

Office of the Judge Advocate General
International and Operational Law Division

International and Operational Law Practice Note

Exercising Passive Personality Jurisdiction over Combatants¹

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Since the onset of the Global War on Terror, U.S. Soldiers have been the subject of judicial proceedings in a number of foreign countries. One such case in Italy involved Army National Guardsman Specialist (SPC) Mario Lozano.³ The following is a synopsis of an article which will appear in an upcoming edition of *The International Lawyer*, the journal of the American Bar Association Section of International Law and published in cooperation with the Dedman School of Law at Southern Methodist University.

On 4 March 2005, Nicola Calipari and Andrea Carpani, members of the Italian Ministry of Intelligence, were traveling to the Baghdad Airport.⁴ With them in the car was Giuliana Sgrena, a journalist who had been taken hostage one month before and who had just been released and was on her way back to Italy.⁵

At 20:45 hours the car, while entering Route Irish, was struck by a beam of light and immediately afterwards by gunshots, coming from one side of the road, which fatally wounded Calipari. The latter was sitting on the back seat beside Ms. Sgrena, and having become aware of the danger he placed himself in front of her, shielding her with his body. Both Ms. Sgrena and Carpani were wounded.

The gunfire came from US soldiers who had organized, acting on the orders of the high command, a checkpoint that was not planned on a permanent basis but had instead been set up that evening in order to secure the transit of the convoy in which US Ambassador Negroponte was to travel.⁶

As a result of this tragic event, on 7 February 2007, Italian judge Sante Spinachi “granted an indictment request made seven months ago by prosecutors” against SPC Lozano.⁷ The Italian prosecutors argued that the case was “political” because it involved several agents of the Italian state, meaning that “Lozano can be tried in absentia.”⁸

Whether SPC Lozano fired the shots that killed Mr. Calipari and wounded Ms. Sgrena and Mr. Carpani was never at issue. Rather, the issue was whether SPC Lozano was criminally responsible for the actions he took on that evening. After the incident, a joint Italian-U.S. commission investigated the incident but could not agree on the findings.⁹ The United States “cleared its troops of any wrongdoing”¹⁰ and asserted that “[t]he soldiers stuck to the rules of engagement for this sort of situation and therefore no action should be taken against them.”¹¹ The Italian prosecutor disagreed and brought the case to trial in Italy on 27 September 2007 where SPC Lozano’s attorney, Alberto Biffani, argued that “members of the multinational

¹ Eric Talbot Jensen, *Exercising Passive Personality, Jurisdiction Over Combatants: A Theory in Need of a Political Solution*, 42 INT’L LAW. (forthcoming 2008).

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³ Rome Court of Assize, 25 Oct. 2007, n. 5507/07 (transl. by E. A. Stace) (translation on file with author),

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Judge Orders Indicts of U.S. Soldier in Calipari Case*, ANSA ENGLISH MEDIA SERV. (Rome), Feb. 7, 2007, available at LexisNexis Library.

⁸ *Id.*

⁹ Rome Court of Assize, n. 5507/07, at 4.

¹⁰ *Accused US Soldier Defends Self*, ANSA ENGLISH MEDIA SERV., June 20, 2007, available at LexisNexis Library.

¹¹ *Id.*

force in Iraq are under ‘exclusive jurisdiction’ of the country that sent them.”¹² The Italian prosecutors argued that they had jurisdiction by way of “passive personality.”¹³

As the initial question of the case was jurisdiction, Judge Gargani had to determine whether Italy had jurisdiction to try a foreign Soldier for acts committed during an armed conflict where the victim was Italian.¹⁴ He ruled that Italy did not have jurisdiction.¹⁵ He based his ruling on the international law principle that “between the criterion of passive authority and that of the flag there can be no doubt that the latter, [is] the strongpoint of international law” and prevails in a jurisdictional argument.¹⁶ The ruling was subsequently upheld on appeal at the Court of Cassation, Italy’s highest court of appeal.¹⁷

This principle that the law of the flag, or a Soldier’s sending state, prevails over a claim of passive personality jurisdiction in a case like this is an extremely important ruling, especially given current operations. Absent another international agreement, the exercise of passive personality criminal jurisdiction over a combatant for combatant acts is inappropriate when the combatant’s sovereign has cognizance of the case.

A Soldier such as SPC Lozano, who was acting as the agent of his sovereign and was determined by his sovereign to have acted appropriately in the circumstances, ought not to be subject to a foreign nation’s domestic criminal process via passive personality jurisdiction.

¹² Marta Falconi, *Trial of US Soldier Charged with Murder of Italian Agent in Iraq Resumes in Rome*, ASSOC. PRESS WORLDSTREAM, Sept. 27, 2007, available in LexisNexis Library.

¹³ Judge Gargani examined the different types of jurisdiction recognized under international law, including that of passive personality which he defined as “attribut[ing] such jurisdiction to the State to which the victim belongs.” Rome Court of Assize, n. 5507/07, at 8.

¹⁴ *Id.* at 13.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Agence France Presse, *Italy Court Quashes Case of US Soldier Who Killed Secret Agent*, MIDDLE EAST TIMES, June 20, 2008, available at http://www.metimes.com/International/2008/06/20/italy_quashes_case_of_us_soldier_who_killed_secret_agent/9371/.