

Italy, Use of force against ambulances in Iraq

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** Judgement by the Preliminary Hearing Judge, Rome Military Tribunal, 9 May 2007, n. 33, in the criminal trial against Allocca Raffaele and Stival Fabio; Aggravated use of weapons against an ambulance and its staff (Articles 47 and 191 of the Military Criminal Code Applicable in Time of War; Article 47 (2) and (5) of the Military Criminal Code Applicable in Time of Peace; Article 110 of the Criminal Code); available at <http://www.difesa.it/GiustiziaMilitare/RassegnaGM/Bimestrale/2008/Pagine/Sent-GUP-Trib-mil-Roma-9maggio2007-allocca-stival.aspx>, unofficial translation]

[1] Judgement by the Preliminary Hearing Judge, Rome Military Tribunal [...] in the criminal trial against:

1) ALLOCCA Raffaele [...]

2) STIVAL Fabio [...]

ACCUSED of

“AGGRAVATED USE OF WEAPONS AGAINST AN AMBULANCE AND ITS STAFF” (Articles 47 and 191 of the Military Criminal Code Applicable in Time of War; Article 47 (2) and (5) of the Military Criminal Code Applicable in Time of Peace; and Article 110 of the Criminal Code), because on the night of 5 to 6 August 2004, in Nasiriyah (Iraq), [...] members of the “Serenissima” Task Force, deployed near the bridge called Charlie on the Euphrates River, [...] used the detachment’s arms against an Iraqi ambulance and its staff –

driven by the driver SABAH KHAZA Al accompanied by the nurse ABDUL ALSSHEB Adel and with on board IWAID KENAIB Ali, subjects protected in accordance with [...] international conventions – and fired an undetermined number of shots from a Browning 12.7 mm machine gun at the moving vehicle, resulting in the death of four Iraqi citizens (JLUD QUTTI Halema, pregnant woman, JLUD QUTTI Thaer, HABSH IRKES Khadmea, ZYAER THEJELK Khamesa, respectively the brother, mother and neighbour of the woman in labour). [...]

FACTS AND LAW

[...] [2] According to the findings of the preliminary investigations, on the night of 5 to 6 August 2004 [...] large-scale clashes occurred between Iraqi insurgents from the “Al Mahdi” armed group and Italian soldiers from the second company of the Lagunari “Serenissima” Regiment. The militiamen, positioned on the northern bank of the river, were attacking the bridge with the aim of capturing it and entering the civilian and military facilities in the southern part of the city; meanwhile, the Italian soldiers [...] were drawn up on the southern bank in order to prevent, by force, the insurgents from crossing the bridge. This gave rise to a real war situation in which the Iraqi fighters, organized according to a veritable armed structure [...], used a large quantity of weapons, including heavy armaments. The Italian military, meanwhile, numbering around 80, had various means of combat at their disposal [...]: STIVAL was tank company commander of one of them, while ALLOCCA had the function of machine-gunner. [...].

[3] While all this was going on, at around 3:30 am a vehicle turned onto the bridge from the northern bank and, despite orders to the contrary, drove to within some 50 metres of the defensive set-up, to the point that it was hit by multiple shots fired by the Italian soldiers; among the shots that definitely hit the target were those discharged by ALLOCCA, on the explicit orders of STIVAL [...]: the vehicle caught fire almost immediately.

[4] As noted by the Public Prosecutor [...], the testimonies gathered in this regard provide two radically divergent versions of the events. On the one hand, Iraqi witnesses asserted that the vehicle was a Red Crescent ambulance bearing the relevant markings and colours as well as lighting devices. Various Italian soldiers, meanwhile, maintained that it was a van with no distinctive signs or lights whatsoever.

[...]

[5] This therefore calls for a [...] reconstruction of the facts and their wider contextualization [...]. On the night of 5 to 6 August 2004, our soldiers were facing a major attack of warlike dimensions; as the hours passed, various motor vehicles attempted to cross Charlie bridge; whereas on all other occasions the drivers obeyed the order to turn back, in two cases this did not happen: the first is that under discussion in the present trial against STIVAL and ALLOCCA [...]. All this took place in a more general operational context in which, in order to fulfil the overall goals of the Iraqi peace mission, the troops had not only to be ready to respond

militarily to traditional-style attacks in the open field, but also to contend with new and different instruments of warfare that were not infrequently used by the opposing side [...]: in particular the ruthless tactics of some rebel groups, which went as far as to carry out suicide attacks using car-bombs, availing themselves of any means of transport to this end [...]. It should also be remembered that, in densely populated centres such as Nasiriyah, civilians were meanwhile struggling to continue their daily lives, [...] for instance [...] accompanying a woman in an advanced state of pregnancy to hospital. [...]

[...]

[6] Thus, the highly tense operational conditions and the visual difficulties resulting from the night darkness, only partially offset by the use of special viewers, as well as the different positions occupied by the individual soldiers [...] and their consequent varying observation points, can easily explain the discrepancies and imprecisions that have been noted in the reconstruction of what happened in the various testimonies [...].

[7] In any case, an overall assessment of the evidentiary findings obtained in the case leads to the following conclusions with regard to the reconstruction of the facts: the vehicle hit was indeed an ambulance from Nasiriyah civilian hospital that bore the usual markings and lighting devices; there were seven people on board, three of whom were seated in the front seats (the driver Sabah Khaza Al, the nurse Abdu Alssheb Adel and Iwaid Kenaib Ali), while four others were at the back [...]; whereas the first three could save themselves when the ambulance was hit by jumping out and taking flight, the other four unfortunately died [...].

[8] The death of the above-mentioned people [...] was caused by the strong combustion that expectably followed the instantaneous ignition of the ambulance's fuel tank after it was hit by the ammunition [...] fired by the Italian soldiers; the flames were further fuelled by escaped oxygen from a cylinder, also hit and pierced by a projectile, which was at the back of the ambulance. [...]

[9] While it can be said with certainty that the vehicle was an ambulance bearing red crescent markings and colours, there is no proof [...] that it was advancing with the lighting devices on. It is true that the driver claims that he had activated them [...].

[10] The role of the third man sitting at the front of the ambulance, Iwaid Kenaib Ali, is not completely clarified. The Judge in charge of the preliminary investigation already noted that he was not the husband of the woman in labour, as the above-cited health staff had said, but rather a friend of the woman's brother [...]. These discrepancies in particular prompted the Public Prosecutor to hypothesize that Iwaid could have been an armed militiaman who boarded the ambulance with hostile intentions, such that, after jumping out when it was hit, he fired at the Italian soldiers before taking flight. [...]

[11] Whatever the truth of the matter, there is no doubt that the vehicle hit by Italian fire was an ambulance

[...].

[12] After this reconstruction of the events, it is noted that the Judge in charge of the preliminary investigation [...] seems vastly to underrate the importance of the so-called rules of engagement, intended to regulate the actions of today's defendants, almost seeming to want to brush them off hastily with the simple assertion that "no rule of engagement could permit the use of force in this case" [...].

[13] On the contrary, the content of the rules of engagement issued for the specific circumstances of deployment must be evaluated [...].

[14] They [...] can be defined as the instructions given to military commanders to determine the means and limits of the use of force in a given theatre of operations. [...] There are, however, currently two opposing theses: the first holds that the rules of engagement have a regulatory quality and capacity on a par with ordinary law [...]; this would mean that exceptions to general legislation can be introduced through the rules of engagement [...]. The second thesis, meanwhile, maintains that [...] the rules of engagement have a purely administrative legal status, as subordinate acts with respect to ordinary law, and that they therefore lack any power of derogation in regard to this law. And, since it is the Minister of Defence, as the highest body responsible for the military administration, who gives administrative execution to government decisions approved by parliament, the rules of engagement therefore fall within the category of hierarchical orders that is those issued by hierarchically higher authorities.

[15] The Public Prosecutor seems to adhere to this second thesis. In his motion for dismissal, the content of which was confirmed in the present hearing, he first recalled that, according to the rules of engagement, which the Italian soldiers were obliged to observe in the circumstances at hand, if a vehicle attempted to cross the bridge at night, warnings to stop should be given by flashing headlights or using electric torches, while in daytime visibility conditions arm signals should be made; it was, moreover, forbidden to shoot at vehicles on the northern side of the river, since fire could be opened only once a vehicle had reached the middle of the bridge; then, warning shots had to be fired first into the air, and after that at the ground in front of the vehicle's wheels, and only thereafter at the vehicle itself, aiming primarily at the wheels and the engine.

[16] Thereafter, the Public Prosecutor, arriving at conclusions that seem fully supportable, argued that in a legal system like ours – in which, as an inalienable principle, a crime is an unlawful, culpable act that is designated as a criminal offence by law – rules of engagement cannot have an autonomous discriminating capacity; there exists, however, the possibility of establishing additional grounds for justification based on those typified by criminal law. In this regard, given that the Italian servicemen had observed the above operational instructions [...], the counsel for the prosecution recalled the asymmetrical regulatory supplementation of the criminal offence by sublegislative provisions, and affirmed that "the rules of engagement, imposing the duty to use weapons to achieve the goal of the mission, although of sublegislative status, appear in reality necessarily to implement provisions having the status of law" (p. 11). [...].

[17] In this general context [...], Article 191 criminalizes the conduct of anyone who uses weapons [...] against

care facilities and emergency vehicles, as listed in the article, including ambulances, or against their staff. [...] The Judge in charge of the preliminary investigation accurately observed that the crime covered by Article 191, certainly of intentional nature, significantly does not envisage so-called military necessity as a limit to its application. [...]

[18] [...] However, two distinct points emerge from the conclusions reached by the Judge in charge of the preliminary investigation. Firstly, the Military Criminal Code Applicable in Time of War, in defining the crime in question with the purpose of protecting ambulances, hospitals and any other means for sheltering and caring for the sick and wounded as well as the staff therein, states that this obligation to protect is present “When pursuant to the law or international conventions they must be respected and protected”. Consequently, considering that the Military Criminal Code Applicable in Time of War makes reference to international legislation, specifically in Article 191 [...], it must be stated, in accordance with the Public Prosecutor’s conclusions today, that the object of protection is the ambulance (like the hospital or any other place or means of care and shelter) not in all circumstances but as long as it is used in accordance with its specific function and purpose; that same function and purpose that prompted the law or international conventions to accord it special protection [...].

[19] [...] The death of the four above-mentioned Iraqi citizens cannot, it seems, be correctly assessed as the unintended consequence of negligent conduct, characterized and caused namely by imprudence, negligence or inexperience, according to Article 43 of the Criminal Code. The conduct under examination is that of soldiers who [...] either fired (ALLOCCA) or gave orders to fire (STIVAL) multiple shots from a Browning 12.7 mm machine gun at a moving vehicle at close range. It is thus absolutely likely that they directly foresaw and intended that their acts would lead to the death of the occupants [...]. [...]

[20] Thus, a comparison between the crime under discussion up to now and other criminal offences, as imposed by the subsidiary nature of Article 191 of the Military Criminal Code Applicable in Time of War, must be conducted by this judge [...] with respect to the crime of intentional homicide [...] in accordance with Article 575 of the Criminal Code. It follows from this that, by virtue of the principle of subsidiarity, only this last crime is concretely applicable [...].

[...]

[21] Considering that the defendants’ acts must be correctly qualified according to Article 575 of the Criminal Code, and that following the above observations the material elements seem complete, it should be noted that the Public Prosecutor had already [...] invoked the existence of several exonerating factors in their favour.

[22] Among these, Article 44 of the Military Criminal Code Applicable in Time of War on special cases of military necessity should be considered as a matter of absolute priority. [Under this article, a member of the armed forces is not punishable if he has committed a crime while constrained by the necessity of preventing

the security of his post from being compromised. Indeed, in the present case, the act is alleged to have been committed by the accused with the erroneous but justified belief that he had to defend his post against the threat posed by the Iraqi vehicle.] [...]

[23] It is true [...] that the insight contained in the decision of the Judge in charge of the preliminary investigation, even if perhaps not fully developed, provides [...] an invaluable basis for upholding that the motion for dismissal by the Public Prosecutor, in the part invoking the applicability of Article 44 of the Military Criminal Code Applicable in Time of Peace to the crime established by Article 191 of the Military Criminal Code Applicable in Time of War, could not [...] be accepted, at least in the terms in which it was formulated. It must indeed be considered that this crime, unlike all those against the laws and usages of war that are characterized by the special element of unlawfulness of the lack of military necessity [...], does not contain this negative constituent part: it thus appears consistent with the true will of the legislator to conclude that no limitations and exceptions can be made to compliance with the humanitarian rule lying at its foundation [...].

[24] There is, on the other hand, no doubt that Article 44 of the Military Criminal Code Applicable in Time of Peace, which is inapplicable to Article 191 of the Military Criminal Code Applicable in Time of War in the terms mentioned above, can theoretically justify the crime of homicide, foreseen by Article 575 of the Criminal Code, considered to exist in its constitutive elements. In line with the above approach, it is noted that Article 44 of the Military Criminal Code Applicable in Time of Peace does not establish the conditions for considering that a conduct is "fully legitimate", but rather the non-liability of the soldier who has committed an act that constitutes a crime, whether common or military, in certain situations of necessity. In detail, the rule, which is not reflected in ordinary legislation, recognizes this necessity in relation to certain criminal qualifications established by both the criminal code and the military criminal code, specifically when the military must intervene to prevent mutiny, revolt, plunder and devastation; in addition to these cases, given as typical examples, is the need to prevent acts that could jeopardize the security of the post, ship or aircraft. [...]

[25] The same legal thinking [...] holds that the reason for non-liability established by Article 44 must remain separate from the state of necessity mentioned in Article 54 of the Criminal Code. While the latter provision requires the existence of a physical necessity that is binding within these limits, since founded on the risk of direct harm to the person, Article 44 of the Military Criminal Code Applicable in Time of Peace stipulates necessity of a legal nature, based on the security of the emplacement, and thus an objective military interest. This distinction leads to a further significant difference: whereas, in the case of Article 54 of the Criminal Code, the subject could avoid taking action when physically threatened, [...] in the hypothesis regulated by Article 44 of the Military Criminal Code Applicable in Time of Peace, the soldier has not a right but an obligation to act. For, what counts in this case are not his personal, and hence disposable, interests, but higher interests pertaining to service, discipline and military order [...].

[26] It ensues from this that individual cases of military necessity should theoretically be considered within the

larger framework of the fulfilment of a duty. However, whether one adheres to this thesis or instead prefers to relate them to the different issues of self-defence or state of necessity, there is in any case no doubt that Article 44 establishes the requirement of proportionality for its application. [...]

[27] The Public Prosecutor thus rightly [...] invoked proportionality in recalling that the higher command had given orders to block passage from the north onto the bridges leading to the southern part of the city [...]. The soldiers deployed there found themselves [...] facing a double emergency: the vehicle in question continued to advance, seemingly indifferent to warnings to the contrary, even after shots were fired into the air away from the target; regardless of its appearance, the vehicle could have been carrying not only armed men but also explosive devices. [...]

[28] Faced with this deemed operational emergency, they could only decide, in just a few moments, to apply the rules of engagement [...] and make use of the weapons available to them, according to the prescribed graduated approach. [...]

[29] The belief and fear that attacks would be made using ambulances as car-bombs were really very widespread. [...]

[30] It is thus not true that, in the case under examination today, there were no rules of engagement that could allow the use of force. It would in fact make no sense, not even from a purely logical point of view, first to maintain that the higher command issued service information aimed at warning the detachments deployed in the field of the possibility that ambulances might be used as car-bombs, and then to expect [...] that the recipients of that information do nothing but passively await their fate.

[...]

[31] All of these considerations permit application of the grounds for justification under discussion, in line with the situation assumed by the accused envisaged by Article 59 (c) (4) of the Criminal Code. According to this provision, where the agent believes by mistake that there exist circumstances excluding liability, such circumstances are always assessed in his favour, however if the mistake was caused by negligence, liability is not excluded if the act is a culpable crime according to the law.

[...].

[32] And thus: based on the above considerations, it must be ruled out that, in committing the act, the defendants culpably transcended the limits imposed by necessity in accordance with the provisions of Articles 44 and 45 of the Military Criminal Code Applicable in Time of Peace. [...]

[33] The truth is [...] that the danger to which they thought they had to react was, in fact, non-existent. The vehicle hit was not just any van, but an ambulance; far from carrying explosive devices, it was in reality

rushing a woman in an advanced state of pregnancy to hospital [...].

[34] [...] This does not, however, alter the fact that the situation of danger was considered as such by the soldiers, who reached an unfounded assumption as a result of their mistaken, but not negligent, assessment of the complex prevailing circumstances. The situation, as previously mentioned, is covered by Article 59 (c) (4) of the Criminal Code.

[...]

[35] Specifically, the need to prevent acts that could compromise the security of the emplacement as considered by the defendants and the excusable error of judgement committed by them, must necessarily be related to the concrete conditions of deployment [...]. The general difficulties linked to fulfilment of the mission in Iraq, and more particularly the fierce, serious clashes that took place that night, created a situation in which any action taken by others could be interpreted as threatening and hostile: the approaching vehicle, its continued progress despite orders to the contrary, the failure to recognize the identifying symbols of the red crescent owing to the night-time darkness, all led them to believe that it constituted a serious and real danger. [...]

[36] It should be noted here that, under Article 530 (c) (3) of the Code of Criminal Procedure, the judge must pronounce a sentence of acquittal not only when there is evidence that an act was committed in the presence of causes of justification, but also when there are doubts about its existence. [...]

[37] It is therefore fair that the defendants be acquitted of the crime of multiple homicide (Article 575 of the Criminal Code), both consummated and attempted as described above, as the act ascribed to them is better and differently qualified, as they cannot be punished for believing that they were acting in a state of military necessity.

[...]

Discussion

1. (Paras. 12 – 16, 28 – 30)

a) How would you classify the conflict in Iraq in August 2004? What then is the applicable law for this case? (See also **Case** Iraq, The End of Occupation)

b) (Paras. 12 – 16, 28 - 30) What are Rules of Engagement (RoE)? In general, in case there is a contradiction between an IHL rule and RoE, which should prevail? In the present case, what – in your opinion – is the IHL rule to which the RoE referred? What is – and in your opinion what should be - the impact of the RoEs in the present case?

2. (Paras. 1, 4 - 7, 9, 35)

a) (Paras. 1, 4, 7, 9, 35) For what purpose was the emblem of the red crescent used in this situation? Did this

use of the emblem constitute misuse? Does misuse of the protected emblems always constitute a war crime? In the present case? (CIHL, Rules 59, 156; HR, Art. 34; GC I, Art. 53; P I, Art. 37 (1) (d), 38 and 85 (3) (f) b) (*Paras. 1, 5 – 7, 9, 35*) Are medical vehicles protected under IHL? In all circumstances? If they are not marked by a protective emblem? If the protective emblem marked on them is not visible? Was the Iraqi vehicle protected in the present case? (CIHL, Rules 28, 30, 59; P II, Art. 11; P I, Art. 13 (1) and 21)

3. (*Paras. 1, 7, 10*) Who were the persons in the vehicle? Were these persons legitimate targets? In a NIAC? How would you qualify them under IHL of IAC? (CIHL, Rules 1 – 6, 25, 110, 134; GC I – IV, Art. 3; GC III, Art. 4; GC IV, Art. 4, 16, 20; P I, Art. 8, 41, 48, 50, 51)

4. (*Para. 33*) How should a soldier behave if there is uncertainty about whether an ambulance is being used by the enemy for acts harmful to his or her forces? If the necessity to attack the ambulance materialises suddenly? Does the right to self– defence exist under IHL? How is the latter question relevant in the present case? (CIHL, Rules 15 – 21; GC I, Arts 21 and 22; P I, Art. 57)

5. a) Did the Italian soldiers respect their Rules of Engagement? IHL? Did any of their actions, in your opinion, constitute a war crime? Could the case have been brought before the International Criminal Court? (**Case** The International Criminal Court, A., ICC Statute, Arts. 1, 8 (1) and 17)

b) Why did the court acquit the two soldiers? Does the “necessity” invoked by the court correspond to “necessity” under IHL? In your opinion, does it correspond to “necessity” as a defence under the ICC Statute? What other defences of international criminal law listed in the ICC Statute could you have analysed in the present case? (**Case** The International Criminal Court, A., ICC Statute, Art. 8 (2) (b) (xxiv), Art. 31 (1) (c) and 32 (1))