

The Italian Court of Cassation Misapprehends the Notion of War Crimes

The *Lozano* Case

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Abstract

In July 2008, the Italian Court of Cassation held that Italian courts lacked jurisdiction over the 2005 killing in Baghdad by a US serviceman of an Italian intelligence officer in civilian clothes and the wounding of another officer and a reporter. The Court asserted that the action was accomplished by the serviceman while fulfilling his official duties, and that he therefore enjoyed functional immunity from foreign courts. According to the Court, this immunity was not removed by the fact that the killing allegedly amounted to a war crime. The Court took the view that war crimes are 'grave breaches' of international humanitarian law, and must be large-scale, odious and inhuman, as well as intentional acts, whereas the killing at issue was not. The author argues that the Court premised its reasoning on a clearly erroneous definition of war crimes.

1. Introduction

On 24 July 2008, the Italian Court of Cassation held that Italy lacked jurisdiction over the crime attributed to the US soldier Mario Luis Lozano, a member of the Multinational Force in Iraq. On 4 March 2005, at a checkpoint in Baghdad, Lozano had fired on a vehicle, killing an Italian senior intelligence officer and wounding both the reporter he was taking to the airport and the vehicle's driver (another Italian intelligence officer).¹ The judgment is notable: it is elaborate, based on an extensive perusal of national and international case law, and forcibly argued on many issues. Nevertheless, I respectfully submit that,

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¹ The judgment is still unreported. There exists a PDF text on the Court's website (www.cortecassaazione.it) accessible only on payment. I will cite here from that text (on file with the author).

although the Court has set forth some interesting *obiter dicta*, the legal grounds on which it has asserted the lack of Italian jurisdiction are predicated on a manifestly erroneous notion of ‘war crimes’.

2. The Facts

An Italian reporter, Giuliana Sgrena, had been kidnapped by Iraqi insurgents or terrorists. After secret negotiations, the Italian intelligence managed to obtain her release. On 4 March 2005, she was taken to the airport by a senior Italian intelligence officer, Nicola Calipari, in a civilian car driven by another intelligence officer, Andrea Carpani. Both were in civilian clothes and did not carry any weapons (for these reasons they were properly regarded as civilians rather than combatants; although in Italy they were civilian staff members of the Ministry of Defence, they were not taking any part in armed hostilities but were fulfilling a peaceful mission). When they were approaching a checkpoint near the airport manned by US soldiers and set up in expectation of the passage of the US ambassador, the US soldier Lozano, who was at the checkpoint, opened fire on the vehicle, killing Calipari and wounding the other two passengers. An investigation was immediately conducted by a commission of inquiry made up of US officers, joined by two Italian military experts. The commission reached different conclusions. The majority, composed of US military, concluded that Lozano had acted in keeping with the rules of engagement on the manning of check points, and placed the blame for the killing on the excessively fast driving of the Italian agent and the lack of coordination of the Italians with US personnel. The minority, consisting of the two Italian experts, dissented on the factual findings, although it conceded that the killing had not been intentional.²

Criminal proceedings were instituted in Italy against Lozano. The Rome Prosecutor acted upon a provision of a 2005 law regarding the participation of Italy in international missions, which granted the Rome Tribunal jurisdiction over criminal offences committed on Iraqi soil by foreigners against Italian nationals.³ In this context, the Prosecutor invoked Article 10 of the Italian Criminal Code, granting Italian courts jurisdiction over ordinary crimes committed abroad, but the First Instance Judge (*giudice dell’udienza preliminare*) determined it was more appropriate to invoke Article 8 of the same Code. Article 8 provides that Italian courts have jurisdiction over criminal offences committed abroad if such offences are ‘political’ in nature. This includes an attack against the ‘political interest of the state or a political right of the

2 The US Report was placed on the internet by www.macchianer.net without the redactions made by the US authorities (it runs to 42 pages; it would seem that it was later deleted from the website). The Italian report, in Italian, runs to 52 pages.

3 See Art. 13 decree law 19 January 2005, note 3, converted into law on 18 March 2005, note 37.

national' or an attack which is 'politically motivated'.⁴ The Prosecutor charged Lozano with 'voluntary murder' and 'voluntary attempted murder' (against the intelligence officer and the reporter, both of whom had been wounded).

On 25 October 2007, the Rome Court of Assize, to which the case had been submitted, held that Italian courts lacked jurisdiction on three grounds: (i) customary international law, applicable in Italy on the strength of Article 10(1) of the Italian Constitution, upholds the 'law of the flag' thereby attributing to the sending state (that is, the state that sends military contingents abroad) exclusive jurisdiction over offences committed by its troops; (ii) Security Council resolution 1546 of 8 June 2004, which, according to the Court, is self-executing in Italy, confirms that jurisdiction over troops in Iraq is granted to the state of the author of alleged offences; (iii) no concurrent exercise of jurisdiction by the territorial state (Iraq) or the national state of the victim (Italy) could be asserted. In any event, the United States had exercised its primary jurisdiction in that the US Department of Justice, based on the conclusions of the commission of inquiry, had determined that Lozano did not commit any crime, and therefore the case had been dismissed out of hand.⁵ The Prosecutor and counsel for the reporter, Giuliana Sgrena (who had participated in the proceedings as '*parte civile*', or private petitioner), lodged an appeal with the Court of Cassation.

3. The Court's Reasoning

The Court first deals with the notion of the 'flag state' jurisdiction, dismissing it with regard to the case at issue. Citing some of its earlier decisions, as well as those of the Italian Constitutional Court and some Italian lower courts, the judges determined that the sending state's exclusive jurisdiction has progressively been limited after the Second World War by the territoriality principle.⁶ The Court thus seems to hold that the Court of Assize's argument on the issue was not dispositive, although it does not then explain how present customary international law regulates the matter.

The Court then discusses the relevance of the Security Council resolution and the Status of Force Agreements (SOFAs) and concludes that:

notwithstanding the tendency to grant jurisdiction to the sending state that one can discern in international practice, one cannot yet find a principle of customary international law or a principle deriving from ad hoc agreements or from SOFAs, specifically and expressly regulating 'horizontally' the assignment of jurisdiction among states participating

4 The most likely reason why the Prosecutor relied upon Art. 8 and not on Art. 10 of the same Code (granting jurisdiction over 'ordinary' crimes committed abroad against Italians or foreigners) lies in the fact that the latter provision requires the presence of the accused in Italy for trial. Art. 8, in contrast, does not make this presence indispensable for trial proceedings because trials *in absentia* are allowed in Italy.

5 The judgment, running to 30 typewritten pages, is still unreported (on file with the author).

6 *Ibid.*, at 7–8.

in the Coalition or in the Multinational Force operating on the territory of another state. In other words, the status of multinational contingents in their reciprocal relationships is not yet clearly regulated in international law. Nor does there exist a clear regulation of the exclusive jurisdiction of the national state of each military contingent, providing that it prevails over other concurrent heads of jurisdiction, such as that of passive nationality, not even in the most dramatic cases, such as that here at issue, of ‘collateral damage’ or ‘friendly fire’, that is criminal conduct undertaken either voluntarily or recklessly, against members of contingents or nationals of other allied states participating in the same peace mission. These are grey areas where new problems crop up and controversial solutions can be found on account of the evident involvement of a plurality of national legal systems.⁷

The Court notes that the problem at issue renders moot the question of whether the Security Council resolution 1546 (2004) was self-executing in Italy, although it rightly notes in passing, in an important *obiter*, that a negative answer is more appropriate. In its view, the legislative practice in Italy requires the passing of implementing legislation, and this legislation is all the more necessary when the question at issue relates to criminal law, on account of Article 25(2) of the Italian Constitution (enshrining the *nullum crimen sine lege* principle).⁸

After that the Court moves to the crucial issue, raised by the defence counsel, of whether the indictee enjoyed immunity from jurisdiction. This immunity would apply if he had acted in his official capacity and only if it had not been removed by international rules regarding immunity from individual responsibility for international crimes. It had been argued by the defence that because ‘Lozano’s conduct lacked the hallmarks of war crimes and crimes against humanity, namely “gravity, intensity, arbitrary character, heinousness and intentionality”’, this immunity was applicable.⁹ Thus, once it had established the possible legal foundation of Italian jurisdiction, assuming that such jurisdiction did exist,¹⁰ the Court turned to the crux of

7 *Ibid.*, at 10 (*‘S’intende dire, in altre parole, che non risulta affermato con chiarezza nel sistema di diritto internazionale lo status dei contingenti multinazionali nei loro rapporti reciproci, né tanto meno l’esclusiva attribuzione della giurisdizione allo Stato di appartenenza di ciascun contingente militare, con carattere di prevalenza su ogni altro criterio concorrente di collegamento, come quello della giurisdizione “passiva”, neppure nei più drammatici casi — come nella specie — di “danni collaterali” o di “fuoco amico”, cioè di condotte criminose, dolose o colpose, in danno di membri del contingente militare o comunque cittadini di altro Stato, contribuente e alleato nella medesima missione di pace: zone grigie, queste, caratterizzate dall’emersione di problematiche nuove e controverse per l’evidente coinvolgimento di una pluralità di ordinamenti.’*).

8 *Ibid.*, at 10–11. The Court of Assize had upheld the contrary view, citing verbatim the opinion set forth by B. Conforti, *Diritto internazionale* (6th edn., Naples: Editoriale Scientifica, 2002), at 327–328.

9 *Ibid.*, at 5.

10 The Court, in another *obiter*, specifies that the Italian jurisdiction at issue, were it to be asserted, would be based on Arts 8 and 10 of the Criminal Code and not on the criminal provisions of the 2005 law concerning Italian military missions abroad. According to the Court, Art. 13 of the 2005 law (*‘The criminal offences committed by foreigners on Iraqi territory against the Italian state or Italian nationals participating in the mission provided for in Articles 1 and 4 [on the mission in Iraq] are prosecuted at the request of the Minister of Justice, and after hearing the Minister of Defence in the case of offences against members of the Armed Forces’*) were not applicable since none of the Italians involved in the ‘tragic events’ caused by the military action of Lozano was participating in the peace mission in Iraq: the two

the matter: namely, the existence of a rule granting functional immunity to the US soldier and the simultaneous inapplicability of another rule removing such immunity in cases involving international crimes. Citing international and national case law, the Court upheld the customary rule whereby foreign officials performing acts *jure imperii* are immune from foreign civil and criminal jurisdiction. The Court elegantly sets forth the rule and its rationale,¹¹ although at times it appears to confuse this rule with that of *state* immunity from foreign civil jurisdiction.¹²

Italian intelligence agents were accomplishing an ad hoc mission, namely obtaining the release of the Italian reporter kidnapped by 'Iraqi terrorists', *ibid.*, at 11.

11 'Ogni Stato, indipendente e sovrano, è libero di stabilire la propria organizzazione interna e individuare le persone autorizzate ad agire per suo conto, sicché, una volta determinate la qualità di organo e la sua competenza, le relative condotte individuali esprimono l'esercizio di una funzione pubblica e sono imputabili allo Stato, comportandone, senza indebite interferenze da parte dei tribunali di un altro Stato, solo la responsabilità per l'eventuale illecito internazionale da far valere nei rapporti fra lo Stato leso e lo Stato responsabile, a garanzia dell'assetto strutturale della stessa comunità e delle relazioni internazionali nel rispetto delle reciproche sovranità fra gli Stati ("par in parem non habet imperium/jurisdictionem").' (at 13).

12 For instance, the Court extensively cites both cases relating to the agents' immunity for criminal jurisdiction (the *McLeod* case, *British and Foreign State Papers*, Vol. 29, at 1139; Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14-A), Appeals Chamber, 29 October 1997; *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports (2002), at 3; *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Reports (2008); as well as Arts 27 and 98 ICCSt) and cases relating to the immunity of states from foreign (civil) jurisdiction (e.g. three cases brought before the European Court of Human Rights: *Al-Adsani v. United Kingdom* (2002) 34 EHRR 273 (Application No. 35763/97), *Kalogeropoulou v. Greece and Germany*, ECHR (2002-X) (Application No. 59021/00) and *Markovic v. Italy*, ECHR (2006) (Application No. 1398/03) plus the 1972 European Convention on State Immunity and the 2004 New York Convention on Jurisdictional Immunities of States and their Property).

According to the Court, the rule on the immunity of state agents from foreign criminal jurisdiction is the 'natural corollary' of the customary principle on the restricted immunity of states from foreign jurisdiction for acts *jure imperii* (at 11). This, however, does not seem correct, since, unlike states, state agents are immune from foreign jurisdiction also for acts accomplished *jure gestionis* because their immunity is 'substantive' and not only merely procedural (on the matter see H. Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952), at 235 ff.; A. Verdoss and B. Simma, *Universelles Völkerrecht* (3rd edn., Berlin: Duncker und Humblot, 1984), at 773; G. Dahm, *Völkerrecht*, Vol. 1 (Stuttgart: Kohlhammer Verlag, 1958), at 237–238; A. Cassese, *International Law* (2nd edn., Oxford: Oxford University Press, 2005), at 110–113).

A case in point is *Lyders v. Lund* concerning consular immunities. An attorney had filed an action against the consul of Denmark seeking to collect legal fees and costs for services performed; the consul had filed a motion to dismiss on the grounds of sovereign immunity. The District Court, N.D. California, held that 'in actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state. Acts of such officials, beyond the scope of their authority or in connection with their private business, cannot be regarded as acts of the foreign state, and the official may be sued on account of any such acts.' (judgment of 12 April 1929, 32 F.2d 308; 1929 U.S. Dist. LEXIS 1179), at 2.

The main problem in the case at issue was whether this immunity failed to apply by operation of the customary rule that removes immunity when a state official's conduct amounts to a war crime. The Court first asks itself whether such a customary rule exists. It does not pronounce right away on the issue, but instead addresses the different question of whether a *state* as such may invoke immunity from foreign jurisdiction when an international crime is at stake. In the view of the Court, a rule on the matter 'is in the process of formation'. This rule,

On account of the peremptory nature of international humanitarian law, which imposes respect for fundamental human rights and the possibility for universal values transcending individual state communities, aims at limiting the civil responsibility of a foreign state the organ of which, while performing acts *jure imperii* such as in military operations, has engaged in actions of such gravity as to undermine the very foundations of the coexistence of nations, actions that may therefore be classified as international crimes.¹³

Here the Court clearly sets forth an important and innovative *obiter*: whenever a state agent, acting in his official capacity performs acts that amount to international crimes, the sovereign immunity from foreign civil proceedings normally accruing to the *state* on whose behalf the individual acted may cease to operate. In other words, this state immunity can be removed. The importance of this legal proposition cannot be underestimated. As has been noted by some commentators, it makes no sense to remove the immunity from foreign criminal jurisdiction for state *agents* and then maintain *state* immunity for the same acts.

The Court then dwells on the central issue at stake: whether the functional immunity of the state *agent* is lifted when the acts he performs amount to an international crime. Its answer is in the affirmative and is based on Italian case law and the consideration that acts such as massacres in war 'bear the stigma of being contrary to the most elementary principles of humanity and are glaringly criminal'.¹⁴ In addition, according to the Court, in case of conflict between the rule granting functional immunity to state officials and that on

13 'Può pertanto ritenersi (condividendosi, sul punto, le lucide argomentazioni dei più recenti arresti [sic; this is an old-fashioned Italian word, of French origin, used to denote a judgment] delle Sezioni Unite civili: n. 5044 del 2004, nn. 14199 e 14201 del 2008, citt.) che sia "in via di formazione" una consuetudine internazionale la quale, in considerazione del carattere cogente e imperativo delle norme di diritto internazionale umanitario ("peremptory norms of general international law", nella dizione dell'art. 53 della Convenzione di Vienna del 23 maggio 1969 sul diritto dei trattati), che impongono il rispetto dei diritti umani fondamentali, e della concreta lesività di "valori universali che trascendono gli interessi delle singole comunità statali", è diretta a limitare l'immunità dalla responsabilità civile dello Stato estero, il cui organo, pur nell'esercizio di un'attività *iure imperii*, come in situazioni belliche, si sia tuttavia reso autore di atti di gravità tale da "minare le fondamentali stesse della coesistenza tra i popoli" (Corte cost. di Ungheria, n. 53 del 1993), configurabili perciò come "crimini internazionali"'. (at 13–14).

14 *Ibid.*, at 15.

the removal of such immunity for international crimes, the latter must prevail since it has the nature and character of *jus cogens*.¹⁵

Moving to the case at issue, the Court holds that this customary rule does not apply because the act performed by Lozano was not a war crime. Here the Court makes three preliminary points: (i) it is not necessary *in casu* to establish whether the conflict was international or national, for in any event the application of international humanitarian law is provided for in Security Council Resolution 1546 (2004), a resolution which, the Court probably assumes, was fully applicable in and binding upon Iraq;¹⁶ (ii) international crimes have a 'complex legal structure' in that they are offences envisaged in national legal orders, plus a something (*quid pluris*) residing in one or more elements 'that qualitatively turn them into offences that attack and undermine interests and values of the international community as a whole';¹⁷ and (iii) the acts performed by Lozano cannot be classified as crimes against humanity absent a widespread or systematic practice and awareness of such practice by the agent.

The Court then focuses on the core issue of what constitutes a war crime. The Court asks, 'What are war crimes?' Its answer is that they are

grave breaches of international humanitarian law of armed conflicts protecting the life and limb of persons, in particular of those who belong to the civilian population and who in that context do not take part in hostilities.¹⁸

The Court reviews various cases as well as Article 8 of the ICC Statute. It emphasizes two features of Article 8: (i) it requires that war crimes be 'in particular . . . committed as part of a plan or policy or as a part of a large scale commission of such crimes'; and (ii) it always requires, as an 'indispensable constitutive element of the crime' the 'intentionality' of conduct. The Court

15 *'Dalla parallela e antinomica coesistenza nell'ordinamento internazionale dei due principi, entrambi di portata generale, consegue, come logico corollario, che l'eventuale conflitto, laddove essi vengano contemporaneamente in rilievo, debba risolversi sul piano sistematico del coordinamento e sulla base del criterio del bilanciamento degli interessi, dandosi prevalenza al principio di rango più elevato e di jus cogens, quindi alla garanzia che non resteranno impuniti i più gravi crimini lesivi dei diritti inviolabili di libertà e dignità della persona umana, "per il suo contenuto assiologico di meta-valore" nella comunità internazionale, rispetto agli interessi degli Stati all'uguaglianza sovrana e alla non interferenza, rappresentando la violazione di quei diritti fondamentali "il punto di rottura dell'esercizio tollerabile della sovranità", in altre parole l' "abuso di sovranità" dello Stato.'* (at 15).

16 It is not clear, from this particular statement of the Court, whether in its view the resolution did not need any national implementation to become operative in Italy.

17 *' . . . i crimini individuali di natura propriamente internazionale hanno una struttura complessa, nel senso che essi, anche se si sostanziano in fattispecie costituenti reati per il singolo ordinamento penale nazionale (es. omicidio), presentano, rispetto agli schemi di parte speciale dei vari codici penali, un quid pluris costituito da uno o più elementi tipici, soggettivi e oggettivi, atti a trasformarli qualitativamente e ad elevarli a rango autonomo di delitti lesivi degli interessi e dei valori della comunità internazionale nel suo insieme.'* (at 16).

18 *' . . . quanto alla categoria dei "crimini di guerra", che si qualificano tali le violazioni gravi ("grave breaches") del diritto umanitario nei conflitti armati, a tutela della vita e dell'integrità fisica e psichica delle persone, appartenenti in particolare alla popolazione civile, che in quel contesto non prendono parte alle ostilità.'* (at 16).

concludes that Lozano's conduct is 'manifestly out of proportion to the notion of war crimes':

In principle, in spite of the indubitable tragic character of the acts affecting persons not taking part in the armed conflict, some elements prevent us from characterizing [Lozano's conduct] as an odious and inhuman hostile act against civilians, and consequently as a war crime: the specific historical and factual dimension of the episode (the fact that the vehicle with two Italian state agents and a reporter rapidly approached the check-point in order to reach the airport; the placement of the check-point at the intersection between two roads leading to the airport, which had already been repeatedly been the object of terrorist attacks; the objective situation of maximum alert of the servicemen manning the check-point, in anticipation of the US ambassador motorcade; the fact that it was night) and the isolated and individual nature of the act.¹⁹

The Court further supports its conclusion by noting that in any event the classification of Lozano's conduct as a 'war crime' had never been advocated by the prosecution either initially, before the Court of Assize, or subsequently, before the Court of Cassation.²⁰

4. The Court's Erroneous Definition of War Crimes

Two objections can be raised. First, the Court clearly confuses *war crimes* with *grave breaches of the Geneva Conventions and the First Additional Protocol*. It is well established that the latter are simply a sub-category of the former. This distinction is clear from the language of the Geneva Conventions and the First Additional Protocol, and spelled out in Article 85(5) of the Protocol ('Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes'). It can also be deduced from Article 86(1) (which speaks of 'grave breaches' and 'all other breaches' of the Conventions and Protocol), a comparison between this

19 *'Sembrano ostare, in linea di principio, alla configurabilità di un odioso e inumano atto ostile contro civili e quindi del "crimine di guerra", nonostante l'indubbia tragicità degli eventi lesivi in danno di persone estranee al conflitto armato iracheno, la concreta dimensione storico-fattuale dell'episodio (l'approssimarsi del veicolo, con a bordo i due funzionari italiani e la giornalista liberata, in avvicinamento veloce al posto di blocco per raggiungere l'aeroporto militare di Baghdad; la localizzazione del checkpoint all'intersezione fra due strade di accesso all'aeroporto, già oggetto di ripetuti attacchi terroristici; la situazione obiettiva di massima allerta dei soldati in servizio al posto di blocco, in attesa del corteo dell'ambasciatore USA in Iraq; l'ora notturna) e il carattere isolato e individuale dell'atto.'* (at 18).

The same view as that of the court had been already advanced by a professor of law, N. Ronzitti (*Il Sole 24 Ore, Guida al Diritto*, no. 6, 9 February 2008, at 52–54) and has been restated after the judgment in a short article in *Affari internazionali* of 30 June 2008 (www.affarinternazionali.it/articolo.asp?ID=878, visited 3 October 2008). Ronzitti, however, simply states that it is clearly to be ruled that the Lozano's acts amounted to an international crime (*'è palesemente da escludere'*).

20 This argument, it is submitted, is not crucial, for in Italy the Court of Cassation is 'master of the law', under the principle *jura novit curia*, and is not at all bound by the arguments of the parties.

paragraph and paragraph 2 of the same Article, as well as from Article 87 (which only mentions 'breaches' of the Conventions and Protocol).

What is even more important is the primary purpose of the distinction, that mandatory universal criminal jurisdiction operates only with regard to grave breaches. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) also contains separate provisions relating to the criminal offences over which the Tribunal has jurisdiction, one for grave breaches (Article 2), the other for 'violations of the laws and customs of war', namely war crimes (Article 3). The ICC Statute draws the same distinction. Article 8, dealing with war crimes, differentiates between 'grave breaches' (Article 8(a)), and 'other serious violations of the laws and customs applicable in international armed conflict' (Article 8(2)(b)).

Second, the Court holds the view that war crimes are such only if they reach a high threshold: they must be (i) 'odious and inhuman acts'; (ii) large-scale (possibly even part of a plan or policy) or in any case not isolated and individual acts; and (iii) intentional. With respect, I submit that this view is wrong. One ought not to confuse the definition provided in Article 8 of the ICC Statute with the definition of war crimes that can be derived from customary international law. The former is only intended to set limits to the Court's jurisdiction (by establishing on which specific categories of war crimes it can pronounce). It can in no way impinge on the existing customary law of war crimes, as is confirmed in Article 10 of the ICC Statute (although of course in the long run it can erode or modify that notion at the customary law level).²¹ If one wants to find the customary law definition, it may suffice to look up some treaty provisions that have turned into customary law, the most authoritative Military Manuals as well as national and international case law. Article 6(b) of the Nuremberg Charter defines war crimes as 'violations of the laws and customs of war' and the same notion can be found in Article 5(2)(b) of the Tokyo Charter (1946) as well as the 1956 US Military Manual (*The Law of Land Warfare*, section 499), and the 2004 UK Military Manual (*The Manual of the Law of Armed Conflict*, sections 1620–1621). The Control Council Law 10 (of 20 December 1945) defined war crimes slightly better as 'atrocities and offences against persons or property constituting violations of the laws or customs of war'. Some judicial decisions more correctly restrict the definition to 'serious violations' of international humanitarian law.²²

21 'Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'

22 See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995, at § 94. The Court cited, as an example of violation of international humanitarian law that is not 'serious', the fact that the serviceman of an occupant belligerent appropriates a loaf of bread belonging to a national of the occupied territory. This definition has been upheld in the legal literature; for instance see G. Werle, *Principles of International Criminal Law* (The Hague: Asser Press, 2005), at 280–281; A. Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008), at 81–86. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1 (Cambridge: Cambridge University Press, 2005), at 568.

Furthermore, it is apparent from this body of law and borne out by case law²³ that individual and isolated acts (such as a rape, murder, the wounding of a civilian and so on) may amount to a war crime provided they are connected to an armed conflict. Although courts, for reasons of judicial economy, rightly tend to deal primarily with large-scale attacks on life or limb and other atrocities, this does not convert those factors into jurisdictional prerequisites.

In addition, war crimes need not be 'odious or inhuman' acts. The category of war crimes includes such acts as 'unlawfully holding as a prisoner or unjustifiably delaying the return home of a protected person'²⁴ or misuse of the red cross emblem,²⁵ appropriating or destroying private property of the enemy, when such appropriation or destruction is not imperatively demanded by the necessities of war (cf. Article 8(2)(b)(xiii) of the ICC Statute), or wounding a person hors de combat.

Moreover, intentionality (or *dolus*) is not indispensable to jurisdiction (and *a fortiori* is not invariably constitutive of the crime). It would be preposterous if it were so, because one would first have to establish in each case whether the act was intentional and then classify it as a war crime. Instead, intention or *dolus* is only one of the possible modes of *mens rea*, others being recklessness or *dolus eventualis*²⁶ (while gross negligence or *culpa gravis* seems to be

23 For example in *Erich Weiss and Wilhelm Mundo*, a US Military Court in Ludwigsburg dealt with the killing in 1944 by two German policemen of a US airman captured after his aircraft had been shot down (the accused were, however, acquitted because the Court accepted their plea that they had acted in self-defence: verdict of 11 November 1945, see *Law Reports of Trials of War Criminals*, Vol. XIII, at 149–150); in *Takeuchi Hiroe*, the Dutch Temporary Court Martial at Makassa (Indonesia) ruled on 4 June 1947 that the accused, a Japanese soldier, was guilty of the war crime of rape for he had threatened and then used sexual violence against an Indonesian female civilian (text cited by Cassese, *supra* note 22, at 89); in *Albrecht*, the Dutch Special Court of Cassation held on 11 April 1949 that the accused, a member of the German *Waffen SS* was guilty of a war crime (and not a crime against humanity) for killing a person in custody (in *Nederlandse Jurisprudentie* (1949), no. 125, at 747–750, summarized in 16 *Annual Digest* (1949), at 396–399); in the *Sergeant W.* case, a Belgian serviceman operating in 1965 on behalf of the army of the Democratic Republic of Congo was convicted of killing a female civilian in an internal armed conflict (judgment of 18 May 1966, in *Revue de droit pénal et de criminologie* (1972–1973), at 806–809); similarly, in the *Case of the Italian Corporal*, an Italian serviceman and his superior (a sergeant) were brought to trial in Italy for accidentally killing an Iraqi civilian at Nassiriyah (Iraq) in 2003. The court of first instance convicted the perpetrator, but on appeal he was acquitted on account of a defence (see details in A. Cassese, 'Under What Conditions May Belligerents be Acquitted of the Crime of Attacking an Ambulance?' 6 *JICJ* (2008), 389, note 15).

24 See for instance the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) of 26 June 2002, § 8(2).

25 Henckaerts and Doswald-Beck, *supra* note 22, at 571. The ICC Statute considers this a war crime only if 'making improper use of a flag of truce or of the military insignia and uniforms of the enemy or of the United Nations, as well as the distinctive emblems of the Geneva Conventions' results 'in death or serious personal injury' (Art. 8(2)(b)(vii) ICCSt).

26 The ICTY case law is consistent to the extent that, for instance, the mental element of murder as a war crime may be either intent or *dolus eventualis*: see the cases cited in Cassese, *supra* note 22, at 93. See also Judgment, *Blaskić* (IT-94-14), Appeals Chamber, 29 July 2004, §§ 41–42 (on *dolus eventualis* in command responsibility).

In *Strugar* a Trial Chamber made this statement: 'The following formulation appears to reflect the understanding which has gained general acceptance in the jurisprudence of the Tribunal:

ruled out).²⁷ Let it be further noted that not even Article 8 of the ICC Statute requires ‘intention’ as an indispensable mental element for each enumerated war crime. In particular, Article 8(2)(c)(i) — under which the action we are discussing could fall — does not provide that ‘violence to life and person’ of one ‘taking no active part in the hostilities’ must be intentional in order for it to be prohibited and criminalized.

5. Does International Law Nevertheless Maintain Functional Immunity for War Crimes that are not ‘Odious’ and ‘Intentional’?

In light of the ruling of the Italian Court, the further question should be raised whether the customary rule removing the immunity normally accruing to state agents for official acts only covers grave and odious or intentional war crimes (thus leaving that immunity intact with regard to crimes of lesser magnitude or scope), or instead applies to any war crime, whatever its degree of gravity.

To the best of my knowledge, in no war crime trial has the defendant ever asserted that he enjoyed immunity on account of the scarce gravity of his war crime. Normally defendants either invoke superior orders, or argue that the acts attributed to them did not occur or were not performed by them, or challenge their classification as war crimes. Although this tendency seems to demonstrate that the answer to the above query should be in favour of the second option (that is, for no war crime whatsoever can one rely on functional immunity), no conclusive evidence can be inferred from case law, because cases specifically dealing with the issue are lacking.

Similar remarks can be made with regard to international *written* rules designed to remove functional immunity for international crimes (the prime, and first in time, of these rules being Article 7 of the Charter of the Nuremberg International Military Tribunal, whereby ‘The official position of defendants, whether as Head of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating

to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission. In respect of this formulation it should be stressed that knowledge by the accused that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death. The Chamber notes that this formulation may prove to require amendment so that knowledge that death or serious bodily harm is a probable consequence is sufficient to establish the necessary *mens rea*, but the Chamber need not consider this in the present case; it has not yet received authoritative acceptance.’ (Judgment, *Strugar* (IT-01-42), Trial Chamber, 31 January 2005, at § 236).

²⁷ For instance see Judgment, *Stakić* (IT-97-24), Trial Chamber, 31 July 2003, at § 587.

punishment'). True, these rules do not draw any distinction between major or lesser war crimes (or for that matter, other international crimes). Nevertheless, this consideration as well cannot be held to be conclusive, for one could always come to a different conclusion through a logical construction of the whole set of international rules on individual criminal liability.

To attain a satisfactory solution one should therefore turn to general principles and focus on the rationale behind the customary rules under discussion.

The rationale underpinning the customary rule that lifts the usual immunity for official acts lies in the need to remove the shield of state sovereignty whenever individuals, whether or not acting on orders of their superiors, engage in actions that infringe *values* protected by international humanitarian law or (in the case of crimes other than war crimes) by human rights law. Taking the life of a civilian in an armed conflict is always contrary to international humanitarian law, whether or not this act is intentional, or results from racial or political hatred or other vicious conduct — unless of course the killing is lawful (for instance as legitimate and proportionate collateral damage, or as a result of civilians forfeiting their immunity from attack on account of their active participation in armed hostilities). Further, other acts that do not involve the taking of life (such as abusing the red cross emblem or appropriating enemy private property) are at odds with values safeguarded by international law (such as the need to protect special humanitarian emblems or private property). Removing functional immunity serves to *dissuade* service personnel from engaging in criminal conduct: they are warned that they will not be able to enjoy the protection of their national state, which will no longer be entitled to claim that the action of its agent must be attributed to the state with the consequence that the agent does not incur any individual liability. The rule lifting functional immunity thus has a significant deterrent effect.

Let me add that international law is not insensitive to realities and to the whole gamut of different situations occurring in real life. It does not turn a blind eye to the difference between massacres of civilians, large-scale torture of prisoners of war or the extermination of groups (even without genocidal intent, as in the case of political opponents) and the isolated killing of a single civilian. It indeed also takes into account the various gradations of culpability of the agent; it does so either at the level of justifications or excuses (when a court can conclude that the defendant is not guilty, or is not punishable), or, if no defence is available, at the sentencing stage (when the author of a 'minor' war crime can get a relatively light sentence). Nevertheless, the killing of one or more civilians, as well the other 'minor' war crimes mentioned above, whatever their criminal magnitude, remain acts utterly contrary to international humanitarian law and consequently to international criminal law.

Besides, were one to accept the position whereby 'minor' war crimes are covered by immunity, the major problem would arise of the standards by which to identify the gravity of a war crime. Abuses deriving from the choice and the application of such standards would be inevitable.

More generally, as rightly suggested by the Court in the judgment under discussion (when it deals with the possible conflict between state immunity

and the necessity to react to international crimes), in the event of a conflict between state immunity and the need to remove such immunity, the latter should prevail on account of the higher values protected. In other words, in a clash between state sovereignty and universal values, the latter must gain the upper hand. This is the result of the current trends in the world community, where a core of universal values (among which is the protection of life and limb of civilians caught in the maelstrom of warfare) tends increasingly to supplant the traditional demands of state sovereignty.

6. Concluding Observations

One fails to see why the Court has taken this patently wrong approach to war crimes, downgrading the actions of Lozano to a 'banal' if regrettable military operation devoid of any potential international legal consequences, thereby depriving the Italian courts of jurisdiction. War crimes may be individual and isolated serious violations of international humanitarian law. Firing on a civilian vehicle and killing civilians is a serious violation. Such violations do not need to be part of large-scale or vicious policies. They may be committed by mistake in the course of military operations. They might therefore be excused, if the necessary conditions for this or other defences are fulfilled. As the killing of civilians in an internal armed conflict is a war crime, it would have been more apposite to assert Italian jurisdiction, and request the lower court to satisfy itself whether the murder had been voluntary, as claimed by the prosecution, or alternatively whether there were circumstances, such as putative self-defence or mistake of fact, excluding the wrongful character of the action.²⁸

The 2005 US inquiry cannot, of course, be equated to a judicial appraisal. The Court of Cassation's pronouncement has therefore resulted in the action remaining untried, with the consequence of leaving unsatisfied the victims' justifiable demand for justice.

28 The UK 2004 Military Manual also envisages for war crimes the defence of 'accident', namely 'the fact that death or damage was caused by accident . . . because of lack of intent' (§ 16.41), and gives these examples: 'the death or damage was caused by a mistake, malfunction, accident, or collateral damage, for example a civilian being hit by a stray bullet or shell or as a result of a ricochet' (§ 16.41.1). This proposition is not, however, supported by authority such as case law. In any event, in the case discussed in this article the alleged defence of 'accident' would not seem to apply.