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Two Legal Issues in the Context of the Abu Garda Decision

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In early February, the ICC Pre-Trial Chamber I declined to confirm the charges against Bahr Abu Garda, commander of a group that broke away from the Justice and Equality Movement, in connection with the attack that killed 12 African Union peacekeepers in Darfur in 2007. The decision of the pre-trial judges is a blow for the Office of the Prosecutor (OTP). If it is true that the Prosecutor submitted “scant and unreliable” (para. 179) http://www.iccnv.org/sites/default/files/2010-02-27_evidence_for_a_trial_in_the_case_of_an_independent

impartial organ of the Court abiding by standards of due process to decline the confirmation of charges. At a more general level, the Abu Garda decision brings two important legal issues to the fore: the selection of cases at the ICC and the legal status of peacekeepers.

The Selection of Cases and the Role of the Prosecutor

The Abu Garda decision is a reminder of the Prosecutor's vast discretion in selecting cases. Similar to other international criminal tribunals, this power has been granted to the Prosecutor in order to ensure his or her independence. But this power can be a double-edged sword. First, everyone else has very little say in the selection of cases although, under article 53, paragraph 3(b), pre-trial chambers may review his decisions not to investigate or not to prosecute – to date, this power has never been used. For example, since 2003 the Prosecutor has been monitoring crimes in Colombia, without deciding whether or not to open an official investigation. The Rome Statute (<http://www.icc-cpi.int/Menu/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>) provides no deadline for the Prosecutor to make such this determination. On 30 November 2006, in regards to the situation in Central African Republic, the Pre-Trial Chamber III concluded (<http://www.icc-cpi.int/iccdocs/doc/doc320175.PDF>) that the prosecutor should decide within a reasonable time whether or not to open an investigation. The position of the Prosecutor, however, has been that he cannot be forced to make this decision as long as his evaluation is ongoing. Indeed, the Prosecutor never accepted the holding of the Pre-Trial Chamber III, as his 15 December 2006 filing made clear (<http://www.icc-cpi.int/iccdocs/doc/doc320182.PDF>). Furthermore, where an investigation has been officially opened, the Office of the Prosecutor selects the particular cases – as it happened in the Abu Garda case.

Apart from upholding the integrity of the Court, there is another unintended reason why the Pre-Trial Chamber's dismissal of the charges against Abu Garda has a positive side effect: It means that the Court does not have to pronounce itself on the legal status of personnel involved in peacekeeping missions.

The Legal Status of Peacekeepers

Abu Garda is alleged to have committed three counts of war crimes under the Rome Statute (<http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050209/ICC02050209.htm>): murder, intentionally directing attacks against a peacekeeping mission, and pillaging.

As far as the second charge is concerned, Article 8(2)(e)(iii) of the Rome Statute stipulates that it is a war crime to intentionally attack personnel involved in a peacekeeping mission, as long as they are protected as civilians under the international law of armed conflict.

The drafters of the Rome Statute apparently felt the need to underscore the seriousness of attacks against peacekeepers operating in armed conflicts. Legally however, the paragraph does not seem to change much, because peacekeepers are protected only "as long as they are entitled to the protection given to civilians under the international law of armed conflict". The provision does thus not appear to criminalize conduct that is already covered by rules regarding the prohibition of attacks against civilians. From a legal point of view, this consequently begs the question of why the provision has been included in the Rome Statute at all.

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International humanitarian law (IHL) distinguishes combatants and civilians. Intentional attacks against civilians count as a war crimes. But when civilians directly take part in hostilities, they lose this protection. The classical view of IHL is that the same logic applies to peacekeepers. The 1994 Convention on the Safety of UN and Associated Personnel (<http://www.un.org/law/cod/safety.htm>) confirms that the personnel of peacekeeping missions is protected under IHL, unless and for such time as they take part in hostilities.

In other words, when peacekeepers do engage in hostilities, they lose the protection of civilians, and they may be lawfully attacked. Nevertheless, it is controversial to what extent and under what conditions peacekeepers are entitled to the protection of civilians in situations where they operate in armed conflicts (see the ICTY Karadzic/Mladic Indictment (<http://www.icty.org/x/cases/mladic/ind/en/kar-ii950724e.pdf>), where peacekeepers in the former Yugoslavia were said to be civilians, para. 14). It is also not always easy to determine when certain acts must be considered as “taking part in hostilities ([http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf))”, for example when peacekeepers claim to be acting in self-defense. Here, it appears that the UN’s use of the concept in relation to its peacekeeping forces is not perfectly congruent with IHL, which permits self-defense, but understands the term in a more limited fashion.

Had the Abu Garda case gone to trial, the Court would have had to pronounce itself on the legal status of peacekeepers by qualifying the Haskanita attacks in light of Article 8(2)(e)(iii) cited above. This may well have created a lose-lose situation for the ICC.

Had the Court decided to treat peacekeepers as “normal” civilians, it would have implied that peacekeepers are not different from any individual in armed conflict. Ergo, peacekeepers are only protected under international law when they do not directly take part in hostilities. The big elephant in the room here is of course the fear of the UN Department of Peacekeeping Operations and others that such a ruling could shy way potential contributors of peacekeeping troops.

Alternatively, had the ICC interpreted Article 8(2)(e)(iii) to imply that peacekeepers are legally a separate category, this would have been even more problematic (and legally wrong). In IHL, the distinction between civilians and those that are taking part in hostilities is of fundamental importance. There is *no* intermediate or third status in IHL (<http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument>). Suggesting that peacekeepers are a separate species in IHL would be a slippery slope with potentially dangerous consequences. The Bush administration was not the first to claim that certain individuals fell outside the classic logic of IHL. Arguments made in the context of the “war on terror” about “unlawful combatants” rely on the same misguided idea of a third status, which ultimately undermines IHL as an institution.

The dismissal of the Abu Garda case avoids that the ICC have to wrestle with the complicated dilemmas pertaining to the legal status of peacekeepers – this may prove to be another positive, if unintended consequence of the Pre-Trial Chamber’s decision.

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