



THE ADVERSARIAL VS INQUISITORIAL DICHOTOMY IN INTERNATIONAL CRIMINAL LAW: A REDUNDANT CONVERSATION

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Abstract: International criminal tribunals have procedural rules of both an adversarial and inquisitorial nature. Such tribunals portray that it is possible to amalgamate what are often thought of as dichotomous models. This essay seeks to show that these are, in fact, not dichotomous models but are increasingly converging in both national and international judicial systems. The reasons for the adversarial/inquisitorial distinction being a redundant conversation are threefold: firstly, there is no longer a “pure” adversarial or inquisitorial system, with national judicial systems increasingly incorporating elements of both; secondly, the norms of human rights necessitate the convergence of the two models; and finally, the unique context and goals of international justice mean that the perceived dichotomy of the adversarial/inquisitorial system is no longer relevant. As a result, international criminal tribunals portray that it is possible to incorporate elements of both systems into a single judicial system.

Keywords: international criminal law, ICC, inquisitorial, adversarial

Introduction

The prevalence of international criminal justice has brought to the forefront questions about whether international criminal law is a common law or inquisitorial system. As a result, international criminal tribunals have faced questions regarding their place in the common law/civil law dichotomy.

For example, in *Prosecutor v. Tadic*, the defence argued that the rules of the International Criminal Tribunal for the Former Yugoslavia (ICTY) “are more akin to the adversarial common law system and that most such systems contain a general exclusionary rule against hearsay” (ICTY, 1996). However, the Trial Chamber confirmed that the ICTY “does not strictly follow the procedure of civil law or common law jurisdictions” (ICTY, 1996).

A focus on the differences between the common law adversarial and civil law inquisitorial systems limits international tribunals and hinders them from being truly international. Furthermore, it is important to recognise that two systems that evolved in domestic contexts may not be suited to the international criminal sphere. At the same time, international tribunals influence domestic responses to atrocities and, as such, need to make decisions in such a way that domestic systems can model their own laws on international criminal judgments.

While there is no homogenous adversarial or inquisitorial system, this essay will discuss the dichotomy based on common features of the two models. Common law systems are characterised by jury trials and an adversarial element between two parties. Under these, evidence is presented during a trial in the form of examination-in-

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chief and cross-examination, and they often have strict rules for evidence, while the prosecution cannot appeal acquittals.

Civil law systems, on the other hand, are “inquisitorial in nature” (ICTY, 1996), and they rely less on oral arguments and more on a written dossier of evidence. As such, they often do not incorporate jury trials. A judge’s more comprehensive oversight of the evidence in such cases means that civil law jurisdictions have been deemed to focus more on “truth-finding” than common law ones. Finally, in these systems both acquittals and convictions can be appealed.

Focusing on the discrepancies between the adversarial and inquisitorial justice systems is increasingly less relevant – and this is especially true when setting up and evaluating procedural designs of international criminal tribunals. While the effects of international human rights and the unique context of the international criminal justice system play important parts in this convergence, another crucial reason is related to state practices, with national procedural models no longer purely adversarial or inquisitorial in nature. As a result, it makes no sense to constrain international criminal tribunals using a standard no longer adopted by national judicial systems.

This essay will look at three reasons why focusing on discrepancies between adversarial and inquisitorial justice systems is increasingly less relevant, especially when examining international criminal tribunals. Firstly, the practices of national justice systems will be examined; secondly, the effects of international human rights law will be explored; and finally, the unique context and goals of the international criminal justice system will be considered. By examining these areas, this essay will show that the reasons for the adversarial/inquisitorial dichotomy becoming less relevant are threefold.

1. Convergence in national systems

It is proposed that there is no longer a “pure” adversarial or inquisitorial model in national judicial systems, with states having adopted procedural designs that conflate the traditional adversarial/inquisitorial dichotomy.

In Europe, the adversarial and inquisitorial models have developed in line with historical developments. For example, after the French Revolution, the revolutionaries replaced the French civil law model with English criminal procedure (Spencer, 2016, p. 603). When this model did not work in France due to a combination of increased crime in the wake of the collapse of the existing social order and declining relations with England, the Emperor Napoleon in 1808 adopted “a new system of criminal procedure that combined what were then thought to be the advantages of the ‘English’ system introduced by the revolutionaries and the earlier system that it had replaced” (Spencer, 2016, p. 604). “Napoleon’s *Code d’instruction criminelle* was imposed on most of continental Europe during the French occupation. When the French left, the newly liberated countries either kept it – as did Belgium – or (like Italy and Germany) used it as the basis when constructing their own procedural code” (Spencer, 2016, p. 604).

Procedural reforms in Italy in 1988 arguably “transplant[ed]” adversarial procedure into a formerly inquisitorial system (Panzavolta, 2016, p. 618). These reforms included the abolition of the investigative judge; a ban on hearsay evidence at trials; an adversarial trial procedure, with parties having the right to call, examine and cross-examine witnesses; and the introduction of alternatives to trials, such as plea bargaining (*applicazione della pena su richiesta*) (Panzavolta, 2016, p. 622). All these reforms mirror the procedural format of adversarial systems such as those of the UK and US. However, many elements of the inquisitorial system remain, such as a lack of jury trials and the possibility of appealing both convictions and acquittals (Panzavolta, 2016, p. 623). The Italian judicial system has therefore incorporated elements of both the adversarial and inquisitorial models.

Although other European countries have not carried out such a dramatic overhaul of their inquisitorial procedures, their adversarial and inquisitorial systems have converged. Germany abolished the office of investigative judge in 1974 and has implemented procedures to hear evidence from key witnesses orally (Spencer, 2016, p. 604), while Belgium and Spain use jury trials for serious offences (Spencer, 2016, p. 605). In 1882, Spain incorporated cross-examination into trials (Volkman-Schluck, 1981, p. 1). Meanwhile, France introduced the equivalent of a guilty plea in 2004 in the form of *comparution sur reconnaissance préalable de culpabilité* (Spencer, 2016, p. 612).

Conversely, traditionally “adversarial” systems have inquisitorial elements. For example, the existence of summary trials in magistrates’ courts in England and Wales means that not all criminal trials are tried before a jury (Magistrates’ Courts Act 1980). Instead, in a similar fashion to that in many civil law jurisdictions, trials occur before three lay justices or one district judge. A summary trial may also be conducted on paper if certain conditions are met (Magistrates’ Courts Act 1980, s. 16(A)). It has also been noted that “one further important respect in which English criminal procedure has moved towards the continental tradition concerns appeals in criminal cases – an institution historically foreign to the common law tradition” (Spencer, 2016, p. 607). In line with this, the defence can now appeal both the conviction and sentence in criminal trials.

In the US, the Supreme Court has emphasised that the basic purpose of a trial is the determination of truth (Volkman-Schluck, 1981, p. 5; *Estes v. Texas*, 1965; *Tehan v. United States ex rel. Shott*, 1966; *United States v. Wade* (dissent), 1967). Ascertaining truth is a goal often associated with inquisitorial jurisdictions, because the adversarial model is deemed to prioritise competition between the parties. This reflects the procedural practice of archetypally “adversarial” models incorporating inquisitorial elements into their judicial systems.

As a result of all this, there is no “pure” adversarial or inquisitorial system: in national jurisdictions, both systems incorporate elements of the other into their judicial practices. This means that 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.

2. International human rights law

The second factor to consider is international human rights law, which has also resulted in increasing convergence between the inquisitorial and adversarial models. This law provides a norm by which states must abide and as a result, practices converge to meet the requirements of such human rights norms.

The Delmas-Marty Commission examined the French legal system in light of the Declaration of the Rights of Man and of the Citizen, the French Constitution and the European Convention on Human Rights (Delmas-Marty, 1991). The Commission found that the passive role of the defence and limited rights of intervention fell short of existing human rights standards (Field & West, 1995, p. 479). It therefore recognised the needs for the defence to have greater capacity through the expansion of defence access to the dossier; the right to ask for further police and/or judicial investigations or for alternative expert reports; the right of the defence counsel to participate during hearings of suspects and witnesses; and the right to seek the exclusion of unlawfully obtained evidence (Field & West, 1995, p. 479-480). Notably, these recommendations reflect the practices of many adversarial systems. However, the Delmas-Marty Commission did not advocate for an adversarial system, instead seeking a way to bring French judicial procedure in line with international human rights law. These recommendations show that the demarcation between adversarial and inquisitorial practices becomes blurred when aligning national practices with this international law.

The adversarial system has often had much stricter rules of evidence due to the evidence being judged by a jury as opposed to a professional judge. However, in Germany, exclusionary rules on evidence have been introduced to protect the right to privacy (Frase, 1995, p. 334).

The expansion of human rights rules means that the accused has more rights for defence lawyers to protect. As a result, such lawyers now play a greater role in inquisitorial systems (Bradley, 1996, p. 474). This does not necessarily represent a move towards an adversarial system though, but a convergence of practices based on human rights standards and the right to a fair trial. To protect the right to a fair trial, inquisitorial systems must allow defence lawyers a greater role in the judicial process and adversarial systems must ensure that those investigating do so with the rights of the accused in mind. There is no preference for one system over the other, with human rights standards necessitating a convergence of the two traditional models in order to protect fundamental rights.

Jackson and Summers argue that:

The debate on whether systems of criminal proof are converging or diverging has continued to be dominated by ‘adversarial’ and ‘inquisitorial’ models [...] An analysis of the case law of the European Commission and ECtHR and of the HRC shows that human rights bodies have been steadily developing a model of proof which requires none of these traditionally adversarial features to be adopted [...] [T]he model of proof that has been developed is better characterised as ‘participatory’ than ‘adversarial’ or ‘inquisitorial’ (Jackson & Summers, 2012, p. 106).

Similarly, in international criminal justice, the focus should not be on dichotomous models but the participation of the defence and prosecution. In many cases, victims also participate. It is the rights of these individuals that should be paramount rather than the procedural model applied. Therefore, instead of viewing the adversarial and inquisitorial models as dichotomous, international criminal justice should select procedures through which fundamental rights can be guaranteed. European human rights standards have paved the way for such a convergence of models.

No one system protects human rights more than the other, and human rights treaties do not favour one model over another. International standards in this area have shifted the conversation away from the adversarial/inquisitorial dichotomy and allowed national judicial systems to transition from their traditional models to adopting procedures that comply with human rights standards. This has resulted in increasing convergence between the two models for the sake of protecting rights.

3. The unique context and goals of international criminal justice

International criminal justice operates in a unique context, in that it deals with those responsible for the most serious crimes in the international community. As a result, its aims go beyond those of national criminal tribunals. International criminal tribunals play a part in post-conflict reconciliation and the healing of countries that have experienced mass atrocities. As a result, such tribunals adopt a system that is in line with their goals, as opposed to abiding by the adversarial/inquisitorial dichotomy, and are a “unique amalgam of civil and common law features” (ICTY, 1996).

For example, the International Criminal Court (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.

Another aim of the ICC is to create a historical record of mass atrocities. Many international criminal tribunals have such a “truth-finding” purpose and it would be assumed that an inquisitorial model should be adopted to do this. Inquisitorial jurisdictions do not accept guilty pleas and instead focus on creating a full record of the events through inquiry. However, “a guilty plea coupled with the acknowledgement of full responsibility by the accused for the actions with which he is charged is thought to make an important contribution to establishing the truth and, thereby, an accurate and accessible historical record. Moreover, such an admission of guilt may contribute to peace and reconciliation” by not drawing out the trial and prolonging the suffering of victims (Swart, 2009, p. 106). This shows that one system is not favoured over another, with procedural rules being applied that best align with the purposes of the tribunal in the circumstances.

Although the ICC is primarily adversarial, it has many inquisitorial elements. For example, the Chamber may require the testimony or attendance of witnesses or order the production of evidence (Rome Statute, 1998, art. 65(6), RPE Rule 14(2)). This oversteps the traditional passive role of a judge in adversarial systems and also “introduce[s] an element of inquest in what is otherwise a contest” (Swart, 2009, p. 111). However, the use of these powers shows that international criminal justice is not constrained by the adversarial/inquisitorial dichotomy. The unique context in which international criminal tribunals operate means that such fluid procedural rules are necessary to achieve their purposes. There is a higher onus to prosecute international crimes, but this also results in a higher onus to protect defendant rights. As such, there should be a necessity for more and higher-quality evidence when this is lacking. The unique context of the ICC shows that such inquisitorial rules are necessary in a largely adversarial system.

However, while the unique context and aims of international criminal tribunals have portrayed that an amalgamation of adversarial and inquisitorial procedural rules is possible, such an amalgamation is not limited to the context and goals of just these international tribunals. As indicated by the developing procedural rules of national justice systems, a convergence is possible outside of rules necessitated by international crime. As well as international criminal justice portraying a system in which the adversarial/inquisitorial dichotomy is decreasingly relevant, a convergence of such rules can therefore be achieved outside this unique context in national judicial systems.

Conclusion

A focus on the traditional adversarial/inquisitorial dichotomy is decreasingly relevant, especially when it comes to setting up and evaluating procedural designs of international criminal tribunals. This essay has shown that the reasons for this are threefold.

The most important reason for this decreasing relevance is that national judicial systems are no longer separated along the lines of the dichotomy. Their procedural rules are becoming increasingly conflated as jurisdictions borrow practices from across the dichotomous demarcation, and a “pure” adversarial or inquisitorial model no longer exists. As such, it makes no sense to divide international criminal tribunals along these lines if they no longer exist in national jurisdictions.

Secondly, increased human rights protections have resulted in greater roles played by defence lawyers and judges in protecting such rights. National jurisdictions work towards the norms for such protections, which in turn leads to a convergence of the two models. Furthermore, the conversation on the adversarial/inquisitorial models is no longer as relevant as the conversation on whether the procedures are in accord with human rights standards.

Finally, the unique purposes and context of international criminal tribunals portrays the amalgamation of the adversarial and inquisitorial systems on an international scale. It has been noted that “although most rules can be

traced back to a common or civil law origin, they are rendered *sui generis*” in the context of international criminal tribunals (Ambos, 2003, p. 34).

International criminal tribunals provide a model by which both systems can be incorporated into one. This means that a convergence of the two systems is not restricted to the unique context and goals of the international justice system. However, this system has been useful in providing working models for such an amalgamation.

The conversation should move away from the distinction between adversarial and inquisitorial models, which is no longer relevant in a globalised and internationalised system. While many advocate for the strengths of their system, both sides can learn from each other, and the goal should be a judicial system that is efficient, protects rights and contributes to notions of justice. The best way to achieve these sometimes contrasting goals is to incorporate what have traditionally been seen as dichotomous principles into a single judicial system. Both systems have their strengths and weaknesses, so the conversation should be about how to create a strong judicial system rather than focusing on the discrepancies between the two models.

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