Would al-Bashir Get a Fair Trial? Lessons from Guantánamo for the ICC¹

Rid Dasgupta

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ICC prosecutor Luis Moreno Ocampo’s decision on 14 July 2008 to seek an arrest warrant for Sudanese President Omar al-Bashir on ten counts of genocide (under Article 6 (a) of the Rome Statute, which governs the ICC), war crimes (under Article 8 (2)(e)(i)), and crimes against humanity (under Article 7 (1)) has given rise to much brouhaha in the political blogosphere. Articulate commentators such as Phil Clark and Teddy Harrison have focussed on the politics (both real and perceived) of the prosecutor’s role. On the doctrinal front, Han-ru Zhou argues that the Rome Statute’s “deferential stance towards collective enterprises of states … weakens the ICC’s ability to enforce international criminal justice.” Naseem Badiey touches upon the international legal ramifications of the sought arrest warrant but ultimately concludes that, at least from the contemporaneous vantage point of Southern Sudan, this daring ICC prosecutorial decision is quixotic “legal adventurism.”

Few observers have spoken on the legal methodology to be employed if, in fact, such a trial gets underway – understandably so, as Ocampo’s warrant request to the Pre-Trial Chamber will be granted only if the prosecutor’s summary of evidence constitutes “reasonable grounds to believe” al-Bashir’s commission of the crimes enumerated in the indictment. The current enforcement quagmire may be resolved and the Sudanese head of state might be extradited (now or after his official tenure ends). This essay addresses how we can transport the lessons of certain deficiencies in the United States’ military commission proceedings in Guantánamo Bay, Cuba,² to the context of the ICC’s moves against al-Bashir. The international community must focus on two commonalities regarding both systems: (i) amorphous international legal structures susceptible to insider manipulation and political expediency; (ii) trials of politically unpopular defendants likely to receive prejudiced judicial fora. Neither the ICC nor Guantánamo is free of these two concerns.

Task Ahead

Certainly the legal process attending the Guantánamo Bay military commissions is not easy to transpose to the ICC system. The Guantánamo commissions were designed to try alleged enemy combatants with procedures deliberately speedy or slow to suit prosecutorial needs. They are fundamentally different from a courts-martial system where criminally accused military personnel enjoy the full panoply of legal protections.

¹ A different version of this paper is being processed as a Note by the Nottingham Human Rights Law Review for publication in its next autumn issue.
² Operated by Joint Task Force Guantánamo (JTF-GTMO), this U.S. detention centre is located in Guantánamo Bay Naval Base, which is on the shore of Guantánamo Bay, Cuba. Since the commencement of the present U.S. hostilities in Afghanistan, 775 detainees have been brought to Guantánamo and 420 detainees have been released. As of May 2008, 270 detainees remain.
Let us survey the notion that the ICC could be considered superior to the Guantánamo military commissions. The ICC is a formal institution with rules and procedures entrenched in the Rome Statute, while the Guantánamo commissions were the United States Government’s ad-hoc response to the U.S. Supreme Court’s pronouncements in *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004). These cases opened United States courts to detainee challenges from Guantánamo and required a “neutral decision-maker” to decide culpability. A third case, *Hamdan v. Rumsfeld* (2006), referenced *Common Article 3 of the Geneva Conventions* and the Uniform Code of Military Justice (UCMJ) in striking down the Guantánamo military commissions’ trial procedures as lawfully wanting. Suggesting, however, that the ICC inherently is a better alternative is an oversimplification. Certain scholars, such as Giovanni Conso, Gerhard Hafner, and Anita Ramasastry, offer reasons suggesting why the United States has not signed the ICC Treaty, but a larger doctrinal compatibility also appears to be present.

Certain protections at the core of an American criminal trial and considered fundamental judicial guarantees are not secured to an ICC defendant. First, the ICC’s *Rules of Procedure and Evidence* ("ICC Rules") do not guarantee the defendant a speedy trial, a right preserved by the Sixth Amendment to the U.S. Constitution. Rules 117-120 permit pre-trial restraint of the defendant. An ICC detainee is allowed, once every 6 months, to request release pending bail. The ICC, however, is not obligated to grant that request. Nor is there a stipulation about the maximum length of time that a prisoner may be detained, thus causing significant delay in the commencement of a trial. Second, Rule 150 allows prosecutors to appeal a criminal defendant’s acquittal. In the United States, the Fifth Amendment to the Constitution categorically forbids such double jeopardy, fearing the vexation likely to result from incessant government efforts to convict.

Third, Rule 74 enables the ICC to require witnesses to provide self-incriminating testimony, only if the Court itself privilege the testimony as classified and secretive, *including from the defense itself*. The Fifth Amendment to the U.S. Constitution expressly rules out all judicial or governmental efforts to compel self-crimination. Fourth, either individually or in tandem, Rules 81 and 82 allow secret trials, the use of hearsay or anonymous testimony, or narrow the rights of defendants to confront their accusers. In contrast, the U.S. Constitution guarantees the right to a public trial (Fifth Amendment), bans hearsay or anonymous testimony (Sixth Amendment), and promises the actual confrontation by the accusers in court (same). Finally, the ICC trials are adjudicated by five judges, of whom a majority must vote to convict. In the United States, however, the constitutional rights to jury trial (Sixth Amendment) and due process (Fifth Amendment) have been construed to require a *unanimous* vote to convict by the *jury* of one’s peers, not judges. Granted that some of these differences, *i.e.*, trials by judges rather than juries, regulations weakening the defendant’s right to cross-examine witnesses, and no prohibition against double jeopardy, result from the distinctions inherent in Anglo-American *common law*

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versus continental European civil law. From the standpoint of defendants’ rights, then, these points of tension demonstrate that the ICC proceedings are not categorically superior to American criminal trials.

Structural reasons, too, militate against summarily preferring the ICC structure over the Guantánamo commissions. The Rome Statute’s precedential history is far from time-tested; in fact, the Statute itself is only six years old. On the other hand, unlike the ICC, the body of case-law (stare decisis) germane to Guantánamo is substantial. As noted earlier, the legal bases for the Guantánamo challenges were the Geneva Conventions and the Uniform Code of Military Justice (UCMJ). The Geneva Conventions, adopted in 1949, concern the treatment of non-combatants and prisoners of war. Their precursors were the Hague Conventions of 1899 and 1907.8 The UCMJ’s roots run even deeper, before the founding of the American Republic and before the Declaration of Independence. In 1775, the Continental Congress passed 69 Articles of War to govern military conduct; in 1806, Congress first enacted 101 Articles of War into federal law; and in 1951 the modern-day UCMJ became effective.10 The Rasul-Hamdi-Hamdan line of precedent traced the American court cases that have helped develop this strain of jurisprudence. The ICC, by comparison, is relatively new.

Certainly both the Rome Statute and U.S. laws afford the defendants certain basic safeguards. The Rome Statute in Article 66 (2) provides that the prosecution bears the burden of proof throughout the trial and in Article 67 (3) (i) states that the accused must not bear any reversal of the burden of proof or any onus of rebuttal. Presuming innocence, Article 67 (3) (g) gives the accused the right to remain silent. And Article 55 states that no person shall be compelled to incriminate herself or to confess guilt; be subjected to coercion, duress, threat, torture or ill-treatment; or be subjected to arbitrary arrest or detention. The same protections, preserved in American law and now applicable to Guantánamo by virtue of the Supreme Court’s decisions, are “closely linked historically with the abolition of torture,” and are regarded as a “landmar[k] in man’s struggle to make himself civilized.”11

However, the protections will mean very little if the enforcement mechanism, the threat of inadmissibility, is not strong enough to deter prosecutorial overreach. According to both due process in American courts and Article 69 (7) of the Rome Statute, evidence obtained in a manner contrary to universal human rights is inadmissible if the violation would mar the integrity of the proceedings. But, then, who determines when the risk of error is substantial if certain evidence were to be admitted? And what salience would the theoretical protections have for an individual defendant if the admissibility criteria themselves were opaque, malleable and

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8 The historic roots of both the Rome Statute, starting with the International Committee of the Red Cross in 1872, and the Geneva Conventions run deep. See “History of the ICC,” Coalition for the International Criminal Court. However the latter has been developed doctrinally more than former. This process was facilitated by linking Common Article of the Conventions to domestic law. No such development has occurred for the Rome Statute.
10 “Index & Legislative History of the UCMJ (1950)” in MILITARY LEGAL RESOURCES, Library of Congress.
11 E. Griswold, The Fifth Amendment Today 7 (1955); see id., at 8 (Fifth Amendment expresses “one of the fundamental decencies in the relation we have developed between government and man”).
susceptible to insider manipulation by experts versed in the field? A prime example derives from the text of the ICC prosecutor’s application for an arrest warrant against al-Bashir: as evidence for the “fate of the displaced persons,” the application presents “[d]ata from refugee camps in Chad and camps for internally displaced persons … within Darfur.” Simply owing to the difficult situation on the ground, the reliability of this data is likely to be imperfect. Yet there might be pressure to admit this or other forms of evidence, including anecdotal testimony, in order to make a morally compelling case against al-Bashir. Similarly, there might be international insistence from many quarters to ignore rules concerning hearsay as well as victim impact statements (VIS) which, in ordinary cases, are scrutinised rigorously before being admitted into a criminal proceeding.

_A (Necessary) Conversation_

Whatever becomes of the prospect of trying al-Bashir in the ICC, a conversation is needed to decide upon the prerogatives of the prosecutor and of the Court, the protections to be afforded this defendant (or a similarly situated defendant in the future), and how best judicial impartiality and independence may be preserved. These concerns have less to do with _how political the prosecution is_ and more to do with _what, according to the international legal norms, is the remedy if an intolerable conflict of interest or other deviation from lawful prosecutorial behaviour is uncovered_. In other words, the cautionary concern of this essay is less theoretical in nature and centred more on the pragmatic legal considerations likely to arise. The Guantánamo example is undoubtedly recent, but that is not the only reason that it is informative in the current ICC context. In short, what went “wrong” (at least through the often clouded lens of international law) in Guantánamo could recur here.

Which elements constitute the charges against al-Bashir and what are the evidentiary burdens that the ICC prosecutor must carry? First, since the Rome Statute pertains to all persons irrespective of their official capacity and since Article 27 expressly refuses to exempt heads of state from ICC prosecution, an argument could be made that the ICC retains jurisdiction over al-Bashir. Second, _genocide_ is defined as the pervasive commission of certain acts, executed with the specific intent to eliminate a group based on nationality, ethnicity, race or religion. The acts specified by the Rome Statute are killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to facilitate physical destruction, inflicting measures intended to prevent births, and forcibly migrating children beyond their community. To prove _genocide_, the ICC prosecutor must prove that some or all of the above acts were committed and that they were committed with the particular intent of obliterating a population.

Third, to meet the burden of proving a _crime against humanity_, the prosecutor must demonstrate that the accused committed one of a number of acts (such as murder, extermination, deportation or forcible transfer of a population, rape, torture, persecution, or other inhumane acts) as part of

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13 See _Prosecutor’s Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad al-Bashir_, p. 4.
14 Even though the U.S. Supreme Court upheld the facial admissibility of VIS in criminal proceedings, if “a witness’ testimony or a prosecutor’s remark so infects the sentencing proceeding as to render it fundamentally unfair” then that evidence is inadmissible. See _Payne v. Tennessee_, 501 U.S. 808, 831 (1991) (O’Connor, J., concurring).
an extensive or methodical attack against civilians. The prosecutor must also show that these acts were committed as part of governmental or organisational policy with the accused’s knowledge. Under the Rome Statute there are two forms of criminal liability. Article 25 states that individual responsibility is triggered when the person commits a crime individually or jointly, by ordering, soliciting, or inducing the commission of a crime; by aiding and abetting the crime; or by otherwise contributing to the commission. Command responsibility, according to Article 28, is at issue when an actual or de facto military commander does not control (or punish) forces subordinate to him who, in his knowledge, were committing or were about to commit crimes against humanity.

These questions could be murky in a criminal case against al-Bashir, and decided by convenience rather than truth-seeking. In a prospective al-Bashir trial, the presiding judges will discern whether particular evidence is exceedingly prejudicial or otherwise reliable or the extent to which a certain Exhibit X denotes culpability. Since the judges will almost certainly be subject to immense international scrutiny and political expectations, the inevitable subjectivity of these judgements will provide opportunity to tinker with the procedural rules. This is especially problematic given that the data accumulated by the ICC prosecutor is almost entirely secondary, and based on evidence from the Sudanese diaspora rather than independent investigations on the ground. Other weaknesses of the ICC include an inability to effectively communicate information to victims and communities affected by the crimes, an incapacity to protect witnesses (making consequential and forthcoming testimony in the future more difficult to obtain), and the ICC’s frequent failure to apprehend suspects.

As a supranational judicial body, the ICC is handicapped by its reliance on the cooperation of the United Nations and of constituent states. According to a July 2008 report by Human Rights Watch (HRW), “the international community has too often downplayed justice amid other important diplomatic objectives, such as peace negotiations and the deployment of peacekeeping forces.”

The remedy fashioned by the Rome Statute to neutralise some of these deficiencies is to enable victims of human rights violations to be parties to the trials. In al-Bashir’s case, this panacea might have the unintended effect of supplanting demanding rules of evidence entirely with anecdotes, hearsay and otherwise questionable testimony — concerns familiar to the military commissions at Guantánamo.

Problems with the Military Commissions at Guantánamo

Let us now trace the development of the Guantánamo commissions and their legal deficiencies. More than four years ago, the U.S. Supreme Court ruled in Hamdi and Rasul that Guantánamo is sovereign American territory; that habeas corpus, the common law right of the accused to have her detention challenged in court, applies there; and that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” Responding to these decisions, the President and the U.S. Department of Defense created the Combatant Status Review Tribunals (CSRTs) to determine whether individuals detained at Guantánamo were “enemy combatants” who took up arms against the United States.

Indeed, the detainees whose case led to the Supreme Court’s latest word on the legality of the Guantánamo military commissions, in *Boumediene v. Bush* (2008), had been detained for more than two years without significant judicial review. *Boumediene* found that Congress could not suspend the constitutionally-secured right to habeas corpus for Guantánamo detainees and that the alternative provided by Congress, a federal statute named the Military Commissions Act (MCA), was an inadequate substitute for habeas.

What, then, were the CSRT system’s shortcomings? Why did the Supreme Court nullify the CSRT remedy as an insufficient surrogate for habeas? And most importantly, what temptations are likely to present themselves in an ICC trial of a reviled perpetrator of genocide? In *Hamdan*, the Guantánamo military commissions were judged by the Supreme Court to be unlawful by providing fewer jury members, distinctive rules of evidence (including allowing hearsay in certain situations), and greater flexibility regarding the defendant’s presence at trial than would otherwise be permissible. Unlike the Guantánamo commissions, the Rome Statute in Article 24 proscribes retroactive prosecutions and states clearly that “in the event of a change in the law … the law more favourable to the person being investigated, prosecuted or convicted shall apply.”

An overarching problem lies in the concentration of power in the structure of the Guantánamo commissions. The “Appointing Authority … who convenes and refers charges against individuals to the military commissions” also decides the questions over the “establishment and proceedings of the commissions”: the selection of jurors to vote on the accused’s culpability, how to exercise oversight concerning the chief prosecutor, whether to permit plea agreements between the prosecutors and the accused, to decide when the fact-finding mission has been exhausted, and to respond to the presiding officer’s interlocutory questions.

But these were not all. Other deficiencies may include the limitations placed upon the accused’s ability to rebut the allegations; evidence that has been labelled classified is not accessible to the defendant who consequently cannot deny or disprove the accusations. It may appear tempting, purportedly for preserving international security, to deter the accused from obtaining evidence to challenge the ICC prosecution’s case. In Guantánamo, for instance, “[r]epresentation by counsel, even with security clearance, was expressly forbidden. Instead, the rules only allowed [the detainees] to meet briefly with a ‘Personal Representative,’ who was not a lawyer, did not represent the [accused]’s interests, and could not have confidential communications with him.”

Article 67.1(d) of the Rome Statute — enforced by Rule 22(1) of the ICC Rules — recognises the defendant’s right to be represented by preferred counsel, but offers only vague notions of fundamental justice to govern the trial itself. But the extent of attorney-client privilege, privacy, and confidentiality are unclear. Moreover, interests of witness or victim protection against public humiliation (particularly relevant for rape victims) or physical danger, or other security concerns could be shown as adequate to deprive even counsel of the right to examine evidence and witnesses to be offered against their clients.

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19 *Brief for Petitioners* 6 (in *Boumediene*).
The theoretical admissibility of hearsay (or evidence procured by torture and other coercive techniques) implies that the accused will be unable to meaningfully confront and cross-examine witnesses. In July 2008, military commission judge Navy Capt. Keith Allred, presiding in the Guantánamo trial of Salim Hamdan (a former chauffeur to Osama bin Laden, the leader of the al Qaeda terrorist network), was compelled to exclude certain pieces of evidence because of “the highly coercive environments and conditions under which [the statements] were made.” Hamdan was “kept in isolation 24 hours a day with his hands and feet restrained, and armed soldiers prompted him to talk by kneeling him in the back. He says his captors at Panshir repeatedly tied him up, put a bag over his head and knocked him [to] the ground.”

Such an interrogative environment can introduce the risk of factual error in confessions, testimony, or other evidence exacted from the accused.

Concluding Thoughts

These procedural guarantees largely followed in civilian trials are not merely academic; they form the backbone of a fair trial consisting of rights, both procedural and substantive, to which even a defendant accused of the most reprehensible crimes is entitled. When trying al-Bashir, who is suspected of committing or negligently standing by genocide, war crimes, and crimes against humanity, it will be enticing to afford him a cursory and incomplete process. However, the protections, if whittled away, stand to benefit no one in the long term. Some words of the American patriot Thomas Paine are instructive: “He that would make his own liberty secure, must guard even his enemy from opposition; for if he violates this duty he establishes a precedent that will reach to himself.”

Rid Dasgupta (rd2136@columbia.edu) is a Masters student at Oxford. He will commence his doctorate at Cambridge this autumn.

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