "two-file system".[83] In the words of *Solomon*, it means to ensure that "judges were not predisposed to the prosecutor's case before he/she established it through oral examination of witnesses. This facilitated an adversarial trial, what journalists in Italy called."

Since the end of the 20th century, Germany and Italy have had a modern neo-inquisitorial model that relies on a pre-trial system in which an investigating magistrate does not create the dossier. It is created by police who works under the authority of the prosecutor. The evidence is assessed by the prosecutor and cases could be dismissed by employing alternatives to the trial or directed to the judge. An adversarial trial with reliance on oral testimony is required in Italy. However, in Germany, it relies on the judge to treat the dossier critically and to make trial proceedings stop.[84]

The approach of convergence[85] between Anglo-American and civilian styles of the criminal justice system is interpreted as a movement toward the civilian criminal procedure.[86] However, *McEvan* suggests a convergence which is "not towards a centre ground between the two kinds of system, but possibly towards a new model sharing elements inimical to both". It appears that the distinction between the inquisitorial and adversarial criminal justice systems represents some rooted in-depth views regarding the convenient functionality of criminal proceedings about "the relative importance of ascertaining the true facts as opposed to using party control over the process as a protection against state power".[87]

II. THE PROCEDURAL REGIME OF THE INTERNATIONAL CRIMINAL COURT

A. Functions of the International Criminal Court: A Brief Overview

It is a well-known fact that the ICC was a "major success" for international criminal law at the beginning of the 2000s. The ICC is not only an institution to give a verdict upon individual guilt of international crimes' perpetrators. It is claimed that the court has three different functions, that is, three different faces. *Jessberger/Geneuss* describes these faces as *"Three hats on one hand"*.[88]

First, distinctively, the ICC works as a "criminal court" on the international scale by carrying out investigation, prosecution and conviction for specific international crimes under its jurisdiction. Today, "individual criminal

83 ibid 162–163.
84 ibid 163.
85 Eser (n 26) 813.
86 McEwan (n 52) 543.
87 ibid 520, 523.
88 Florian Jessberger and Julia Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10 Journal of International Criminal Justice 1081, 1083, 1084.

responsibility" and "the jurisdiction of international tribunals", especially by establishing the ICC, have been settled in international law. This function of the court has a broad and more general meaning in terms of both goals of criminal law and punishment. It is significant to highlight that the action of the court in investigations, prosecutions, trials and punishment does not only have a symbolically broader effect but also the performance of the court raises global awareness. It is clear that the court carries out "an integrative action". Nonetheless, the ICC is a treaty-based international court rather than a supranational legal institution.[89]

Secondly, the ICC has a role named "watchdog court". The ICC is an integration of international and local powers based on legality through merging the sovereignty and the legal enforcement of the international system. The court acts within a horizontal[90] framework using vertical elements and interacts with its parties. This second function is related to the "complementarity principle", which designates the judicial relationships between states and the court. The purpose is to push state parties according to their international obligations to investigate, prosecute and punish perpetrators who commit international crimes. Additionally, an indirect contribution to ending impunity and the prevention of international crimes is aimed in this manner.[91]

Lastly, it is claimed that the ICC is a "world security court". It means that when the Security Council under Chapter VII of the United Nations Charter addresses a situation to the court, the court acts as an institution to establish international peace and to help for security regarding an ongoing conflict between different groups. This function could mean that the ICC is a judicial body considering its organs.[92] I would say that "just being in existence is not enough" while people arise their demands and expectations related to justice. An apparent gap between theoretical promises and achievements of the ICC in reality could be seen clearly considering the practice of the court for more than twenty years. Regarding global, political and legal developments, on one hand the ICC has a significant role in the (post)-conflicts, on the other hand it seems difficult to bridge the gap between its desires in theory and achievements in reality. In this sense, it is worthy to discuss whether the ICC is a proper international institution or not.[93]

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89 ibid 1085–1087.

90 ibid 1083, 1084.

91 See more ibid 1087–1090. For more information about "the ideology of deterrence" related to the aims of the ICC see Dawn L Rothe and Victoria E Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' (2013) 13 International Criminal Law Review 191, 191 ff; Zafer (n 4) 304.

92 See more Jessberger and Geneuss (n 88) 1090–1092. For the answer to the following question: Has the ICC a role in the phenomenon of impunity? See Telli (n 4) 13 ff.

93 Sercan Tokdemir, 'International Criminal Court within Global Realities, And Desires

B. Origins of the Procedural Regime at the International Criminal Court

Procedural systems at international tribunals (*ad hoc*[94] and *mixed tribunals)* before the arrival of the ICC were based on adversariality.[95] However, as stated by *Kress*, the procedural structure of the ICC is a 'truly unique' system, which is neither an inquisitorial system nor is it adversarial.[96] The procedural models for the ICC were discussed by many states implicated in drafting the Rome Statute. For example, a draft by France (*so-called 'French Draft'*) included important elements from common and civil law and provided for both systems' meeting in the Statute and the Rules of Procedure and Evidence[97]. Initially, attorneys in common law drafted the *ad hoc tribunals'* law and the Statute of the International Law Commission (ILC) based on adversariality and discussed the common law-oriented procedure for the ICC in the first Preparatory Committee negotiations (1995). Fundamentals of inquisitoriality were also presented during discussions, such as the issue of '*in absentia trials'* principled in *Romano-Germanic* justice culture (civil law).[98]

It is important to realize that the original ideologies of the ICC were built upon the adversarial culture; of course, to a lesser degree than the ICTY and the ICTR. However, drafters offered essential materials from the context of both terms.[99] In other words, the procedural system at the ICC is primarily adversarial, but there are many inquisitorial elements in terms of victim participation and the position of the judge. For example, the judge can order "the production of evidence" or "the testimony or attendance of witnesses" as required. It is so obvious that the adversarial/inquisitorial dichotomy cannot restrict the international criminal procedure.[100]

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beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (2013) XVII EÜHFD 163, 163 ff.

94 Ambos (n 21), § 8, Rn 1.

95 In *Prosecutor v. Tadic* case, the rules of the ICTY "are more akin to the adversarial common law system and such systems contain a general exclusionary rule against hearsay", which is argued by the defence. Though, it is approved by the Trial Chamber that the ICTY "does not strictly follow the procedure of civil law or common law jurisdictions" cited in Souresh (n 10) 81.

96 Kress (n 18) 605.

97 Rules of Procedural and Evidence,
<https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf> accessed 07 December 2022.

98 Ambos (n 17) 5–10.

99 Gordon (n 64) 41; Vladimir Tochilovsky, 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience' (2002) 10 European journal Crime Criminal Law & Criminal Justice 268, 268; Schabas (n 10) 249–252; Cryer and others (n 6) 428–429.

100 Souresh (n 10) 85. *"...ICC has adopted a largely adversarial trial procedure, but like many inquisitorial systems, it allows victim participation and appoints lawyers to represent them. This shows how the adversarial and inquisitorial models have converged in order to achieve the ICC's aims."* See ibid 84.

Schabas believes that the 'fight between common law and civil law has been replaced by an agreement on common principles and civil behaviour'[101]. *Cryer et al.* reject the sharp contrast at the ICC citing the decision of the ICTY Trial Chamber as follows:

The procedures were a 'unique amalgam of common and civil law features' and did not strictly follow the procedure of common law or civil law.[102]

Last but not least; the first procedural decisions of the ICC were made under inquisitorial model. In this regard, the main reference to distinguish both inquisitoriality and adversariality is the role of the judge, who is like a fact-finder. The *judges* at the ICC presents the main features of inquisitorial proceedings, similarly, the *prosecutor* acts independently and impartially while conducting the investigation (*so-called proprio motu*[103]). Those 'interventionist judges' keep judicial control in their hands. As for *victims*, they play a vital role in the proceedings of the ICC. The function of this body of the court has been granted and fascinated by the inquisitorial rules and still remains today, such as in terms of participation-*partie civile*.[104]

It is now clear that the ICC is a judicial institution which follows "a highly formulized specific procedure and commands only the classical 'tools' of a criminal judicial system"-such as arrest warrants, indictments and judgements.[105]

C. The Position of the Judge, the Prosecutor and Victims

For a functional procedure model on a universal scale, one needs to look at the role of some actors in different domestic procedures: the judge, the prosecutor, and victims.[106]

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101 Schabas (n 37) 249–252.

102 Cryer and others (n 4) 428–429. See also Souresh (n 10) 84.

103 Rome Statute art.76, 77 and 121/2.

104 Cryer and others (n 4) 436–440; Schabas (n 37) 242–252. Rome Statute art.15/3, 19/3 and 82/4.

105 Jessberger and Geneuss (n 88) 1085.

106 *Glasius* points out that "prosecutors and judges of international criminal courts may be able to strengthen the empowering dynamics pointed … not just as to the socio-political and cultural environment, but also the wider legal environment they operate in, without reifying what appear to be the tenets of local tradition." See Glasius Marlies, 'Do International Criminal Courts Require Democratic Legitimacy' (2012) 23 The European Journal of International Law 43, 57.57.","plainCitation":"Glasius Marlies, 'Do International Criminal Courts Require Democratic Legitimacy' (2012 In a criminal justice system, one can say that there are three subjects by right of office: Judge, prosecutor and defendant. The system is carried out in cooperation with them. See Soyaslan (n 16) 154.

1. The Role of the Judge: The Fact-Finder[107]

Let us remember that inquisitorial proceedings are mandated by a 'directive manager'[108] while adversarial proceedings are guarded by parties.[109] The role of the judge differs in terms of the criminal procedural system.[110] This differentiation is as well reflected in the criminal procedure of international courts. Regarding those roles, an important inquisitorial 'drift' from adversarial justice to inquisitorial justice has engendered noticeably in the international courts.[111]

The ICTY and the ICTR judges' role was influenced by the adversarial proceedings. At the outset, they acted as a referee, but some provisions of their statutes made them more active, such as ordering the parties to present their additional evidence and calling witness *ex officio*. Over time, the judges became more active, taking the proceedings completely under their control.[112] As maintained by *Kress,* amongst more experiences of *ad hoc* tribunals, the judge played a dynamic role in the administration of trials even though 'textual' initial points were reflecting the adversarial procedure. Hence, a 'sliding scale' occurred between the two models. 'Investigative dossier' approach has also enhanced the directive role.[113]

The role of the judge at the ICC, on the other side, is from the outset created by the Rome Statute as "more interventionist in nature". Leaving the activities related to preparations for trial and presenting evidence aside, the ICC judges play a certain limited role in the phase of criminal investigations. Although it does not seem to reflect the role of the investigative judge in Civil Law, it actually reflects the presence of additional inquisitorial elements in the criminal procedures.[114] It is clear that the judge plays a much more active role in the trial phase examining the art.62 of the Rome Statute and further while she/he has a limited role in the investigation phase. The judge at the trial phase has the authority to use her/his broad powers of giving directions in order to

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107 Eser (n 26) 825; Guerra and others (n 25) 1.

108 Vogler, *A World View of Criminal Justice* (n 5) 313.

109 Cryer and others (n 4) 426; Tochilovsky (n 99) 271; Daryl A Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence' (2001) 14 Leiden Journal of International Law 367, 369; Freiberg (n 8) 95–96.

110 Eser (n 26) 817–818.

111 Kress (n 18) 613.

112 Cryer and others (n 4) 436.

113 Kress (n 18) 613. See also McClelland (n 8) 16; Vogler, *A World View of Criminal Justice* (n 5) 313; Tochilovsky (n 99) 271 (Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 of 22 November 1999).

114 Cryer and others (n 4) 436.

conduct the proceedings.[115] The judge [at the ICC] is the person who intervenes in a case and decides about the dispute in the light of claim and defence.[116] The position of the judge at the hearing is shaped within the framework of this definition. For example, the judge has the power to demand some definite evidence to be put forward in the art.69/3 of the Rome Statute.[117]

2. The Role of the Prosecutor

A realistic approach to tackle the matter of a proper procedural system on an international scale could be to consider the role of the international prosecutor[118] and the judge together. As said by *Vogler*:

> *The whole controversy was part of an ongoing struggle between the Office of the Prosecutor and the judges, one that is underpinned by the great cultural debates in comparative criminal procedure.*[119]

The main issue addressed at this stage is the *proprio motu*. In the statutes of the ICTY[120], the ICTR and the ICC, the prosecutor opens an investigation in the light of gathered information and decides whether the evidence is satisfactory to make the first move for the procedure. As *Kress* and *Ambos* stressed the importance of 'impartiality, the prosecutor has to be a 'non-partisan' in the pre-trial investigation.[121] What the authors mean is that the dossier of the prosecutor must include both *inculpatory* and *exculpatory* proofs. In this case, a chamber

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115 ibid 469.

116 ibid 469–470. For the definition see Yener Ünver and Hakan Hakeri, *Ceza Muhakemesi Hukuku* (19 bs, Adalet Yayınevi 2022) 61; Öztürk and others (n 31) 175; Soyaslan (n 16) 75.

117 Tezcan, Erdem and Önok (n 1) 423.

118 The prosecutor is the person who carries out the activity of allegation on behalf of the public. For more about the role of the prosecutor in the domestic procedural system (such as the Turkish criminal justice system) see Ünver and Hakeri (n 116) 216 ff. See also Öztürk and others (n 31) 218 ff; Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (n 16) 1 ff. For prosecution by right of office see Soyaslan (n 16) 178 ff. As said by Tokdemir, *"It would not be incorrect to say that the prosecutor is getting more power and becoming a key player through the criminal process in Romanic- Germanic countries in which the prosecutor has two important functions. The first function is to perform 'as prosecutor' in the conduction of the investigation… As to the second function, it is to act as a 'public servant' in the best interests of the public".* See Tokdemir, 'The Powers of the Prosecutor in the Turkish Criminal Justice System' (n 16) 1. For fundamental international documents on the principles of the role of the prosecutor, see ibid 40, endnote 5 . For details about prosecutorial powers in Turkey see ibid 1 ff.

119 Schabas (n 37) 272. Cited in also Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 108.

120 According to *Schrag*, prosecutorial decisions are needed to be immune to "political influence and considerations". "Many prosecutorial choices have been made with insufficient appreciation of political issues and perceptions" throughout the ICTY's jurisprudence. See Schrag (n 2) 429.

121 Respectively, Kress (n 18) 612; Ambos (n 17) 9.

of the ICTY accepted immediately. As to the ICC, the prosecutor must conduct the investigation considering these criteria: 'a reasonable suspicion of a crime' and 'the admissibility of the case'. In civil procedural law, the two-sided investigation is the duty of the state while the prosecutor does not have to gather 'exonerating evidence' in the common law.[122]

As said by *Ambos*, *the presentation of the charges* by the prosecutor is also a matter of inquisitorial and adversarial models. After affirmation of the indictments, if a change is called for, would it be altered by the prosecutor or by the court?[123] According to *Kepreskic*, the ICTY accepted its authority merely for less serious crimes, as for serious crimes the prosecutor is responsible.[124] When it comes to the ICC, art. 74(2) of the Statute takes 'facts and circumstances' into consideration. It can be seen that the former is much closer to common law while the latter reflects civil law.

Finally, creating an office for an international prosecutorial body "with a common approach to substantive and procedural issues" is not easy and is the "greatest challenge".[125]

3. The Role of Victims

The role of victims[126] is at the heart of our understanding of the 'shift away from adversariality'[127] because a significant amendment linked to the

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122 Tochilovsky (n 99) 629; Cryer and others (n 4) 437–439, 443–444. Rome Statute art. 53/4.

123 Ambos (n 17) 11, 12.

124 14 January 2000 (IT-95-T), para.728 et seq. (744 et seq), *Kepreskic* <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf > accessed 14 December 2022.

125 Schrag (n 2) 432.

126 Eser (n 26) 820–821. Victim refers to a person/persons to whom the subject of the crime belongs. In other words, it means the person against whom the crime was committed. For more information about the victim in substantive criminal law, see Mahmut Koca and İlhan Üzülmez, *Türk Ceza Hukuku Genel Hükümler* (15 bs, Seçkin Yayıncılık 2022) 116–118. For the difference between the victim and "the person affected by crime" see Öztürk and others (n 31) 237. With the participation of the victim, the ICC can be defined as a "reparations court". See Jessberger and Geneuss (n 88) 1083. To provide a democratic basis, victims must be given a voice. See Marlies (n 106) 51, 52; Eser (n 26) 821."volume":"23","author":[{"family":"Marlies","given":"Glasius"}],"issued":{"date-parts":[["2012"]]},"locator":"51, 52","label":"page"},{"id":259,"uris":["http://zotero.org/users/10024986/items/4D7XPAA9"],"itemData":{"id":259,"type":"chapter","container-title":"Prof. Dr. Feridun Yenisey'e Armağan","edition":"1 bs","event-place":"İstanbul","page":"807-833","publisher":"Beta Yayınevi","publisher-place":"İstanbul","title":"\"Adversatorish\" Versus \"Inquisitorisch\"- Auf der Suche nach Optimalen Verfahrensstrukturen","volume":"I","author":[{"family":"Eser","given":"Albin"}],"issued":{"date-parts":[["2014"]]},"locator":"821"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

127 Almost all-European countries embrace adversarial elements by adopting the principles of counsel-led evidence and cross-examination at trial in their inquisitorial justice systems

participation of the victims happened and this is 'one of the greatest innovations of the Rome Statute'. In the view of *Schabas*, continental justice models encourage victims to participate in the courts (*partie civile*).[128] *Vogler* also indicates that '…in many senses [here, for example, the participation of the victims] they reflect a basic dynamic of the contemporary law reform process.' For instance, the pre-trial of the ICC enabled victims to participate in the court directly in January 2006.[129]

The issue of victims' involvement[130] in proceedings has grown in importance in the light of "restorative justice system", which is a very new discipline for international criminal justice as regards restorative approaches

to protect victims in the process. This tendency from the adversarial model manifested itself clearly in domestic law after the Directive of the European Parliament and the Council, (2012) 2012/29/ EU, 25 October 2012 under which minimum standards on the rights, support and protection of victims of crime have been established. Victims had many significant rights,-namely "access to information to interpretation and translation, to review a decision not to prosecute, to restorative justice, to legal aid, to compensation, and protections during proceedings"-under the Framework Directive of 2012 by which the integration of inquisitorial procedures was taken courage on the local level of member states. As seen, those rights are recognised normally in the inquisitorial procedural model where victims preserve the right to accessory and adhesive prosecution. Kirchengast (n 13) 518, 519. This tendency had been also recognised by the European Court of Justice in the procedure of the *Pupino case* [2005] 3 WLR 1102. For more about the case see ibid 519. A notable and cross-national example in the context of the participation of victims in criminal proceedings is ECHR, which reflects a challenge to pure adversarial proceedings. ibid 520 ff.

128 Schabas (n 37) 342.

129 Vogler, *A World View of Criminal Justice* (n 5) 315. *Damaska* makes a significant evaluation on identifying the "retributive" or "restorative" character of the Court in modern criminal justice whispering the "transitional justice" concept. See Mirjan R Damaška, 'International Criminal Court between Aspiration and Achievement' (2009) 14 University of California Los Angeles Journal of International Law and Foreign Affairs 19, 26. *Damaska*'s paper has been evaluated in a review paper in which the issue of whether the international criminal court is a proper international institution is dealt with indicating not only the paradoxical points of the court in global realities and desires but also a restorative character of the court. For a review paper see Tokdemir, 'International Criminal Court within Global Realities, And Desires beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (n 93) 163–176. For the difference between the concepts of retributive and restorative justice see Tokdemir, 'Ceza Adaleti Sistemine Yeni Bir Yaklaşım: Tamamlayıcı Bir Sistem Olarak "Onarıcı Adalet" Mekanizması' (n 9) 100 fn 68.

130 The involvement of victims has been influenced by the development of the concept of human rights. A striking shift can be seen over the past few decades. The victim has progressively played an important role in criminal procedure law. In domestic law, the rise of civil-part applications has accommodated them to become involved in criminal hearings to provide "interest in punishment". All mentions about the participation of victims in criminal trials lead us to a summary that it is aimed to coincide with the desire to get "practical redress" and "symbolic satisfaction". See Tulkens (n 6) 594, 595.

by the ICC inspired by "restorative and therapeutic forms", such as victim-offender mediations in European domestic jurisdictions. It is important to emphasize that "the reparation of harm" to victims can be seen as a brand in this discipline.[131] In this regard, the two main goals of the international courts are "to provide a safe forum for victims to tell their stories" and "to provide a forum for considering restitution and reparations".[132]

According to the Art.68 (3) of the Rome Statue:

> *Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, [following] the Rules of Procedure and Evidence.*

The article, which speaks generally about the victims' protection and their involvement in the judicial process, is built on two prominent concepts related to their participation: the "views" and "concerns". This provision seems to be saying that the judges render the most important roles of such kinds of stakeholders, as well as witnesses. Nonetheless, the judge regarding every case's circumstances evaluates the participation of the victims, and ultimately a decision by the ICC is called for absolute participation in the proceeding. The ICC Appeals decided in the *Lubanga* case that *"under certain conditions, victims may offer and examine ('lead') evidence relating to the guilt of the accused, and challenge the evidence's admissibility and relevance".* Due process[133] in the trial phase takes longer than the pre-trial stage and victims do not have any guarantee of a real implication in due process. The proceedings in the first cases of the ICC have been deferred because more than a hundred applications had been received from the victims. The admissibility of an application by a victim takes one year or more. It would be interesting to compare the practices of ad hoc tribunals (here the ICTY) and the ICC amongst their experiences. For example, the pre-trial stage in the case, *Dusko Tadic* in the ICTY was completed in 360 days whereas the *Lubanga* case lasted more than 800 days in the ICC.[134]

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131 Freiberg (n 8).

132 Schrag (n 2).

133 One of the international tribunals' goals is "to demonstrate fairness and the highest standarts of due process". See ibid 428.

134 For more information see Damaška (n 129) 19 ff; Tokdemir, 'International Criminal Court within Global Realities, And Desires beyond the Cuff Mountain: "Is the ICC A Proper International Institution?' (n 93) 171–173.

Lastly, it is undeniable that victims have limited permission to be able to take part in *ad hoc* tribunals.[135]

D. An Analysis: The "Drift" To Civil Law-Inquisitorial Justice?

The foregoing discussion related to the drift[136] away from adversariality is the very subject that has been a big 'procedural revolution' in the international courts. Some have described this shift as a 'tempered adversariality' some described it as 'cafeteria inquisitorialism'; and some even as 'harmonic convergence'[137].[138] Some commentators enjoy this change, especially because of the direct participation of victims, which means 'real community involvement'[139].

On one hand, *Ambos* and *Delmas-Marty* advocate a harmonic legal system defined as a *mixed/hybrid*[140] model containing fundamentals of both,

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135 Tochilovsky (n 99) 273; Vogler, *A World View of Criminal Justice* (n 5) 318; Cryer and others (n 4) 479.

136 Although the issue of drift in domestic criminal law is outside the scope of our study, let us note briefly as follows: it is argued that, the drift to inquisitorial justice has not only occurred in international criminal law but also in domestic criminal law. Some countries such as the USA, Canada, England and Wales, and Australia, which once held their criminal legal positions as the adversarial system are on the path of considering the legal process of Europe and international tribunals adopted to and expanding their legal process towards new ways. In those common law countries, an interventionalist justice model labelled as the inquisitorial procedure has been adopted to a considerable extent. Kirchengast (n 13) 514, 524. The deviation in the criminal procedure has also occurred in substantive criminal law. For example, a radical change in criminal law in America where the law was under the influence of the English legal system until the middle of the 19th century, was made in the Model Penal Code (1962) prepared by the American Law Institute. The issue of complicity is one of the areas where change takes place. While the classical distinctions in the Anglo-Saxon legal system continued to prevail in the legal systems of the provinces which did not adopt the law, these distinctions in the provinces that adopted the law were abandoned. It could be said that the system of complicity in the Model Penal Code is in favour of the German complicity system. See Sercan Tokdemir, *Ceza Hukukunda Akim Kalmış Azmettirme* (1. bs, Seçkin Yayıncılık 2022) 550–551. One can state that it is not a one-way change or one-sided drift. Similarly, most European States, including Turkey, have incorporated into their laws many features borrowed or at least inspired by Common Law. Therefore, it is possible to talk about the convergence of systems through mutual exchange. In this regard, cross-examination is an example of a convergence of adversariality and inquisitoriality in Turkey. The cross-examination, which is accepted in the scope of the art.201 of the Turkish Criminal Procedure Code, regulated under the title of "Direct Questioning", is a kind of criminal procedure in Common Law.

137 Such as Ambos see Ambos (n 17) 37; such as Delmas Marty, see Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 116.

138 Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 113–117.

139 Such as Vogler, *A World View of Criminal Justice* (n 5) 318.

140 Eser (n 26) 815; Tezcan, Erdem and Önok (n 1) 414. The first judge of the ICTY, *Mcdonald* claimed: 'We merged elements of common and civil law into 129 Rules'

which is called *sui generis*[141] emerged from experiences and practices[142] of *ad hoc* tribunals.[143] One might as well say, in the words of *Kirchengas*t, that the development of domestic practices and procedures, which "fuse aspects of adversarial and inquisitorial procedure into a mixed and hybrid model of justice", are encouraged by the ICC's criminal procedural model and practices. The criminal procedural model adopted by ICC provided the affiliation of adversarial and inquisitorial elements.[144] Also, *Knoops* suggests a hybrid approach as key for the functions of the ICC, by stating the following sentences:

> *A significant aspect of the ICC Statute is that, during its drafting stage, delegates made a conscious effort to negotiate a statute and set of RPE [rules of procedure and evidence] that were acceptable to all. One could say that the battle between common law and civil law was there replaced by an agreement on common principles and civil behaviour. It can therefore be said that the ICC Statute and RPE represent a truly international set of procedures, acceptable to the major legal systems of the world and drawing on the experiences of the ICTY and ICTR. Some novel procedures were created with predominantly civil law features, these being: admissibility of evidence and defences, pre-trial proceedings, supervisory responsibility of the ICC over arrested individuals and rights of victims and witnesses*[145]

According to *Tezcan et al*., in general, a mixed model of adversariality and inquisitoriality is applied in international criminal proceedings. However, the traces of the adversarial system in terms of the ICTY, the ICTR and the ICC are much stronger and seeking the material truth is the task of the parties. The authors state that although a mixed approach is pursued in terms of the criminal procedural model at the ICC, the system is closer to the adversarial model with a general evaluation. In other saying, adversariality still maintains its weight. The art. 64/8-a and 65/1 of the Rome Statute reflect the adversarial approach.[146] Nevertheless, in my opinion, there are also traces of the inquisitorial system, and most importantly, the jury system and plea-bargaining in common law

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141 Souresh (n 10) 86.

142 Eser (n 26) 815. Tadic at the ICTY <https://www.icty.org/en> accessed 19 December 2012. *Souresh* draws our attention to the fact that a homogenous system can be said to be neither adversariality nor inquisitoriality. See Souresh (n 10) 81.

143 See respectively Kai Ambos and Stefanie Bock, 'Germany' in Alan Reed and Michael Bohlander (eds), *Participation in Crime (Domestic and Comparative Perspectives)* (1st edn, Ashgate 2013) 37; Delmas-Marty (n 11) 290; see also Mundis (n 109) 367; Askin (n 11) 907; Ambos (n 21), § 8, Rn 61; Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 116. See also Souresh (n 10) 86.

144 Kirchengast (n 13) 514, 522.

145 cited in ibid 522.

146 Tezcan, Erdem and Önok (n 1) 414.

were not inserted in the Rome Statute. It should be noted that more obvious signs of the inquisitorial system can be seen after examining the art. 15/3 and 61 concerning the acceptance of the indictment and art.56-60 concerning the establishment of a *Pre-Trial Chamber* to make a decision on the admissibility of preliminary investigation measures. One of the most important indicators of the inquisitorial system is the art.54 of the Rome Statute related to the role of the prosecutor. The obligation of the prosecution office is to collect not only the evidence against the accused, but also the evidence in favour of him/her. The prosecutor is not the opponent of him/her; on the contrary, the purpose of the prosecutor is to seek the truth. The investigation phase and the role of the judge in the trial phase reflects the inquisitorial system. After all, although the criminal procedure at the ICC can be described as *hybrid*, it does not seem possible to say that it is closer to the adversarial system.

Vogler indicates that if the two systems reflect an epistemological disagreement, the hybridisation makes no sense. As seen by the author, one of the further and equal problems for the hybridisation is the polarity of inquisitoriality and adversariality.[147] *Zappala* expands this last sentence as follows:

> *...two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the "inquisitor" must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process*.[148]

Suffferling claims a new international criminal procedure "with the completely unjustified ascertain" in support of the following sentences: An international procedure must be searched on the grounds of two main systems of domestic criminal procedure; namely the Anglo-American and the Continental European models. For providing a suitable criminal procedural structure for the ICC, the prosecution and trial phases could be derived from the indicated traditions.[149] *Souresh* stated that international courts are limited by just a focus on differences between adversariality and inquisitoriality and this focal approach prevents them from arriving at a truly international scale.[150]

On the other hand, the concepts 'post-adversarial' and 'post-inquisitorial' are suggested by *Freiberg* whether a *transformative system* might be envisaged instead of a merged system on the ground of a 'participative approach' to discover the truth.[151] Moreover, the issue has grown in importance in the

147 Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 114.
148 cited in ibid 114.
149 cited in ibid 115; Souresh (n 10) 81.
150 Souresh (n 10) 81.
151 Freiberg (n 8) 83.

light of 'popular justice'[152] from a global aspect as suggested by *Vogler* who lists three principal methodologies in the criminal procedure: interests of the individual, the community and the state.[153]

However, *Ambos* draws our attention to another important point. Whatever opinions or definitions are taken, it is important to know whether 'fair trial standards' and a high procedural level have been accomplished within their legal structure or not. Thus, the origin of this subject is of no importance (common or civil law).[154] It should also be considered that the inquisitoriality and adversariality divide has been overcome, so this deep issue is a worthwhile subject regarding the purposes of every procedural stage in the light of recent attempts. The same drift away from 'orality' at trial is also another arguable topic in those tribunals' procedures.[155]

Souresh suggests a procedural regime, which is not based on a purely adversarial or inquisitorial system. In a well telling[156]:

> *...the adversarial/inquisitorial dichotomy becomes less relevant when assessing the procedures of international criminal tribunals. Each national judicial system has incorporated elements that it deems to suit its history, needs, purposes and resources, and international criminal tribunals should base their assessment of procedures on the same factors. The amalgamated systems of national jurisdictions show that it is possible to combine traditionally "adversarial" or "inquisitorial" elements into a single judicial system. As such, the distinctions are irrelevant when setting up and evaluating procedural designs for international criminal tribunals.*

Apart from the aforementioned remarks, *Ambos* mentions another problem as 'in the future, a much greater problem may be to accommodate legal systems not based on western traditions as, for example, the Islamic law.'[157] "Islamic

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152 *Kirchengast* claims that the responsibility of the prosecutor is the main difference in community justice based on the notion of community prosecution. That is, prosecutors have broader accountability in terms of public safety, crime prevention and developing public confidence in the justice system even though they must respond to particular cases. In this context, prosecutors work differently here than in traditional cases. They, therefore, work with different persons, for example, victims, residents, community groups and government agencies. See Kirchengast (n 13) 528.

153 Vogler, *A World View of Criminal Justice* (n 5) 21–23; Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 118–121.

154 Ambos (n 17) 35; Ambos (n 21), § 8, Rn 61; Tezcan, Erdem and Önok (n 1) 415.

155 Vogler, *A World View of Criminal Justice* (n 5) 315; Ambos (n 17) 34; Deu (n 16) 5; Cryer and others (n 4) 476; Mundis (n 109) 367 ff.

156 Souresh (n 10) 83.

157 Ambos (n 17) 37.

law is simply absent from the structure of the ICC'[158] whilst a hybrid model, based on the rules and procedures of civil and common systems proposed by both *Ambos* and *Delmas-Marty*.

Consequently, as stated before, it is important to guarantee fundamental rights and freedoms, whichever system is preferred, rather than making criminal justice systems a dichotomous difference.[159]

CONCLUSION

In the study, to understand the procedural regime of the ICC whose foundation is seen as a great success for criminal responsibility on a global level, the first section of the paper was devoted to the examination of criminal procedural models known as inquisitorial and adversarial procedural systems with a comparative perspective. In the second part, our focus has been on the criminal procedural system of the ICC, having a brief overview of its functions. Having examined the criminal procedural systems in the first part, the criminal procedure of the ICC, which adheres to procedural criminal law, is analysed with a broad perspective.

All of the points concerning the foundation and the procedure of the ICC lead us to the conclusion that international criminal procedural law is like a 'fledgling discipline'. Hence, we need 'the best truth-seeking vehicle' to overcome difficulties in procedural scope in practice, such as the problems of judges from inquisitorial culture. If we assert that inquisitoriality is a conducive tool that provides service for international criminal justice, we must also bear in mind that firstly substantive international criminal law without practice would be like a single winged-bird. Based on this, seeking the truth seems a paramount reference to compare two legal justice models. When the inquisitorial model feels the need to discover the truth, its partner, adversariality presents 'competing values'. Thus, to me, a non-adversarial system should be the preferred because regarding the structure of the courts in those procedures, adversarial trials depend on 'Hegelian dialectic' therefore the court might be seen as a *battleground.* This philosophy is based on two opinions: 'Life is conflict' and 'everything owns itself'. Conversely, the inquisitorial (non-adversarial) model depends on the mutual help of constituents in the criminal proceedings with an interventionist judge. Participants in the court should be in cooperation, bearing in mind that the judge, the prosecutor and the victim/

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158 Shahrzad Fouladvand, 'Complementarity and Cultural Sensitivity: Decision-Making by the ICC Prosecutor in Relation to the Situations in the Darfur Region of the Sudan and the Democratic Republic of the Congo (DRC)' (Doctoral Dissertation, University of Sussex 2012) 69.

159 See also Souresh (n 10) 84; Tezcan, Erdem and Önok (n 1) 415.

victims are all in the same boat in the midst of finding the truth.[160] In addition, *Vogler*[161] emphasises that mixing these opposing procedural traditions is 'hardly internationalism'.

One might also say that a more effective criminal procedure model can be created with the cooperation of constituents in international criminal procedure. From my point of view, the system, which will ensure this stability, should be inquisitorial. Although inquisitoriality can be seen more functional as a national and balancing model for criminal procedure, it does not mean that a plural criminal procedural model cannot be accepted at international level in the future. The term pluralism refers to a new international procedural model based on a cooperation of procedural justice systems within inherently a sense of separation. Considering the political and social developments taking place at the global scale, it seems possible to mention plurality. A pluralist procedural structure based on avoiding a unilateral approach to the course of justice for the ICC concerning global developments in our day and particularly in post-conflicts through the transformation of politics and legal changes can be feasible while the court is on the way to progressive procedural changes.

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[160] For more assessments see Schabas (n 37) 251; Jackson (n 8) 22; Freiberg (n 8) 95.

[161] Vogler, 'Making International Criminal Procedure Work: From Theory to Practice' (n 5) 115.

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