

Under What Conditions May Belligerents be Acquitted of the Crime of Attacking an Ambulance?

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Abstract

The author discusses a decision handed down in 2007 by an Italian military court concerning the firing by Italian troops on an Iraqi ambulance in 2004, at Nassiriyah, resulting in the killing of four civilians. The court held that the action was covered by the defence of putative 'special military necessity' and consequently acquitted the two defendants. The author argues that the accurate basis on which to exclude criminal culpability, both under Italian law and international criminal law, could be the excuse of putative self-defence. He also raises the issue of whether in that case the servicemen behaved negligently in acting in the belief that the ambulance was likely to be a car-bomb. The author then discusses the question of compensation to civilians for violations of international humanitarian law, regardless of whether such violations entail the criminal liability of the perpetrators.

1. The Protection of Ambulances

The relevant rules of international humanitarian law (IHL) make it crystal clear that belligerents may not attack medical vehicles. Article 21 of the First Additional Protocol of 1977 ('Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol') codifies customary international law. Similarly, the law is clear on another point: ambulances and other medical vehicles forfeit their protection any time they are used for military purposes, such as carrying weapons, munitions or soldiers who are not wounded. Abuse of the protective emblem amount to perfidy, a war crime (see Article 37 of the First Protocol). If all this is clear, what is uncertain is how a combatant must behave when there is a well-founded suspicion that an ambulance is being abused by the enemy.

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The rules on the precautions to be taken to spare civilians when launching a military operation, currently codified in Articles 57 and 58 of the First Protocol, are of relatively little assistance, because the need to attack an ambulance may materialize suddenly and there may be no time for reflection or weighing up the various options.

A recent case relating to the Iraqi war, brought before the Rome Military Tribunal, can help clarify this intricate matter.

2. The Case of the Italian Forces' Attack on an Ambulance at Nassiriyah (*Corporal X and others*)

In an elaborate judgment of 9 June 2007¹ the Rome Military Tribunal acquitted two members of the Italian forces in Iraq for firing in Nassiriyah on an Iraqi ambulance and killing four persons; according to the Judge, the two accused were entitled to raise the defence of 'having thought to act under military necessity'. Let us examine whether the Court's complex legal reasoning is persuasive.

The facts, as established by the Court, can be briefly summarized as follows. On the night between 5 and 6 August 2004 intense firing between Iraqi insurgents belonging to the Al Mahdi group and Italian troops broke out. The former were positioned on the northern bank of the Euphrates; the latter on the southern bank of the river. The Iraqi insurgents attempted to attack the bridge called Charlie, in order to take it and thus be able to move to the southern part of Nassiriyah. When firing stopped, the Italian troops positioned themselves at the end of the bridge, on the southern side, and remained vigilant, fearing that a car-bomb could be sent over to blow up the Italian emplacement (military intelligence had warned that such an attack was to be expected). The Italian troops were acting under the relevant Rules of Engagement, which prescribed that, in the event of a vehicle crossing the bridge overnight, the Italian military was to (i) issue a warning to stop, by blinking with the headlights or by flashlight; (ii) in the event of the vehicle arriving, in spite of such warnings, at the middle of the bridge and continuing to advance, open fire; (iii) in such a case soldiers were, however, first to fire into the air, then at the wheels of the vehicle and only thereafter against the car,

1 The judgment is still unreported. The copy of the typescript on file with the author runs to 46 pages. On 13 November 2006 the Military Prosecutor (who under Italian law is legally bound to undertake investigations any time he becomes cognizant of a possible crime) had requested the dismissal of the case. The Judge in charge of preliminary investigations (*giudice delle indagini preliminari*) had however rejected the request and required the Prosecutor to issue charges of breaches of Art. 191 of the Military Criminal Code Applicable in Time of war (on this provision see *infra* note 4). With the agreement of the parties, it was then decided to opt for an 'abbreviated judgment' (*giudizio abbreviato*) and the case was therefore brought before a sole Judge (the judge for the preliminary hearing: *giudice dell'udienza preliminare*), who decided on the basis of the file or dossier as presented at the preliminary hearing.



but even then aiming at the wheels and the engine.² That night four Iraqi cars that tried to cross Charlie bridge heeded the warning given by the Italian military, made an about-turn, and returned to the northern part of the city. Two vehicles did not do so, and were fired upon. One of the two was the ambulance at issue.³

According to the testimony of the driver, the ambulance had first tried to cross two other nearby bridges (called Alpha and Bravo respectively), but was compelled to make a U-turn after seeing soldiers at the other end of the bridge. The ambulance, so the witness said in his testimony, had instead tried to cross Charlie bridge, for the driver had not seen any military at the southern end of the bridge. This statement is perplexing, for the bridge was humpbacked, with the obvious consequence that somebody coming from the northern bank could see persons at the southern end of the bridge only once he had reached the middle of the bridge.⁴ Be that as it may, the ambulance crossed the bridge, did not stop after the warnings, and, when it was about 50–60 metres (55–65 yards) away from the emplacement, was fired upon by an Italian serviceman (a corporal) on the order of his superior (a lieutenant). After the first warning shots were fired three men jumped out of the ambulance and escaped towards the northern part of the bridge (they were the driver, a nurse and a third unknown person). Other shots reached the tank of the vehicle and immediately thereafter an oxygen bottle in the back of the ambulance; this set the back part of the vehicle on fire, burning to death the four occupants (a pregnant woman, her mother, her brother and a female friend). The whole 'episode' lasted only a few seconds.⁵ It turned out that the vehicle was an ambulance coming from the civil hospital of An Nassiriyah; it was rushing the pregnant woman who urgently needed some medical checks to another hospital. The car — as established by the Court — wore all the emblems and signs of an ambulance (although, according to the Court, they were not visible because of the dark⁶

2 At 18.

3 The other vehicle, a van for the transport of fruit, had been hit on Charlie bridge the same night at about 4.30, after the burning of the ambulance; the driver had not heeded the warnings of the Italian military, continuing to go towards the southern end of the bridge, and had been killed. Following investigations against *Captain X*, suspected of unlawfully giving orders to fire on the van, the Military Prosecutor had issued a request for dismissal (*richiesta di archiviazione*), finding that the action at issue was justified on the following grounds: 'fulfilment of official duty' (Art. 51 of the Italian Criminal Code), 'lawful use of arms' (Art. 41 Criminal Code Applicable in Time of Peace) and 'self-defence', as well as, in light of a judgment of the Military Court of Appeals, 'special military necessity' (Art. 44 Military Criminal Code Applicable in Time of Peace). Upholding the request of the Military Prosecutor, the Judge in charge of the preliminary investigations issued on 18 February 2007 an order for dismissal (*decreto di archiviazione*). He found that the Military Prosecutor's submissions were correct, and focused on the justification of 'special military necessity' (the order of six typewritten pages is unreported; copy on file with the author).

4 This remark on the characteristics of Charlie bridge are made both in the judgment under discussion, at 44, and by the Judge in charge of the preliminary investigations in the order for dismissal in the case of *Captain X* (referred to in *supra* note 3), at 1.

5 At 10 and 44.

6 At 43.

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in spite of the fact that the Italian servicemen had 'special viewers'⁷), but it was not certain whether the flashing lights and the siren were on.⁸ Similarly, the Court did not establish with certainty whether the ambulance was proceeding at 'rather high speed' (as maintained by the Italian witnesses) or was instead moving 'at reduced speed' (as asserted by the Iraqi witnesses).⁹

Once it established the facts, the Court noted that the legal provision relied upon by the 'Judge in charge of preliminary investigations' (*giudice delle indagini preliminari*) was Article 191 of the Italian Military Criminal Code Applicable in Time of War, a provision that is part of the Section of the Code dealing with 'crimes against the laws and usages of war', that is, war crimes.¹⁰ Article 191 provides that whoever fires on ambulances, hospitals and other medical facilities where 'pursuant to the law or international conventions they must be respected and protected', may be punished with imprisonment for no less than ten years 'unless the fact constitutes a more serious offence'. The Court emphasized in passing that this provision does not envisage any 'military necessity' (at 22–23). It pointed out, however, that the legal provision applicable to the facts at issue was not Article 191 (which merely prohibits firing on ambulances and other medical vehicles or installations) but rather the provision of the Italian Criminal Code prohibiting murder, namely Article 575. The Court added that the death of the four Iraqis was not the result of negligence because the two Italian servicemen, when one of them gave an order to fire and the other fired, did intend to bring about the death of the persons in the ambulance. In itself, this was therefore a wilful murder (*omicidio doloso*),¹¹ a crime that manifested itself in a twofold form: as a 'perfected crime' (with respect to the four dead Iraqis) and as attempted murder (with respect to the three survivors).¹²

7 At 10.

8 The Court states at 12 that the ambulance had the 'usual...flashing lights devices' (*usuale...dispositivo luminoso*), whereas it states at 13 that it was not certain that the flashing lights were on, although the driver had testified that he had switched them on.

9 At 4–5, 12.

10 Article 191 (entitled 'Use of Arms against ambulances, hospitals, medical ships or aircraft or against the personnel working therein') stipulates that 'Military imprisonment for not less than ten years may be inflicted on any person who uses arms against ambulances, hospitals, mobile medical units, medical fixed establishments, hospital ships, other ships used for medical purpose and their boats, medical aircraft, any other place for the treatment or shelter of ill or wounded persons, or against the staff working in there, where pursuant to the law or international conventions such places and persons must be respected and protected'. The applicability of the Military Criminal Code Applicable in Time of War was provided for in Art. 10(1) of the Italian Law of 30 July 2004, no 207 (on Italian Participation in International Missions), as well as in Art. 9(1) of the Law of 21 March 2005, no 39 (on the same matter). Subsequent laws on the same question provide instead (clearly on political grounds) that the Military Code Applicable in Time of Peace applies to the Italian military personnel participating in Italian missions abroad: see Art. 26 of the Law of 4 August 2006, no 247, and Art. 5(1) of the Law 29 March 2007, no 38.

11 At 28.

12 *Ibid.*



Thus having defined the criminal offence at stake, the Court considered whether the prosecution's submission that the fact was not punishable on account of the defence of military necessity, was well-founded. The Court rejected the applicability of the general concept of military necessity, 'a notion vague and hazy' which in any event — noted the Court — may only be applied when specifically provided for in a rule of international humanitarian law. In the case at issue the relevant substantive rules 'may not be subject to any limitation or derogation nor made conditional on more or less cogent military exigencies'.¹³ The Court held that Article 44 of the Military Criminal Code Applicable in Time of Peace was rather applicable, in that it envisages 'the necessity to prevent facts that could jeopardize the security of the military position'.¹⁴ This provision envisages a particular form of 'military necessity', which is different, according to the Court, from necessity as a criminal justification. It differs in the following ways (that the Court borrowed from the judgment of the Military Court of Appeals of 5 May 2006 in the *Corporal Y* case):¹⁵ special military necessity is (i) a 'legal necessity', based on the need to ensure the security of an emplacement or military position, hence on 'a military interest objective in nature' and (ii) involves for the person having recourse to such necessity not a power or right, but rather the *obligation* to act in order to protect interests that are not personal, but 'superior'

13 At 34.

14 Article 44 (titled 'Special Cases of Military Necessity') provides that 'A military who has performed an act constituting a crime may not be punished, where he has been constrained by the necessity to prevent a mutiny, revolt, plunder, devastation or in any event acts such as to jeopardise the security of the post, of the ship or the aircraft'. The applicability of provisions of the Military Criminal Code Applicable in Time of Peace is provided for in Art.19 of this Code, which stipulates that 'The provisions of this Code also apply to matters regulated by the military criminal law applicable in time of war and by other military criminal laws, unless they provide otherwise.'

15 This judgment, unreported, concerned the accidental killing of an Iraqi by an Italian corporal at Nassiriyah on 7 September 2003 (a copy of the typescript is on file with the author, at 15–16). In short the facts were as follows: Italian troops were distributing drinking water to civilians when disorder broke out and civilians began to throw stones and other objects at the Iraqi police and the Italian troops. The Italian vehicle was surrounded by rioting civilians, some of whom began firing on the military. One of them managed to climb into the armoured vehicle; an Italian corporal attempted to push away the Iraqi civilian, but in so doing he accidentally fired a shot from the rifle that a moment before the military officer in charge of the machine gun, a sergeant, had passed on to him, and which was loaded, contrary to the orders previously issued by a superior. Both servicemen had been accused of culpable homicide (*omicidio colposo*), and the sergeant in charge of the machine gun had also been accused of a serious breach of superior's orders (*violata consegna aggravata*). The court of first instance (*Giudice dell'udienza preliminare*) on 12 October 2005 acquitted the sergeant that had passed the loaded rifle to the other (he had warned the corporal that the rifle was loaded), while it sentenced to 8 months' imprisonment the serviceman who had materially, albeit involuntarily, fired the lethal shot (text unreported, running to 18 typewritten pages; on file with the author). On appeal, the Military Court of Appeal on 5 May 2006 acquitted the appellant, holding that his conduct was covered by the defence provided for in Art. 44 of the Military Criminal Code applicable in Time of Peace for he had acted to avert actions compromising the security of the 'military position' (text of the judgment unreported; the typescript runs to 17 pages and is on file with the author).

in that they relate to 'service, discipline and military order'. In contrast, for the Court, necessity as a general ground for justification (i) covers acts intended to repel a physical attack on a person, and (ii) merely grants a right or power to engage in conduct otherwise criminal.¹⁶

5 Thus, the Court drew a distinction between three classes of necessity: (i) necessity as a general justification in criminal law (ruled out in the case at issue); (ii) military necessity as envisaged in specific rules of international humanitarian law (also excluded in the case under discussion), and (iii) 'special military necessity' as provided for in Italian law, which according to the Court
10 was instead applicable to the case.

Of course, added the Court, this category of 'special military necessity' was also grounded on, and limited by, proportionality. In the case at issue, proportionality no doubt existed, given the serious danger the Italian military believed it was facing: the ambulance might have been full of explosives capable of destroying the whole emplacement thereby allowing the insurgents to
15 break the Italian forces' defence line; it had approached within 50–60 metres (50 or 60 yards) of the Italian emplacement; if loaded with explosives, it could have produced lethal effects within a radius of more than 100 metres (110 yards).¹⁷ Furthermore, the Court noted, the military had fully complied
20 with the Rules of Engagement by issuing the necessary warnings and first shooting in the air (in this connection, the Court rightly noted that the Rules of Engagement, given their status as administrative guidelines, may not per se provide any defence; they may nevertheless prove useful in spelling out the modalities for the application or implementation of defences provided for
25 in criminal law).¹⁸ The Court then noted that the 'special military necessity' had been 'putative': the danger to which they reacted in fact did not exist: the vehicle was not a car-bomb but an ambulance. In the view of the Court, Article 59 (4) of the Italian Criminal Code applied ('If the agent believes by mistake that there exist circumstances excluding liability, such circumstances are
30 always assessed in his favour'). The Court held that the two defendants had *not* acted culpably or negligently in appraising the specific circumstances with which they were confronted.¹⁹ It therefore acquitted them on account of the defence of putative 'special military necessity'.

3. 'Special Military Necessity' v. Necessity 35 and Self-defence

The notion of (putative) 'special military necessity' resorted to by the Court is open to criticism. The provision on which the Court grounded its reasoning, i.e. Article 44 of the Military Criminal Code Applicable in Time of Peace,

16 At 36–37.

17 At 39.

18 At 18.

19 At 42.



in fact refers to a justification covering acts performed by enforcement agents: it contemplates acts performed by servicemen (state officials) for the purpose of protecting persons and property from unlawful appropriation, destruction, interference or damage or (as in the case of mutiny or revolt) from unlawfully putting public authority in jeopardy. The heading of the provision is clearly a misnomer. The provision manifestly sets out, with specific reference to the military, the general justification of 'fulfilment of a duty' laid down in general terms in Article 51 of the Italian Criminal Code.²⁰ Thus, the provision has little or nothing to do with necessity as a general category. Moreover, the provision is clearly intended to authorize force by the Italian military against other Italians who try to mutiny, rebel, or cause the devastation of military posts or installations.

We should now ask ourselves whether in the case at issue the appropriate defence for the Italian military was *necessity*, or *self-defence*, both general grounds for justification under international criminal law.

The Italian military used armed force to avert an imminent and putatively unlawful attack. *Necessity* implies that a person, for the sake of saving his own or another person's life, limb or property, and where no other option exists, may go so far as deliberately to commit a crime against an innocent person or his property. This innocent person was *not intent on attacking the agent or his property*; nevertheless respect for that person's rights of life, limb and property would have entailed a sacrifice of the agent's life, limb or property. For instance, to extinguish a fire in his own apartment, a person's breaks into the apartment of a neighbour to call the firemen²¹ (clearly, the neighbour had not committed any wrong against the agent, but necessity justified the break-in); or, to save his own life in a storm, a person throws back into the sea another person who was trying to climb into a safety boat capable of holding only one person.

In the case at issue the Italian military did not intend to breach the rights, or take the life, of innocent people; they used force with a view to repelling an imminent threat that they perceived to be not only extremely dangerous but also *unlawful*. They acted on the assumption that the incoming vehicle was full of explosives and its driver intended to wreak havoc against them. It would therefore seem that we are rather faced with *self-defence*. They intended to avert an imminent danger threatening their own life as well as the life of their colleagues in the emplacement and caused by what they considered to be an unlawful use of a protected vehicle.

A question must however be raised: was their reaction both necessary and reasonable in the circumstances to avoid a serious threat to their life? The vehicle was not a private car, but clearly displayed the markings of

20 Article 51(1) provides that: "The exercise of a right or the fulfilment of a duty imposed by a legal provision or by a legitimate order of the public authority excludes that a person may be punished."

21 See F. Desportes and F. Le Gunehec, *Le nouveau droit pénal*, I (3rd edn, Paris: Economica, 1996), at 560.

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an ambulance. Could one maintain that the servicemen acted *negligently* in firing on the ambulance? Should they have taken extra precautions before firing, given that this was a vehicle protected by international rules and not an ordinary unmarked van or car? It seemed likely to the Italian servicemen that the vehicle was transporting explosives because, after trying to cross the other two bridges, the vehicle had attempted to cross Charlie bridge and failed to stop when warning lights were flashed. According to the Court, firing on the ambulance was proportional to the (putative) danger. A serious question nonetheless arises: since the first round of shots did not set alight the petrol tank and the oxygen bottle in the back of the ambulance, and indeed compelled the three persons in the driver's cabin to escape,²² should the Italian military have stopped firing, given that at that stage the ambulance could no longer move forward for lack of a driver? Admittedly, these are decisions to be taken in a split second, when there is no time for weighing up the various options. This is a typical situation to which the saying attributed to the great lawyer Baldus (Baldo degli Ubaldi) can apply (*sic turbatus non potest semper habere stateram in manu*, that is, a person, when agitated and troubled, may not always be required to hold a balance in his hand).

As for their *mens rea*, it has not been clearly established that the Italian military intended to kill: they may have fired just to stop the car, knowing that it would blow up if it was unlawfully transporting munitions, but it would stop if it was an innocent ambulance. When they fired, they probably had no intention to kill (contrary to what the Court held in noting that the servicemen fired to kill and consequently could be accused of 'wilful murder').²³ It may however be safely assumed that they willingly ran the risk that their shooting might cause the death of those in the ambulance (*dolus eventualis* or recklessness).

Since the Italian servicemen acted on the assumption that the ambulance was being unlawfully used for military purposes, which in fact was not so, their justification of self-defence, if admissible, should be held to be *putative*, being based on a non-culpable mistake of fact (mistaken self-defence).²⁴ Putative self-defence as a cause excluding criminal liability is generally recognized in Italy.²⁵ As was rightly noted by a distinguished criminal lawyer,

22 The Court rightly infers from the fact that the three persons in the front of the ambulance were able to escape unhindered and unhurt after the first round of shots was fired, that this round did not hit the petrol tank and the back of the ambulance (see judgment, at 14).

23 See judgment, at 28. According to the Court, both negligence (or *culpa*) and recklessness (*dolus eventualis*) were to be ruled out (*ibid.*, 27–28).

24 On putative justification see G. P. Fletcher, *Rethinking Criminal Law* (1978) (Oxford: Oxford University Press, 2000) 762–9, as well as 'The Right and the Reasonable', in 98 *Harvard Law Review* (1984–5), 971–6.

25 See G. De Vero, 'Le scriminanti putative – Profili problematici e fondamento della disciplina', in *Rivista italiana di diritto e procedura penale* (1998), 773–844, especially at 788–809 (with many references to case law); T. Padovani, *Diritto penale*, 6th edn (Milan: Milano Giuffrè, 2002), at 149 and 215. See also the decisions of the Court of cassation of 15 April 1999 (on appeal by *D.R.M.*) and of 10 November 2004 (*C.G. Podda*), both setting out at length the notion of putative self-defence but rejecting it *in casu*, as well as the decision of the Milan Court of assize



putative self-defence does not *justify* the use of force, but merely *excuses* it.²⁶ In other words, the Italian servicemen's conduct was wrongful, but — if they did not act negligently — they should not be blamed and hence may not be punished, for they acted under the non-culpable (and reasonable) mistake that the persons in the ambulance intended unlawfully to kill them as well as the other military at the emplacement.²⁷

4. The Case from the Viewpoint of International Criminal Law

Thus far I have discussed the case from the perspective of Italian law. It would perhaps be appropriate also to look at it, albeit briefly, from the viewpoint of international criminal law.

There is no doubt that this body of law provides for self-defence.²⁸ Article 31(1)(c) of the ICC Statute therefore codifies, in part, customary international law.²⁹ Does it also allow for putative self-defence? To the best of my knowledge, only one case can be cited to support an affirmative answer: *Wilhelm Mundo and Erich Weiss*, a case brought before a US General Military Government Court sitting at Ludwigsburg.³⁰ During the Second World War, after an air raid an American airman safely parachuted to the ground and was taken captive; he was turned over to the accused (two German policemen) who escorted him into a town where they were approached by an angry mob that demanded that the prisoner be killed. The airman made a sudden motion in reaching in his pocket and was immediately shot dead by the accused, who believed that the airman was reaching for a weapon. The defendants pleaded that they had felt threatened by the prisoner's movement and had fired in self-defence. The Court upheld the plea and acquitted them. The Court did not clarify whether the airman indeed held a weapon in his pocket. If he did not, this was clearly a case of putative self-defence. Be that as it may, in the absence

(*Corte di assise*) of 24 May 2006 (case *M. and B.*), upholding the defence, in . . . 1665–73 (with comments by R. Palavera, at 1673–81).

26 See G. P. Fletcher, *A Crime of Self-Defense – Bernard Goetz and the Law on Trial* (Chicago: The University of Chicago Press, 1988), at 27.

27 On the distinction between 'wrongfulness' and 'blameworthiness' see G. Fletcher, 'The Right and the Reasonable', *supra* note 23 at 954–7 and 967–71.

28 See the cases mentioned in A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 223–4; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: Asser Press, 2003), at 266–7; R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 337–8; A. Zahar and G. Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2007), 433–6.

29 On the reasons for considering that the provision on self-defence related to property is a (questionable) innovation, see A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', in 10 *EJIL* (1999), 154–5.

30 Verdict of 10 November 1945, in *Law Reports of Trials of War Criminals* (London: UN War Crimes Commission, 1949), XIII; at 149–50.

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of consistent case law and states' opinions, one can draw upon the general principles of international criminal law. Since this corpus of law upholds both the notion of self-defence and that of mistake of fact, it can be held that it also allows for the joint application of these two defences, and consequently for reliance on putative self-defence.

This conclusion is borne out by resort to one of the sources of international criminal law that may be tapped any time a customary or treaty rule is lacking, and general international criminal law principles are also missing or uncertain: the principles of criminal law upheld in most legal systems of the world.

If one takes a look at national legal systems, it becomes apparent that putative self-defence is upheld in most of them.³¹ The contention is therefore warranted that the same notion may also apply in international criminal law to the extent that it is consistent with the principles inspiring that body of law. Thus, also in international criminal law, a person that acts in self-defence to repel what he honestly and reasonably thinks is an imminent attack on his life, limb or property may be excused, provided the mistake of fact was not culpable, that is, he did not act negligently.

Let us also ask ourselves how the case would be resolved under the ICC Statute. To be sure, the case could not go to the ICC, even though the crime was committed by nationals of a contracting party, on two distinct grounds: (i) the case lacks the requirement of 'seriousness' laid down in Articles 1 and 8(1) of the ICC Statute: it is not part of a plan or a large-scale commission of war crimes or a widespread or systematic attack on a civilian population; it was an isolated offence; (ii) under the principle of complementarity in Article 17 the ICC could not step in, for the Italian national authorities have already taken action at the judicial level. Whether or not one agrees with the ruling of the Italian Military Tribunal, it is a fact that the criminal proceedings instituted before it were genuine, even though the Tribunal applied Italian rules on war crimes that are not those implementing the ICC Statute (most regrettably Italy has not yet passed the legislation required for implementing the Statute).

31 For instance in France (see R. Merle and A. Vitu, *Traité de droit criminel*, I, 7th edn (Paris: Editions Cujas, 1997), at 577–8 (with reference to case law)); Germany (see H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5th edn., (Berlin: Duncker & Humblot, 1996), 330 ff.); Belgium (see C. Hennau and J. Verhaegen, *Droit pénal général*, 3rd edn (Bruxelles: Bruylant, 2003), 212–6). As for common law countries, see G. Fletcher (*Basic Concepts of Criminal Law* (New York–Oxford: Oxford University Press, 1998), at 137, has emphasized that in such legal systems there is a tendency towards 'subjectification of self-defence' in that rules provide that the use of force in self-defence is justifiable if the actor *believes* it is necessary to protect himself against unlawful force. Thus, for instance, Art. 3515 (2) of New York Penal Law provides that 'A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless: (a) The actor *reasonably believes* that such other person is using or about to use deadly physical force' (emphasis added). On putative self-defence in common law countries see generally G. Fletcher, *Basic Concepts of Criminal Law*, *ibid.*, at 88–91, 137–8; H. Ludsin, 'Ferreira v. The State: A Victory for Women Who Kill their Abusers in Non-Confrontational Situations', in *20 South African Journal of Human Rights* (2004), at 644, 646–7, 649; B. Sangero, *Self-Defence in Criminal Law* (Oxford and Portland (Oregon): Hart, 2006) 282–307. See also J. Pradel, *Droit pénal comparé* (Paris: Dalloz, 1995), at 287.



Assuming that the case had been brought before the ICC, what rules should the Court have applied? Clearly the Court could have applied Article 31(1)(c) (on self-defence) in conjunction with Article 32(1) (on mistake of fact). The Court should have determined whether the mistake of fact (the wrong belief that the incoming vehicle was a car-bomb) was such as to 'negate the mental element' required for the war crime provided for in Article 8(2)(b)(xxiv) of the ICC Statute (namely the crime of 'intentionally directing attacks against medical transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law'). Was the mistake such as to negate the intention to attack the ambulance as a protected vehicle? This is the difficult issue that the Court should have addressed.³²

5. A Few Lessons This Case May Teach

The tragic events discussed in the judgment prove once again how terribly dangerous war, particularly insurgent war, can be for innocent civilians even when combatants endeavour to comply with the laws of warfare. It also shows that the Italian authorities were right in instituting criminal proceedings against Italian servicemen suspected of war crimes: it would have been wrong to pass over in silence those tragic events and fail to establish whether the loss of human life was the result of criminal behaviour by the Italian military.

However, the most fundamental question those events pose relates to the consequences of shooting at the ambulance. Assuming the Rome Military Tribunal was right at least in its final finding (though wrong in its legal reasoning), why not pay compensation to the victims? Both under national and international law victims and their relatives have a fundamental right not only to see the alleged authors of crimes brought to justice, but also to be compensated for loss of life and limb.

From the viewpoint of national law the question was posed on 8 November 2007 by an Italian member of Parliament, Elettra Deiana, who asked the Government to explain among other things whether the victims' relatives had been compensated. In his reply to the question, the representative of the Italian

³² It does not seem that in the case under discussion the last part of Art. 31(1)(c) could have played a role (under this provision 'The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph'). As persuasively shown by K. Ambos ('Other Grounds for Excluding Criminal responsibility', A. Cassese, P. Gaeta and J.R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), at 1033-4), this provision deals with participation in a 'collective defensive operation', and 'does not in itself exclude criminal responsibility'. As emphasized by Ambos, collective and individual self-defence must be distinguished, from the viewpoint not of the UN Charter but of criminal law; the former relates to inter-state conflicts, the latter to conflicts between two or more individuals. 'Consequently, the legality or illegality of a collective defence operation is independent of the recognition or rejection of self-defence in an individual conflict taking place within the framework of this operation' (at 1034).

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Government, Minister Paolo Naccarato, answered that the victims' relatives, although they had requested compensation or some financial assistance during the investigations by the Italian military prosecutors, had then failed to participate in the criminal proceedings as 'private petitioners' (*parti civili*) pursuant to Articles 74, 76 and 90 of the Italian Code of Criminal Procedure. They have consequently not been compensated.³³ Although the defendants were acquitted, it may nonetheless be argued that the victims' relatives do have a right to institute civil proceedings against the defendants and/or against the Italian State and obtain compensation. In this respect, it should be noted that some Italian courts³⁴ and scholars³⁵ hold the view that in cases of putative self-defence one may apply by analogy Article 2045 of the Italian Civil Code, which provides for the granting of an 'indemnity' (instead of compensation proper) when damage has been caused by a person in 'a state of necessity'.³⁶ The Iraqi victims' relatives could therefore rely upon this provision and at least apply for an 'indemnity' before an Italian civil court. Moreover, even if no such a claim is formally brought, arguably it would be appropriate for the Italian Government to take steps to ensure appropriate compensation.

As for international law, arguably a right to compensation accrues to the state of Iraq vis-à-vis the Italian state under a general principle of international humanitarian law that has evolved as a result of the acceptance of Article 3 of the 1907 Hague Convention IV into customary international law applicable both to international and internal armed conflicts³⁷ (in contrast, no such right belongs to Iraq on the strength of Article 91 of the First Additional Protocol, since Italy is a party to the Protocol whereas Iraq is not). As for a right of the victims vis-à-vis the Italian state, one could perhaps go so far as to contend that at present the human rights doctrine has become so pervasive as to have largely displaced, at least in some areas, the old inter-state dimension of international dealings. As a result, individuals might be held to have

33 See the transcript of the question and answer online: <http://www.camera.it/resoconti/dettaglio.resoconto.asp?idседата=238&resoconto=ste>

34 For instance see the decision by the Arezzo Tribunal of 16 March 1960, in 85 *Foro italiano*, 1960, I, 858.

35 A. De Cupis, 'Legittima difesa putativa e responsabilità civile', in 85 *Foro italiano*, 1960, I, 858. A contrary view is taken by M. Franzoni, 'I fatti illeciti' in A. Scialoja, G. Branca and F. Galgano (eds), *Commentario del Codice Civile* (Bologna-Roma: Zanichelli, 1993) at 604, who argues that often the victim is not innocent but may have contributed to the danger that is averted by the agent.

36 The provision reads as follows: 'Where the author of a damage has been constrained to cause it by the necessity to save himself or other persons from the present danger of a serious damage to the person and the danger has not voluntarily caused by him nor was otherwise avoidable, the damaged person is entitled to an indemnity, the measure of which is left to the equitable assessment of the judge.'

37 According to the UK Ministry of Defence's *Manual of the Law of Armed Conflict*, 'It is a principle of international law that a state responsible for an internationally wrongful act is obliged to make full reparation for the injury caused by that act. This principle extends to the law of armed conflict in that a state is responsible for violations of the law committed by persons forming part of its armed forces and, if the case demands, is liable to pay compensation' (Oxford: Oxford University Press, 2004), at §16.15.



5 a right to compensation towards a state whose officials have breached international rules; arguably this right could be vindicated before the courts of that state, without the state being entitled to rely upon the old doctrine of the sovereign immunity of states for official acts of their agents. However, this whole area is clouded in uncertainty.³⁸

10 In view of this legal uncertainty, it is high time for states to agree upon and pass sweeping rules, both at the international and at the domestic levels, providing for compensation to victims of war crimes, whether or not the authors of such crimes may be held criminally liable (that is, whether or not their actions may be excused). This would to some extent attenuate the suffering of civilians caught in the maelstrom of war.

38 The excellent ICRC research on the role of custom in the area of international humanitarian law is rightly cautious: see J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, I, (Cambridge: Cambridge University Press, 2005), at 541, 549–50.