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'Responsible' compliance with military orders. Aspects of military criminal law

English version of the chapter *Adempimento 'responsabile' dell'ordine del superiore. Profili di diritto penale militare*, in Brigaglia M., Pino. G., Vallini A., *Obbedienza e responsabilità*, Roma Tre Press 2026, pp. 119–142.

ABSTRACT

The value of obedience to a superior's orders in the military is attested not only by the statutory provisions emphasising its importance as a tool for cohesion in the fulfilment of service, but also by the defence that exonerates from liability a subordinate who carries out an order given by the relevant authority, and by the offences that punish disobedience by a soldier who fails to fulfil an order given by a superior. Building on these provisions, this paper examines the position of the soldier caught between the risk of concurrent liability for carrying out illegitimate orders and that of being reprimanded for disobeying binding orders. Of particular importance is the investigation of the soldier's ability to discern the legitimacy of an order, the assessability of which may depend on the role of training and instruction in enabling soldiers to perform their duties.

KEYWORDS

Obedience; Military discipline; Military offences; Order from a superior; Legitimacy; Enforceability.

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SUMMARY: 1. Obedience as a component of organisation and part of military discipline. – 2. Legitimacy of the order and criminal relevance of disobedience. – 3. 'Responsible' obedience and the importance of professional training for military personnel – 4. Enforceability of obedience and attribution of disobedience to the superior's order. – 5. Regulatory indicators preparatory to an assessment of the military personnel's attitude towards a superior's order.

1. Obedience as a component of organisation and part of military discipline

There is no doubt that obedience is a fundamental component in the performance of the duties one is called upon to carry out in the military. The hierarchical structure that characterises the organisation of the Armed Forces naturally requires subordinates to follow their superiors' instructions, so that military duties are carried out in a manner consistent with society's expectations of efficiency and punctuality. Obedience therefore represents a value in itself, relating to the disciplinary code to which military personnel are bound for the proper performance of their service, as confirmed by numerous regulatory provisions.

Article 1347 of the Code of Military Law (Legislative Decree No. 66 of 15 March 2010, hereinafter the Code of Military Law) defines obedience as the 'prompt, respectful and loyal execution of orders relating to service and discipline, in accordance with the oath taken', and imposes an absolute duty to carry them out, provided they are not manifestly criminal orders or directed against the institutions of the State, in which case there is a corresponding duty of abstention (Article 1349 of the Military Code). Article 1346 of the Military Code of Order further requires military personnel to observe 'with a sense of responsibility and conscious participation all rules relating to discipline and hierarchical relations' and defines military discipline as 'the conscious observance of the rules pertaining to military status in relation to the institutional tasks of the Armed Forces and

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the requirements arising therefrom'. Military discipline, in turn, 'constitutes the main factor of cohesion and efficiency' of the Armed Forces and is a 'fundamental rule' for citizens in the armed forces. Linked to the centrality of the value of military discipline² is the affirmation of the hierarchical principle, with the definition of the respective positions (in terms of prerogatives and duties) of the superior and the subordinate, and, indeed, the imposition of the duty of obedience incumbent upon the subordinate.

Obedience to orders thus stands as an essential tool for the performance of military service. Through the orders issued, the superior ensures the fulfilment of the assigned objectives and achieves the aims of the service performed. For orders to be deemed functional to the service, however, they must demonstrate the relevance to discipline and the performance of statutory duties that the regulations require. Where these conditions of legitimacy are met, the subordinate is expected to raise no objections. The functional nature of obedience to the service is such that it requires compliance even with orders issued by a non-immediate superior (provided that the immediate superior is informed of the order issued and any conflict with another order issued is reported: Article 729, paragraph 1, Decree of the President of the Republic No. 90 of 15 March 2010). In line with the directive for prompt, respectful – but also responsible – execution of orders, it is nevertheless stipulated that a subordinate who harbours doubts as to the legitimacy of the instruction is 'required' to bring this to the attention of their superior, in order to obtain confirmation from the latter (Article 729(2) of Presidential Decree No. 90/2010).

Beyond the appearance of a system designed to ensure unilateral and automatic compliance with orders by the subordinate, the reality of more varied situations emerges: those of an individual caught between the duty to cooperate loyally with their superior, on the one hand, and the responsibility to remain attentive and vigilant to ensure that orders which do not comply with the requirements of service and discipline are not carried out, on the other. Unless orders of manifestly criminal content are issued, 'grey' situations may arise that require the military personnel to distinguish between an order worthy of obedience and one that lacks genuine binding force. Such marginal situations must be taken into account in order to apply the provisions governing obedience to orders and which take into account the responsibility of the military personnel called upon to carry out the orders.

² On the centrality of values in the wake of the reform introduced by Law No. 382 of 11 July 1978, see P. NUVOLONE, *'Valori costituzionali della disciplina militare e sua tutela nel codice penale militare di pace e nelle nuove norme di principio'*, in *'Rassegna della Giustizia Militare'*, No. 1-2, 1979, pp. 21–36.

The ‘prompt and loyal’ execution of orders is safeguarded – alongside disciplinary measures³ – primarily by Article 173 of the Military Criminal Code, which punishes military personnel who refuse, delay or fail to obey an order issued by a superior, provided that the order relates to service or discipline⁴. Disobedience is considered more serious if committed whilst on duty or on board a ship or aircraft; it is even more serious if committed during a fire, an epidemic or other circumstances of grave danger: all situations or places that emphasise the need to ensure cohesion within military units and reinforce the duty of everyone to cooperate as required.

As demonstrated by the fact that the offence is aggravated when committed in the course of of duty, the offence does not aim to punish offences caused (directly) to the service through disobedient conduct⁵. Moreover, considering the systematic placement of the provision, the

³ See Article 751(1)(14), (15) and (22) of Presidential Decree No. 90/2010.

⁴ Quite different criminal provisions govern the duty of a subordinate to obey the orders of a superior: in peacetime, Articles 174 and 175 of the Military Criminal Code in peacetime, which cover the most serious cases of ‘rebellion’ – revolt and mutiny – united by the circumstance of involving four or more military personnel acting in concert in disobeying the same order. In wartime, the following are considered separately: failure to comply with an order not to attack the enemy (Article 95 of the General Military Penal Code), failure to carry out an assignment (Article 100 of the General Military Penal Code), refusal to march against the enemy or to perform a service or other military operation (Article 112(4) of the General Military Penal Code), as well as disobedience by a (hostile) prisoner to orders given by an Italian military officer charged with escorting or guarding him (Article 199 of the Military Penal Code) and disobedience by an Italian prisoner to the orders of a superior who is also a prisoner of the enemy (Article 215 of the Military Penal Code). Similar provisions exist outside the military sphere. Without considering the offence set out in Article 650 of the Criminal Code, which punishes anyone who fails to comply with measures lawfully issued by the authorities for reasons of justice, public safety, public order or hygiene, it is worth noting offences concerning areas in which a principle of hierarchy is established within vertically structured public organizations: this is the case with Article 72 of Law No. 121 of 1 April 1981, which, with reference to personnel responsible for safeguarding public security, penalises (among other things) the violation of orders issued by a superior (with Article 66 of that text establishing duties of obedience corresponding to those applicable to military personnel), whilst Article 73 of the aforementioned Law No. 121 punishes a specific instance of ‘mutiny’ (i.e. collective disobedience). It is also worth noting the recent introduction of Article 415-bis of the Criminal Code, introduced by Article 26 of Decree-Law No. 48 of 11 April 2025, converted into Law No. 80 of 9 June 2025, which punishes a specific form of ‘riot’ (carried out by five or more persons) occurring within prisons and characterised by violence, threats or resistance – including passive resistance – to orders issued for the maintenance of order and security. A similar provision was introduced (by Article 27 of Decree-Law No. 48/2025, cited above) into Article 14 of Legislative Decree No. 286 of 25 July 1998, to penalise riots occurring within detention facilities for migrants.

⁵ On the minimum elements of the offence, see P. RIVELLO, ‘*Sulla natura del reato di disobbedienza militare. Questioni controverse*’, in ‘Cassazione penale’, LXII, no. 4, 2022, pp. 1564–1569.

criminal provision is aimed rather at protecting ‘military discipline’⁶. The Constitutional Court⁷ has nevertheless clarified that ‘the offence does not consist in disobedience to any “order” issued by a superior’, but in disobedience ‘to an order that is functional and instrumental to the requirements of service or discipline’. Indeed, the offence in question ‘safeguards the need to ensure the proper functioning of the military apparatus through compliance with the order issued by a superior’⁸. This premise embraces the idea that ‘service activities are the end to be achieved by the Armed Forces, and the order is the means through which the superior – when acting not directly but through an order given to the subordinate – pursues that end’; therefore, even orders apparently concerning discipline alone have, in reality, a certain relevance to the service⁹. This is why it is argued that the offence does not protect a value of a purely ethical nature¹⁰, nor does it defend the prestige enjoyed by the superior on account of the respect due to him by the subordinate¹¹.

A prerequisite for the rule to apply is the existence of a hierarchical relationship of subordination between the person disobeying the order and the person issuing it. The order must be issued by a person holding a position of authority (in rank or command) and must be addressed to an individual bound by a relationship of subordination to the person issuing the order. As mentioned, such a relationship may also exist in relation to a superior to whom the military personnel does not report directly and who issues a command; however, the immediate superior must be made immediately aware of the order received (Article 729(1)(c) and () of Presidential

⁶ On the object of protection in this case, see also L. GATTO, *‘Disobbedienza: il rifiuto, ragionevolmente motivato, di eseguire l’ordine è coerente con l’oggettività delle tutela?’*, in *‘Rassegna della Giustizia Militare’*, No. 5–6, 1994, pp. 247–262.

⁷ Constitutional Court, 14 February 2001, No. 39, in *‘Cassazione penale’*, XLI, No. 6, 2001, p. 1744.

⁸ Court of Cassation, Section I, 13 December 2011, No. 3339, in *‘Data Processing Centre of the Court of Cassation’*, ref. 251838.

⁹ Military Court, Naples Section, 14 September 2021, No. 19, in *‘Cassazione penale’*, LXII, No. 4, 2022, p. 1556.

¹⁰ On obedience as a political-criminal paradigm for the conception of criminal offences with a predominantly ethical background, see F. FORZATI, *‘Il diritto penale dell’obbedienza fra fondamento etico-religioso dell’offesa e funzione potestativa della pena’*, in *‘Archivio penale’*, No. 3, 2017, pp. 1–59.

¹¹ Constitutional Court, 14 February 2001, No. 39, cit.; so much so that the superior cannot claim to have suffered compensable damage within the meaning of Articles 185 of the Criminal Code and 2043 and 2059 of the Civil Code: see Court of Cassation, Section I, 18 March 2003, No. 14760, in *‘Cassazione penale’*, XLIV, No. 6, 2004, p. 2017. On moving beyond this conception of discipline and obedience, see D. PROVOLO, *‘Esecuzione dell’ordine del superiore e responsabilità penale’*, CEDAM, Padua 2011, pp. 52–54.

Decree No. 90/2010), so as not to create the conditions for inefficiency in the service, which could arise from a lack of coordination between commands.

An order is a directive requiring one or more specific individuals to act in a prescribed manner. It may be given in any form, provided that it consists of an unequivocal expression of will which – subject to any margin of flexibility regarding the manner – leaves no room for doubt or uncertainty whatsoever as to *the subject matter* and the objective of its execution¹². The order must, however, be legitimate in that it must relate to service or discipline for both parties (superior and subordinate) in the hierarchical relationship. In assessing these aspects of the order's – substantive – legitimacy, the regulations governing the conduct of military service and those establishing the duties and obligations of members of the Armed Forces are of primary importance.

The order to undergo a medical examination, issued to a member of the armed forces temporarily exempted from active duty on the basis of a medical certificate produced by him following the rejection of his request for leave, was deemed lawful, as it was required by service regulations (see Article 718, Presidential Decree No. 90/2010) that the soldier's fitness to remain at the disposal of the military authorities be verified¹³; likewise, the order given to a subordinate to cut his hair, given the duty imposed on military personnel to maintain a presentable appearance in a manner befitting the dignity of their status (Article 721, Presidential Decree No. 90/2010)¹⁴. Conversely, due to a lack of relevance to service or disciplinary matters, it has been ruled that disobeying a commander's instruction to attend a religious service or refusing a superior marshal's request to give up one's seat in the service car on the grounds that it is reserved for the 'driver' do not constitute an offence¹⁵.

¹² Court of Cassation, Section I, 13 June 2014, No. 28232, in 'Data Processing Centre of the Court of Cassation', ref. 261412; Ibid., 23 December 1987, No. 3007, in 'Cassazione penale', XXIX, No. 6, 1989, p. 1001. For the exclusion of acts of an organisational nature, see A. BARBIERI, '*Ordine di servizio e foglio di viaggio: differente natura giuridica e funzione con interessanti risvolti in tema di configurabilità del reato di disobbedienza*', in 'Rassegna di Giustizia Militare', No. 1-2, 2006, pp. 68–70.

¹³ Court of Cassation, Section I, 3 March 2015, No. 30724, in 'Court of Cassation Data Processing Centre', ref. 264487. See also Court of Cassation, Section I, 23 September 1999, No. 11728, in 'Court of Cassation Data Processing Centre', ref. 214289, which held that the order issued by a superior officer to a member of the Carabinieri, who had been prescribed rest due to illness, not to leave the barracks where he was serving except for the time necessary to undergo treatment, as the order was issued for reasons relating to service and discipline, with the consequent commission of the offence of disobedience following the soldier's unjustified departure from the barracks.

¹⁴ Military Court, Naples Section, 14 September 2021, No. 19, cit.

¹⁵ Constitutional Court, Order No. 39 of 5 February 2001, cit.

Moreover, the legitimacy of the order is invoked to support and justify, pursuant to Article 51 of the Criminal Code, the actions of the subordinate¹⁶ who, in carrying out the order, is led to commit any criminal acts¹⁷. The same premise therefore governs the two complementary and symmetrical circumstances in which the duty of obedience to the order is manifested: that of the imposition of the command by the superior and that of its implementation by the subordinate.

2. *Legality of the order and relevance of disobedience*

By requiring that the order relate to service or discipline (in accordance with the relevant provisions), Article 173 of the Military Criminal Code imposes an obligation both on the parties to the hierarchical relationship of subordination and on the criminal court: on the former, as they are required to observe the conditions of lawfulness when the order is issued and executed¹⁸; on the latter, because it is required to verify that the measure is in fact lawful, so that the offence of failure to comply with the order may be established.

Indeed, the subordinate is also required to ensure the order meets the requirements of legality, in accordance with the mechanism set out in Article 729(2) of Presidential Decree No. 90/2010, whereby, if a military personnel is given an order which they consider to be inconsistent with the regulations in force, ‘he must, in a spirit of loyal and active participation, bring this to the attention

¹⁶ The traditional approach – recently followed by T. TRAVAGLIA CICIRIELLO, *‘Duty and Exculpatory Order. Contenuto e limiti dell’art. 51 c.p.’*, Giappichelli, Turin 2020, p. 16 – which, regarding the legitimacy of the order, considers the dichotomy between formal and substantive requirements – is contrasted by the opinion of E. INFANTE, *‘L’adempimento del dovere’*, in *‘Trattato di diritto penale’*, edited by A. Cadoppi, S. Canestrari, A. Manna, M. Papa, *‘Parte generale’*, II, *‘Il reato’*, UTET, Turin 2013, p. 330, who, considering an ‘endopenalistic’ view of the order to be inappropriate, refers to the concepts of lack of jurisdiction, abuse of power and violation of the law.

¹⁷ It should be noted that Article 19(3) of Law No. 145 of 21 July 2016 (following Article 4(*l-sexies*) of Law No. 197 of 29 December 2009) permits personnel accompanying or supporting the Armed Forces engaged in international military missions carried out under the auspices of the UN or other international organizations, or in any case in accordance with international law, to make legitimate use of force, weapons or other means of physical coercion, when such use (among other things) complies with ‘legitimately issued orders’ to meet the ‘necessities of military operations’. On this exemption, see S. RIONDATO, *‘Missioni militari internazionali italiane c.d. di pace all’estero. Novità giuspenalistiche nella legge di riforma 21 luglio 2016, n. 145’*, in *‘Diritto penale contemporaneo’*, No. 5, 2017, pp. 298–309.

¹⁸ The requirement that the person carrying out the order must also assess its (substantive) lawfulness is discussed by V. GARINO, entry on *‘Disobbedienza nel diritto penale militare’*, in *‘Digesto delle discipline penali’*, vol. IV, UTET, Turin, 1990, pp. 143–144.

of the person who issued it, stating his reasons, and is required to carry it out if the order is confirmed'¹⁹. It is sometimes argued that the superior's confirmation serves to establish the legitimacy (and binding nature) of the order²⁰.

This outcome highlights the stabilising effect that this mechanism undoubtedly has on the conduct of military service, promoting its efficiency through the prompt execution of orders. As has been observed²¹, the superior's confirmation of the order reduces the likelihood that the subordinate will be held accountable (both disciplinarily and under the legal system) for having carried out an order that may nevertheless lead to undesirable outcomes. It does not appear, however, that the completion of the confirmation mechanism can be equated with the presumptive affirmation of the objective conditions of the order's legitimacy: not so much because the mechanism is outlined by a provision of a regulatory nature, which would be required to limit the scope of application of the incriminating (legislative) provision; greater weight is given to the fact that, according to the aforementioned provision, 'a member of the armed forces to whom an order is given that is manifestly directed against the institutions of the State or whose execution in any case manifestly constitutes a criminal offence, has a duty not to carry out the order and to inform their superiors as soon as possible': which demonstrates that the condition of the order's lawfulness is to be determined on the basis of independent criteria, even in the face of confirmation of the order by a superior²².

In reality, taking into account the established case law on offences penalising non-compliance with administrative measures subject to certain criteria of legitimacy²³, the judge is authorised to

¹⁹ The same provision applied under Article 25 of Presidential Decree No. 545 of 18 July 1986, implementing Article 4 of Law No. 382/1978. On this, see G. MONTANARA, '*Aspetti problematici delle cause di giustificazione nel sistema penale militare*', in '*Rassegna della Giustizia Militare*', No. 4-5, 1988, pp. 357-370.

²⁰ For all, see E. INFANTE, '*L'adempimento del dovere*', op. cit., pp. 335-341; G. MARINUCCI, E. DOLCINI, G.L. GATTA, '*Manuale di diritto penale. Parte generale*', Lefebvre Giuffrè, Milan 2025¹⁴, p. 350.

²¹ D. BRUNELLI, G. MAZZI, '*Diritto penale militare*', 4th ed., Giuffrè, Milan 2007, 82 ff.; P. RIVELLO, '*Manuale del diritto e della procedura penale militare. Ordinamento giudiziario militare*', 2nd ed., Giappichelli, Turin 2023, pp. 69-70; but see already V. GARINO, '*Disobbedienza nel diritto penale militare*', op. cit., p. 144, with reference to the previous statutory provisions.

²² See D. PROVOLO, '*Esecuzione dell'ordine del superiore*', op. cit., pp. 72-76.

²³ See G. COCCO, '*L'atto amministrativo invalido elemento delle fattispecie penali*', CUEC Editrice, Cagliari 1996, pp. 83-84, 95 and 281-289; M. GAMBARDELLA, '*Il controllo del giudice penale sulla legalità amministrativa*', Giuffrè, Milan 2002, pp. 113-114; ID., '*La disapplicazione degli atti amministrativi illegittimi nel sistema penale dopo le recenti riforme del diritto amministrativo*', in '*Rivista italiana di diritto e procedura penale*', LVII, no. 2, 2013, pp. 784-786. On the classification of the offence under Article 173 of the Code of Military Criminal Procedure within this framework and

review the order's compliance with the conditions for its issuance – and to set aside its validity in the event of a found deviation – regardless of whether the superior confirms the order in response to the subordinate's request. The relevance of the order to service or discipline must be assessed on the basis of the objective conformity of the act with the formal and substantive requirements set out in the legislation governing the exercise of the prerogative; a requirement of conformity to which the superior issuing the order is, of course, also subject. The problem that may actually arise, if at all, is that of the level of scrutiny that the judge is able to exercise regarding the order's compliance with the substantive requirements underpinning the order.

This aspect of a potential limitation on judicial review emerged, for example, when the existence of a criminal offence was recognised following a military personnel's evasion of an order to undergo a medical examination and compulsory treatment in relation to behaviour indicating psychological disorders inconsistent with compliance with service discipline²⁴. In that case, the judge confined himself to verifying that the order concerned 'the management of personnel within a hierarchical organisation' and did not attach any significance (by refusing to admit the relevant medical documentation into the criminal proceedings) to the fact that the Civil Court had declared that the substantive conditions for imposing compulsory medical treatment were lacking.

Moreover, it cannot be ignored that the reference to service requirements and disciplinary relevance, invoked by the legislator to legitimise the issuance of the order, entails the making of assessments which, due to the 'fluidity' of the parameters invoked, leave the issuing military authority with a margin of discretion that is difficult to challenge in judicial review proceedings, even when the orders derogate from service regulations²⁵. Given this limited scope for assessing the grounds for the legitimacy of the orders, the Constitutional Court and the Court of Cassation have taken care to emphasise that the regulations to which the order refers (and pertains) cannot be understood as safeguarding the mere authority of the superior who issued the command²⁶, but concern compliance with the rules of proper conduct in relations with the superior, which are intended to enable the

on the constitutionality of the offence, see G. CAPPITELLI, *'Una nuova questione in tema di disobbedienza'*, in *'Cassazione penale'*, XLII, no. 2, 2002, pp. 563–573; G. MAZZI, *'Il controllo del giudice penale sulla legittimità degli atti dell'Autorità militare'*, in *'Rassegna della Giustizia Militare'*, nos. 1–3, 2003, pp. 34–42.

²⁴ Court of Cassation, Section I, 13 December 2011, No. 3339, cit.

²⁵ It is worth noting that, according to Article 727(2) of Presidential Decree No. 90/2010, 'where essential service requirements so dictate, the superior may issue orders in derogation from service regulations, promptly notifying the authority that issued the regulations from which the derogation is made'. The assessment of service conditions entrusted to the superior thus allows for a derogation from the rules governing the performance of the duty.

²⁶ For this perspective, see V. GARINO, *'Disobbedienza nel diritto penale militare'*, op. cit., pp. 140–142.

subordinate to perform their duties to the best of their ability. Orders which (whilst displaying traits of authoritarianism) impose conduct that has no impact or even potential implications on the performance of duties would therefore certainly be ‘unlawful’.

Even from this perspective (which we might describe as substantive or functional), however, the military judiciary’s scrutiny of the order’s legitimacy is not so stringent as to make it plausible to expect the act to be set aside, unless the order itself appears radically or manifestly unrelated to the reasons of service or discipline that might explain its issuance.

Alongside, and as an alternative to, the recourse to the non-application of unlawful acts, there has been a tendency to assess, rather, the reduced seriousness – and the lack of criminal relevance – of the act of disobedience on the grounds that the failure to comply with the order has no, or only a negligible, impact on the actual performance of the service. In this regard, it has been held²⁷, even in the past, that refusal to comply with an order does not necessarily constitute an offence if the defiance of the superior’s command is followed by prompt and exact execution of the order, such that the performance of military service was not at risk of being materially affected by the fact that the military authority did not have to reorganise itself in the slightest²⁸. And, again considering the consequences that failure to comply with the order may have on the performance of service, it is deemed plausible to exclude the punishability of the disobedient person, in accordance with Article *131-bis* of the Criminal Code, where the effects of the criminal conduct, whilst perceptible, are deemed to be of very limited significance²⁹.

²⁷ A. CADOPPI, ‘*La rilevanza penale del «rifiuto» ed il reato di disobbedienza (art. 173 c.p.m.p.)*’, in ‘*Rivista italiana di diritto e procedura penale*’, XXVI, no. 2, 1986, pp. 613–633.

²⁸ *Against* the Court of Appeal of Verona, 20 September 1985, Mastrullo, in ‘*Rivista italiana di diritto e procedura penale*’, XXVI, no. 2, 1986, p. 613. Critique by A. CADOPPI, ‘*Brevi note in tema di disobbedienza*’, in ‘*Rassegna della Giustizia Militare*’, No. 3, 1986, pp. 288–292.

²⁹ See Court of Cassation, Section I, 12 April 2024, No. 33369, in ‘*Cassazione penale*’, LXIV, No. 12, 2024, p. 4029: the punishability of the offence presupposes that it is possible to assess – in relation to the factual circumstances – the impact of the disobedience on the regularity and efficiency of the service to which the order relates. The case concerned failure to comply with a superior’s order to stop recording an interview which the subordinate was conducting in response to a summons regarding a service report drawn up by the subordinate; this failure to comply was followed by the interruption of the interview. On the application of the provision referred to, see F.P. FASOLI, ‘*L’applicabilità dell’art. 131-bis c.p. e di altre norme simili (artt. 49, cpv., c.p., 27 d.p.r. n. 448/1988 e 34 del d.lgs. n. 274/2000) ai reati militari con particolare riguardo ai delitti di disobbedienza, truffa militare, abbandono di posto/violata consegna ed insubordinazione*’, in ‘*Cassazione penale*’, LXIV, No. 10, 2024, p. 3256.

Given the limited scope for judicial review of the grounds for the order, the mechanism for reinforcing the order, as outlined in Article 729 of Presidential Decree No. 90/2010, could end up playing a decisive role in defining the scope of the duty of compliance imposed on the military personnel required to carry out the order³⁰; all the more so insofar as the military personnel (even before the judge) are not provided with further guidance to assess whether the order contravenes service regulations and disciplinary rules³¹. However, as this latter aspect concerns the position of the individual recipient of the order in relation to the instruction addressed to them, it leads the matter towards an examination of aspects that no longer coincide with the question of the legitimacy of the authoritative act itself, but rather concern the personal attitude maintained by the person carrying out the order and, with it, the subjective aspects of the attribution of criminal liability³².

3. *'Responsible' obedience and the importance of military professional training*

Given the limits of judicial review with which the judge is likely to encounter, the question of the criminal relevance of the conduct of a subordinate who fails to comply with an order issued by his superior shifts to a different plane from that of the legitimacy or illegitimacy of the order, instead addressing the issue of whether the order is enforceable against the subordinate and the assessment of the subordinate's subjective attitude towards the order. The aim is to ascertain what practical options the military personnel actually have in choosing whether to carry out the order. This raises the criteria of the enforceability of compliance with criminal law and the culpability of its violation, upon which the judgement of guilt for the offence is based. From this perspective, indeed, it makes more sense to address the issue of 'responsible' obedience and disobedience on the part of the military personnel with regard to the orders addressed to them³³.

³⁰ In this regard, Court of Cassation, Section I, 2 December 1997, No. 735, in *'Cassazione penale'*, XXXIX, No. 7-8, 1999, p. 2193.

³¹ See on this point F. BELLAGAMBA, *'Sui limiti della responsabilità penale dell'esecutore di un ordine illegittimo insindacabile'*, in *'Diritto penale e processo'*, No. 2, 2009, pp. 193–199.

³² D. BRUNELLI, G. MAZZI, *'Diritto penale militare'*, op. cit., pp. 84–86. The distinction between the lawfulness of the order and the recipient's ability to challenge it is highlighted by E. INFANTE, *'L'adempimento del dovere'*, op. cit., p. 330.

³³ See D. PROVOLO, *'Esecuzione dell'ordine del superiore'*, op. cit., pp. 76, 99 ff. and 289. The primacy of a subordinate's duty of obedience is discussed by G. MARINUCCI, E. DOLCINI AND G.L. GATTA, *'Manuale di diritto penale'*, op. cit., p. 350.

In this regard too, interesting insights can be drawn from the aforementioned Articles 1346 and 1347 of the Military Code of Order and Article 729 of Presidential Decree No. 90/2010. In those provisions, in fact, in addition to requiring a ‘prompt, respectful and loyal’ execution of orders relating to service and discipline, to be carried out ‘within the limits established by the Code and the Regulations, as well as scrupulously observing specific instructions and service provisions’, the military personnel are called upon to carry out orders with a ‘sense of responsibility’. The same military personnel are required to observe ‘with a sense of responsibility and conscious participation’ all rules relating to discipline and hierarchical relations.

However, these phrases seem to merely raise the issue, without actually specifying the terms of the subordinate’s conduct. The ‘sense of responsibility’ with which the soldier is called upon to carry out the order refers to (further) value-based parameters that remain unstated and in the background of the regulatory wording³⁴. According to a first interpretation, ‘responsible’ might appear to mean execution that blindly ensures the efficiency of military action in view of the objectives set by the order. However, the reference to ‘responsibility’ could also prompt the executor to take into account the further interests arising from the execution of the order, suggesting that the subordinate strike a reasonable balance between them, albeit within the value framework cultivated in the military sphere. The latter would seem, at first glance, to be the preferred interpretation, if one attaches importance to the meaning (of full involvement of the ‘responsible person’) that the phrase tends to assume in the common social context; a careful consideration of the factual situation also seems to be alluded to by the ‘conscious participation’ with which the rules of discipline and the conduct of hierarchical relations must be observed by the military³⁵. It cannot, however, be ignored that in the aforementioned provisions, ‘sense of responsibility’ and ‘conscious participation’ stand alongside repeated calls by the legislator for ‘promptness’ and ‘accuracy’ in execution and for ‘scrupulous’ compliance with orders and service regulations by those required to do so.

To assess the conduct of the soldier called upon to respond to a superior’s order, it is therefore important to take into account *the cultural context* from which the soldier draws when, as a member of the military, he is called upon to carry out the order promptly and accurately; in the knowledge that the military hierarchical structure is not in itself a factor sufficient to lead the subordinate to

³⁴ Article 717 of Presidential Decree No. 90/2010 does not assist in identifying those parameters when it states that ‘a sense of responsibility consists in the conviction of the need to fulfil in full the duties arising from the status of a member of the armed forces for the realisation of the institutional aims of the Armed Forces’.

³⁵ This interpretation is also supported by the value (of the spirit) of ‘democracy’ which must inform the organisation of the Armed Forces pursuant to Article 52(3) of the Constitution, to which Article 87 of the Military Code of Organisation refers.

always consider the order issued by the superior to be legitimate³⁶. In this regard, the training experienced by military personnel from the moment they join the Armed Forces cannot fail to be of central importance. The training that military personnel receive (already in military academies and schools) is not limited to making them repositories of extrinsic knowledge of service and disciplinary regulations, but provides them with guidance on the meaning of provisions within the general framework and, above all, orients them regarding the implementation mechanisms surrounding the dynamics of issuing and translating orders. It is therefore clear how significant the training pathway that a member of the military undergoes throughout their career tends to be (also) for our purposes; not least because we must not forget that a member of the military trained through a certain habit of obedience will, in the future, be called upon to issue directives and issue orders with similar regularity to their younger subordinates.

The manner in which military personnel are trained provides further elements that assist the judge in assessing the conduct of the subordinate called upon to carry out the order. What is not written on the dispatch and cannot be inferred from the words used to formulate the order can be deduced from contextual indications that should be borne in mind to ascertain the scope available to the soldier to realise the illegality and possible criminality of the order and, therefore, to decide to refuse to carry it out.

A significant role is to be attributed to anthropological factors or indicators linked to the difference in age and current experience between that (often considerably greater) of the superior issuing the order and that of the soldier to whom it is addressed; but the peremptory and decisive tone in which the command is expressed also carries weight in reinforcing the binding nature of the order: it should be remembered that, according to Article 727 of Presidential Decree No. 90/2010, ‘orders, issued in accordance with and in the cases provided for by the Code, must be formulated clearly so as to avoid doubt or hesitation in those who receive them’; a precise disciplinary directive, therefore, requires the superior to use methods and language (including body language) designed to overcome the subordinate’s ordinary resistance and induce them to comply.

No less significant are certain situational indicators, attributable, for example, to the practices followed within individual military units regarding the reliability of orders issued by higher command: depending also on the type of unit and the nature of the duties performed by the service member, the binding nature usually attributed to orders issued by a superior carries weight. Nor can one overlook the question of how well-equipped subordinates are to scrutinise the directives issued to them by superiors, and whether superiors are prepared to tolerate their decisions being subject to

³⁶ See Military Court of Appeal of Rome, 7 March 1998, in ‘Indice penale’, No. 3, 1999, p. 959.

further consideration. Above all, this last aspect, but also that relating to the practices that develop within military environments and, to a lesser extent, the weight attributed to the contextual factors mentioned first, depend on the content conveyed to trainees through the professional and disciplinary training tools used to train military personnel: the mechanism of Article 729 of Presidential Decree No. 90/2010 may operate differently depending on the ‘cultural’ framework within which it operates.

To the significance ordinarily attributed to the military context and environment for the purposes of establishing criminal liability, one must, moreover, the precaution typical of the military judicial system, which entrusts the adjudication of military offences to courts composed of panels including non-judicial members drawn by lot from serving military personnel holding an officer’s rank no lower than that of the defendant in the proceedings (Article 54 of the Military Code of Procedure)³⁷. Individuals are called upon to sit in criminal trials not because of their legal training, but because of their position and experience within the military organisation³⁸ and are therefore deemed capable of effectively representing the situational context³⁹ in which the offence took place⁴⁰. This precaution underpins the prosecution of military offences (such as disobedience), whilst it does not apply if the military personnel unwittingly commits a common offence, even if committed in execution of an order which they were compelled to carry out in implementation of an (illegitimate) order of a criminal nature. In this second scenario, the ordinary court has jurisdiction over the matter, without the involvement of military colleagues; consequently, the *likelihood* that the context in which the offence occurred will be taken into account may depend, at best, on the testimony provided by military witnesses called to give evidence at trial.

³⁷ For the reasons and procedures governing the composition of the panels of military courts, please refer to D. NOTARO, *Lineamenti di diritto penale militare italiano*, 2nd ed., Giappichelli, Turin 2024, pp. 11–12.

³⁸ See Constitutional Court, 16 February 1989, No. 49, in ‘La Giustizia penale’, No. 1, 1990, I, col. 25.

³⁹ As regards the achievement of such a result, M. DE PAOLIS expresses doubts in ‘*Qualche osservazione sulla sentenza della Corte costituzionale n. 49/1989 in tema di giustizia penale militare*’, in ‘Cassazione penale’, XXIX, No. 8, 1989, pp. 1380–1381; P. RIVELLO, ‘*Spunti per un’analisi: i componenti ‘non togati’ dei Tribunali militari*’, in ‘Rassegna della Giustizia Militare’, no. 1-2, 1991, pp. 9–25; ID., ‘*Il «passato» ed il «presente» del diritto penale militare, in Il diritto penale militare tra passato e futuro. Tradizione, profili politico-criminali e prospettive di riforma dei codici penali militari*’, edited by A. GARGANI, Giappichelli, Turin 2009, pp. 51–52.

⁴⁰ For alleged ‘inherent’ flaws identified in the involvement of military personnel holding the rank of officer alone, who are naturally inclined to represent the viewpoint of superior authorities rather than the difficulties encountered by subordinates, see G. PAGLIARULO, ‘*I tribunali militari nella legge 7 maggio 1981 n. 180: osservazioni critiche*’, in ‘Rassegna della Giustizia Militare’, No. 6, 1981, p. 470; R. MESSINA, ‘*Elementi di diritto e procedura penale militare*’, in ‘Rassegna della Giustizia Militare’, No. 6, 1985, p. 165.

The assessment of the context would therefore seem to be facilitated when a military personnel is to be judged for failing to obey an order, as the judge can receive information directly and informally from his non-judicial colleague; the same appears more uncertain (but not necessarily less effective) when the military personnel is accused of having committed an offence in execution of an unlawful order. In the latter case, the information will be mediated (and influenced) by the commitment and ability of the parties to conduct the examination of the witness; ultimately, the soldier's ability to invoke the grounds for exemption available under Article 51, paragraphs 3 and 4, of the Criminal Code will depend on this.

4. The requirement of obedience and the charge of disobeying a superior's order

Having highlighted the importance of cultural training programmes for military personnel in ensuring the most effective and responsible performance of the duties incumbent upon members of the Armed Forces, the scenarios facing the recipient of the order must be highlighted and their scope clarified.

On the one hand, consideration must be given to the possibility that a member of the armed forces may carry out an order that leads to the commission of an offence, and in particular a criminal offence. If the order is lawful, no legal liability shall be attributed to the person carrying it out, as the conditions for the application of the defence of the performance of duty, provided for in Article 51 of the Criminal Code, are met, even in the case of a member of the armed forces who commits offences (civil or military)⁴¹. If, on the other hand, the order is unlawful, without prejudice to the liability of the person who issued the order (Article 51(2) of the Criminal Code), the possibility of holding the person carrying out the order liable for any offence committed also depends on the content of the order itself and the context surrounding the activation of the hierarchical mechanism.

In the event that the order leads to the commission of an administrative offence (or, in any case, a non-criminal offence), it should be noted that Article 4 of Law No. 689 of 24 November 1981 provides that the person who issued the order is liable for the act committed, without specifying the (residual) conditions under which the person carrying out the order may also be held liable. The activation of the mechanism provided for in Article 729 of Presidential Decree No. 90/2010, moreover, reduces the likelihood that the executor could be accused of having contributed to the

⁴¹ On the conditions for the application of the defence of justification in the military context, following the repeal of Article 40 of the Code of Military Criminal Procedure, see D. NOTARO, *Lineamenti di diritto penale militare italiano*, op. cit., pp. 63–64.

commission of the offence, given that it may be assumed that, with the confirmation of the order, the executor was led by the superior to act in the belief that they were acting lawfully; certainly, no disciplinary liability can be attributed to the executor, given the duty to obey the order confirmed by the superior, as imposed by Article 729 of Presidential Decree No. 90/2010⁴². Compliance with the order will ultimately be encouraged (again on a personal level) by the fact that the (minor) consequences of committing any administrative offences are less readily apparent, compared to the more serious and obvious criminal risk to which the military personnel is exposed under Article 173 of the Military Criminal Code for the offence of disobedience⁴³.

If, on the other hand, an unlawful order leads to the commission of a criminal offence, without prejudice to the liability of the superior who issued the order, the subordinate is also liable for the criminal act, except in cases where the subordinate acted under the mistaken belief that the order was lawful and that the order was not open to challenge by the recipient. To ascertain whether either of these latter two cases applies, the subordinate's position and attitude must be assessed in relation to the contextual circumstances in which they acted. And, provided that the order is not manifestly criminal in content or manifestly directed against the institutions of the Republic—in which case there is no scope to consider the offender's personal position⁴⁴—the following factors are relevant in assessing the agent's attitude: the characteristics of preparation, competence and experience; the operational practices followed within the unit; the emotional context of the moment and the time allowed to the person carrying out the order to comply with it, in relation to the importance of the command given, in order to assess whether, depending also on how the subordinate behaved, they actually realised the unlawful nature of the order or whether, despite having had that opportunity, they instead erred as to the validity of the command addressed to them. All the aspects mentioned are

⁴² See GARINO, *'Disobbedienza nel diritto penale militare'*, op. cit., p. 145. Disciplinary liability is established for public security officers who 'fail' to carry out an order confirmed following a 'complaint' by a subordinate (see Article 66(4) of Law No. 121 of 1 April 1981): see E. INFANTE, *'L'adempimento del dovere'*, op. cit., pp. 334 ff.

⁴³ F.P. FASOLI, *'L'ordine militare, dovere di obbedienza, discrezionalità e sindacabilità. Intervento al convegno'*, in *'Rassegna della Giustizia Militare'*, www.portalegiustiziamilitare.difesa.it, No. 1, 2018, pp. 9–10.

⁴⁴ G. ROSIN, *'Il militare fra dovere di obbedienza e dovere di disobbedienza. L'esecuzione dell'ordine criminoso'*, in *'Rassegna della Giustizia Militare'*, no. 3, 1982, pp. 203–236; C. COLOMBO, *'La scriminante dell'adempimento di un dovere: l'ordine imposto dall'autorità e il conflitto tra obbedienza e coscienza'*, in *'Rivista penale'*, no. 6, 2008, pp. 603–613. In reality, in contrast to the prevailing view – see Court of Cassation, Section III, 10 March 2011, No. 18896, in *'Cassazione penale'*, LII, 2012, p. 216 – which identifies the limit based on how often an average person, represented by a 'model agent', is capable of recognising the criminal nature of the order – it is sometimes emphasised that the limit must take into account the qualities and capabilities of the category to which the recipient of the order belongs: see Court of Cassation, Section I, 16 November 1998, No. 12595, in *'Diritto penale e processo'*, No. 5, 1999, p. 603.

influenced by the training and preparation provided to the soldier regarding how to relate to the orders to which they are subject.

Nor can one overlook the fact that the assessment of the (reprehensible) subjective attitude of the soldier carrying out an order of a criminal nature may be influenced by their lack of awareness, not of the unlawful nature of the order, but of the specific nature of the act they are required to perform. It may be the case that the soldier does not realise that he is carrying out an act corresponding to the type of offence in question, misjudging its true nature, and that, consequently, he is not deterred from carrying out the order, even though he might otherwise have questioned it. This aspect, however, is also limited by the circumstance that the order appears manifestly criminal. Whether one is dealing with the negligent commission of an offence, as a result of the clumsy execution of the order or the negligent assessment of the factual circumstances, is a possibility that lies at the limits of the operation of the justification clause⁴⁵. The negligent commission of the offence is indeed considered to fall outside the scope of Article 51 of the Criminal Code when the result presupposes discretionary methods of execution consistent with the violation of flexible precautionary rules, the persistence of which implies a breach of the binding chain of command that would require a prompt and ‘exact’ execution of the order by the subordinate⁴⁶.

On the other hand, consideration must be given to the scenario in which a member of the armed forces, having been ordered to carry out an order, opposes its execution, refusing or failing to carry it out (or even delaying it due to initial hesitation). No liability arises in such a case if it is recognised that the superior’s order is, in fact, lacking in legitimacy because it does not pertain to service or discipline: in such a case, an essential element of the typical offence is missing⁴⁷. However, the subordinate’s liability may also be absent when disobedience follows a legitimate order, provided that the military personnel has personal grounds to believe that the order does not concern matters of service or discipline and it is therefore established that the person concerned did not foresee the

⁴⁵ See Court of Cassation, Section I, 20 May 2011, No. 20123, in ‘Cassazione penale’, LI, No. 11, 2011, p. 3742, with a note by E. MENGONI, ‘*Colpa generica e colpa specifica: la Corte di cassazione fissa le condizioni per l’applicabilità dell’esimente dell’adempimento del dovere*’.

⁴⁶ T. TRAVAGLIA CICIRIELLO, ‘*Dovere e ordine scriminante. Contenuto e limiti dell’art. 51 c.p.*’, Giappichelli, Turin 2020, pp. 92–93, according to which the defence is inapplicable when the subordinate is left with a significant margin of operational discretion, implying the possibility of taking precautions that would have prevented the occurrence of the offence.

⁴⁷ D. NOTARO, ‘*Lineamenti di diritto penale militare italiano*’, op. cit., p. 277.

condition of the binding nature of the command⁴⁸. The possibility that a member of the armed forces may engage in ‘responsible’ disobedience, either because the order is objectively unlawful or because the conduct is based on a reasonable assumption that the order is improper, presupposes, however, the soldier’s ability to critically assess the legitimacy of the order itself and to trust that their assessment will be weighed by the military judge tasked with judging disobedience to a superior’s order. Otherwise, it will be very difficult to see acts of non-compliance finding legal justification.

It is precisely in such situations that the value of the skills acquired by the military personnel is measured, in terms of their knowledge of discipline and the experience gained in applying the rules. It seems all the more difficult to expect the military personnel to be able to react to a biased order – especially after the order has been confirmed by the superior pursuant to Article 729 of Presidential Decree No. 90/2010 – the less their training has been geared towards weighing up the conditions under which the order was issued, albeit in terms compatible with the requirements of prompt response in military action. This criterion also applies to the ‘non-reviewability’ of the order, to which Article 51 of the Criminal Code refers in setting a limit on the executor’s liability; a feature that depends not only on the hierarchical position held by the subordinate and on the more or less high-level and discretionary nature of the order, but also on the military personnel’s ability to weigh up the order, on the extraordinary reasons underlying its issuance, on *the limited scope for deliberation* granted to the subordinate, and on the totality of circumstances reflecting the individual’s actual (in)ability to navigate the specific situation. The heuristic significance of these elements also lies in the (limited) *chances* of identifying acts of disobedience for which the offence under Article 173 of the Military Criminal Code may be excluded due to the absence of the subjective element, if not of the typical act.

Ultimately, when it comes to the possibility of witnessing lawful or excusable inaction regarding an order, the difficulty faced by the military personnel themselves in assessing the legitimacy of the order and in ‘gambling’ that its illegality will be recognised by the military authorities responsible for deciding whether to file a complaint, and subsequently confirmed by the military judge called upon to determine whether the offence has been committed, weighs heavily. In this latter regard, note what was highlighted (*see § 2 above*) concerning the observed difficulty (or reluctance) of the judge in establishing that the order is unrelated to the requirements of military service or discipline. It is even less conceivable that the subordinate soldier, lacking adequate training, would be in a position to know and interpret the rules regarding obedience and disobedience to orders, to the extent of trusting his own assessment over that of his superiors and in the face of the cautious

⁴⁸ V. GARINO, ‘Disobbedienza nel diritto penale militare’, op. cit., p. 149; L. GATTO, ‘Disobbedienza: il rifiuto, ragionevolmente motivato, di eseguire l’ordine è coerente con l’oggettività della tutela?’, op. cit., pp. 247–248.

approach of military magistrates () in setting aside an act affected by potential defects of illegality. It is no longer plausible to assume that the subordinate's differing assessment of the (il)legality of the order issued will be upheld in court, unless one is prepared to examine the personal perspectives and resources of the person to whom the order to be carried out is addressed.

5. Regulatory indicators preparatory to a consideration of the military personnel's attitude towards a superior's order

The legal system appears to take account of the difficulties of assessment faced by the soldier due to the context in which they are engaged in performing their service, albeit in abstract terms and only in certain areas.

Article 48(2) of the Military Criminal Code provides for a general mitigating circumstance in relation to military offences committed by so-called recruits. Under that provision, the penalty for 'exclusively military' offences (Article 37(2) of the Military Criminal Code) committed by a person 'who has not yet completed thirty days of military service' is reduced by up to one third. The intention of this provision is to recognise, on a presumptive basis, the lesser propensity of young conscripts to observe their duties of service, the breach of which is often the cause or motive for the commission of military offences. The provision does not override (by derogating from) the general rule established by Article 5 of the Criminal Code following the Constitutional Court's corrective ruling⁴⁹ regarding the 'relative' inexcusability of ignorance of criminal law, nor does it override the special provision set out in Article 39 of the Military Criminal Code p. which establishes the same principle with regard to ignorance of the duties of military service⁵⁰ : both provisions may operate – with broader

⁴⁹ Constitutional Court, 23 March 1988, No. 364, in 'Giurisprudenza costituzionale', XXXIII, No. 3, 1988, I, p. 1504; in 'Foro italiano', No. 5, 1988, I, col. 1385, with a note by G. FIANDACA, '*Principio di colpevolezza ed ignoranza scusabile della legge penale: "prima lettura" della sentenza n. 364/88*'; in 'Rivista italiana di diritto e procedura penale', XXVIII, no. 2, 1988, p. 686, with a note by D. PULITANÒ, '*Una sentenza storica che restaura il principio di colpevolezza*'. On the principle established by the judgment, see also T. PADOVANI, '*L'ignoranza inevitabile sulla legge penale e la declaratoria di incostituzionalità parziale dell'art. 5 c.p.*', in 'La legislazione penale', No. 3, 1988, pp. 449–456; G. VASSALLI, '*L'inevitabilità dell'ignoranza della legge penale come causa generale di esclusione di colpevolezza*', in 'Giurisprudenza costituzionale', XXXIII, no. 1, 1988, II, pp. 3–15.

⁵⁰ Article 39 of the Military Criminal Code has been declared unconstitutional insofar as it does not provide for the defence of unavoidable ignorance of a duty inherent to military service: see Constitutional Court, 20 February 1995, No. 61, in 'Cassazione penale', XXXV, No. 7–8, 1995, p. 1754, with notes by M. D'ORAZI, '*The partial unconstitutionality of Article 39 of the Military Criminal Code; resolved issues and remaining problems*', and by P. RIVELLO, '*Ignoranza inevitabile dei doveri inerenti allo stato militare*', in 'Diritto penale e processo', No. 11, 1995, p.

exculpatory effects – to the benefit of the recruit who claims to have been in a personal situation where they could not have known the existence, wording and meaning of the incriminating provision or of the duties of service or discipline which they are required to observe⁵¹. The mitigating provision concerns, rather, cases in which, although the soldier is aware of or in a position to know the statutory provisions, he is still undergoing a natural process of training and instruction in the practical realities of military life which, with its rhythms and practices, governs the application of service or disciplinary provisions. Indeed, the reduction in sentence is conditional solely upon the circumstance that no more than thirty days of active service have elapsed since the service member's enlistment, without the personal condition of the service member's limited inclination to understand their duties at the time of the offence being of any relevance; the reduction in sentence follows by virtue of the presumptive assessment made by the legislator.

The stated *rationale* for the mitigating circumstance, moreover, is suited to the commission of 'exclusively' military offences to which it refers: that is, those which – by classifying acts that are criminally relevant only within the military sphere, as they do not correspond to a similar type of offence in the civilian sphere⁵² – denote a negative value that can be inferred solely within the military context and is perceptible only there. For all military personnel, this perception depends, precisely, on the possibility of being effectively trained to observe the rules of conduct applicable in that context.

1305, with a note by P. PITTARO, *'L'ignoranza dei doveri militari: scusabile se inevitabile'*; in *'Foro italiano'*, nos. 7–8, 1995, I, p. 2054, with a note by D. BRUNELLI, *'L'ignoranza inevitabile dei doveri militari dopo la manipolazione dell'art. 39 c.p.mil. pace: nuovi spazi per l'imputazione dolosa della "culpa iuris"?'*; in *'Giurisprudenza costituzionale'*, XL, no. 1, 1995, p. 513, with a note by M. PETRONE, *'L'efficacia scusante dell'ignoranza dei doveri militari'*; and in *'Rivista penale'*, no. 5, 1995, p. 565, with a note by A. TENCATI, *'L'errore nel diritto penale militare'*. See also M. NUNZIATA, *'Caducato perché costituzionalmente illegittimo l'art. 39 c.p.mil.p. sulla inescusabilità dell'ignoranza dei doveri militari, nella parte in cui non esclude l'ignoranza "inevitabile"'*, in *'Rassegna della Giustizia Militare'*, no. 5-6, 1994, pp. 279–289; S. MACCIONI, *'L'art. 39 c.p.mil.p. alla luce della sentenza della Corte Costituzionale n. 61/1995'*, *ibid.*, pp. 289–291. On the systemic issues raised by this provision, see previously R. MESSINA, *'Sull'ignoranza dei doveri militari: spunti per una lettura razionale dell'art. 39 c.p.m.p.'*, in *'Rassegna della Giustizia Militare'*, no. 1-2, 1982, pp. 33–44; G. ROSIN, *'Contributo all'abrogazione dell'art. 39 c.p.m.p. sull'inescusabilità dell'ignoranza dei doveri inerenti allo stato militare'*, in *'Rassegna della Giustizia Militare'*, No. 3, 1985, pp. 245–264; M. D'ORAZI, *'Articolo 39 c.p.mil.p. e principi costituzionali'*, in *'Rassegna della Giustizia Militare'*, No. 6, 1988, pp. 487–518.

⁵¹ On this point, see D. NOTARO, *'Lineamenti di diritto penale militare italiano'*, op. cit., p. 95.

⁵² R. MESSINA, *'Il reato esclusivamente militare'*, in *'Rassegna della Giustizia Militare'*, nos. 4–6, 1979, pp. 198–270; S. MALIZIA, entry *'Reato militare'*, in *'Enciclopedia del diritto'*, vol. XXXVIII, Giuffrè, Milan 1987, p. 891; S. MAROTTA, *'Funzione e limiti dell'art. 37 c.p.m.p.'*, in *'Rassegna della Giustizia Militare'*, no. 6, 1988, pp. 519–555; M. NICOLOSI, entry *'Reato militare'*, in *'Digesto delle discipline penalistiche'*, XI, UTET, Turin 1996, p. 297.

And – incidentally – the offence of disobedience⁵³ has sometimes been classified as an exclusively military offence, for which the mitigating circumstance in question could therefore apply.

Whilst the aforementioned classification of the offence of disobedience (which is, moreover, contingent upon the views held regarding the scope of the category of exclusively military offences⁵⁴, in turn linked to the criteria adopted for resolving conflicts of law⁵⁵) appears doubtful⁵⁶, the need to consider in every case the weight and importance of the training received by the military personnel called upon to carry out duties assigned by their superiors remains unaffected: whether the case concerns (disobedience by) military personnel with *considerable* length of service or the execution of orders leading to the commission of military or common offences attributable to the subordinate.

In the latter case, however, both the aggravating circumstances relating to the joint commission of the offence (civil or military) – which provide for a harsher penalty for a superior who has acted in concert with a subordinate (Article 58 of the Military Criminal Code) and for the military personnel who, holding a position of authority or command, has induced those subject to him to commit the offence (Article 112(1)(3) of the Military Criminal Code), as well as the mitigating circumstances which provide for a (discretionary) reduction in sentence for a subordinate who has been induced to commit the offence by a superior or who, in the preparation or commission of the offence, has played a minor role (Article 59 of the Military Criminal Code): both of these allow the influence generated by hierarchical relationships to be taken into account, at the very least for the quantification of the penalty.

Both in relation to the disobedient serviceman and in relation to the subordinate who carries out an unlawful order, the judge should consider the level (and type) of training received by the subordinate, so as to ascertain on a case-by-case basis whether the soldier possesses the tools to assess and question the binding nature of the order, or whether one must instead fall back on the applicability

⁵³ See Supreme Military Court, 8 March 1966, Della Salvia, in ‘La Giustizia penale’, no. 9, 1967, II, p. 710, cited by V. VEUTRO, in G. LANDI, V. VEUTRO, P. STELLACCI, P. VERRI, ‘*Manuale di diritto e procedura penale*’, Giuffrè, Milan 1976, p. 414.

⁵⁴ For a discussion of the complexity of this concept, see P. RIVELLO, ‘*Un tentativo di approfondimento in ordine alla nozione di reato esclusivamente militare*’, in ‘Rassegna della Giustizia Militare’, no. 1–2, 1994, pp. 1–11.

⁵⁵ On this complex subject, see G. DE FRANCESCO, ‘Lex specialis. *Specialità e interferenza nel concorso di norme penali*’, Giuffrè, Milan 1980; ID., entry ‘*Concorso apparente di norme*’, in ‘*Digesto delle discipline penalistiche*’, vol. II, UTET, Turin 1988, pp. 416–427; V.B. MUSCATIELLO, ‘*Pluralità e unità di reati*’, CEDAM, Padua 2002; I. GIACONA, ‘*Concorso apparente di reati e istanze di ne bis in idem sostanziale*’, Turin 2022; L. BIN, ‘*Unity and plurality in the concurrence of offences*’, Giappichelli, Turin 2022; M. SCOLETTA, ‘*Idem Crimen. Dal ‘fatto’ al ‘tipo’ nel concorso apparente di norme penali*’, Giappichelli, Turin 2023.

⁵⁶ This view is, in fact, opposed by V. GARINO, ‘*Disobbedienza nel diritto penale militare*’, op. cit., p. 149.

of the defences under Article 51, paragraphs 3–4 of the Criminal Code. Admitting the existence of training programmes that equip military personnel with a certain critical capacity in the performance of their duties, one might indeed more readily expect the ‘non-execution’ of orders that appear to be effectively unlawful, and it would be more difficult to rule out the subordinate’s complicity in the commission of offences resulting from the execution of such orders; correspondingly, the alternative of ‘reasoned’ disobedience on the part of the subordinate should arise more readily, in so far as it is motivated by reasons that are reasonable from their perspective; consequently, failure to comply with a ‘lawful’ order should be considered culpable, unless due weight is given to factual circumstances that influence the agent’s perception of the unlawful nature of the order disobeyed.

This shift presupposes, however, a cultural evolution in the way we understand the meaning and aims of military training, also with a view to a renewed perception of the service function to be performed within the context of an Armed Forces organisation based on a principle of hierarchy. Certainly, one would have to take into account a lower degree of immediacy and speed in the execution of orders, which undoubtedly may entail undesirable ‘costs’ in terms of overall efficiency in the performance of service. And whilst such an outcome might perhaps be acceptable when the interests involved in the tasks to be carried out appear less significant from a top-level perspective, it is more difficult for such a solution to apply to more problematic situations (such as operational missions requiring the use of force against third parties) for which, however, the issue of the ‘responsible’ execution of superior orders is persistently felt⁵⁷.

Although the prospect of widespread implementation of this guideline (which, in any case, appears more readily achievable when middle management levels close to the senior leadership from whom orders emanate are involved) seems remote at present⁵⁸, it should be remembered that the goal of greater ‘accountability’ for military personnel in the performance of their duties has been achieved in recent decades with regard to another ground for justification capable of operating to the benefit of military personnel. I am referring to the conditions for recognising the right of self-defence exercisable by a military personnel under attack pursuant to Article 52 of the Criminal Code (for common offences) or Article 42 of the Military Criminal Code (for military offences)

⁵⁷ For a broader examination of the issue, see A. ANDRIES, *‘L’obbedienza militare ed i divieti del diritto internazionale pubblico’*, in *‘Rassegna della Giustizia Militare’*, no. 6, 1986, pp. 505–553.

⁵⁸ It is worth noting, however, that the possibility of holding a subordinate accountable for the deliberate execution of unlawful (and criminal) orders was already envisaged when – prior to 1978 – Article 40 of the Code of Military Criminal Procedure was in force, which appeared to readily grant the benefit of justification to the subordinate soldier: see G. ROSIN, *‘Il militare fra dovere di obbedienza e dovere di disobbedienza’*, op. cit., p. 225; V. GARINO, *‘Disobbedienza nel diritto penale militare’*, op. cit., p. 142.

It is well known that, in order to benefit from justification, the reaction must be ‘compelled’⁵⁹ and that this requirement is linked to the alternative possibility of flight that may be available to the person under attack, which represents a preferable solution provided that it does not expose the person to more serious consequences than those they would inflict on the attacker by defending themselves⁶⁰. For a long time, it was held that a member of the armed forces could not consider flight as a viable alternative, since it was deemed to conflict with the sense of honour to which the military personnel are bound, to the extent of causing significant prejudice to the discipline to be observed within the Armed Forces⁶¹. More recently, however, it has been recognised⁶² that fleeing from an attacker does not necessarily undermine the values to which military personnel are bound (provided it does not involve sacrificing the interests of the service or the organisation of the Armed Forces). The modern soldier is required to exercise force – including in response to unjust aggression – with the sense of responsibility and balance necessary to manage situations in which conflicting interests coexist: a ‘sense of responsibility’, therefore, is also invoked in such circumstances to define the soldier’s conduct and to gauge the commitment required of them in fulfilling their duties of service. It cannot therefore be ruled out that similar ‘cultural’ developments regarding the understanding of the military’s service function may occur (even without any changes to service regulations or disciplinary rules) to temper certain limited aspects of the obligation that requires subordinates to carry out promptly and precisely the orders issued to them by their superiors.

⁵⁹ T. PADOVANI, entry on *‘Difesa legittima*, in *‘Digesto delle discipline penalistiche’*, vol. III, UTET, Turin 1989, p. 510.

⁶⁰ C.F. GROSSO, entry on *‘Legittima difesa (diritto penale)’*, in *‘Enciclopedia del diritto’*, vol. XXVII, Giuffrè, Milan 1977, p. 32. For more restrictive approaches followed in the past, including for the general defence, see F. BAGNATI, *‘Spunti di ricerca su fuga e legittima difesa’*, in *‘Archivio penale’*, no. 3, 1992, p. 390.

⁶¹ I. DE SANCTIS, *‘La fuga e il ‘commodus discessus’: sulla legittima difesa nel diritto penale militare’*, in *‘Rivista penale’*, no. 9, 1973, II, pp. 621–624.

⁶² See P. RIVELLO, *‘Manuale del diritto e della procedura penale militare’*, op. cit., p. 78.