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The (indirect and direct) application of international human rights law for the purpose of determining the (il)legality of an order

English version of the chapter *L'applicazione (indiretta e diretta) del diritto internazionale dei diritti umani ai fini della determinazione della (il)legittimità di un ordine*, in Brigaglia M., Pino. G., Vallini A., *Obbedienza e responsabilità*, Roma Tre Press 2026, pp. 269–313.

ABSTRACT

The contribution examines the role of international human rights law in determining the 'legitimacy' of an order and, consequently, the need to implement it and the possibility of invoking the defence of fulfilling a duty in the event of the commission of crimes. It notes that, to this end, the contribution of international law is primarily indirect, since it often constitutes the basis for the choice to adopt criminal offences or regulatory provisions, which must be interpreted in accordance with the respective international obligations, the violation of which determines the illegality of the order. However, there are also possible cases of direct application of international norms, with the aim of supplementing the rule imposing a criminal command or the rule enshrining the defence of fulfilment of a duty.

KEYWORDS

European Convention on Human Rights; Responsible disobedience; Principle of legality; Direct application of international law; Obligations of criminalisation.

Funded by the European Union - NextGenerationEU under the National Recovery and Resilience Plan (PNRR) – Mission 4 Education and research – Component 2 From research to business - Investment 1.1, Notice Prin 2022 indetto con DD N. 1409 del 14/9/2022, titled “Rule of Law and the Problem of Responsible Obedience (ABIDE)”, proposal code P20229FK2F - CUP B53D23032560001.

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SUMMARY: 1. Introduction – 2. Mediated relevance: the indirect role of international law through positive obligations and the obligation of consistent interpretation – 2.1. Obligations of criminalisation and of effective investigation and prosecution – 2.2. Obligations to regulate dangerous activities – 3. Immediate relevance: the direct application of international law for the purpose of determining the legality of an order – 3.1. The hetero-integration of criminal offences establishing an obligation to comply with an order – 3.2. The hetero-integration of the defence of compliance with an order – 4. Concluding remarks.

1. Introduction

Rarely has the question been raised as to whether the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the ECHR or simply ‘the Convention’)² and, more broadly, international human rights law³, can play any role in

¹ *Tenure-track* researcher in international law at the University of Palermo; former Assistant Lawyer at the Registry of the European Court of Human Rights. This paper is a revised and expanded version, updated in light of the most recent judgments of the Constitutional Court, of the presentation delivered on 13 June 2025 as part of the *Intensive Study Programme* on ‘*Obedience and Responsibility*’, organised within the framework of the PhD programme in ‘Human Rights: Evolution, Protection and Limits’, in collaboration with the Military Judicial Council, as part of the PRIN 2022 project ‘*Rule of Law and the Problem of Responsible Obedience*’ (ABIDE).

² What is said regarding the ECHR applies, in fact, to other essentially identical treaties, such as the International Covenant on Civil and Political Rights of 16 December 1966, or in relation to the relevant provisions of treaties dealing with specific matters, such as (by way of example only) the United Nations Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination or the United Nations Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³ Reference is made here to private individuals who, in certain circumstances, act in the capacity of public officials or persons entrusted with public service, such as the captain of a private vessel flying the Italian flag

resolving the dilemma⁴ faced by the recipient of an order issued by a superior in the hierarchy or, in any event, by an authority whose orders are legally binding on the person to whom they are addressed⁵. This dilemma consists of deciding whether to adhere to a model of *pure or blind obedience*, that is, to comply without any hesitation with the order received, regardless of its content, or to a model of *responsible (dis)obedience*, which is based on a prior assessment of the legality and, more broadly, the legitimacy of the order, and which implies the possibility of adjusting one's conduct on the basis of the outcome of that assessment⁶. This would imply the existence of a certain margin for disobeying the order received, for reasons ultimately deemed legitimate and acceptable under the legal system.

In addressing the issue in question, it is necessary to recognise that '[t]he primary purpose of military discipline is to ensure that in all circumstances, including situations of extreme stress, lawful orders from a superior in rank are unquestioningly and immediately carried out by the serviceman to whom they are addressed'⁷. This principle is well established in the case law of the European Court of Human Rights (the body institutionally competent, pursuant to Article 32, to interpret and apply the ECHR in cases brought before it; hereinafter also referred to simply as the 'European Court'), which has held, from its earliest case law onwards and

whilst carrying out search and rescue operations at sea and who, as such, is required to comply with the instructions and orders issued by the competent authorities in this regard (on this point, Court of Cassation, judgment no. 4557 of 27 February 2024, which will be discussed in greater detail below).

⁴ For an initial analysis, which nevertheless focuses primarily on aspects relating to the defence of superior orders within the context of international criminal law – a subject to be discussed in greater detail below – see H. TAKEMURA, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, Springer, Berlin-Heidelberg 2009.

⁵ This dilemma is clearly explained in P. GAETA, *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, in 'European Journal of International Law', X, no. 1, pp. 172–191, p. 172: 'the duty of military obedience clashes with the need to preserve the supremacy of the rule of law, which proscribes the commission of criminal offences. The soldier is thus caught in a dilemma. Should he [or she] obey the order, at the risk of being held responsible for the commission of a crime, or should he [or she] ignore it and risk being punished for military disobedience?'. ».

⁶ On this point, for example, D. NOTARO, *Esecuzione dell'ordine militare e disobbedienza responsabile*, in «La Legislazione penale», I, n. 1, 2025, pp. 197-209; C. IAFRATE, *Obbedienza, ordine illegittimo e ordinamento militare*, in «Diritto e questioni pubbliche», XVI, n. 2, 2016, pp. 313-336..

⁷ European Court of Human Rights, *Grigoriades v. Greece* [GC], application no. 24348/94, judgment of 25 November 1997, Dissenting opinion of Judge Sir Freeland, joined by Judges Russo, Valticos, Loizou and Morenilla, para. 4.

subsequently reiterated on numerous occasions, that ‘the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline’⁸. Consequently, it can certainly be stated that the maintenance of military discipline, which is also aimed at ensuring the fulfilment of orders, constitutes a legitimate interest of States, which is therefore worthy of protection under the ECHR, as it contributes to the protection of national security and public order⁹. At the same time, however, the European Court has also repeatedly stated that the protection of human rights ‘does not stop at the gates of army barracks’¹⁰.

This latter statement is included in the judgments in which the European Court has dealt with the rights of individuals belonging to the armed forces, to emphasise that the interest in maintaining military discipline is not absolute and cannot therefore justify disproportionate restrictions on their rights, such as freedom of expression or the right to private and family life, since ‘military personnel, like all other persons within the jurisdiction of the Contracting States, are entitled to Convention protection’¹¹.

Whilst it is therefore undisputed that the status of being a member of the armed forces does not deprive an individual of the protection afforded by international human rights law¹², one must instead ask whether this *body* of law also imposes *duties* on such individuals to protect

⁸ See, for example, the first case in which this principle was established, European Court of Human Rights, *Engels and Others v. the Netherlands* [Grand Chamber], applications nos. 5100/71 and others, judgment of 8 June 1976, para. 100. More recently, and with further reference to judgments handed down in the meantime, European Court of Human Rights, *Ayuso Torres v. Spain*, application no. 74729/17, judgment of 8 November 2022, para. 49; European Court of Human Rights, *Jokšas v. Lithuania*, application no. 25330/07, judgment of 12 November 2013, para. 70.

⁹ Indeed, the European Court has even held that the maintenance of military discipline may constitute an obligation on States under the ECHR, in that it protects the rights both of individuals belonging to the armed forces and of those to whom their activities relate and are directed (see, for example, European Court of Human Rights, *Hovhannisyan and Karapetyan v. Armenia*, application no. 67351/13, judgment of 17 January 2023).

¹⁰ European Court of Human Rights, *Grigoriades v. Greece* [GC], cit., para. 45; European Court of Human Rights, *Konstantin Markin v. Russia*, application no. 30078/06, judgment of 22 March 2012, para. 136.

¹¹ European Court of Human Rights, *Konstantin Markin v. Russia*, op. cit., para. 136.

¹² On this point, for example, Parliamentary Assembly of the Council of Europe, *Human Rights of Members of the Armed Forces*, Recommendation No. 1742(2006) of 11 April 2006; Organisation for Security and Co-operation in Europe, *Human Rights of Armed Forces Personnel. Compendium of Standards, Good Practices and Recommendations*, Geneva, 2021.

the fundamental human rights of third parties, and whether such duties give rise to an *obligation of responsible obedience (or disobedience)*, in the sense described above¹³.

Asking this question necessarily requires a preliminary clarification. Indeed, international human rights law differs from international criminal law, under which individuals are directly liable for the commission of crimes provided for by rules enshrined in the international legal order itself¹⁴. In this context, the non-applicability, or limited applicability, of the defence of superior orders as a justification in cases of international crimes has been expressly regulated¹⁵ since the Charter of the International Military Tribunal at Nuremberg of 8 August 1945¹⁶, in the statutes of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda¹⁷ and subsequently, albeit with a partial reformulation, in the Statute of the

¹³ With specific reference to the duty to refuse to carry out an order involving the commission of international crimes, see Committee of Ministers of the Council of Europe, *Human Rights of Members of the Armed Forces*, Recommendation No. CM/Rec(2010)4 of 22 February 2010, which expressly states in paragraph 84 that ‘during training, military members of the armed forces should be informed that they have a duty to object to a manifestly unlawful order amounting to genocide, a war crime, a crime against humanity or torture’.

¹⁴ See, among many others, E. VAN SLIEDREGT, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford 2012. Indeed, pursuant to Article 25(1) of the Statute of the International Criminal Court, ‘[t]he Court shall have jurisdiction over natural persons pursuant to this Statute’, whilst paragraph 2 adds that ‘[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute’.

¹⁵ For earlier studies, see A.M. WILNER, ‘*Superior Orders as a Defence to Violations of International Criminal Law*’, in *Maryland L. Rev.*, XXVI, no. 2, 1966, pp. 127–142; L.C. GREEN, *The Defence of Superior Orders in the Modern Law of Armed Conflict*, in ‘Alberta Law Review’, XXXI, no. 2, 1993, pp. 320–333.

¹⁶ Article 8 of the Statute provided that ‘[t]he fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires’.

¹⁷ Article 7(4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia of 25 May 1993, which is virtually identical to Article 6(4) of the International Criminal Tribunal for Rwanda of 8 November 1994, provides that ‘[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him [or her] of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires’.

International Criminal Court of 17 July 1998¹⁸, as well as being governed in general terms by customary international law concerning the conduct of armed hostilities¹⁹.

The rest of international law (customary and treaty-based), on the other hand – including the ECHR, as well as other international human rights treaties – does not, as a rule, impose obligations directly on individuals, but only on States and, as regards treaties, only on those that have become parties to such instruments on the basis of the specific procedures provided for by international law, in particular ratification and accession. It is no coincidence, to give just one example, that Article 1 of the ECHR, entitled ‘Obligation to respect human rights’ – which has an equivalent in other regional and universal human rights treaties²⁰ – provides that ‘[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’, thus making it clear that it is to the States Parties that the obligations in question apply²¹. Consequently, as expressly clarified by the European Court,

¹⁸ Article 33 of the Statute of the International Criminal Court of 17 July 1998 allows for this in certain circumstances, as it provides that ‘[t]he 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’ (for an analysis of this provision, including in relation to customary international law, see P. GAETA, *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, cit.).

¹⁹ It is considered that this defence is provided for by customary international law, codified in Rule 155 of the study on customary international humanitarian law carried out by the International Committee of the Red Cross, which provides that ‘[o]beying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered’.

²⁰ For example, Article 2(1) of the International Covenant on Civil and Political Rights provides that ‘[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant [...]’; as regards regional treaties, Article 1(1) of the American Convention on Human Rights of 22 November 1969 provides that ‘[t]he States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]’.

²¹ This is not the place to enter into the debate as to whether international human rights standards also have a horizontal dimension, in the sense that they apply to relations between private individuals and are therefore capable of directly imposing obligations on them (see, for example, S. SOMERS, *The European Convention on Human Rights as an Instrument of Tort Law*, Intersentia, Cambridge 2019).

the violation of the provisions enshrined in the ECHR and other human rights treaties is not, in itself, sufficient to give rise to the criminal liability of an individual²², it being understood, however, that the conduct of individuals acting as *de jure* or *de facto* organs of the State – such as, for example, members of the armed forces or the police – is generally directly attributable to the State itself and, therefore, capable of giving rise to its liability at the international level²³.

This does not mean, however, that international law (including international human rights law) is irrelevant for the purpose of determining the ‘lawful’ or ‘unlawful’ nature of an order from a superior or the competent authority and, consequently, whether or not it must be carried out. And in fact, subject to what will be said regarding the limits arising from the necessary respect for the principle of legality in criminal matters, and contrary to what the Italian Court of Cassation appears to maintain²⁴, once ratified and incorporated into the legal system via the

²² European Court of Human Rights, *Kononov v. Latvia* [GC], application no. 36376/04, judgment of 17 May 2010, para. 236.

²³ European Court of Human Rights, *Spivak v. Ukraine*, application no. 21180/15, judgment of 5 June 2025, para. 164; European Court of Human Rights, *B.T. and B.K.CS. v. Hungary*, application no. 4881/16, judgment of 10 June 2025, para. 58. See also, for example, European Court of Human Rights, *Hovhannisyan and Karapetyan v. Armenia*, cit., para. 88: ‘States are required to ensure high professional standards amongst regular soldiers, whose actions and omissions – particularly *vis-à-vis* conscripts – could, in certain circumstances, engage their responsibility, *inter alia*, under the substantive limb of Article 2’.

²⁴ Court of Cassation, judgment no. 18923 of 5 July 2021: ‘the ECHR does not create a supranational legal order and therefore does not produce rules directly applicable in the Contracting States, but rather constitutes a multilateral international treaty, from which obligations arise for the Contracting States, but not the incorporation of the national legal order into a broader system, from which the legislative bodies may issue rules directly binding on domestic authorities’; in the same vein, Court of Cassation, judgment no. 418 of 11 January 2022. For a critique of how such rulings misinterpret the very notion of the direct application of international treaties, see L. ACCONCIAMESSA, F. TAMMONE, ‘About Misunderstandings: The Italian Judiciary’s Approach to the “Direct Applicability” of the ECHR’, in ‘Italian Yearbook of International Law’, XXI, 2022, pp. 475–480; D. RUSSO, *La pretesa impossibilità di invocare le violazioni della CEDU come motivo di ricorso in cassazione: quale fondamento giuridico?*, in «Osservatorio sulle fonti», n. 3, 2021. This approach has also provoked a strong reaction from some scholars of international law and constitutional law: see, in fact, the *Dichiarazione congiunta degli studiosi di diritto internazionale e di diritto costituzionale sulla diretta applicabilità dei trattati internazionali nell’ordinamento italiano*, in «Diritti umani e diritto internazionale», XVI, n. 1, 2022, pp. 103–105.

enforcement order, international conventions on human rights ²⁵ “have become [...] *an integral part of the Italian legal system*, with the same status as the law authorising ratification: and therefore with the status of primary legislation, capable as such of being *directly applied* by the court in the resolution of disputes pending before it”²⁶ . Our Constitutional Court has, in fact, held that the ordinary courts are required to apply the ECHR, as interpreted by the European Court, where there are judgments that have interpreted its provisions with reference to similar situations²⁷ , but also, in the absence of such precedents, by carrying out the interpretative exercise themselves²⁸ . Therefore, where the direct application of a provision of an international human rights treaty, as interpreted by the competent supervisory bodies (including the ECHR, as interpreted by the European Court), does not entail the necessary disapplication of an incompatible domestic rule (this being instead a conflict that can only be resolved by the Constitutional Court, by declaring the domestic rule unconstitutional²⁹) the ordinary courts may certainly proceed in this manner³⁰ .

²⁵ Just as, incidentally, the other international treaties ratified by our State and incorporated into our legal system by means of an implementing order adopted by ordinary law.

²⁶ F F. VIGANÒ, *L'adeguamento del sistema penale italiano al “diritto europeo” tra giurisdizione ordinaria e costituzionale. Piccolo vademecum per giudici e avvocati penalisti*, in «Diritto penale contemporaneo», n. 2, 2014, pp. 167-176, p. 170 (emphasis in the original); see also p. 171: ‘*there is nothing to prevent the ordinary court from directly applying an “incorporated” international provision where such direct application does not entail the simultaneous disapplication of another conflicting domestic provision*’ (emphasis in the original).

²⁷ See Constitutional Court, Judgment No. 348 of 24 October 2007, para. 4.5, which clarified that the provisions of the ECHR must be understood ‘in the sense attributed to them by the Court specifically established to interpret and apply them’, since ‘the provisions of the ECHR exist in the interpretation given to them by the European Court’.

²⁸ In particular, Constitutional Court, judgment no. 68 of 7 April 2017, para. 7, according to which ‘the notion that the interpreter cannot apply the ECHR except in relation to cases that have been the subject of specific rulings by the Strasbourg Court must likewise be rejected. On the contrary, ‘the application and interpretation of the system of rules is, of course, primarily entrusted to the courts of the Member States’ [...]. The duty of the latter to avoid violations of the ECHR obliges them to apply its provisions, on the basis of the principles of law expressed by the ECtHR, particularly where the case can be linked to precedents in the case law of the European Court’.

²⁹ Constitutional Court, Judgment No. 311 of 26 November 2009, para. 6.

³⁰ For a detailed explanation of the distinction between the concept of direct application of international rules, direct effects (understood as the possibility for EU law to automatically prevail over incompatible domestic law) and the non-application of incompatible domestic rules (as an operation carried out by the court with respect to rules having direct effects), see L. ACCONCIAMESSA, F. TAMMONE, *La diretta applicabilità dei trattati*

In this regard, it should be noted that there are various provisions in our legal system which may need to be interpreted or supplemented, for the purposes of their application, by rules of international human rights law. As regards the general public, one might consider Article 650 of the Criminal Code (entitled ‘failure to comply with measures ordered by the authorities’), which provides that ‘[a]ny person who fails to comply with a *measure lawfully issued* by the authorities for reasons of justice or public safety, or public order or hygiene, shall be punished, if the act does not constitute a more serious offence, with imprisonment for up to three months or a fine of up to €206’; furthermore, pursuant to Article 51, paragraph 3, of the Criminal Code (which governs the defence of the performance of a duty), ‘[a]ny person who has 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’³¹. With specific reference to members of the armed forces, Article 173 of the Military Criminal Code provides that ‘[a] military personnel who refuses, omits or delays in obeying an order relating to service or discipline, issued by a superior, shall be punished with military imprisonment for up to one year’; however, Article 1349, paragraph 2, (entitled ‘military orders’) of Legislative Decree No. 66 of 15 March 2010 (containing the ‘Code of Military Law’) provides that ‘[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 event *manifestly constitute a criminal offence* has a duty not to carry out the order and to inform his superiors as soon as possible’.

As will be seen, both the concept of an order given unlawfully or an unlawful order, and that of an order whose execution clearly constitutes a criminal offence – which, as we have seen, imply a duty on the part of the addressee of the order not to comply with it – may in some

nell’ordinamento italiano. Quo vadis?, in ‘Diritti umani e diritto internazionale’, XVI, no. 1, 2022, pp. 91–102; A. GIANELLI, *Dalla disapplicazione di norme configgenti alla mancata applicazione di norme vincolanti*, in ‘Diritti umani e diritto internazionale’, XVI, no. 1, 2022, pp. 39–47; D. RUSSO, *On the direct applicability of the ECHR in Cassation proceedings*, in ‘Human Rights and International Law’, XVI, no. 1, 2022, pp. 49–63; A. CARDONE, *La diretta applicabilità della CEDU nella giurisprudenza del giudice comune tra (apparenti) ritorni al passato e nuove problematiche*, in «Diritti umani e diritto internazionale», XVI, n. 1, 2022, pp. 65–90.

³¹ In this regard, it should be noted that, according to established case law of the Court of Cassation, the possibility of invoking this defence ‘requires a legitimate order, and legitimacy is primarily formal, relating to the superior’s competence to issue it. For the defence under Article 51 of the Criminal Code to apply, it is necessary that the order be lawful, that is, issued by the competent authority, that it was given in the prescribed form and, finally, that its content falls within the scope of the subordinate’s duties as regards its essence, means and purpose’ (among many others, Court of Cassation, judgment no. 4194 of 27 January 1987; Court of Cassation, judgment no. 51962 of 18 January 2018; more recently, Court of Cassation, judgment no. 4557/24, cited).

cases need to be determined in the light of the relevant rules of international human rights law. In this regard, the latter may come into play either *indirectly*, that is, through domestic law, which must nevertheless be interpreted in accordance with the relevant international standards (section 2), or *directly*, in that certain aspects of domestic law are supplemented by the international norm, which is consequently applied directly (section 3).

2. Mediated relevance: the indirect role of international law through positive obligations and the obligation of consistent interpretation

From the first perspective, namely the possibility for international human rights law to regulate the conduct of individuals in a manner *mediated* by domestic law, and therefore indirectly, including whether or not an order must be implemented, it must be borne in mind that, in certain cases, this *body* of law imposes *positive obligations* on States³², which relate precisely to the State's regulation of conduct by individuals, whether they be agents of the State itself or private citizens³³.

This category includes international norms that impose on the State obligations to *criminalise* certain conduct, for deterrent purposes or in any case to prevent certain human rights violations (section 2.1), as well *as regulations*, not necessarily or exclusively through the instrument of criminal law, governing certain inherently dangerous activities, i.e. those which are in themselves capable of entailing the violation of certain fundamental human rights (section

³² The principle that the provisions of the ECHR do not merely require state authorities to refrain from violating human rights but, in certain circumstances, impose positive obligations to take specific measures aimed at ensuring the enjoyment of those rights and protecting them from infringements by private individuals has been established by the European Court of Human Rights, *Case concerning certain aspects of the legislation on the use of languages in the field of education in Belgium* [Grand Chamber], applications nos. 1474/62 and others, judgment of 23 July 1968; furthermore, on the positive obligation to protect people's lives from imminent and known risks on the part of the authorities, European Court of Human Rights, *Osman v. the United Kingdom* [GC], application no. 23452/94, judgment of 28 October 1998, para. 116, in which this principle was first affirmed, and which was subsequently reiterated and extensively elaborated upon, including in relation to specific activities and conduct, in subsequent case law.

³³ However, 'the general scope of the State's positive obligations might differ between cases where the treatment contrary to the Convention has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals' (European Court of Human Rights, *Vyacheslavova and Others v. Ukraine*, applications nos. 39553/16 and others, judgment of 13 March 2025, para. 373).

2.2). In both cases, as will be seen, the State cannot merely adopt the relevant domestic legislation, but must also ensure its effective enforcement, applying it effectively in order to prevent and suppress, by the most appropriate means in the circumstances of the case, the violation of those rights³⁴.

2.1. The obligations of criminalisation and effective investigation and prosecution

Firstly, international human rights law may provide, either expressly (as in the case of certain treaties on specific subjects, such as, as will be seen, those against torture or racial discrimination) or implicitly (as is the case with general human rights treaties, both regional and universal), for positive obligations to *criminalise* certain conduct³⁵.

These are obligations to introduce into national legislation criminal offences prohibiting the commission by individuals, whether private citizens or state agents, of acts constituting (in most cases) the most serious and heinous violations of the most fundamental human rights, such

³⁴ As has been noted, the fulfilment of such obligations is ‘essential to signal the legal system’s determination to combat such attacks effectively, and at the same time to reassure the actual victims of the aggression and the general public of the absence of any collusion between the state authorities and the perpetrators of the aggression’; consequently, ‘[w]ith regard at least to the *most fundamental* human rights – first and foremost, the right to life, the right not to be subjected to torture or to modern forms of slavery and trafficking, and sexual freedom and integrity – such duties of prevention and response can only be implemented through the intervention of criminal law’ (F. VIGANÒ, *Diritto penale e diritti della persona*, in «Sistema penale», 13 marzo 2023, p. 9). For a summary of the case law on this subject, relating to the procedural obligations of investigation and prosecution identified in respect of Articles 2, 3, 4, 5 and 8 of the Convention, as well as Article 1 of Protocol No. 1, see European Court of Human Rights, *Bradshaw and Others v. the United Kingdom*, application no. 15653/22, judgment of 22 July 2025, paras. 127–129, according to which in such cases ‘[t]he investigation is a means of ensuring that the legislative and administrative framework established to protect the substantive rights is properly implemented and any breaches of that right are prosecuted and punished [...]. It should therefore be capable of leading to the identification and punishment of those responsible’.

³⁵ These refer to ‘the international duties to criminalise certain conduct and, as a necessary consequence, to create a corresponding criminal offence at the national level’ (B.I. BONAFÉ, *Constitutional Judicial Review and International Obligations of Criminalisation*, in ‘International Criminal Law Review’, XXI, no. 4, 2021, pp. 660–668, p. 661).

as life, physical and mental integrity³⁶ , self-determination and sexual freedom³⁷ , and, more broadly, human dignity³⁸ . Furthermore, the content of the positive obligations arising from international law is not limited to the introduction of the relevant criminal offences, given that States also have an obligation to ensure effective enforcement of the relevant rules in order to protect the most fundamental human rights from infringement by individuals. These obligations to criminalise are in fact accompanied by obligations to effectively enforce the domestic laws adopted to implement them, in the sense that States must ensure that the commission of criminalised acts is properly investigated and, where appropriate, must prosecute and punish those responsible³⁹ .

When considering the role of these criminalisation obligations in determining whether an order is lawful or unlawful, it should be borne in mind that the rules of international law establishing this type of international obligation are generally considered to *be non-self-*

³⁶ Consider the various types of *hate crimes*, that is, various forms of aggression – whether verbal or physical, direct or indirect – motivated by discriminatory grounds and capable of creating further risks to the physical and psychological well-being of the victims, such as in cases of homophobic violence (European Court of Human Rights, *Beizaras and Levickas v. Lithuania*, application no. 41288/15, judgment of 14 January 2020, para. 111) or on grounds of ethnic or religious discrimination (European Court of Human Rights, *Alković v. Montenegro*, application no. 68895/10, judgment of 5 December 2017, paras. 65–66). Or, furthermore, the obligation to criminalise all forms of domestic and gender-based violence (European Court of Human Rights, *A.E. v. Bulgaria*, application no. 53891/20, judgment of 23 May 2023, para. 100), or to provide for specific offences or aggravating circumstances for offences committed on grounds of discrimination based on sexual orientation (European Court of Human Rights, *Stoyanova v. Bulgaria*, application no. 56070/18, judgment of 14 June 2022, para. 79).

³⁷ Consider, amongst other things, the obligation arising from Article 3 of the ECHR, which prohibits inhuman and degrading treatment, to criminalise any form of non-consensual sexual intercourse, through offences that do not require violence as an element of rape but are based on the mere absence of the victim's consent (European Court of Human Rights, *Y v. Czech Republic*, application no. 10145/22, judgment of 12 December 2024, para. 70).

³⁸ For example, see European Court of Human Rights, *F.M. and Others v. Russia*, applications nos. 71671/16 and 40190/18, judgment of 10 December 2024 (concerning the prohibition on criminalising and effectively prosecuting any act aimed at keeping a person in a situation of slavery, servitude or forced labour);

³⁹ See, for example, European Court of Human Rights, *Cioffi v. Italy*, application no. 17710/15, judgment of 5 June 2025, para. 101, concerning the obligation to investigate and prosecute those responsible for serious ill-treatment inflicted by the police on a participant in the anti-globalisation demonstration in Naples in 2001.

*executing*⁴⁰ and, as such, they cannot *in principle* be directly applied in domestic (criminal) courts, with the consequence that their full implementation requires the adoption of a specific legislative provision introducing the offence into the domestic legal system⁴¹.

This is generally derived from the need to respect the principle of the legal reserve in criminal matters, which constitutes one of the requirements imposed by the principle of legality in criminal matters. In our legal system, this principle is enshrined in Article 25, paragraph 2, of the Constitution, pursuant to which ‘[n]o one may be punished except under a law that has entered into force prior to the commission of the act’⁴². According to this principle, it is solely for the legislature to determine which acts are to be made punishable and which penalties are to be imposed, thereby precluding sub-legislative sources or case law⁴³, including that of the Constitutional Court⁴⁴, from criminalising certain conduct. Consequently, the *full*

⁴⁰ K. KAISER, *Treaties, Direct Applicability*, in H. RUIZ-FABRI (ed.), *Max Planck Encyclopedia of International Procedural Law*, Oxford University Press, Oxford 2013, para. 1: ‘[a] treaty is “self-executing” or “directly applicable” in domestic law when its provisions are applied by courts or executive agencies as provisions of domestic law without the need for further legislative or administrative measures’.

⁴¹ See, for example, Special Tribunal for Lebanon, Appeals Chamber, *Prosecutor v. Ayyash*, Case No. STL-11-01/I/AC/R176bis, interim decision on applicable law of 16 February 2011, para. 76: ‘as a general rule, international norms criminalising conduct are not self-executing, for their implementation requires national legislation defining the crime and the relevant penalty’.

⁴² On this point, see F. SALERNO, ‘*The limit – not the counter-limit – of the legal reservation to the direct implementation of the “generally recognised” international norm in criminal matters*’, in *Essays in Honour of Giuseppe Tesaro*, Editoriale Scientifica, Naples 2024, pp. 2861–2892, p. 2286, who argues that the legislature’s intervention in this case would aim to give effect to the norm at the domestic level, but not to preserve a sort of monopoly of the legislature over decisions regarding criminalisation (‘the limit of the legal reserve serves to make necessary those regulatory instruments supplementing the criminal offence in order to ensure the very effectiveness of the international criminal provision, but not as an inescapable and exclusive manifestation of a purported regulatory monopoly of the State in the punishment of the individual’’).

⁴³ See Court of Cassation, judgment no. 38085 of 5 July 2012, para. 2; Court of Cassation, judgment no. 37088 of 14 June 2013, para. 2.1. These rulings are examined in detail in D. AMOROSO, ‘*The Duties of Criminalisation under International Law in the Practice of Italian Judges: An Overview*’, in ‘International Criminal Law Review’, XXI, no. 4, 2021, pp. 641–659, p. 653.

⁴⁴ Constitutional Court, judgment no. 8 of 18 January 2022, para. 4 of *the Legal Considerations*: ‘the adoption of rulings with *adverse* effects in criminal matters is, as a general rule, precluded by the principle of the reservation of law enshrined in Article 25, second paragraph, of the Constitution, which, by entrusting to “Parliament”, as the body embodying the political representation of the Nation, the choices of criminal policy (with the related delicate balancing of conflicting rights and interests), prevents the Court both from creating new

implementation of international obligations regarding criminalisation necessarily requires the ordinary procedure of adapting domestic law to treaty provisions, in the sense that it is not possible to limit oneself to referring to the international provision; rather, the adoption of a specific domestic provision defining the offence is required⁴⁵.

The principle of the legality of criminal law has therefore often been invoked by criminal law scholars⁴⁶ (or, at least, a certain section of them⁴⁷), to strenuously oppose international criminalisation obligations, in that these would imply ‘a sort of “tyranny” of international obligations over the principle of legality in criminal law, or an “expropriation” of the principle of legality’⁴⁸. According to this strand of doctrine, it follows from the principle of the legal reserve – to be understood more specifically as the *national legal* reserve – that the power to punish is the exclusive competence of the State, and cannot in any way be influenced or constrained by international or supranational law⁴⁹.

offences or extending existing ones to unforeseen cases and from imposing *harsher* penalties or affecting aspects relating, in any event, to criminal liability’.

⁴⁵ D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, in «Rivista di diritto internazionale», CVIII, n. 2, 2025, pp. 289-325, p. 312. See also, in the same vein, G. CATALDI, *Italy*, in D. SHELTON (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation and Persuasion*, Oxford University Press, Oxford 2011, pp. 328–359.

⁴⁶ See A. CAVALIERE, “*Diritti*” anziché “*beni giuridici*” e “*principi*” in diritto penale?, in «Sistema penale», n. 10, 2022, pp. 63-92, p. 71, according to whom ‘the view of the prevailing criminal law doctrine’ is contrary to international obligations regarding criminalisation.

⁴⁷ Indeed, there are also those who have argued that it is necessary to “completely revise the ‘myths’ of the past and find new paradigms, which acknowledge the fact that the legislator’s monopoly on decisions regarding criminalisation has long since ended and that it is senseless to continue to think of criminal law as exclusively national and state-based in the current context of the sometimes difficult ‘dialogue with the courts’ and the necessary identification of the rule within a complex system of multi-level sources’ (G. ZACCARIA, *Una “nuova” legalità penale tra testo e interpretazione*, in «Sistema penale», n. 12, 2022, pp. 11-31, p. 31).

⁴⁸ Constitutional Court, judgment no. 95 of 3 July 2025, para. 5.3.4 of the *Legal Considerations*.

⁴⁹ See, for example, A. CAVALIERE, “*Diritti*” anziché “*beni giuridici*” e “*principi*” in diritto penale?, cit., pp. 74-75: ‘No supranational authority can legitimately assume – and the fact that this occurs widely in practice does not mean it is legitimate, according to Hume’s well-known law – the power to dictate to the legislator criminal provisions, that is, criminal offences and penalties which the legislator would be obliged to introduce; only the legislator can decide whether and which criminal provisions to enact, in accordance with the democratic *rationale* and, at the same time, to safeguard the principle of legality.’ For a critique of these positions, see F. VIGANÒ, *L’arbitrio del non punire: sugli obblighi di tutela penale dei diritti fondamentali*, in *Studi in onore di Mario Romano*, Jovene, Milan 2011, pp. 2645–2704, pp. 2696 ff.

On the contrary, the Constitutional Court has for some time been drawing, even in criminal matters, the conclusions that follow from the fact that ‘compliance with the constraints arising from international obligations constitutes a principle of the legal system’⁵⁰, acknowledging the now inevitable impact of international and supranational law on national criminal policy decisions⁵¹ and on the very content of criminal law provisions⁵², as well as the constitutional requirement for our legal system to be open to such sources⁵³. In this context, the Constitutional Court recently clarified, in judgment no. 95 of 3 July 2025, that international obligations regarding criminalisation are fully compatible with the principle of legality in criminal matters enshrined in our Constitution. As regards the legal reserve, established (in a

⁵⁰ Constitutional Court, judgment no. 159 of 21 July 2023, para. 13 of *the Legal Considerations*. On this point, see the observations of G.L. GATTA, *Abuso d’ufficio: con le mani legate dalla riserva di legge, la Consulta certifica “indubbi vuoti di tutela” e al contempo difende in via di principio l’art. 117, co. 1, Cost e gli obblighi internazionali di incriminazione*, in «Sistema penale», 9 luglio 2025, par. 5, who states that ‘At a historic moment of crisis in international law, brought about by the rise of sovereignist movements, the pages of Judgment 95 reveal a Constitutional Court that takes treaty-based international law seriously’. Furthermore, he added that “the Court has the courage to remind everyone of what the current climate may obscure and what a law student, when reading a textbook on international law, knows full well: when one participates in the international legal order, one sits at the table with other States, one makes commitments including in criminal matters, one signs conventions and implements them in Parliament... this is no joke. One way for Parliament to exercise the principle of legality in criminal matters is precisely to assume obligations regarding criminalisation agreed with other States. Unless one wishes to suggest that international law is a joke, a farce’.

⁵¹ See the very comprehensive analysis by F. VIGANÒ, *Dal “diritto penale dello Stato” al “diritto penale sovranazionale”*, in M. DONINI, L. GARLATI, M.N. MILETTI, R. ORLANDI (a cura di), *I cardini della modernità penale dai codici Rocco alle stagioni dell’Italia repubblicana*, RomaTrePress, Roma 2024, pp. 97-140. Alternatively, see V. MANES, *Il giudice nel labirinto. Profili delle intersezioni fra diritto penale e fonti sovranazionali*, Edizioni Dike, Roma 2012.

⁵² Indeed, international law often does not merely require the criminalisation of a given act, but goes so far as to specify the particular penalties to be imposed and their severity (D. RUSSO, *The Reserve of Law and International Obligations of Criminal Protection*, op. cit., p. 317; B.I. BONAFÉ, *Constitutional Judicial Review and International Obligations of Criminalisation*, op. cit., p. 676). For example, Article 2 of the United Nations Convention against Transnational Organised Crime of 15 November 2000 provides that it is necessary to introduce ‘a maximum deprivation of liberty of at least four years or a more serious penalty’. On this point, see also P. GUALTIERI, *Discipline nazionali favorevoli e diritti dell’uomo. Le ragioni di controlimiti garantistici*, in «Discrimen», 23 dicembre 2024, p. 3: ‘the constraints arising from international treaties, incorporated into domestic law [...] are capable of acting as factors that can alter the scope and function of the offence and the penalty’.

⁵³ D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, cit., p. 321.

democratic context) to guarantee the separation of powers and, therefore, the fundamental competence of Parliament in matters of criminal policy, the Constitutional Court highlighted that the ratification of treaties imposing criminalisation obligations is in any case preceded by a law authorising ratification enacted by Parliament, which remains free to attach reservations regarding certain clauses of the treaty, and which therefore participates in the decision to assume such an obligation, thereby ensuring compliance with this principle⁵⁴. As regards, however, the aspects of individual safeguards deriving from the principle of legality in criminal matters⁵⁵, namely the requirements of specificity and foreseeability of the criminal offence⁵⁶,

⁵⁴ Constitutional Court, Judgment No. 95/2025, op. cit., para. 5.3.4 of *the Legal Rationale*: ‘Nor can it be considered, as argued by some of the parties to the proceedings, that the “democratic” *rationale* behind the principle of the legal reserve in criminal matters – which entrusts to Parliament, as the institution representing the entire national community, the task of assessing whether to impose a criminal sanction to protect certain legal interests – is in fact rendered meaningless, where EU and international sources are recognised as having the authority to lay down binding guidelines for the national legislature in criminal matters. The obligations regarding criminalisation established by treaty-based international law are in fact freely accepted by Parliament itself through the law authorising the ratification of individual treaties, which may also instruct the Government to attach reservations and declarations, within the limits permitted by international law, regarding their specific provisions at the time of ratification. It must therefore be considered that, by authorising ratification *outright*, Parliament has knowingly endorsed the choices made in the treaty negotiated by the Government with the other signatory States (including) regarding the *scope* and specific conditions for the criminalisation, or non-criminalisation, of certain conduct; and has thus agreed to assume, also with regard to those choices, legally binding commitments towards the other Contracting Parties, whilst at the same time subjecting its subsequent legislative activity to compliance with those very obligations pursuant to Article 117, first paragraph, of the Constitution.’ In this sense, the Constitutional Court would have adopted ‘a more rigorous interpretation of the scope of application of the legal reserve as a reserve not of [legislative] source but of body [Parliament]’ (D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, op. cit., p. 298).

⁵⁵ It should be noted that the Constitutional Court has clarified that the principle of legal certainty ‘serves two fundamental objectives: on the one hand, to prevent the judge, in contravention of the principle of the separation of powers and the absolute legal reserve in criminal matters, from assuming a creative role, identifying, in place of the legislator, the boundaries between what is lawful and what is unlawful; and, on the other hand, to guarantee individual self-determination, allowing the addressee of the criminal law provision to assess *a priori* the criminal law consequences of their conduct’ (Constitutional Court, judgment no. 5 of 30 January 2009, para. 5 of *the Legal Considerations*).

⁵⁶ For a similar critique of international obligations regarding criminalisation, see L. CARRARO, *La Convenzione di Merida non contempla un obbligo di incriminazione dell’abuso d’ufficio: questioni risolte e questioni ancora aperte. Osservazioni a prima lettura su C. Cost. 3 luglio 2025, n. 95*, in «Giurisprudenza penale web», 15 luglio 2025, p. 24, according to whom such guarantees would not be respected in ‘supranational

these remain protected by the fact that individual criminal liability arises from the violation of the provision of domestic law introducing the criminal offence imposed by the obligation to criminalise⁵⁷. Finally, as regards the alleged disproportionate prevalence of criminalisation obligations over the principle of legality, given that the ratification of a treaty imposing such an obligation would definitively deprive Parliament of the possibility of modifying its choices in matters of criminal policy, the Constitutional Court emphasised that the ratification of a treaty ‘does not preclude the State from subsequently departing from such obligations in the manner provided for by international law itself, and in particular by promoting an amendment to the treaty, or by denouncing it’, and that such an event ‘may also occur through the intervention of Parliament, in the exercise of its essential function of guidance and control’⁵⁸. Therefore, whilst respecting the necessary limits deriving from the principle of legality, and provided that these are clearly and precisely enshrined in the relevant instruments, international obligations regarding criminalisation remain perfectly compatible with our constitutional principles⁵⁹.

It is therefore in light of the above that one may ask whether, and if so under what terms, international criminalisation obligations may be relevant for the purpose of determining the unlawful nature of an order, insofar as it implies the necessity of committing a criminal offence.

Now, given what has just been clarified, it is not so obvious that criminalisation obligations can be directly relevant where the national legal system has merely transposed the international treaty via an implementing order, but in the absence of the corresponding domestic implementing provision that has introduced the relevant and specific criminal offence. In this

regulatory instruments, which are often deficient in terms of the standards of guarantee, precision and systematicity that would be imposed by a truly liberal criminal law’.

⁵⁷ Constitutional Court, Judgment No. 95/25, cit., para. 5.3.3: ‘In such a scenario, in fact, an individual’s criminal liability will not derive directly from the EU legal act or the international obligation. Individual criminal liability will, instead, be based solely on the national law implementing the international obligation, once this has been effectively incorporated into the legal system by the national legislature’.

⁵⁸ Ibid., para. 5.3.4.

⁵⁹ This presupposes that the international obligation to criminalise is clearly identifiable in the international provision, either because it expressly provides for it, or because it has been interpreted as such by the relevant supervisory bodies, such as, in the case of the ECHR, the European Court. On this point, L. ACCONCIAMESSA, *Sull’inesistenza di un obbligo internazionale di stand still e la conseguente liceità giuridica internazionale dell’eliminazione del reato di abuso d’ufficio*, in «Diritti umani e diritto internazionale», XVIII, n. 3, pp. 647-669, p. 650: ‘if the treaties are to be taken seriously, a conclusion as strong as that put forward in the order for referral—for the reasons we have indicated above [relating to respect for the principle of legality]—must be based on a rigorous interpretation of the relevant treaty provisions’.

regard, part of the legal literature has argued (in our view, convincingly) that in the event of a failure by the State (i.e., the legislature) to fulfil international criminalisation obligations, the corresponding criminal offences could be directly applied by the domestic court in criminal proceedings, including for the purpose of convicting an individual for the commission of the offence provided for therein, provided that these (i.e., the criminal offences provided for by the international norm) are ‘sufficiently clear, precise, complete, accessible, non-retroactive and therefore foreseeable for members of society’⁶⁰. However, at present, the case law of the Court of Cassation appears to be largely oriented towards the view that the scope of criminal liability provided for in the Italian legal system cannot be extended *in malam partem* on the basis of a direct application of international norms that impose obligations of criminalisation which have not been fulfilled by the legislature⁶¹. This approach has been reaffirmed by the Court of Cassation not only where the international provision was invoked for the purpose of convicting an individual for the commission of an offence that domestic law had failed to introduce, but also where direct application was invoked for other purposes that nevertheless produced *adverse* effects for the individual who committed the offence, such as, for example, the inclusion of the requirement of dual criminality necessary for the granting of authorisation for the extradition of a person⁶².

Therefore, in general terms, it would appear that, according to the current position of the Court of Cassation, a requirement for criminalisation not incorporated into domestic law could not be directly applied, not even for the limited purpose of deeming unlawful an order that implies the commission of the relevant offence, where this has not been introduced into the legal system. At the same time, whilst this is indeed the current state of the Court of Cassation’s case law, it will be seen later that the case law of the Constitutional Court and the European

⁶⁰ D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, cit., pp. 321-322.

⁶¹ See, for example, Court of Cassation, judgment no. 37088/2013, op. cit., para. 2.1, in which the Court held that it could not, for the sole purpose of the statute of limitations (or rather, for the purposes of applying the international rule establishing the non-applicability of statutes of limitations to international crimes), consider the acts committed at the Diaz school during the G8 summit in Genoa as torture, given that the relevant obligation to criminalise such acts had not yet been fulfilled under Italian law.

⁶² Court of Cassation, judgment no. 46634 of 17 July 2014, in which the Court refused to extradite to Argentina a person convicted of acts of torture, given that, due to the absence of such an offence in the Italian legal system, the requirement of double criminality was not met (on this point, . MARCHESI, *Il caso Riverberi e gli attuali limiti della collaborazione italiana alla punizione dei crimini internazionali*, in «Diritti umani e diritto internazionale», IX, n. 1, 2025, pp. 218-225).

Court of Justice seems instead to suggest the opposite, namely that, in the event of the State's failure to comply with an international obligation to criminalise an offence, an order concerning the commission of the offence provided for by that obligation but not introduced into Italian law (thus in breach of the obligation) could nevertheless be considered unlawful⁶³.

In any case, it is clear that, once implemented through the introduction of the corresponding offence into domestic law, criminalisation obligations undoubtedly contribute to determining the lawfulness or otherwise of an order from a superior and give rise to an obligation not to comply with an order that is incompatible with them, as they constitute the very basis for the decision to criminalise that conduct: an order requiring the commission of an offence, the definition of which has been introduced in fulfilment of a criminalisation obligation, would undoubtedly be unlawful as it would entail the commission of the offence in question and, therefore, be contrary to domestic law.

Consider, first and foremost (and undoubtedly the most emblematic), the offence of *torture*, introduced into Article 613-bis of the Italian Criminal Code by Article 1 of Law No. 110 of 14 July 2017, in order to implement a criminalisation obligation provided for by various international instruments⁶⁴. Indeed, an obligation to provide for the offence of torture had been expressly enshrined in Article 7 of the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 9 December 1975. Whilst that instrument was not legally binding, a strict obligation was subsequently laid down in Article 4 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁵, ratified by Italy on 12 January 1989 on the basis of the Act authorising ratification of 19 November 1988, No. 489. At the time of ratification, Italy made it clear that it regarded the obligation to criminalise referred to in Article 4 as *essential* to achieving the

⁶³ On this point, see further *below*, in section 3.2.

⁶⁴ . MARCHESI, *Delitto di tortura e obblighi internazionali di punizione*, in «Rivista di diritto internazionale», CI, n. 1, 2018, pp. 131-150; F. LATTANZI, *La nozione di tortura nel codice penale italiano a confronto con le norme internazionali in materia*, in «Rivista di diritto internazionale», CI, n. 1, 2018, pp. 151-184; A. GIANELLI, *Has Italy Finally Implemented its International Obligations Concerning the Punishment of Torture?*, in «International Criminal Law Review», XXI, n. 4, 2021, pp. 715-730.

⁶⁵ Under this provision: '1. [E]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take account of their grave nature'.

object and purpose of the treaty in question, given that it had objected to a general reservation entered by Pakistan in respect of that provision. Moreover, for our purposes, it is important to note that this treaty, in Article 2(3), expressly provides that '[a]n order from a superior officer or a public authority may not be invoked as a justification for torture'⁶⁶.

Nevertheless, as is well known, this obligation remained unfulfilled for a very long time⁶⁷, and this failure to comply was noted in 2010 and 2013, the European Committee for the Prevention of Torture (a monitoring body of the Council of Europe⁶⁸) and, (on various occasions, including) in 2007, the United Nations Committee against Torture, established by the aforementioned Convention against Torture⁶⁹. The inaction of the Italian authorities, however, persisted until the international obligation was reiterated in 2015 by the European Court of Human Rights in its judgment in the case of *Cestaro v. Italy*, concerning the events that took place inside the Diaz school during the 2001 G8 summit in Genoa. In that judgment, the European Court reiterated that the obligation to criminalise torture was enshrined in various international instruments⁷⁰ and, consequently, considered that it was also incorporated into the

⁶⁶ However, during the preparatory work, a deliberate decision was taken to remove from this provision any reference to other forms of inhuman or degrading treatment, with the result that the provision would appear to admit that, where ordered by a superior, such acts are not punishable. Legal scholarship has highlighted how this choice significantly undermines the pursuit of the treaty's object and purpose, but that at the same time it represents a deliberate choice by the drafters which, as such, cannot be overridden by interpretation (G. ZACH, '*Article 2. Obligation to Prevent Torture*', in M. NOWAK, M. BIRK, G. MONINA (eds.), Oxford University Press, Oxford 2019, pp. 72–97, p. 94).

⁶⁷ It should be noted that 'States must ensure the immediate implementation of international obligations regarding criminalisation, as they may face the risk of being held accountable for non-compliance, even in the case of a mere failure to adopt the implementing legislation, regardless of whether that failure has resulted in harm due to the failure to prevent or punish criminally relevant conduct' (D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, op. cit., p. 312). In this regard, see in particular the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, paras. 148–149, according to which the prohibition of torture is immediately breached in the event of 'failure to adopt the national measures necessary for implementing the prohibition'.

⁶⁸ The reports of the European Committee for the Prevention of Torture concerning Italy are available at www.coe.int/it/web/cpt/italy.

⁶⁹ United Nations Committee against Torture, *Recommendations concerning Italy*, UN Doc. CAT/C/ITA/CO/4 of 16 July 2007, para. 5.

⁷⁰ European Court of Human Rights, *Cestaro v. Italy*, application no. 6684/11, judgment of 7 April 2015, para. 244.

prohibition of torture and inhuman and degrading treatment under Article 3 of the ECHR, concluding that ‘the Court considers it necessary to introduce into the Italian legal system legal mechanisms capable of imposing appropriate penalties on those responsible for acts of torture and other types of ill-treatment under Article 3 and of preventing the latter from benefiting from measures incompatible with the case-law of the Court’⁷¹.

In this context, where the obligation has finally been implemented, its relevance is evident, albeit indirect: any order to commit acts of torture would, even before being in breach of the international obligations referred to above, constitute a violation of the domestic law which, in implementation of the obligations to criminalise such acts arising from the aforementioned treaty provisions, has introduced the offence of torture into our legal system.

However, this does not mean that, once implemented, the international obligation ceases to have effect and becomes essentially irrelevant, as it (or rather, the relevant provision establishing it) *remains in the background* and continues to operate in various ways.

In this regard, it is emblematic, with specific reference to torture, that where a State expressly permits acts of torture to be justified on the grounds of compliance with a superior’s order, the aforementioned Article 2(3) of the Convention against Torture (which expressly prohibits the defence of acting on a superior’s orders) would automatically be violated 3 of the Convention against Torture (which expressly prohibits the possibility of accepting the defence of a superior’s order)⁷², which, moreover, does not allow for any mitigation (in the sense that the person carrying out the order cannot justify themselves by demonstrating that they were unable to understand that the order to torture was illegal).

More generally, this ‘merely’ indirect relevance of the international obligation is accompanied by a *particular normative force* conferred upon the (domestic) offence by the (international) rule establishing the obligation to criminalise that very offence. Indeed, the nature – mandatory under international law – of the decision to criminalise is such as to confer a particular normative status on the relevant criminal offence within the national legal system. In this regard, the Constitutional Court has previously stated in an *obiter dictum*⁷³, and recently

⁷¹ Ibid., para. 246.

⁷² G. ZACH, *Article 2. Obligation to Prevent Torture*, op. cit., p. 73.

⁷³ Constitutional Court, judgment no. 37 of 6 March 2019, para. 7.1, according to which the Constitutional Court may issue judgments declaring provisions unconstitutional that repeal a criminal offence, and which therefore entail the reinstatement of repealed criminal provisions (and, therefore, with effects *in malam partem*), in a few limited circumstances, including where ‘the provision under review is deemed to be contrary to relevant

clarified at length, that treaty obligations regarding criminalisation are capable of constituting the intermediate criterion of constitutionality referred to in Article 117, paragraph 1, of the Constitution, according to which ‘[l]egislative power is exercised by the State [...] in compliance with the Constitution, as well as with the constraints arising from the Community legal order and international obligations’⁷⁴, provided that these are compatible with the body of higher constitutional principles⁷⁵. Consequently, any repeal of a criminal offence introduced into the Italian legal system in implementation of a treaty obligation to criminalise, such as the aforementioned offence of torture, would be unconstitutional. Such offences, therefore, possess a particular resilience, with the consequence that, once introduced into the legal system, they remain in any case capable of forming the basis for determining the lawful or unlawful nature of an order issued by a superior, and cannot be repealed unless replaced by other offences equally capable of implementing the corresponding obligation to criminalise.

Furthermore, the relevant criminal offences must in any case be interpreted taking into account their international origin, in accordance with the well-known obligation of *consistent interpretation* of the corresponding domestic law⁷⁶. Consider, for example, the case in which the Court of Cassation interpreted the offence of torture provided for in Article 613-bis of the Criminal Code – which provides for the inclusion of the requirement that the act be committed ‘through multiple acts’ – in the light of the international definition of torture, concluding that this requirement is therefore not an essential element for the purposes of classifying the act as a criminal offence and, consequently, for its punishability⁷⁷. This means that consistent interpretation is deemed admissible even where it produces effects in *malam partem*, that is, a

supranational obligations within the meaning of Article 11 or Article 117, first paragraph, of the Constitution’. See also, in the same vein, Constitutional Court, judgment no. 28 of 28 January 2010; Constitutional Court, judgment no. 32 of 25 February 2014.

⁷⁴ In this regard, it should be noted that, as clarified by the well-known twin judgments (Constitutional Court, judgments Nos. 348 and 349 of 22 October 2007), international treaties serve as intermediate benchmarks of constitutional legitimacy, with the consequence that, in the event of a conflict between a statutory provision and a treaty obligation, the former would be unconstitutional for conflict with Article 117, first paragraph, of the Constitution, as supplemented by the relevant treaty obligation.

⁷⁵ Constitutional Court, judgment No. 95/2025, cit., para. 5.3.4.

⁷⁶ F. F. VIGANÒ, *Il giudice penale e l’interpretazione conforme alle norme sovranazionali*, in P. CORZO, E. ZANETTI (a cura di), *Studi in onore di Mario Pisani*, La Tribuna, Piacenza 2010, pp. 617-679.

⁷⁷ See the examination of the relevant case law in A. GIANELLI, *Has Italy Finally Implemented its International Obligations Concerning the Punishment of Torture?*, op. cit., pp. 715 ff.

partial extension of the scope of criminally relevant conduct⁷⁸. For example, the Court of Cassation proceeded in this manner when it interpreted Article 4 of Law No. 146 of 16 March 2006, which ratified and gave effect in Italy to the aforementioned United Nations Convention against Transnational Organised Crime and its protocols, in order to define the concept of ‘transnational organised criminal group’, to which the application of an aggravating circumstance is linked⁷⁹; furthermore, a broad interpretation of the concept of ‘emotional relationship’, adopted in the light of the relevant provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011, has been used for the purposes of applying the aggravating circumstance provided for in Article 612-bis, paragraph 2, of the Italian Criminal Code⁸⁰.

Consequently, the international origin of the criminal offence entails a number of significant specificities when interpreting and applying the relevant domestic provision, and this may also have an impact on its role when it is used to assess the lawfulness of an order.

The above applies, of course, also to other offences introduced into our legal system in fulfilment of international obligations regarding criminalisation, such as the aggravating circumstances introduced to implement the obligation set out in Article 4(1)(a) (a) of the 1965 United Nations Convention on the Elimination of All Forms of Racial Discrimination⁸¹, and the obligations set out in the aforementioned Convention on the Elimination of All Forms of Discrimination against Women.

2.2. *Obligations regarding the regulatory control of dangerous activities*

⁷⁸ See D. RUSSO, ‘*Reserva di legge e obblighi internazionali di tutela penale*’, op. cit., p. 313. To the contrary, according to the view that consistent interpretation cannot have the effect of aggravating the regime of individual criminal liability, except to justify a restrictive application of domestic rules establishing defences, see MANES, *Method and limits of interpretation consistent with supranational sources in criminal matters*, in ‘*Diritto penale contemporaneo*’, 9 July 2012, p. 17.

⁷⁹ Court of Cassation, judgment no. 50208 of 11 October 2019, para. 2.1.

⁸⁰ Court of Cassation, judgment no. 11920 of 9 January 2018, para. 9.

⁸¹ This provides that ‘States Parties [...] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof’.

Secondly, it must be borne in mind that, in certain cases and specific areas, the obligations regarding criminalisation are accompanied by more general obligations to *regulate* certain activities that are considered inherently dangerous in that, by their very nature, they are capable of infringing upon the fundamental rights of the individual as protected at the international level.

In this regard, one might consider the right to life, as protected by Article 2 of the ECHR⁸². The European Court has consistently reiterated that, although the wording of the provision expressly prohibits only the intentional deprivation of life, taken as a whole, it demonstrates that it also takes into account situations that may lead to a person's death unintentionally⁸³, including 'in the context of activities which may pose a risk to human life due to their inherently hazardous nature'⁸⁴, such as, by way of example, medical and industrial activities. With regard to this type of activity, the European Court has clarified that 'the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails, firstly, a *primary duty* on the State to *put in place a legislative and administrative framework* designed to provide effective deterrence against threats to the right to life'⁸⁵.

The European Court has consistently included military or police operations involving 'the use of lethal force' within the category of inherently dangerous activities which, therefore, require specific and detailed regulatory provisions⁸⁶: in this context, in fact, in order to verify whether States have complied with their obligation not to deprive a person of their life unless absolutely necessary, the Court also assesses, and indeed primarily assesses, the existence, in the national law governing the operation in question, of a system of *adequate and effective*

⁸² To this end, it should be noted that the first paragraph of the provision states that '[t]he right to life of every person shall be protected by law. No one shall be intentionally deprived of life [...]'. The second paragraph adds that '[d]eath shall not be regarded as resulting from a violation of this article if it is the result of the use of force which was absolutely necessary: (a) to ensure the defence of any person against unlawful violence; (b) to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) to suppress, in accordance with the law, a riot or insurrection'.

⁸³ European Court of Human Rights, *McCann and Others v. the United Kingdom* [GC], Application No. 18984/91, Judgment of 27 September 1995, para. 149.

⁸⁴ European Court of Human Rights, *Cannavacciuolo and Others v. Italy*, applications nos. 51567/14 and others, judgment of 20 January 2025, para. 376.

⁸⁵ *Ibid.*, para. 380, emphasis added.

⁸⁶ European Court of Human Rights, *Tagayeva and Others v. Russia*, applications nos. 26562/07 and others, judgment of 14 April 2017, para. 592.

safeguards against arbitrariness and abuse in the use of lethal weapons and, more generally, of force by the authorities, which is based on *the principle of absolute necessity*. In particular, using the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials⁸⁷ as an interpretative guide, the European Court has held that Article 2 of the ECHR entails, amongst other things, an obligation to establish a legal and regulatory framework governing the use of lethal force, given that ‘laws and regulations on the use of force should be sufficiently detailed and should prescribe, *inter alia*, the types of arms and ammunition permitted’⁸⁸. In this regard, whilst clarifying that ‘the lack of clarity in the legislative framework providing for the use of means that were at least potentially lethal [cannot], on its own, lead to a finding of a violation of Article 2 of the Convention’⁸⁹, it nevertheless reiterated that the legislation in question must be guided by the principle of absolute necessity and must contain *clear guidelines regarding the use of weapons*, including the obligation to minimise the risk of unnecessary harm and to exclude the use of weapons and ammunition that produce undesirable consequences, especially in dangerous contexts⁹⁰.

Thus, on various occasions, the Court has held that there had been a violation of Article 2 of the ECHR due to the failure of the Contracting States to adopt such a regulatory framework.

Consider, for example, the case of *Tagayeva and Others v. Russia*, which concerned the internal armed conflict in Russia’s Caucasus region, with specific reference to an operation to counter a terrorist attack involving the taking of hostages, during which the Russian authorities had used indiscriminate weapons, such as grenade launchers, flamethrowers and anti-tank guns, causing the deaths of several civilians. In that case, the European Court noted that the national legal system did not in any way regulate the choice of weapons to be used, including indiscriminate weapons⁹¹, and did not include any rules or limitations regarding the operational choice of the officer as to which weapon to use, and provided for substantial impunity for damage caused by the unintended effects produced by the weapon used, possibly in an

⁸⁷ United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Havana, 7 September 1990.

⁸⁸ European Court of Human Rights, *Tagayeva and Others v. Russia*, op. cit., para. 592.

⁸⁹ European Court of Human Rights, *Finogenov and Others v. Russia*, applications nos. 18299/03 and 27311/03, judgment of 20 December 2011, para. 230.

⁹⁰ European Court of Human Rights, *Tagayeva and Others v. Russia*, op. cit., para. 595.

⁹¹ Ibid., para. 597.

inappropriate context⁹² . It therefore concluded that the legal system did not provide adequate regulation of the use of weapons aimed at preventing the arbitrary use and abuse of force, thereby breaching the obligations to protect the right to life⁹³ .

More recently, and outside the context of armed conflict, the case of *Fraisie and Others v. France* concerned the death of a participant in a demonstration which, having turned violent, had required the intervention of the police. The victim had died as a result of the explosion of an OF-F1 grenade which had accidentally ended up between his neck and the rucksack he was carrying. The European Court noted that, in general, at the time of the events, French domestic law did not in any way define the criteria for selecting the most appropriate weapon in relation to a given threat, nor did it prescribe the need for its use to be proportionate and progressive, thus essentially leaving the individual officer with a wide margin of discretion in their choice⁹⁴ . Furthermore, and in particular, the European Court held that the possibility of using that specific type of grenade, given their exceptional danger, despite being provided for by law, was problematic in terms of the principles of absolute necessity and strict proportionality in the use of force, not least due to the absence of specific instructions in national legislation or internal circulars regarding the circumstances in which their use was lawful, and regarding the manner of their use⁹⁵ .

Such obligations, therefore, may also have primarily indirect relevance in determining the unlawful nature of an order. Indeed, where they are correctly implemented and the corresponding internal regulations are adopted, an order that involves a manifest breach of them – such as, for example, one requiring the use of indiscriminate weapons in an area where civilians are widely present – would undoubtedly be unlawful. In this case too, where the international obligation is fulfilled, it is not necessary to invoke it directly, given that the order is already unlawful due to its conflict with domestic law (), but, as seen above, the international rule remains relevant by virtue of the obligation of consistent interpretation that in any event rests with the national court.

⁹² Ibid., para. 598.

⁹³ Ibid., para. 599.

⁹⁴ European Court of Human Rights, *Fraisie and Others v. France*, applications nos. 47626/21 and 22525/22, judgment of 27 February 2025, para. 124.

⁹⁵ Ibid., para. 126.

3. Immediate relevance: the direct application of international law to determine the lawfulness of an order

The question remains as to whether, in certain circumstances, international law may be applied directly to determine the lawful or unlawful nature of an order and the consequent obligation to implement it. It is indeed possible for situations of *hetero-integration* to arise between domestic law and international law, with the consequence that the latter contributes to determining the content of the conduct required of the individual (the addressee of an order) in a given circumstance (section 3.1) or to define the limits within which a particular defence may be invoked, notably that of the fulfilment of a duty (section 3.2).

In this regard, it should be noted that, under our legal system, the Constitutional Court has long recognised that a criminal provision establishing a prohibition may, without raising any issue of compatibility with the principle of legality in criminal matters – enshrined in Article 25(2) of the Constitution – be limited to the ‘general requirement to comply with [...] acts and measures’ of a sub-legislative nature⁹⁶. On this basis, it has been noted that the principle of legality does not require the legislative command contained in the criminal provision to be exhaustive, but rather that it be specific, with the consequence that forms of hetero-integration of the criminal provision by the judge, or the reference of the provision to non-legislative rules, are also admissible, provided that the content of the command is, on the whole, sufficiently specific⁹⁷. Indeed, the Constitutional Court has expressly recognised the possibility of *heteronomous supplementation* of the criminal provision, where the legislator includes in the description of the criminal act ‘a reference to elements “external” to the provision that have the character of “normativity” – the so-called normative elements of the offence’, for example with reference to the so-called ‘special unlawfulness clauses, which [...] make the punitive response contingent upon the abusive, improper or unlawful nature of a specific conduct’; according to the Constitutional Court, such clauses may refer not only to

⁹⁶ See, for example, Constitutional Court, judgment no. 36 of 19 May 1964, concerning the reference of the criminal provision to an administrative act containing the list of prohibited narcotic substances, where the Court also held that the provision in question should be placed ‘within the framework of the relevant international agreements’, with the consequence that ‘the specific classifications made at international level render these lists nothing more than the implementation of the agreements concluded between the contracting states’.

⁹⁷ G. AMATO, *Sufficienza e completezza della legge penale*, in ‘Giurisprudenza costituzionale’, IX, No. 1, 1964, pp. 486–499; see also, more recently, D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, op. cit., p. 299.

other provisions of domestic law or equivalent acts, or to different sources, such as regional ones, ‘but also, where applicable, [...] to the laws of foreign jurisdictions’⁹⁸. As will be seen, the same applies where the unlawful or illegal nature is determined on the basis of a reference to rules of international law, including those relating to human rights.

The European Court has also had occasion to rule on the compatibility of blank criminal provisions and the technique of criminal legislation by reference with the principle of legality in criminal matters enshrined in Article 7 of the ECHR⁹⁹, clarifying that this legislative technique is not in itself incompatible with the requirements of precision and predictability arising from that principle. This applies even where the criminal provision containing the reference refers to provisions of a higher rank, such as constitutional provisions, which by their nature are formulated in terms of general principles and are therefore necessarily more vague and abstract than criminal provisions¹⁰⁰. However, in this case, the criminal provision establishing the reference and the non-criminal provision to which reference is made must, taken as a whole and through their mutual integration, satisfy the criteria of predictability imposed by the principle of legality, a circumstance which, according to the European Court, is certainly met where the criminal provision in any event sets out all the constituent elements of the criminal offence, whilst the non-criminal provision, which cannot in any event extend the scope of criminally relevant conduct, is limited to regulating further aspects of the criminal offence¹⁰¹, including, for example, the content of grounds for non-punishability or justification.

⁹⁸ Constitutional Court, judgment no. 21/09, op. cit., para. 4 of *the Legal Grounds*.

⁹⁹ Paragraph 1 of this provision states that ‘[n]o one may be convicted for an act or omission which, at the time it was committed, did not constitute an offence under domestic or international law. Likewise, no heavier penalty may be imposed than that which was applicable at the time the offence was committed’. Furthermore, paragraph 2 adds that ‘[t]his article shall not preclude the trial and punishment of any person guilty of an act or omission which, at the time it was committed, constituted a crime under the general principles of law recognised by civilised nations’.

¹⁰⁰ European Court of Human Rights, *Advisory Opinion on the use of the ‘blanket reference’ or ‘legislation by reference’ in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the act and the subsequently amended criminal law* [GC], application no. P16-2019-001, opinion of 29 May 2020, paras. 69–70.

¹⁰¹ *Ibid.*, para. 74: ‘The Court is therefore of the opinion that using the “blanket reference” or “legislation by reference” technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a

In light of the above, it is possible that in some cases international law may intervene to supplement the notion of ‘legality’ of the order referred to in the criminal provision itself or the defence of the fulfilment of a duty. And this, in our view, would be possible even where the domestic legal system – in breach of an international obligation – has failed to adopt the specific detailed provisions. In this regard, taking as an example the judgment handed down by the Constitutional Court in the Regeni case¹⁰², legal scholarship has highlighted how the Court ‘implicitly recognised that certain legal effects may derive directly from international criminal law provisions’, drawing on the possibility ‘that pre-existing domestic rules may be interpreted and applied, broadly and with *adverse* effects, so as to incorporate the content of international rules which the legislature has not yet reformulated into specific provisions’¹⁰³.

3.1. The hetero-integration of criminal offences establishing an obligation to comply with an order

In some cases, it may be the domestic provision which, in the criminal offence in question, establishes a specific obligation to comply with a given order that refers – implicitly or explicitly – to international law – which thus becomes directly applicable for the purpose of determining the lawfulness of an order and, consequently, the existence of an obligation to implement it or to oppose it. This is in accordance with the model of the heteronomous integration of the criminal provision by other rules, as highlighted above.

higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision. The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is for the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

¹⁰² It should be noted that, in that case, the Constitutional Court introduced an additional ground for proceedings in the absence of the defendant, where the defendant’s lack of knowledge of the proceedings is due to a failure to cooperate on the part of the State of nationality and/or residence, in cases concerning the offence of torture, as defined by Article 1 of the 1984 United Nations Convention. And this is regardless of the fact that the acts forming the subject of the charge were committed prior to the introduction of the relevant offence into Italian law (see Constitutional Court, judgment no. 192/23, cit., para. 7.1.2 of the *Legal Considerations*).

¹⁰³ D. RUSSO, ‘*Reserva di legge e obblighi internazionali di tutela penale*’, op. cit., p. 320.

A specific instance of implicit reference from domestic (criminal) law to international law has in fact been identified very recently by the Constitutional Court. This occurred when the Court was examining the issue of compatibility with the principle of legal certainty regarding the penalties that may be imposed on the shipowner and the captain of a (civilian) vessel who refuses to provide information or fails to comply with the instructions of the competent national authority for search and rescue at sea, as well as the national body responsible for coordinating border police activities and combating illegal immigration¹⁰⁴. In Judgment No 101 of 9 July 2025, the Constitutional Court held that the conduct required of the master could also be reconstructed in the light of international law, ‘in so far as such references relate to the SAR Convention and, in this context, acquire an unambiguous meaning for the master and the shipowner’, given that ‘[t]he national legislation fits harmoniously into the framework of shared rules and procedures established by that Convention, including in its interrelationships with other relevant international regulations’.¹⁰⁵ In essence, the Constitutional Court ruled that the conduct required of the ship’s captain (specifically, that of complying with the instructions of the competent authorities and providing the information requested by them) must also be determined by taking into account the relevant rules of international law, with the consequence that such conduct will be mandatory, and therefore its breach criminally punishable under domestic law, only where compatible with those rules. Indeed, the ruling expressly recognised that ‘[i]nternational sources may also contribute to defining the conditions for the application of a provision backed by sanctions’ and that ‘[t]his process of integration and osmosis not only does not undermine the principle of legality enshrined in Article 25 of the Constitution, but safeguards its essential guaranteeing function, when the national legislation itself, by its very nature, interacts with customary and treaty-based international obligations’¹⁰⁶.

Having thus clarified that, in order to be binding, the instructions of the competent authority must comply with the relevant international legislation, the Constitutional Court held that ‘the failure of the master and the shipowner to comply is relevant only insofar as the requests and instructions are lawfully issued and comply with the rules of the Hamburg Convention and other regulations concerning rescue at sea, which the signatory states are bound

¹⁰⁴ This refers to Article 1, paragraph 2-*sexies*, of Decree-Law No. 130 of 21 October 2020, as converted, as inserted by Article 1, paragraph 1, letter b), of Decree-Law No. 1 of 2 January 2023, as converted.

¹⁰⁵ Constitutional Court, judgment No. 101 of 7 July 2025, para. 13.3.

¹⁰⁶ *Ibid.*

to observe', given that [t]henon-compliance cannot be sanctioned as such, but only in so far as it relates to a measure that is legitimate from both a formal and substantive point of view'¹⁰⁷. The Constitutional Court then proceeded to reconstruct the content and purpose of the international obligations of assistance and rescue at sea as deriving from the various relevant international norms¹⁰⁸, which require not only that shipwrecked persons be brought to safety from imminent danger, but also their subsequent disembarkation at a 'safe harbour', to be understood as a place 'suitable for ensuring, upon disembarkation, respect for fundamental human rights, including in relation to the prohibition of refoulement, where there is a real risk to the physical and mental integrity of the shipwrecked persons: a safe harbour is one that safeguards respect for life, essential needs, freedom and absolute rights (the prohibition of torture and inhuman or degrading treatment)'".

On the basis of this, the Court therefore held that '[a]n order that leads to a breach of the primary obligation to save human life and that is likely to endanger it is not binding, and failure to comply with it cannot be sanctioned'¹⁰⁹. According to the Constitutional Court, therefore, no penalty may be imposed on a captain who refuses to carry out an order that is incompatible with the (international) legal framework governing rescue and life-saving operations at sea. In conclusion, it held that only a refusal to obey an order compatible with the aforementioned purposes may be penalised, given that such a refusal itself constitutes a violation of those very purposes:

'The provision in question does not penalise any failure to comply, but a failure to comply that is significant in nature, as required by the letter of the law and compliance with constitutional principles. The penalty concerns the deliberate breach of the obligations of cooperation imposed by the SAR Convention system and the acts lawfully issued by the competent authority. The provision in question, therefore, concerns those breaches which undermine the very objective of safeguarding human life at sea, inherent in the SAR

¹⁰⁷ Ibid., para. 13.5.

¹⁰⁸ This framework stems from the integration of the International Convention on Maritime Search and Rescue of 18 May 1998 (SAR Convention), the International Convention for the Safety of Life at Sea of 25 May 1980 (SOLAS Convention), and the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS).

¹⁰⁹ Ibid., para. 26.

Convention, and which, in the absence of legitimate grounds, are capable of compromising the system of cooperation established by that Convention'.¹¹⁰

In doing so, the Constitutional Court has identified a specific scenario in which the lawfulness of an order is determined by an implicit reference made by domestic law to international law, which thereby becomes directly applicable. This is because the specific activities covered by the order are regulated in detail by the relevant international sources.

However, a similar argument could be made for other types of offence that have a similar regulatory structure, which penalises non-compliance with orders and measures, but makes the imposition of the criminal sanction, either implicitly or explicitly, contingent upon the lawfulness of the order or measure. In this way, the provision implicitly refers to the rules that may be relevant in each case for determining the lawfulness of the order, including, where applicable, the rules of international human rights law relating to the activity covered by the order.

Consider, as regards the generality of the provisions, the aforementioned Article 650 of the Criminal Code, which imposes criminal sanctions on the conduct of anyone who 'fails to comply with a *measure lawfully issued* by the authorities', and which constitutes a typical example of a 'blank' criminal provision, the content of which can only be supplemented by other, non-criminal provisions capable of determining when the measure issued by the authorities is lawful¹¹¹. Since 1956, in fact, the Constitutional Court has recognised that the criminal offence in question 'by its very nature presupposes and expressly requires the

¹¹⁰ Ibid., para. 34.2.

¹¹¹ Constitutional Court, Judgment No. 168 of 8 July 1971, para. 1 of *the Legal Considerations*: 'This Court has examined the matter of so-called blank criminal provisions on several occasions, affirming that the principle of legality is not violated "when it is a law of the State – regardless of whether it is the same law or another law – that indicates with sufficient specificity the conditions, characteristics, content and limits of the measures taken by the non-legislative authority, the violation of which must be followed by a penalty" [...]. In the case of Article 650 of the Criminal Code, the material elements of the offence are described exhaustively in all their constituent parts [...]. It is for the judge to determine, on a case-by-case basis, whether the measure was issued in the exercise of a power or duty provided for by law or whether a State law determines 'with sufficient specificity' the conditions and scope of application of the measure'. This was confirmed by the Constitutional Court, Order No. 11 of 12 January 1977.

lawfulness of the orders issued by the competent authority', which must be ascertained on a case-by-case basis by the competent court¹¹².

The same could be said, as regards military personnel, in relation to the aforementioned offence of disobedience provided for in Article 173 of the Military Criminal Code in peacetime. In this case, it has already been noted that Article 1349, paragraph 2, of the Code of Military Law provides that a member of the military has a duty not to carry out an order only when it involves the commission of a criminal offence or when it is manifestly directed against the institutions of the State. As regards, more generally, other types of unlawful orders which do not necessarily entail the commission of an offence, Article 729 of Presidential Decree No. 90 of 15 March 2010 (namely the 'Consolidated Act on Regulatory Provisions Concerning the Military System') is relevant; its second paragraph provides that '[a] military personnel to whom an *order* is given *which they do not consider to be in accordance with the regulations in force* must, in a spirit of loyal and active participation, bring this to the attention of the person who gave the order, stating their reasons, and is required to carry it out if the order is confirmed'. However, as has been observed in legal scholarship, the confirmation of the order is not in itself sufficient to render it lawful, and the judge, before passing sentence, should in any event independently ascertain that the order was lawful¹¹³. This, moreover, is in accordance with the position of the Court of Cassation regarding other types of offences that penalise non-compliance with measures issued by the authorities, but on the premise of their lawfulness¹¹⁴.

If one considers these offences (or similar ones provided for in domestic law) in the light of the clarifications provided by the Constitutional Court in Judgment No. 101 of 2025, it seems undeniable that there is scope in this area for the direct application of international human rights law. Indeed, it may be considered that the court is permitted to exclude the application of such criminal offences, which presuppose non-compliance with orders and measures, where the defendant succeeds in demonstrating that the superior's order or the authority's measure that was not complied with was incompatible with the norms of international human rights law, not

¹¹² Constitutional Court, judgment No. 8 of 2 July 1956. In that case, the Court emphasised that the criminal penalty for breaching contingent and urgent ordinances was subject to compliance with the following requirements: 'limited duration in relation to the dictates of necessity and urgency; adequate justification; effective publication in cases where the measure is not of an individual nature; conformity of the measure with the principles of the legal system'.

¹¹³ D. NOTARO, *Esecuzione dell'ordine militare o disobbedienza responsabile*, cit., p. 5.

¹¹⁴ See, for example, Court of Cassation, judgment no. 3339 of 13 December 2011.

only those that impose the criminalisation of certain conduct, but also those that provide, more generally, for the regulation and adoption of preventive and precautionary measures relating to certain dangerous activities: one might consider, for example, an order to use certain indiscriminate weapons in a densely populated area, or to use unauthorised interrogation techniques, or to detain a person unlawfully and outside the cases provided for by law.

In such cases, moreover, there is not even a question of the necessary observance of the principle of legality in criminal matters, since the rules of international human rights law that are directly applicable for the purpose of determining the illegality of the order would produce effects *in bonam partem*, specifically in the sense of precluding the commission of the offence and thus the punishment of the individual.

3.2. The exogenous integration of the defence of compliance with an order

The situation is different, however, where international law is invoked to supplement the elements necessary to recognise the applicability of the defence of compliance with an order, which, as is well known, allows one to be exempted from criminal liability only where it can be demonstrated that the order in question was *lawful*. In this case, the direct application of international law to demonstrate the illegitimate nature of the order would have the effect of precluding the invocation of the defence in question and would therefore produce *adverse* effects for the defendant. However, there are reasons to believe that such an approach is permissible.

On this point, it should be noted that it has long been proposed in legal scholarship that certain defences, such as those referred to in Articles 52 (self-defence) and 53 (lawful use of weapons) of the Criminal Code, must be interpreted in accordance with the relevant obligations regarding the protection of human rights and, in particular, in accordance with the limits imposed by the protection of the right to life, as set out in Article 2 of the ECHR. On the basis of such a compliant interpretation, conduct carried out in the context of legitimate self-defence and the legitimate use of weapons should in any event be proportionate to the attack suffered by the agent, provided always that such a restrictive interpretation is foreseeable in the specific case and is therefore not applied retroactively, as required by the principle of legality referred to in Article 7 of the ECHR¹¹⁵. Consequently, the obligations arising from the ECHR and other

¹¹⁵ For an initial proposal to this effect, see F. VIGANÒ, *Il giudice penale e l'interpretazione conforme alle norme sovranazionali*, cit., pp. 670 ff. The same idea has also been endorsed by those who consider that

human rights treaties not only to criminalise, but also to investigate and effectively punish human rights violations, as indicated above, would in certain circumstances give rise to the need not to apply certain defences, even where these are otherwise established according to an assessment strictly limited to the parameters of domestic law, without prejudice in any case to the need to respect the principle of non-retroactivity¹¹⁶.

This doctrinal thesis, which has been criticised by criminal law scholars (albeit with unconvincing arguments)¹¹⁷, has in fact now been accepted by the Court of Cassation, which has expressly recognised the relevance of international obligations to protect life, enshrined in Article 2 of the ECHR and Article 6 of the International Covenant on Civil and Political Rights, regardless of their transposition into specific provisions of domestic law, for the purpose of interpreting the defence of self-defence in a manner consistent with those obligations. In particular, the Court of Cassation has ruled, invoking the aforementioned provisions and the relevant case law that has interpreted them (in particular, that of the European Court), that ‘[e]ven in order to give Article 52 of the Criminal Code a constitutionally oriented interpretation, all the more so when assessing defensive conduct that concretely infringes the fundamental right to life, one cannot therefore disregard the requirement of necessity with

interpretation in conformity with international and supranational rules cannot, in general, have effects *in malam partem* that aggravate the regime of individual criminal liability, noting that ‘on this primary value there is a constitutional convergence that renders it entirely original (and which likely even downplays the contribution of European case law), calling for equally distinctive assessments (and balances)’ (V. MANES, *Metodo e limiti dell’interpretazione conforme alle norme sovranazionali in materia penale*, op. cit., p. 21).

¹¹⁶ F. VIGANÒ, *L’arbitrio del non punire: sugli obblighi di tutela penale dei diritti fondamentali*, cit., p. 2677.

¹¹⁷ See, for example, A. CAVALIERE, “Diritti” anziché “beni giuridici” e “principi” in diritto penale?, cit., p. 77, who argues that using Article 2 of the ECHR to interpret defences would lead to “rather disturbing” results, for example because it permits the killing of a person “to carry out a lawful arrest”. The author fails to consider how this provision has been interpreted by the European Court, namely as implying the need to respect the principle of ‘absolute necessity’ in the use of lethal force, with the consequence that the provision must be understood as authorising the killing of a person where, in the context of an operation aimed at their arrest or the other exceptions provided for by the provision, this is absolutely necessary to protect a person’s life, and with the clarification that such exceptions must be interpreted and applied restrictively and presuppose the agent’s honest and reasonable belief that they are reacting to a risk (see, among many others, European Court of Human Rights, *Giuliani and Gaggio v. Italy* [GC], application no. 23458/02, judgment of 24 March 2008, paras. 176–179). The position of the author cited, according to which the ECHR unreasonably permits the killing of a person in order to arrest them, is therefore based on an incorrect reading of the provision in question and of the way in which it is interpreted and applied by the European Court.

regard to the protection of the person from unlawful violence, in the absence of which the infringement of that right can never be said to be justified'¹¹⁸ . Therefore, it can be said that, even from this perspective, the Court of Cassation recognises the application of an interpretation of domestic law in conformity with international norms, even where *this has adverse* effects for the defendant.

Now, a partly similar argument can be made regarding the defence of the fulfilment of a duty, referred to in Article 51 of the Criminal Code, which, as we have already indicated, provides in paragraph 3 that 'a person who has 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'. As is well known, the established case law of the Court of Cassation holds that, for this defence to apply, 'it is necessary that the order be lawful, that is to say, issued by the competent authority, that it was given in the prescribed form and that, finally, its content falls within the scope of the subordinate's duties as regards its essence, means and purpose'¹¹⁹ .

In this case, therefore, we are not dealing with a case of conforming interpretation, but rather with the integration of domestic and international law, following the model outlined above. In particular, what is required of the judge is not to interpret the provision on the defence (Article 51 of the Criminal Code) in a manner consistent with international human rights law, but rather to apply the latter in order to determine what is meant by a *legitimate* order and, consequently, to establish whether or not the defence is applicable. This is no different from the examples cited above, according to which what constitutes an *illegal* narcotic is determined by applying the administrative regulations that specify which substances are illegal.

The European Court has had occasion to rule on this matter when dealing with cases in which members of the armed forces had been convicted of committing an offence, despite their claim that they had merely carried out an order issued by a superior which, in some cases, was at the time of the offence compatible with the domestic law of their State of nationality. The European Court, whilst recalling that the requirements of foreseeability and precision of the criminal law imply that, for a penalty to be lawful, there must be an element of individual responsibility¹²⁰ , which could in certain cases be excluded by the legitimate reliance placed on

¹¹⁸ Court of Cassation, judgment no. 49883 of 10 December 2019, para. 3.2.2.

¹¹⁹ Court of Cassation, judgment no. 4554/24, cit., para. 7.

¹²⁰ It stated that 'a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established' and that, consequently, 'Article 7 requires, for the purposes of punishment, the existence of a mental link through which an element of liability may

the lawfulness of the order received, also clarified that the mere conformity of an order with the domestic law of a State is not sufficient to render it lawful, since, in its view, members of the armed forces ‘could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights’¹²¹. This principle has been reaffirmed regardless of whether or not the order is compatible with domestic law¹²², and the European Court has also clarified that even the fact that the (criminal) conduct covered by the order is normally tolerated under the legal system in question cannot be invoked as a justification¹²³: in doing so, it made clear that the execution of orders *manifestly incompatible* with international human rights law, and in particular with the obligations arising from the protection of the right to life, cannot be invoked as a defence against criminal liability by the person who actually carried out the order, whilst it acknowledged that it may in some cases be legitimately taken into account for the purposes of determining and quantifying the penalty¹²⁴.

This conclusion was justified precisely on the basis of a sort of automatic and implicit hetero-integration between domestic law and international law, given that the European Court has affirmed that the accessibility and foreseeability of a criminal offence must also be determined by taking into account a sort of implicit ‘requirement to comply with international fundamental human rights instruments’, regardless of the fact that such instruments are not

be detected in the conduct of the person who physically committed the offence’ (European Court of Human Rights, *G.I.E.M. and Others v. Italy* [GC], applications nos. 1828/06 and others, judgment of 28 June 2018, paras. 242 and 243; European Court of Human Rights, *Yüksel Yalçinkaya v. Turkey* [GC], application no. 15669/20, judgment of 26 November 2023, para. 242).

¹²¹ European Court of Human Rights, *K.-H. W. v. Germany* [GC], application no. 37201/97, judgment of 22 March 2001, para. 75; European Court of Human Rights, *Kononov v. Latvia* [GC], cit., para. 236; European Court of Human Rights, *Vasiliauskas v. Lithuania* [GC], application no. 35343/05, judgment of 20 October 2015, para. 158;

¹²² European Court of Human Rights, *Drėlingas v. Lithuania*, application no. 28859/16, judgment of 12 March 2019, para. 99.

¹²³ European Court of Human Rights, *Vasiliauskas v. Lithuania* [GC], op. cit., para. 158: ‘A State’s practice of tolerating or encouraging certain acts that have been deemed criminal offences under national or international legal instruments, and the sense of impunity which such practice instils in the perpetrators of such acts, does not prevent them from being brought to justice and punished’.

¹²⁴ European Court of Human Rights, *K.-H. W. v. Germany* [GC], op. cit., para. 81.

directly binding on the individual and that their violation cannot, in itself, give rise to individual criminal liability¹²⁵.

On the basis of this approach, the European Court has expressly ruled out the possibility that an individual could invoke an order from a superior to exempt themselves from criminal liability where, although compatible with domestic law, the order given was manifestly in breach of international standards regarding the protection of the right to life. For example, in the case of *K.-H. W. C.*, it held that a soldier of the German Democratic Republic, convicted of murder by the German courts following the reunification of Germany, could not rely on the order issued by his superiors to shoot on sight anyone attempting to cross the border between the two Germanys in order to avoid criminal liability for murder. In this regard, the Court held that '[e]ven though the applicant was in a particularly difficult situation on the spot, in view of the political context in the GDR at the material time, such orders could not justify firing on unarmed persons who were merely trying to leave the country'¹²⁶, and concurred with the view of the German courts that, regardless of the order received, 'it must have been immediately apparent and obvious even to an indoctrinated person that it breached the principle of proportionality and the fundamental prohibition on the taking of human life'¹²⁷. Similarly, and on the basis of the same arguments, the European Court rejected a similar argument when it was raised by a KGB officer convicted of genocide on account of the deportation and summary execution of two Lithuanian partisans, who had defended himself in domestic proceedings by claiming that he had not taken the decision in question¹²⁸.

In light of the above, namely the need for implicit hetero-integration between domestic and international law, we believe we can argue that this applies in all cases, and therefore also when the State, in breach of the aforementioned international obligations regulatory framework, has failed to adopt the corresponding domestic rules, at least in circumstances where the order is *manifestly incompatible* with the international obligations in question. In this sense, there would be a limited scope for the direct applicability of the international norm.

Such instances of reference to the international norm would not be incompatible with the principle of legality and the requirement of statutory provision, given that in these cases criminal liability does not arise from the violation of international law per se, but from the

¹²⁵ European Court of Human Rights, *Kononov v. Latvia* [GC], op. cit., para. 236.

¹²⁶ European Court of Human Rights, *K.-H. W. v. Germany* [GC], op. cit., para. 76.

¹²⁷ Ibid., para. 80.

¹²⁸ European Court of Human Rights, *Drėlingas v. Lithuania*, cit., para. 99.

fulfilment of all the elements of the offence as defined by domestic law, whilst international law intervenes to supplement the content of the defence. It is, in fact, the defence of compliance with an order that must be applied taking into account the aforementioned implicit reference to international human rights law: it will be invocable only when the order can be said to be compatible with the obligations arising therefrom, given that the lawfulness of an order must also be determined with reference to the same.

Obviously, as this involves a form of reference to a higher-ranking source of law (the ECHR or other rules of international human rights law), which by definition is formulated in vague and principled terms, the aforementioned requirements of predictability necessitate clarification as to in which cases an order may be considered unlawful due to a violation of international human rights law. In this regard, the Court has clarified that this occurs where an order is *manifestly incompatible* with the obligations arising from the protection of the right to life, guaranteed by Article 2 of the ECHR. To gain an understanding of when a duty to disobey arises, we may therefore refer to cases in which the European Court has held that a particular conduct constituted a *flagrant or manifest* violation of international obligations to protect human life. In this regard, the European Court has repeatedly held that the use of lethal force, especially if indiscriminate, must comply with *the principle of absolute necessity*¹²⁹, meaning that it must be absolutely necessary for one of the purposes set out in Article 1(2) and strictly proportionate to achieving that purpose. To this end, the Court has clarified that States have an obligation to ensure that an operation involving the use of lethal force is planned and controlled by the authorities in such a way as to minimise, to the greatest extent possible, the use of lethal force. The authorities must exercise particular diligence in ensuring that risks to life are minimised¹³⁰. And it is precisely with reference to this obligation that the Court has found, in certain cases, a flagrant and manifest violation of Article 2, for example in the case of the use of massive and indiscriminate weapons in the presence of civilians¹³¹, or in any event the use

¹²⁹ European Court of Human Rights, *Tagayeva and Others v. Russia*, op. cit., para. 584.

¹³⁰ European Court of Human Rights, *Isayeva and Others v. Russia*, Application No. 57950/00, judgment of 24 February 2005, para. 175.

¹³¹ *Ibid.*, para. 191. The case, relating to the armed conflict in Chechnya, concerned the use of bombs, missiles and other heavy weapons in a densely populated area, outside the context of war in the strict sense and without prior evacuation of civilians. The European Court held that such an operation cannot be reconciled with the degree of caution required of the armed forces in a democratic society, and stands in flagrant contrast to the aim of protecting people's lives from violence. Similarly, in the European Court of Human Rights case *Tagayeva and Others v. Russia*, cit., para. 584, the Court stated that the primary aim of the authorities must be to protect

of weapons that are wholly disproportionate to the situation¹³², such as the indiscriminate aerial bombardment of civilians and their villages¹³³.

It can therefore be argued that where an order entails a *flagrant and manifest violation* of the obligations to protect the right to life, as enshrined in Article 2 of the ECHR, the order in question may be considered unlawful, with the consequence that anyone carrying it out could not subsequently invoke the defence of the performance of a duty to exempt themselves from criminal liability.

4. Concluding remarks

In light of the above, it can be argued that international human rights law implies an obligation of responsible disobedience, at least in cases where orders are manifestly contrary to and in flagrant breach of human rights obligations. And this— as well as in the case of an order to torture, also with regard to the essential obligations to protect human life, such as in the case of operations that in no way include planning aimed at reducing the use of lethal force to the absolute minimum and minimising collateral damage, or an order for the massive use of weapons against defenceless individuals, or the use of heavy weapons in a manner that is totally disproportionate to the situation in question.

International standards, including those of international human rights treaties, can in fact be used to assess the *legitimacy of an order*. And this occurs in two ways. Where the norm

people's lives from unlawful violence. Consequently, it held that the massive use of indiscriminate weapons stands in flagrant contrast to that aim.

¹³² In the European Court of Human Rights, *Esmukhambetov and Others v. Russia*, application no. 23445/03, judgment of 29 March 2011, concerning an attack by the Russian armed forces during the conflict in Chechnya aimed at arresting separatists, the Court found that the authorities had not done everything necessary to minimise the risks to life, both of those targeted by the attack and of the civilians involved. In particular, the Court held that the use of military aircraft equipped with heavy weapons was, in itself, manifestly disproportionate to the stated aim of arresting the separatists.

¹³³ In the European Court of Human Rights, *Benzer and Others v. Turkey*, application no. 23502/06, judgment of 12 November 2013, the Court held that such an operation is not compatible with any of the legitimate aims of the use of lethal force set out in Article 2(2) of the ECHR and, furthermore, with any of the customary rules of international humanitarian law or any treaty governing the use of armed force in the context of armed conflicts, and therefore constitutes a flagrant and manifest violation of the obligations to protect the right to life.

imposes obligations regarding criminalisation or regulatory provisions, and such obligations have been fulfilled, the relevant domestic rules determine the lawful or unlawful nature of the order, with the proviso that they must in any case be interpreted in accordance with the international norms from which they derive. Secondly, it is possible that the international norm directly incorporates both the content of the criminal command and that of the defence of a legitimate order, and this regardless of any failure to transpose into domestic law the regulatory provisions whose adoption would be mandatory under international norms. This applies both where such integration produces effects *in bonam partem*, in the sense of excluding the inclusion of an offence consisting in the failure to comply with a legitimate order, and where it produces effects *in malam partem*, in the sense of precluding the invocation of the defence of compliance with a legitimate order.

This latter conclusion requires us to address the argument that it is not possible to derive *adverse* effects for the defendant from human rights treaties, given the existence, for example, of Article 53 of the ECHR, which states that ‘nothing in this Convention shall be interpreted as limiting or prejudicing the human rights and fundamental freedoms which may be recognised under the laws of any Contracting Party or under any other agreement to which it is a party’. This provision has in fact been interpreted by legal scholars as ‘an impediment which [...] precludes, even for the domestic court, the possibility of disapplying the national law if it is more favourable in terms of both the facts of the case and the legal consequences’¹³⁴. Now, one can certainly agree that the ordinary court cannot set aside domestic rules incompatible with international rules, but this does not derive at all from Article 53, but rather (as seen above) from the fact that in our legal system the review of the constitutionality of laws is vested in the Constitutional Court. Consequently, the domestic court remains free to apply directly applicable international rules where they do not conflict with domestic law; whereas, where such a conflict exists, the only body competent to assert the hierarchical primacy of the international rule—which derives from Article 117(1) of the Constitution—is the Constitutional Court.

This reasoning then proceeds to the effect that ‘the Italian regulation of criminal law in time and space, of the constituent elements of an offence and the grounds for criminal liability, including the general limits on non-punishability, as well as the imposition of penalties, covered, such regulation, by an absolute and constitutional reserve of state action, presents

¹³⁴ P. GUALTIERI, *Discipline nazionali favorevoli e diritti dell’uomo. Le ragioni di controllo limiti garantistici*, cit. p. 9.

itself, in fact, both as a basic model below which no derogations or judicial arguments with ‘invalidating’ effects, broadly understood, are conceivable, and as a limit to the applicability of the Convention itself¹³⁵. According to this interpretation, international human rights standards could never entail a worsening *in malam partem* of the rules governing criminal liability¹³⁶, and consequently ‘the impact of the fact on the interests protected by a classification in terms of human rights cannot prevent the application of a ground for non-punishability, if this, in turn, implies compliance with Article 53 of the ECHR, as a rule imposing a self-binding obligation on the international regulation of human rights and relations with the national legislation of the Contracting States’¹³⁷. The author of this view goes on to argue that Article 53 of the ECHR ‘cannot serve as an instrument that would legitimise the Italian courts in disapplying or limiting, *in any way*, the balance between opposing interests already achieved by the legislature [...] except to expand the scope of the offender’s personal liberty contained within a specific general rule of criminal law, given that any action aimed at restricting that scope is incompatible with the absolute reservation of state law’, and this also applies to defences¹³⁸.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, p. 19: ‘Taking into account Article 53 of the ECHR, it follows that any effect arising from the classification of a particular interest as a human right, *where the legislative framework remains unchanged*, cannot limit the domestic regulation of the offence and the penalty, at least as regards the production of effects *in malam partem*, since preclusions on application are not admissible with regard to the personal, spatial, temporal and material dimensions of the criminal law merely because a specific human right comes into play in any case’.

¹³⁷ *Ibid.* The author goes on to argue that ‘[t]his conclusion applies across the board to all provisions that produce favourable effects and, above all, to any ground for non-punishability, generically provided for as such by the domestic legislature, whether it relates to the personal dimension of the criminal law provision, such as immunities or other instances of inability to be the addressee of the criminal obligation to act or refrain from acting, or to the more strictly material dimension, because it is limited to the obligation to adopt the type of conduct imposed, such as, in particular, situations attributable not only to the category of justifying grounds or so-called exculpatory grounds, but also to those of impossible offences [...]’.

¹³⁸ *Ibid.*, p. 20. In the same vein, A. CAVALIERE, “Diritti” anziché “beni giuridici” e “principi” in diritto penale?, cit., p. 78, according to whom ‘invoking the case law of the European Court of Human Rights to render punishable conduct which, under Italian law, namely pursuant to Articles 52–53 of the Criminal Code, is not punishable’ would be incompatible with the *rationale* of safeguarding the principle of legality. Or again, CARRARO, *La Convenzione di Merida non contempla un obbligo di incriminazione dell’abuso d’ufficio: questioni risolte e questioni ancora aperte. Osservazioni a prima lettura su C. Cost. 3 luglio 2025*, n. 95, cit., p. 26, according to which international law would unduly influence the parliamentary decision to extend the individual’s sphere of freedom by deeming certain conduct criminally lawful.

This interpretation stems, in our view, from the fundamental misunderstanding that extending the scope of what is criminally relevant would always entail a reduction in the level of protection of human rights within the domestic legal system, which therefore could not be achieved on the basis of the provisions of the Convention, given that such a reduction is prohibited by Article 53 of the ECHR. However, in our view, this approach fails to grasp the meaning of a human rights violation.

Firstly, it has been observed that, from a general perspective, in many cases international human rights law imposes obligations to introduce criminal offences and to investigate and prosecute the relevant conduct, precisely for the purpose of protecting human rights themselves (obviously those of persons other than the suspect and the accused). And these obligations must be implemented in good faith by all state bodies.

As regards the defendant, however, he would be entitled to ensure that the criminalisation of certain acts reflects the criteria of ‘the necessity and appropriateness of criminal protection, as elements of a strict proportionality assessment of such intervention’, which would constitute a genuine subjective right of the offender, ‘provided as a defence against unlawful penalties’¹³⁹. However, whilst part of the doctrine holds that this should preclude extending the scope of criminal liability on the basis of the provisions regarding the obligations of criminalisation¹⁴⁰, in reality it is precisely on this assessment that the extension of the scope of criminal liability is based in this case: the criminalisation of such conduct does not constitute a violation of the fundamental rights of the offender precisely because that conduct is so gravely detrimental to the victims’ absolutely fundamental human rights as to justify the State’s response through criminal law.

Furthermore, this approach stems from the erroneous belief that extending the scope of what is criminally relevant constitutes in itself a violation of human rights, in that it reduces the individual’s sphere of freedom, as if there were some sort of right to the non-existence of criminal offences or a right not to be prosecuted, rights whose non-existence has been

¹³⁹ A. CAVALIERE, “Diritti” anziché “beni giuridici” e “principi” in diritto penale?, cit., p. 71, referring to F. VIGANÒ, *Diritto penale e diritti della persona*, op. cit., p. 9.

¹⁴⁰ A. CAVALIERE, “Diritti” anziché “beni giuridici” e “principi” in diritto penale?, cit., p. 72. The author cites, as examples of ineffective, disproportionate and therefore unjustified criminal measures, cases that have nothing to do with the protection of the most fundamental human rights guaranteed by criminalisation obligations, such as those relating to the criminalisation of soft drugs, or indeed the criminalisation of abortion.

consistently reaffirmed by the European Court¹⁴¹. And this is without considering that, on the contrary, such a reduction in the individual's sphere of freedom implies a violation of human rights only if it is unjustified: if a conviction is handed down following a fair trial that respects all the rights of defence required by Article 6 of the ECHR, and is compatible with the principle of legality referred to in Article 7 of the ECHR, in the sense that it is based on a clear, precise and foreseeable legal basis and is not interpreted or applied in breach of the principle of non-retroactivity, the conviction is perfectly compatible with the protection of human rights.

It follows that the above interpretation, according to which in certain circumstances it is possible to apply directly provisions imposing obligations of criminalisation or regulatory control in order to deem an order unlawful and thus preclude, for example, the invocation of the defence of the performance of a duty, 'does not entail any derogation from the principle of legality in criminal matters, neither in terms of the prohibition on the retroactive application of criminal law, since the international rule is already present in the legal system, nor in terms of the principle of determinacy (and thus of the accessibility and predictability of the prohibition), since the international rule [...] is quite clear in its definition of the typical conduct'¹⁴².

¹⁴¹ See European Court of Human Rights, *International Bank for Commerce and Development AD and Others v. Bulgaria*, Application No. 7031/05, judgment of 2 June 2016, para. 129, and the cases cited therein: 'Article 6 of the Convention does not guarantee the right not to be criminally prosecuted; it only enshrines the right to a fair trial within a reasonable time if and when criminal charges are brought against a person [...] Nor can a general right not to be criminally prosecuted be derived from Article 8 of the Convention. The appropriateness of a decision to prosecute thus normally falls outside the scope of the Court's review'.

¹⁴² D. RUSSO, *Riserva di legge e obblighi internazionali di tutela penale*, op. cit., p. 320. See also, at pp. 322–323: 'where the legislature has failed to transpose, or has intervened too late or incompletely in transposing, international norms, such failure undermines the effectiveness of international law and places the state legal system in contradiction with its own commitments and values. This is a serious consequence that requires every conceptual effort to be made to reconcile compliance with international obligations regarding criminal protection with the guaranteeing function of the legal reserve, at least by allowing the judge to derive from the transposed international norms, by way of an enforcement order, provisions that are not merely programmatic in nature, but which, on the contrary, are formulated in a clear, complete and self-executing manner, all the necessary effects to supplement the content of domestic provisions. The application of the international provision with effects *in malam partem*, in this case, would have no subversive impact on the value of the predictability of the criminal consequences of the conduct, since it would be firmly anchored to the clear and precise wording of an international provision already transposed by an enforcement order, namely through a legislative text that refers to the treaty, also physically annexing its text, which is comparable, in terms of legal certainty, to a provision enacted by Parliament'.

Consequently, it cannot be considered that the mere fact that the application of rules of international law leads to an extension of the scope of what is criminally sanctioned constitutes a reduction in the level of protection of human rights within the domestic legal system; on the contrary, as we have sought to demonstrate, it often serves precisely to raise that level of protection.