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Fulfilment of duty and unlawful orders

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ABSTRACT

The article examines the evolution of the relationship between the duty to obey and unlawful orders in Italian military criminal law, from the repealed Article 40 of the Military Penal Code in Time of Peace to the current combined provisions of Articles 51 of the Italian Penal Code and 1349 of the Italian Code of Military Organisation. It examines the duty to review orders, the notion of an order that is manifestly criminal, and the related implications for the liability of superiors and subordinates, in light of case law on war crimes, supranational sources, and the rules of engagement applicable to international missions.

KEYWORDS

Duty to obey; Manifestly unlawful order; Subordinate liability; Military criminal law; International humanitarian law; Rules of engagement.

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SUMMARY: 1. Introduction – 2. Article 40 of the Military Penal Code in Peacetime (repealed) – 3. Current legislation – 4. Manifestly criminal orders – 5. Supranational norms – 6. Foreign legislation – 7. Rules of engagement – 8. Conclusions.

1. Introduction

The Armed Forces (hereinafter referred to as the AF) are characterised by their particular efficiency, which is ensured by the existence of certain fundamental rules and specific legal institutions. Among these, the power of superiors to issue orders and, conversely, the duty of subordinates to carry them out are of particular importance.

Binding military orders and prompt obedience are the hallmarks of military life, ensuring the proper and swift functioning of the military organisation.

Physiology is represented by compliance with legitimate orders, which does not pose any particular problems since such orders obviously give rise to the subordinate's duty of obedience. According to Article 1347 of the Code of Military Law (hereinafter CML), "obedience consists in the prompt, respectful and loyal execution of orders relating to service and discipline, in accordance with the oath taken".

But it may happen – and sometimes does happen – that unlawful orders are given, and this raises a twofold question:

a) Is the subordinate under a duty to carry out an unlawful order?

b) In the event that a subordinate commits an offence in carrying out an unlawful order, does liability lie with the person carrying out the order, or with the person who issued the order, or with both?

The answer to the second question also provides a solution to the first, as it clarifies how a subordinate should behave when faced with an unlawful order.

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On this point, a brief introduction is required and, before analysing the Military Penal Code, it must be emphasised that the common Penal Code contains a provision governing the fulfilment of a duty imposed by an order from a public authority. Specifically, this concerns the defence provided for in Article 51 of the Penal Code.

> "Article 51 of the Penal Code (Exercise of a right or fulfilment of a duty)
> 1. The exercise of a right or the fulfilment of a duty imposed by a legal provision or by a lawful order of a public authority excludes criminal liability.
> 2. If an act constituting an offence is committed on the orders of the public authority, the public official who gave the order shall always be liable for the offence.
> 3. The person who carried out the order shall also be liable for the offence, unless, due to a mistake of fact, they believed they were obeying a lawful order
> 4. A person who carries out an unlawful order is not liable to punishment where the law does not allow them to question the lawfulness of the order."

It is important to start with the common Penal Code, because Article 16 of that code contains a fundamental provision which states: "Art. 16 of the Penal Code (Special Penal Laws) 1. The provisions of this Code shall also apply to matters governed by other criminal laws, unless otherwise provided for therein". This provision establishes a hierarchy among codes and sets out the so-called principle of complementarity: in essence, it establishes that all the rules laid down in the general part of the common Penal Code apply not only to all common offences but also to military offences, unless otherwise provided for therein. Therefore, to determine whether Article 51 of the Penal Code also applies to military offences, it is necessary to verify whether the Military Code contains a provision that provides otherwise, replacing the common provision or supplementing it.

A search for a provision corresponding to the defence under Article 51 of the Penal Code yields a negative result, in the sense that there is no provision in the Military Code derogating from Article 51 of the Penal Code.

Therefore, it would seem straightforward to state that the performance of duty is governed by the general criminal law, in accordance with the principle of complementarity. However, when applying a general provision to the Military Code, one must also analyse the context within which it is situated.

2. Article 40 of the Military Penal Code in Peacetime (repealed)

On this point, it should be emphasised that the Military Penal Code in Peacetime (hereinafter referred to as the MCCC) contained a corresponding provision, which was repealed by Law No. 382 of 11 July 1978. It is important to examine the previous provision in order to understand the scope of the change and the current regime.

> "Art. 40 MPC (Performance of a duty)
> 1. For military offences, in place of Article 51 of the Penal Code, the provisions of the following paragraphs shall apply.
> 2. The performance of a duty, imposed by a legal provision or by an order from a superior or other competent authority, excludes criminal liability.
> 3. If an act constituting an offence is committed on the orders of a superior or other authority, the person who gave the order shall always be liable for the offence.
> 4. In the case provided for in the preceding paragraph, the military personnel who carried out the order shall also be liable for the act where the execution of the order manifestly constitutes an offence."
> (Article repealed by Article 22 of Law No. 382 of 11 July 1978 on military discipline)

Prior to 1978, therefore, there existed a provision similar to Article 51 of the Penal Code, which had a derogatory effect in relation to the general criminal law. The technique of substitution was adopted, and it was expressly stated that Article 40 of the Military Penal Code applied in place of Article 51 of the Penal Code.

The military legislator's intervention was justified by the fact that the issue of obedience has always been a fundamental problem in the military world. On the one hand, prompt obedience to the orders of superiors must be guaranteed (the only means of ensuring the efficient functioning of the armed forces); on the other hand, provision must be made for cases of arbitrary use of hierarchical power and the possible limits of the duty of obedience and the liability of those carrying out orders that are unlawful, criminal or even manifestly criminal must be established with the utmost clarity.

The issue of obedience to orders and the lack of liability of the person carrying out the order represented one of the most sensitive points in military criminal law: a balance had to be struck between the need to ensure obedience to superiors and the need to prevent subordinates, relying on an absolute guarantee of exemption from criminal liability, from becoming instruments of heinous crimes.

As mentioned, the problem had already arisen in ordinary criminal law due to the need to regulate the defence of fulfilling a duty arising from an order by an authority and to define the scope of the executor's liability (the issue had been resolved by Article 51 of the Penal Code). However, in the Military Penal Code, the issue was even more pressing, and therefore Article 40 was introduced to replace Article 51, introducing differences and limitations.

An analysis of the previous regime provides a better understanding of the current rules: in particular, a comparison between Article 51 of the Penal Code and the repealed Article 40 of the Military Penal Code reveals certain differences:

1) The term 'public authority' was replaced by 'superior' or 'other competent authority'.
2) Article 51 of the Penal Code requires the order to be lawful, whereas Article 40 of the Code of Military Penal Procedure made no reference to the lawfulness of the order; it was sufficient that it was an order from a superior.
3) Article 51 of the Penal Code provides for the normal joint liability of the person giving the order and the person carrying it out ("the person who carried out the order shall also be liable"), unless the latter believed, on the basis of a factual error, that they were obeying a lawful order.
4) By contrast, Article 40 of the Military Penal Code established the exclusive liability of the superior who gave the order, subject to the joint liability of the person carrying out the order in the case of a manifestly criminal order.

Essentially, whilst a civilian who is authorised to question the order is held jointly liable for the offence committed in carrying out the order, the military executor, who is denied such authority, was normally deemed not liable: a rule that stood alongside the exclusive liability of the person who gave the order.

Thus, the rule was as follows: it was assumed that the chain of command was unquestionable, in line with disciplinary regulations requiring prompt and absolute obedience and with the provision criminalising disobedience (Article 173 of the Military Penal Code); then, a corrective measure was applied in the military sphere, requiring no longer that the order be 'lawful', but only that it be issued by a 'superior or a competent authority'.

The obligation to carry out even an unlawful order met with the full consensus of both legal doctrine and case law. It was held that the overriding interest of the State in hierarchical discipline should prevail over the unlawfulness of a superior's order, which had to be carried out in any event.

3. Current legislation

From the 1970s onwards, the view began to gain ground that the entire framework (according to which military personnel were in any case prohibited from any form of substantive review of the orders received) should be revised, and in particular, the argument that military personnel were, in any case, permitted to exercise some form of scrutiny, maintaining that an order contrary to the law, even if not manifestly so, could not constitute the basis for the offence of disobedience, as it was not relevant to service or discipline.

The doctrinal disputes reached a turning point in 1978, when Article 40 of the Military Penal Code was repealed, resulting in the extension of Article 51 of the Penal Code to military offences, by virtue of the principle of complementarity.

In reality, when applying a general provision to military offences, one must always verify whether it needs to be adapted in some way, based on the specific characteristics of the military legal system and the *status* of military personnel, which differs from that of civilians.

The first point to note is that the 1978 Act, which repealed Article 40 of the Military Penal Code, contained an important provision (Article 4), which has now been incorporated into Article 1349 of the Military Code.

> "Article 1349 (Military Orders)
>
> 1. Orders must, in accordance with the regulations in force, relate to discipline, concern the manner in which service is performed, and not exceed institutional duties.
>
> 2. A member of the armed forces who is given an order that is manifestly directed against the institutions of the State, or the execution of which would in any event manifestly constitute a criminal offence, has a duty not to carry out the order and to inform their superiors as soon as possible.
>
> 3. Chapters I, III and IV of Law No. 241 of 7 August 1990 do not apply to military orders."

This provision is followed by Article 729 of the Implementing Regulations of Presidential Decree No. 90 of 15 March 2010:

> "Art. 729 (Execution of orders)
>
> 1. A member of the armed forces must carry out orders received promptly, responsibly, and accurately, within the limits established by the Code and the Regulations, and in strict compliance with specific instructions and service regulations. In particular, they must:

a) refrain from making any comments, except those that may be necessary for the proper execution of the order;
b) obey an order received from a superior to whom they are not directly subordinate, informing their immediate superior as soon as possible;
c) point out, if applicable, any conflict with an order received from another superior; obey the new order and inform, as soon as possible, the superior from whom the previous order was received.
2. A member of the armed forces who is given an order which he considers not to comply with the regulations in force must, in a spirit of loyal and active participation, bring this to the attention of the person who issued it, stating the reasons there , and is required to carry it out if the order is confirmed. In accordance with the provisions of the Code, a member of the armed forces who is given an order that is manifestly directed against the institutions of the State or whose execution would in any case manifestly constitute a criminal offence has a duty not to carry out the order and to inform their superiors as soon as possible."

In applying Article 51 of the Penal Code in accordance with the principle of complementarity, the provisions of these rules must necessarily be observed.

The regime of normal joint liability provided for in Article 51 of the Penal Code (of the person who gave the order and the person who carried it out) must be reconciled with these provisions, which provide for the obligation to obey an unlawful order (if reiterated by a superior) with consequent exemption from liability for the offence committed; and the duty to disobey in the case of a manifestly unlawful order, with consequent criminal liability in the event of execution and the impossibility of invoking the defence.

It should be noted, in fact, that the provisions of Articles 1349 of the Italian Civil Code and 729 of the Consolidated Law on Military Regulations expressly provide for the duty not to carry out the order. The concept is the same as that expressed in the final paragraph of the repealed Article 40, with the difference that the duty to disobey is expressly enshrined (a literal formulation that the old legislation, of a militaristic and authoritarian nature, avoided mentioning). Furthermore, the duty to disobey is linked not only to manifestly criminal orders, but also to orders manifestly directed against the institutions of the State.

Therefore, the scenarios that may arise for the subordinate are varied:

1) In the case of a legitimate order, there is obviously an obligation to carry it out, on pain of committing the offence of disobedience: "Art. 173 of the Military Penal Code (Disobedience). 1. A member of the armed forces who refuses, omits or delays to obey an order relating to service or

discipline, issued to him by a superior, shall be punished with military imprisonment for up to one year. 2. If the offence is committed whilst on duty, or on board a ship or aircraft, the term of military imprisonment shall be from six months to one year; and may be extended for up to five years if the offence is committed during a fire or epidemic or in other circumstances of grave danger".

2) Then, there is the case of an unlawful order that does not manifestly constitute a criminal offence. In such a case, the subordinate must point out the unlawfulness to the superior and, if the order is confirmed, obey it, being exempt from liability should the order prove to be effectively unlawful.

3) Furthermore, there is the case of a manifestly criminal order, which triggers the duty to disobey, on pain of liability for the offence committed, jointly with the superior who issued the order.

4) In between, there is the case of a criminal order, but not a manifestly criminal one. According to some, the duty to disobey also applies in this case. However, it must be assessed whether the person carrying out the order was aware of the (non-manifest) unlawfulness of the order, because: a) if so, they would undoubtedly be liable for the offence committed; b) if not, the lack of awareness would lead to the exclusion of the subjective element of intent, pursuant to Article 51(3) of the Penal Code, according to which "the person who carried out the order is also liable for the offence, unless, due to a mistake of fact, they believed they were obeying a lawful order", establishing not only that the executor realised that the order was unlawful, but also that its execution constituted a criminal offence. In the event of a failure to realise this due to negligence, Article 59(4) would apply, concerning the erroneous assumption, caused by negligence, regarding the existence of a justification.

Therefore, there is certainly a power of review over manifestly criminal orders, which entails a duty of disobedience. But this does not mean that, for criminal orders that are not manifestly so, a duty of blind obedience exists. For some authors, the reference in the first paragraph of Article 1349 of the Military Penal Code to the order's conformity with the law would lead to equating a manifestly criminal order with a non-manifestly criminal order.

4. Manifestly criminal orders

The express duty to disobey therefore arises only when the order is manifestly criminal: but when is an order to be considered as such?

The answer is that an order is such when it is immediately recognisable as criminal, without the need for further investigation: it therefore meets a requirement of obvious criminality. In Italian too, the word 'manifesto', according to the Treccani dictionary, means "obvious, clear, evident, openly presented to the eye or the mind" (e.g. an order to shoot a peaceful passer-by, or to commit a sexual assault).

The initial provision of the preliminary draft of the Military Code was that the defence could not be invoked when the perpetrator realised that they were committing a criminal offence. It was then decided to use a more objective expression. Thus, the manifest criminality must be objective, such that it is perceptible to the average person, and not subjective, i.e., perceived by the subordinate, which would have largely nullified the scope of the provision.

In judicial practice, trials in which a manifestly criminal order is at issue are rare. In recent years, there have been only a few judgments concerning military personnel who have drawn up reports or documents containing false statements, often regarding the reconstruction of events that occurred during service, and who have justified their actions by claiming to have done so on the orders of their superiors. In all these cases, the applicability of Article 51 of the Penal Code has always been ruled out, even on a putative basis, due to the manifest criminal nature of the order.

The issue, however, has consistently been the subject of cases heard before Military Courts for war crimes (Marzabotto Trial, Military Court of La Spezia, 2007; Fosse Ardeatine Massacre, Military Court of Rome, 1997; Bolzano Massacres, Military Court of Verona, 2000; Sant'Anna di Stazzema, Military Court of La Spezia, 2005; the so-called Vallucciole Trial, Military Court of Verona, 2011).

An early example was provided by the trial conducted by the Military Court of Rome and, subsequently, by the Military Court of Appeal and the Court of Cassation, against Hass and Priebke (1998), in relation to the Fosse Ardeatine massacre.

In the decisions on the merits, it was stated:

> "An order is manifestly criminal if it imposes an act or action that the average person immediately perceives as criminal, based on simple criteria such as ordinary experience, prevailing morality and common sense, civic conscience, and the normal sense of humanity. This is an objective criterion. Any average person would have realised that such an inhuman, barbaric and cynical execution – given the disproportionate number of victims, the criteria that led to their selection and the manner of execution – contravened the most basic and indispensable principles governing human conduct in any society, whether in times of peace or war".

Subsequently, the Court of Cassation (Section 1, Judgment No. 12595 of 16 November 1998) reiterated this concept, stating: 'it must be held, with reference to Article 40 of the Code of Military Criminal Procedure then in force, that the order to carry out the massacre at the Fosse Ardeatine was to be regarded as manifestly criminal, with the consequent obligation not to carry it out, as its contravention of the most basic principles of humanity was *immediately* apparent".

The same principle was affirmed in the trial judgments concerning the Sant'Anna di Stazzema massacre (Court of Cassation, Section 1, No. 4060 of 2007), in which it was stated:

> "Although the essential and mandatory rules of humanitarian law of war incorporated into the Geneva Conventions were not in force at the time – and could not be applied retroactively – nor were the provisions concerning the prevention and punishment of genocide, it must be held, with reference to the then-applicable Article 40 of the Military Penal Code then in force – that the order to carry out the massacre at Sant'Anna di Stazzema, which was *immediately* recognisable as contrary to the most basic principles of humanity, was to be regarded as manifestly criminal, with the consequent obligation not to carry it out."

Similarly, in the trial judgments concerning the Marzabotto massacres (Military Court of La Spezia, 2007), it is stated:

> "The cornerstone of normal non-liability […] in the execution of an order was the need to ensure that a category of people as specific as the military, whose institutional duties must be carried out with promptness […] was not exposed to painful assessments, and consequent loss of time, in the face of what was commanded."

However, as early as 1941 (the date of the Military Penal Code's enactment), there was a recognised need for such obedience to have a limit: it was considered, that is, that where the conduct required conflicted intolerably with the precepts that should govern the conscience of every human being, any member of the military should have been obliged to refuse to carry out the order (see today Article 4 of Law 382/1978 on military discipline).

The issue then shifts to identifying the limit beyond which a superior's order no longer has its exculpatory effect, and the opposite duty of disobedience arises. It has been noted that paragraph 4 of the aforementioned provision refers to the manifest criminality of the order, a criterion that is consistently interpreted in an objective sense, meaning that, once that limit is reached, it is the order itself that loses its binding nature. In the present case, the orders issued for the Marzabotto operation constituted a manifest violation of domestic and international law on the use of military force.

Strictly speaking, since these are facts characterised by compelling evidence, as well as by a very high degree of reprehensibility, it would not even be necessary to demonstrate awareness of that criminality, so much so that Article 8 of the Charter of the Nuremberg Tribunal directly established the inexcusability of orders relating to war crimes, through an absolute presumption of manifest unlawfulness which exempted the judge from any further verification. This is because the criminal nature of the act excludes the exculpatory effect of the order from an objective standpoint, thereby rendering even putative non-reviewability entirely irrelevant (Court of Cassation, Section I, 16 November 1998, No. 12595, Priebke; but, even earlier, Court of Cassation, Section V, 28 May 1984, No. 7866, Guerrieri, cited therein). Also worth noting is the reasoning in the 2011 judgment of the Military Court of Verona, concerning 12 military personnel belonging to the German Armed Forces, serving in the Hermann Göring Armoured Division, Reconnaissance Unit, who, without necessity and without justifiable cause, contributed to causing the deaths of approximately 360 Italian civilians who were not taking part in military operations, including women, the elderly and defenceless children, acting with cruelty and premeditation (massacres in the Tuscan-Emilian Apennines, the so-called Vallucciole trial). In that trial, too, the issue of the fulfilment of duty in the face of a manifestly criminal order was discussed at length. It states, in fact:

> "The absence of grounds for justification. The fulfilment of a duty.
> Once the responsibility of the men of the Reconnaissance Unit and the Anti-Aircraft Regiment of the Hermann Göring Division has been established, within the limits set by the evidence regarding the individual units that took part in the massacres, and having ascertained that their planning and execution were carried out through the transmission of orders down the chain of command to the soldiers, it is necessary to verify, first of all, whether the justification of the fulfilment of a duty may apply, given that the defendants obeyed orders from their superiors.
> The relevant provision for the court is Article 40 of the Military Penal Code, which, although repealed by Law 382/1978, must be deemed applicable to the facts of the case as it is more favourable than Article 51 of the Penal Code, which is currently applicable to military offences as well. (…) The assessment must therefore be based on these rules and those of § 47 of the German Military Penal Code, applicable during the Second World War, according to which the rule of substantial non-liability applied to military personnel carrying out orders, unless the order concerned a manifestly criminal act.
> […]
> As early as 1941 (the date of promulgation of the Military Penal Code), there was a recognised need for obedience to be subject to a limit, stipulating that, where the conduct required conflicted intolerably with the precepts that should govern the conscience of every human

being, any soldier would have to refuse to carry out the order (see today Article 4 of Law 382/1978 on military discipline).
The issue then shifts to identifying the limit beyond which a superior's order no longer has its exculpatory effect, giving rise to the opposite duty of disobedience.
It has been observed that paragraph 4 of the provision in question refers to the manifest criminality of the order, a criterion that is consistently interpreted in an objective sense, meaning that, once that threshold is reached, it is the order itself that loses its binding force. It must therefore be a judgement that forms an integral part of common sense and which, for this obvious reason, is also required of the subordinate called upon to carry out the orders.
In the present case, even from the perspective of the German soldier engaged in round-up and massacre operations, it is glaringly evident that the order received bore clear signs of manifest criminality.
The systematic and indiscriminate extermination of the civilian population, taken as a whole and including women, the elderly and children, constituted a crime of abnormal brutality and presented itself as such to anyone who had been called upon, in whatever capacity, to take part in it and make their contribution.
[…]
From the very outset, in fact, the location where the military's violence and the use of deadly weapons were to be deployed was well known. The theatre of operations consisted of villages and towns and had nothing to do with the known locations where partisan units operated, well hidden in the ravines of the many surrounding mountains and woodlands. The planned and sole target of military violence was the civilian population, and of this were certainly aware all those who, in various capacities, had made available the men of the units under their command and issued the necessary orders regarding the weapons to be used.
Consequently, any soldier was able to understand that, by taking part in the execution of that absurd criminal plan, they were committing an act of barbarism and a crime against humanity.
Consequently, the defendants today, almost all of whom were officers or non-commissioned officers of the units called upon to carry out those ferocious massacres, could not have had and did not have any doubt as to the manifest criminality of the orders received and transmitted.
[…]
Strictly speaking, since the acts committed are characterised by overwhelming evidence, as well as by an extremely high degree of reprehensibility, it would not even be necessary to prove awareness of that criminality, so much so that Article 8 of the Charter of the Nuremberg Tribunal directly established the inexcusability of orders relating to war crimes, through an

absolute presumption of manifest criminality which exempted the judge from any further verification. This is because the criminal nature of the act excludes the exculpatory effect of the order from an objective standpoint, thereby rendering even putative non-reviewability entirely irrelevant (Court of Cassation, Section 1, 16 November 1998, Priebke; but, previously, Court of Cassation, Section V, 28 May 1984, Guerrieri, cited therein).'

5. Supranational norms

The manifest criminality standard not only derived from national legislation but is a principle of a universal nature. It concerns not only domestic law but also supranational law.

A prime example is provided by Article 33 of the Rome Statute of the International Criminal Court. This refers to Law No. 232 of 12 July 1999, which came into force on 1 July 2002.

Article 33, entitled "Superior orders and prescription of law", expressly provides for the principle of individual responsibility and states explicitly:

> "1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.
>
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

It is also worth mentioning the Geneva Conventions, which provide for an obligation to disobey orders contrary to international humanitarian law, in accordance with the following principles:

a) General duty of obedience: military personnel are required to obey superior orders, but only where such orders are in accordance with international law;

b) Limit on obedience: obedience is not absolute and cannot be required for orders that involve a violation of the Geneva Conventions or international humanitarian law;

c) Individual responsibility: military personnel may be held personally responsible for violations of international humanitarian law, even if they were carrying out an order;

d) Prohibition on committing war crimes: the Geneva Conventions expressly prohibit the commission of war crimes, and every member of the military has a duty to refuse to carry out orders that entail their commission: indiscriminate attacks on civilians, inhuman or degrading treatment of prisoners of war;

e) Duty to report violations: military personnel have a duty to report to the competent authorities any violation of international humanitarian law of which they are aware.

f) Responsibility of superiors: superiors are responsible for violations of international humanitarian law committed by their subordinates, if they were aware of the violations or should have been aware of them.

To this must be added the Nuremberg Principles: following the Nuremberg trials of 1945, the newly established United Nations considered the need to confirm the principles of international criminal law that had emerged during the proceedings and from the judgments, thereby giving the trial a significance beyond that of a mere judicial measure imposed by the victors upon the vanquished. The United Nations General Assembly tasked the International Law Commission (a subsidiary body of the General Assembly) with producing a document setting out the principles emerging from customary law and the Nuremberg trials, with a view to ultimately establishing a legally binding treaty for the international community. On 29 July 1950, the Commission issued a report entitled "Principles of International Law Recognised in the Charter and in the Judgements of the Nuremberg Tribunal", in which it sets out seven fundamental principles. In addition to establishing that international criminal responsibility is individual, the fourth principle states that "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him".

6. Foreign legislation

These principles, which are universal in nature, are found in the main foreign constitutions or military penal codes. This is all the more true given that, among the sources of law cited, Article 21 of the Rome Statute of the International Criminal Court refers to the "general principles of law derived by the Court from national laws of legal systems of the world". By way of example, and without claiming to be exhaustive, the following may be highlighted:

1) *Germany.* The German Constitution recognises the right to resist orders contrary to the constitutional order. German law does not recognise the concept of a ‘lawful order’, but rather that of an ‘existing order’, which is binding by virtue of its very existence. However, certain ‘grounds for the non-binding nature of an order’ are identified, i.e., limits to the duty of blind obedience. There is no duty of obedience, and therefore disobedience does not constitute a criminal offence, in two cases: a) when the order is detrimental to human dignity; b) when it is not directed towards service-related purposes.

A genuine duty to disobey arises, however, in the face of an order that violates criminal law. In any case, it should be noted that in 2002 Germany also incorporated the general principles codified in the Rome Statute of the International Criminal Court. With regard to orders, in accordance with Article 33 of the Statute, a subordinate is exempt from liability only if they were unable to recognise the criminal nature of the order, provided that such criminality was not manifest.

A practical example of the application of these principles was provided in the trials that took place following the reunification of the two Germanys: in the period that followed, the Federal Republic of Germany felt the need to punish crimes committed by members of the government of the former East Germany (GDR) and by the perpetrators: punishing individuals for acts which, at the time they were committed, were considered perfectly lawful under the legal system in force, with reference to the so-called border guards.

These were the perpetrators of the crimes at the Wall, the East German soldiers who opened fire on anyone attempting to cross the Wall to seek their fortune in the West. The main defence put forward by the defendants was that their actions were perfectly lawful in the eyes of the law and that, in any case, they were carried out in compliance with orders from their superiors. The use of weapons to prevent people from crossing the Wall was regulated and permitted, but the defence of superior orders was accepted only on the condition that the order was not “manifestly contrary to generally recognised rules of international law or to criminal law”. Once again, the principle of manifest criminality comes to the fore, in the light of which the judges considered the conduct ordered of the border guards to be clearly contrary to “the fundamental prohibition against killing”.

2) *France.* The French Penal Code prohibits the execution of *manifestement illégaux* orders, and case law recognises personal liability in the event of the execution of criminal orders.

In particular, French law exempts a subordinate who has carried out an order from a legitimate authority from criminal liability, unless the order was manifestly unlawful. It is worth noting that the French Penal Code identifies an exception to the general rule regarding orders: an order from a superior never constitutes a ground for justification if its execution involves the commission of a crime against humanity, as the order can only be considered a mitigating circumstance. In other words, an order to commit a crime against humanity is always deemed manifestly criminal, according to a presumptive mechanism that is identical to that used in the Rome Statute.

3) *Spain.* The Spanish legal system also recognises a power/duty to raise objections where an official suspects that the formal requirements for issuing the order are not met or suspects that the order is manifestly criminal. On the concept of manifest criminality, there is the usual split in legal doctrine between those who advocate a more objective interpretation and those who argue that one must look specifically at the person receiving the order. In the field of military criminal law, the code excludes the exculpatory nature of an order only in the case of manifest contravention of the law, the customs of war, or an order constituting a criminal offence, in particular against the Constitution. A similar provision is found in the Organic Law on the Police and in case law. The Supreme Court tends to favour the view that criminal orders must not be obeyed.

4) *United Kingdom.* The *Armed Forces Act* provides for the offence of disobedience, but also includes safeguards for military personnel who refuse to carry out unlawful orders. In England too, the principle applies that a subordinate is bound to carry out only lawful orders and must be held individually responsible for any crime committed (according to an unwritten constitutional principle, officers do not have the power to render lawful what the law considers unlawful). This is the main reason why a subordinate, aware of the unlawfulness of the conduct, cannot hide behind their superior's order.

5) *USA*. US laws come in various forms, federal or state-specific, to which are added military orders, which may also originate from the President of the United States. The rules of military law are compiled in consolidated texts (Uniform Code of Military Justice and Manual of Courts-Martial). These provide for the inclusion of the offence of insubordination for military personnel who fail to carry out lawful orders.

An unlawful order, on the other hand, is not binding, but a person who carries out such an order is not held individually liable. Indeed, there is a presumption of the lawfulness of the order received, which only ceases to apply in the face of a manifestly unlawful order.

"It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful" (United States, *Manual for Military Commissions*, published in implementation of the Military Commissions Act of 2006, 10 U.S.C. §§ 948a, *et seq.*, 18 January 2007, Part II, Rule 916 (d), p. IV-1.)

The criterion adopted, in essence, is that of *manifest illegality*, embodied in the model of the 'person of ordinary understanding' or from whom one might 'reasonably' expect an understanding of the illegality of the act.

7. *Rules of engagement*

It cannot be overlooked that in some cases the use of violence is a necessary part of military operations and that the issuing of criminal orders is sometimes necessary to prevent more serious acts of violence. This issue is particularly relevant in the context of Italy's participation in international missions. In such cases, the so-called rules of engagement take on particular importance.

> "Law No. 145 of 21 July 2016 (Provisions concerning Italy's participation in international missions). Art. 19(3) (Provisions on criminal matters).
>
> 1. The Military Penal Code for Peacetime applies to personnel taking part in international missions, as well as to personnel deployed in support of such missions. Jurisdiction lies with the Military Court of Rome.
> 2. This is without prejudice to the Government's power to decide on the application of the provisions of the Military Penal Code of War.
> 3. Personnel referred to in paragraph 1 shall not be liable to punishment if, during international missions, in accordance with directives, the rules of engagement or to orders lawfully issued, uses or orders the use of arms, force or other means of physical coercion, or of equipment, devices, programmes, apparatus, IT tools or other means suitable for committing any of the offences referred to in Sections IV and V of Chapter III of Title XII of Book Two of the Penal Code, for the purposes of military operations. Where, in committing one of the acts referred to in the first sentence, the limits established by law, directives, rules of engagement, or lawfully issued orders, or those imposed by the necessities of military operations, are negligently exceeded, the provisions concerning negligent offences shall apply if the act is classified by law as a negligent offence.
> 4. Paragraph 3 shall in no case apply to the crimes provided for in Articles 5 et seq. of the Statute establishing the International Criminal Court, adopted in Rome on 17 July 1998, ratified

pursuant to Law No. 232 of 12 July 1999 [Author's note: crimes of genocide, against humanity, war crimes, and the crime of aggression]
5. (*omissis*)."

Both the defence and the related offence of culpable excess must be understood within the framework of the general limitation set out in paragraph 4 of Article 19, according to which they do not apply "in any case to the crimes provided for in Articles 5 et seq. of the Statute establishing the International Criminal Court, adopted in Rome on 17 July 1998, ratified pursuant to Law No. 232 of 12 July 1999". This limitation is the new provision introduced by the amendment, whilst the defence and culpable excess already appeared in previous laws concerning certain missions.

This constitutes a legitimate use of arms, specifically provided for those engaged in the missions referred to in the law, justified by the necessity of military operations.

Outside cases of self-defence, military personnel on operations use force in accordance with the so-called rules of engagement, which are precisely authorisations to use force in situations other than self-defence, or which set out prohibitions on the use of force.

There is an obligation to assess the possibility of using non-violent means before resorting to force and weapons, and to use weapons only when other means have proved ineffective. If unavoidable, the use of a weapon must be proportionate to the danger posed by the aggression, and the weapon must be employed in such a way as to minimise so-called collateral damage. In accordance with the requirements of necessity and proportionality, therefore, the use of lethal force is permitted only if strictly necessary to protect human life from unlawful violence, that is, in self-defence, to defend others, to prevent acts that seriously endanger human life, and only if less extreme measures prove ineffective, and not before warning the aggressor of the intention to use the weapon.

The authorisations to use force established by the rules of engagement for each operational requirement (to carry out the mission, ensure freedom of movement, prevent intrusions into bases, protect installations and assets of a particular nature, etc.) never authorise the use of lethal force in the absence of an immediate danger to the safety of persons. It remains difficult to regulate very specific situations that arise in war scenarios, such as attacks on civilians used as human shields for military targets, or the use of so-called child soldiers, who often actively participate in military operations on a par with adults.

8. Conclusions

All these principles, both national and supranational, regarding the concept of manifest criminality of the order, are well represented in the words of the American judge who presided over the trial in the famous so-called *My Lai* case (1968).

This was the trial concerning the events that took place on 16 March 1968 in the Vietnamese village of *My Lai*: a platoon of American soldiers led by Lieutenant Calley entered the village and massacred the civilians, including women and children. The defendant defended himself by claiming that the conduct had been ordered by Captain Medina.

The judge's words in instructing the jury are particularly noteworthy:

"Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, *a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances*" (United States V. William L. Calley, Jr., U.S. Court of Military Appeals, 21 December 1973; available at https://casebook.icrc.org/case-study/united-states-united-states-v-william-l-calley-jr#:~:text=After%20fairly%20summarizing%20the%20evidence,in%20compliance%20with%20illegal%20orders).