Maurizio Block

Interview on the problem of responsible obedience

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ABSTRACT

The interview focuses on the principle of responsible obedience in Italian military law, analysing its historical evolution and current challenges. Starting from the overcoming of the authoritarian model of the first half of the twentieth century, it examines the tension between the operational need for immediate execution and the duty to question illegitimate orders. The role of language, case law on insubordination and criminal orders, and the impact of the cultural elevation of the military are discussed. A picture emerges in which hierarchical authority must be based on authority and sharing, balancing discipline and efficiency with individual responsibility.

KEYWORDS

Military law; Duty to obey; Superior orders; Duty to disobey manifestly unlawful orders.

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Maurizio Block[1]

Interview on the problem of responsible obedience[2]

Various studies in the psychology of obedience seem to suggest that a soldier's sense of responsibility and control over their actions tends to diminish when carrying out an order, compared to when performing actions chosen independently. What is your view on this?

First of all, it is worth noting that the topic we will be discussing is, specifically, military orders. As is well known, failure to comply with an order in a military context is a criminal offence. Of particular relevance is Article 173 of the Military Penal Code[3] .

Now, as regards the issues you mentioned in your question, I would say first of all that the idea of an order carried out in an entirely automatic manner – an idea that suggests a limitation on the interpretative abilities of the subordinate soldier to whom it is addressed – is currently to be regarded as a historical relic. This is an idea that may have been appropriate in reference to another era and another type of society, such as that of our country in the 1940s, for example – in particular, the society in which, in 1941, the Military Penal Code of Peace and the Military Penal Code of War were conceived. It was a society in which, generally speaking, the soldier was characterised as a figure of limited cultural background: the social conditions of the time were such that there was no opportunity to attend school, let alone to obtain an adequate education through the Armed Forces. In this case, therefore, the role of the subordinate soldier boiled down to that of someone who had to carry out orders, and nothing more than that. To this must be added that the Military Penal Codes for wartime and peacetime, having been enacted in 1941, were situated in a very specific historical context, namely that of a time of war. Well, in wartime, orders take on even greater importance than they do

[1] Military Prosecutor General at the Court of Cassation, Editor-in-Chief of the journal *Rassegna della giustizia militare* and President of the Italian section of *the Société de Droit Militaire et de Droit de la Guerre*.

[2] The interview, conducted on 19 November 2024, was led by Giorgio Pino (in person), Marco Brigaglia, Salvatore Di Piazza and Alessandro Spena (online), with the assistance of Luca Falsone (online) and Matija Zgur (in person). A list of questions had been sent to Prosecutor Block in advance, and these are included at the end of this chapter. During the interview, some questions were grouped together and put forward with reference to the text provided, whilst other questions were added to explore specific points in greater depth. The interview was subsequently transcribed and edited by Luca Falsone, and reviewed by Prosecutor Block.

[3] 'A member of the armed forces who refuses, omits or delays to obey an order relating to service or discipline, issued to him by a superior, shall be punished with military imprisonment for up to one year'.

in peacetime. It takes on specific and distinctive characteristics which, precisely, differ from those in peacetime, with the need for orders to be carried out immediately becoming even more pressing as a result of a reinforced hierarchical structure. So much so that failure to comply with an order was punishable by extremely severe penalties, extending as far as the death penalty. The consequence was that in the years that followed, even after the Constitution came into force, the same conception of orders that had developed in wartime was retained.

On the other hand, we must remember that, although the Constitution came into force in 1948, a great many provisions of the Military Penal Code survived until the 1980s and, in particular, until the entry into force of Law No. 180 of 7 May 1981 (containing "Amendments to the military judicial system in peacetime"). The latter, in fact, introduced a change and, in particular, the abandonment of principles and regulations that should already have been abolished thirty years earlier. Of these, although they do not concern the subject we are dealing with today, it is possible to give a few examples: first of all, until 1980 the investigating judge reported directly to the Military Prosecutor, and there was therefore a subordination of the judicial power to the prosecuting power; furthermore, ship's courts were in operation; as these were established only after a dispute had arisen, they stood in direct contradiction to the principle of legality, according to which the natural judge must be pre-established and designated by law (Art. 25 of the Constitution).

Thus, the concept of orders and consequently the conduct involved in carrying them out have also evolved over the last few decades. As early as Law No. 382 of 11 July 1978 [containing "Principles of military discipline"], Article 4 addressed the issue of orders and established the principle that a person carrying out an order is not liable for its illegality; however, it also provided that, when the order is "manifestly directed against the institutions of the State" or when its execution constitutes "in any event a manifest offence", the order must be disregarded. We have even come to conceive of a duty of disobedience on the part of the soldier who receives a wholly unlawful order.

So, I would say that today we have reached a radical and profound change within military society. And this profound change, on the other hand, also depends on a general improvement in the educational standards of the military. Consider, for example, that around 1983–84, I was teaching at the Carabinieri Non-Commissioned Officers' School and the average of my students had only attained lower secondary school qualifications. Today, however, military personnel hold a degree or at least a sixth-form certificate. Upon completion of their military training, they are awarded a three-year bachelor's degree, which can be extended to a five-year degree. It follows that the educational level of military personnel has changed profoundly, even among those of lower rank.

As regards the topic we are discussing today, therefore, we can say that we have begun – and are still pursuing – a path towards the conception of an order that bears the hallmarks of *a responsible*

order. And, of course, the military institution has also had to take this on board, because whilst in 1941 – to give a clear example – one simply needed an extra 'star' or 'stripe' to assert one's superior rank and thus to command respect and imbue orders with unquestionable credibility and authority, this is no longer the case today. Personally, I believe that today the extra 'star' is certainly indispensable for issuing an order, but it is no longer sufficient: the superior in rank needs to demonstrate their authority; that is, they must be able to convey to the subordinate that sense of credibility which is inherent in the concept of superiority in rank. On the other hand – that is, from the subordinate's perspective – I believe we must always remember that the military world differs from the civilian world due to specific characteristics. These characteristics, which serve as distinguishing features between the two worlds, must be preserved and cannot be abolished: indeed, we cannot allow an order issued by a superior to end up having merely conversational significance. Unlike the civilian sphere, in fact, the military sphere has a specific criminal provision that safeguards order and discipline and punishes disobedience, namely Article 173 of the Military Penal Code. But even more significant – even if no criminal legislation existed – is the fact that the military sphere involves requirements for speed and efficiency typical of the military context, which necessitate dealing with actual and concrete dangerous situations, for which the superior must take responsibility and which must be resolved, including through the immediate execution of orders.

In my view, therefore, these two aspects must be reconciled: on the one hand, a specific need, inherent to the military world, for efficiency and thus for immediacy in the fulfilment of certain tasks carried out through orders; on the other, the consideration that military society has changed and that the soldier is no longer a mere executor of orders, a sort of *'longa manus'* of the superior, but rather a person with their own cultural background. Now, it is clear that, when faced with sudden situations requiring an immediate reaction, the factor of the subordinate's higher cultural level cannot be decisive. However, it must be borne in mind that this aspect can, if properly developed, constitute a resource for the superior, as it contributes to the shaping of a concept of obedience, understood in a more contemporary sense, namely, *responsible* obedience. This benefits the military system as a whole, without prejudice to the requirement for immediacy and prompt efficiency that must characterise the role of the Armed Forces.

Precisely with regard to what you said about this higher level of education and, consequently, of awareness even among subordinates, can we say that this different sensibility has already permeated the military hierarchies? For example, within the context of disciplinary proceedings, is there greater

attention paid to the person receiving the order and, secondly, is this different awareness also taken into account within the military judiciary?

I would say absolutely yes. This different sensibility has also grown through the case law of the military courts. The latter, in fact, whilst being fairly monolithic in affirming the idea that there are principles of discipline and order – in particular, military service discipline – and that these principles cannot be undermined and must, as such, be respected, have, on the other hand, also adopted positions of greater understanding and flexibility when faced with specific situations that may have led to the failure to carry out an order.

Thus, it appears to me that even the administrative authority, whilst respecting the specific nature of the military function which is founded on order and discipline, as well as on prompt efficiency – such that all manifestations of opposition to an order are, in any case, conduct which, in the general context, must be viewed negatively – has undoubtedly developed a greater awareness and sensitivity to the issue. And this greater sensitivity is precisely due to the evolution of military case law (both administrative and criminal), which has become more lenient on these issues in the context of criminal and disciplinary proceedings.

It should also be noted that disciplinary proceedings concerning disobedience to orders are few in number, since the order is protected under criminal law and disobedience is not prosecutable at the request of a superior but *ex officio*. All cases of disobedience, therefore, must be dealt with under criminal law.

That said, it should also be noted that in our criminal law system – and not just in military law – a ground for non-punishability, or an exemption or defence, has been introduced, namely that set out in Article 131-bis of the Penal Code, which, as is well known, excludes punishability in cases where the offence is of a particularly minor nature. It is precisely regarding the applicability of this defence to military criminal proceedings that a general debate arose, the outcome of which was, in fact, to recognise its applicability. This is a more than reasonable outcome, not least because the legislator has not provided for any explicit exclusion of applicability to military proceedings and, therefore, given the principle of complementarity – whereby all provisions contained in the general part of the Penal Code also apply to the Military Penal Code in peacetime and in wartime – excluding the applicability of Article 131 bis would have entailed an interpretation *in malam partem*, which, in the absence of specific legal provisions, as is well known, is not permitted under our legal system. Consequently, the defence provided for in cases of minor offences, which is also applicable to military proceedings, has been applied in relation to disobedience (Article 173 of the Military Penal Code).

On this point, there is a very recent ruling by the Court of Cassation[4] according to which, in cases of disobedience to an order from an authority, there may be acts of non-compliance that are of a minor nature; consequently, although such conduct falls within the scope of criminally relevant non-compliance, it only slightly prejudices service and discipline, which are interests protected by criminal law. In particular, the case in question concerned an order to stop the recording of an ongoing conversation for service-related reasons. The superior ordered the subordinate to stop the recording, but the latter failed to comply. The Court of Cassation, therefore, whilst acknowledging that the court of second instance had correctly classified the behaviour as disobedience, held that the disobedience in this case was of a minor nature and thus ruled out criminal liability.

Personally, I would have gone even further than that statement, in the sense that, in my view, there must be a clear connection between the order and service and discipline, because when the superior's order and the related non-compliance do not affect the interests protected by the legal provision – which are precisely service and discipline – there is effectively no offence. So, I fully agree with this approach taken by the Court of Cassation. Let me give an example that may seem trivial, but which could occur: if a superior ordered a subordinate to pick up a piece of paper that had fallen on the floor and the subordinate failed to comply, would this constitute an offence of disobedience? In my view, it must be noted that criminal sanctions are something to be applied as a last resort, since there are also milder measures available. It must be borne in mind, in fact, that in criminal law imprisonment is used and therefore, in order to impose it, a balancing of interests must be carried out: personal liberty, on the one hand, and the infringement of a legal interest, on the other. In conclusion, it seems to me that if non-compliance with an order does not infringe upon any protected legal interest, then there is no offence either. Obviously, these are personal views which may not be shared by those who have a different conception of the hierarchical relationship.

Also, bearing in mind what you said regarding the acquired centrality of the individual's role within the military hierarchy, do you think that, in order to encourage responsible obedience, it would be possible to introduce new organisational measures, or to give prominence to this aspect within military training as well?

I believe this is fundamental. It is indeed essential that military personnel understand and accept the mechanisms of military administration, to which they are, after all, subject, and equally important is

[4] The reference is to the Cassation Court, Criminal Chamber, Section I, Judgment No. 33369 of 3 September 2024.

their awareness of the importance of orders and their execution. This must be a clear and uncontroversial prerequisite.

What can be acted upon and implemented is ensuring that military personnel acquire full knowledge of their duties and the consequences of any failure to comply with an order. Let us say that these are the cornerstones of common and military criminal law, as well as, today, of international military criminal law. There are, in fact, codes of international criminal law, not yet transposed into law within our legal system, according to which the issue of criminal orders and the corresponding scrutiny by military personnel involved in armed conflicts, as well as the nature of the order and the related issue of its execution, constitutes one of the central and most debated issues.

Therefore, in my view, adequate preparation and education of military personnel is important from the perspective of training and thus, so to speak, in terms of the duties they are required to perform in accordance with their position. Beyond that, however, I would propose specific training to enhance knowledge of the organisation and principles underpinning military administration and, in particular, the legal consequences associated with the order and its implications, so that there is – and here we return to the earlier point – an ever-increasing awareness on the part of the soldier both of the need to obey an order and also of what follows from the duty not to comply with a criminal order. This is a very significant aspect, especially in international scenarios. On the other hand, whilst military personnel do have a duty to comply, there are situations in which they might not do so, or indeed in which they should not do so.

Let us move on to the second set of questions concerning the linguistic form in which orders are expressed. How do you think the language used in military orders might influence subordinates' perception of authority and responsibility?

First of all, I believe that the language used in military orders is a fundamental aspect. However, we are faced with a problem that must be addressed as a preliminary point.

With regard to the nature of the language, in my view there is a potential conflict that may arise between the concept of responsible obedience, on the one hand, and the need for the subordinate to understand the peremptory nature of the order, on the other. I believe it is essential that the subordinate, when faced with an order from a superior, has the unequivocal perception that they have no option but to comply with what is ordered of them. On the other hand, if this were not the case, we would not be dealing with an order and, therefore, it would not fall within the scope of criminal law. As mentioned earlier, in fact, we must consider that, when a subordinate fails to carry out or

delays the execution of an order, they must be aware that they are dealing with an order, so that such conduct may be criminally punished. If this awareness is lacking, then legally there is no intent. This aspect, however, must be reconciled with the other issue, which is that of responsible obedience. We have said that obedience must be responsible. Therefore, the language used when superiors issue an order must be, on the one hand, peremptory, and on the other, in my view, also persuasive, such as to encourage the execution of the order itself, without the order appearing to be unreasonably imposed. In other words, the peremptory nature of the order must not derive solely from a hierarchical factor, but must be based on the subordinate's ability to agree with the content of the order itself. Here, we are probably talking about a perspective that concerns the superior rather than the subordinate: even the fact of holding a position of hierarchical superiority, from which derives both disciplinary authority and the ability to issue orders, clearly requires professional training. In my view, in fact, it is necessary that, as part of professional training, superiors are made to understand that orders convey important content and messages relating to service and discipline. It is also necessary to focus on the manner in which an order is conveyed, so that the superior is aware that the order must also involve sharing, where possible, with a view to synergy and harmony with the subordinate.

Now, I realise that this view may seem complex, and perhaps it is, especially when considered in contexts and situations where immediate action is required, and therefore in cases where an order must be carried out without delay. For this reason, I believe it is important to emphasise a distinction between orders issued in certain specific situations, such as in the case of armed conflict, on the one hand, and orders issued in peacetime, on the other. The former situations, obviously, require an immediate response: in such cases, therefore, it is perhaps more difficult to establish harmony in the transmission of orders and thus to employ a more carefully considered and accommodating language. On the other hand, however, there is the scenario of peace, in which it is clearly possible to proceed differently, in a less rigid manner. Let me explain: if there is no situation of absolute urgency, such as those that can certainly arise in the military world, especially in emergencies, I believe that the issuing of an order can follow various stages and be presented progressively in its imperative language. For example, the superior might first proceed by setting out the requirement, that is, the purpose of the order; thereafter, they might explain why they believe that this requirement must be addressed in the manner identified and, at that point, issue the order to the subordinate. This way of communicating the order would, in my view, serve to encourage forms of responsible obedience. This is because the subordinate is made aware of the reasons underpinning an order and, therefore, in such a context – which we might describe as more 'conversational' – it is possible to envisage opportunities for interaction between superior and subordinate. In such a dynamic, the subordinate, whilst continuing to demonstrate their complete dedication and adherence to the order, would also have the opportunity

to communicate their point of view or present factual elements that could then be assessed and taken into consideration by the superior.

In the event that the subordinate perceives the order to be unlawful, even if it is not manifestly criminal, they can and must, for example, bring this to the superior's attention, as well as in the event that they recognise that the factual premises on which the order is based are the result of a factual error on the part of the superior. In this latter scenario too, dialogue with the superior—within the framework of responsible obedience—is absolutely essential.

Clearly, all this presupposes a thorough grounding in modes of expression and forms of communication – which are fundamental in the modern world – as well as an ability to understand what the other party's reactions might be. I mean, at the heart of dynamics of this kind, there must be an almost 'psychological' understanding of the hierarchical relationship and, consequently, of the person with whom this hierarchical relationship is established in the process of conveying an order. I realise that it is by no means easy to address issues of this kind or to foster such dynamics, but I believe this is something the military administration must work on: communication, preparation and training in such dynamics. The military administration should aim to provide professional training for superiors on the language to be used when conveying orders, as well as on the psychological understanding of situations. Nevertheless, professional training should also be provided for subordinates on how to understand and behave when faced with an order whose content they do not agree with. Perhaps this is asking too much, but it is a direction worth exploring. Now, as I have said on several occasions, I make an exception to this discussion for those specific situations that must be dealt with immediately and where, therefore, the language must obviously be more peremptory.

All very clear. However, to be honest, given the general understanding we have of the military environment, it is difficult for us to imagine a constantly dialectical relationship between a superior and a subordinate, not least because of those requirements for immediacy and efficiency you mentioned, which, particularly in wartime contexts, are exponentially significant. So, we wondered, what would you think of a framework of this kind: one that certainly presupposes a principle of obedience to the superior's orders, but also envisages introducing a body – for example, a further superior or a disciplinary office – where orders can be challenged separately on the basis of specific and reasonable objections. In other words, not just relying on dialectical mechanisms between superiors and subordinates, but, so to speak, introducing a third party to which the subordinate can report that they are receiving orders they do not consider appropriate: the establishment of an ad hoc

structure, similar, for example, to what in companies is called an audit. *We do not know if similar structures already exist in the Armed Forces...*

So, I agree in general with this idea, but with one clarification. Since criminal law provides that not only the failure to carry out an order is punishable, but also any delay, I wonder how such bodies can be reconciled with the structure of the law and with the need for immediacy in the execution of the order. This is because I cannot imagine how a situation in which a subordinate, having received an order, suspends its execution in order to consult an independent body beforehand, could be reconciled with and comply with the requirements of speed and efficiency that we highlighted earlier. Therefore, mechanisms of this sort seem to me ill-suited to the structure of the military organisation. Rather, one might envisage a subsequent form of appeal to an independent body. In this way, first of all, if permitted, the subordinate may present to the superior the reasons which he considers to be obstacles to the execution of the order. Thereafter, if the superior insists, the subordinate must carry out the order, but would still have the option of lodging a *post-facto* complaint with an independent third party. However, it must be said, of course, that in such a scenario the order would already have taken effect, effectively undermining the usefulness of the complaint. In any case, I do not see this as particularly compatible or suited to the military world.

It is clear that any liability on the part of the superior for the order given and for the consequences produced could be assessed.

May I ask again how important you consider linguistic transparency to be in the context of official communications, and how this factor might influence responsible obedience?

On this point too, I would add that military case law is unanimous in recognising that the tone of the order must necessarily and clearly convey that the subordinate has no option but to comply with the order. In this sense, linguistic transparency is central: the order must be expressed in such a way that the subordinate understands that they cannot fail to comply, and this is because it is clear to them that they are faced with an order. After that, probably, once the order has been issued, the subordinate may – let us say – have some leeway to say to the superior: 'I understand what you are saying and I assure you of my obedience, however I would like to point out that…'. In this case, then, the fact that the subordinate has first stated that they understood it was an order and that, therefore, they would in any event assure their absolute obedience, in some way, upholds the principle of discipline. In what sense? In the sense that, in any case, the individual is acknowledging their willingness to comply and is

affirming their intention to do so, since they recognise that they are within the sphere of military discipline which requires them to do so. On the other hand, however, he is also raising an objection to the content of the order. You see, a linguistic expression of this kind satisfies both requirements to some extent. In the sense that the order is presented in a clear and unambiguous manner, and therefore the superior has perfectly conveyed the instruction in the way they should have. At the same time, discipline is upheld, because in any case, faced with the order issued, the subordinate has expressed his absolute willingness to carry it out. However, the principle of responsible obedience is also upheld when the subordinate explains to their superior the reasons they believe prevent the execution of the order, or at least the reasons that would suggest other possible and different formulations of the order given.

Now, all this certainly applies in a peacetime situation. Communicative solutions of this kind, where the subordinate is involved in the management of discipline and military service through the promotion of an obedience that is not blind, but also allows room for responsibility, should indeed be the ones on which the military authority should focus. However, I repeat, this applies in peacetime and not in wartime, which requires greater decisiveness.

May we ask you to clarify something? It concerns the concept of delay, which we feel is a particularly significant aspect. We wanted to ask you whether, in your view – naturally within the context of military organisation, and thus also in the interpretation of Article 173 of the Military Penal Code in peacetime to which you referred – there is scope for interpreting the concept of delay in a way that is not merely chronological. We mean, a fairly intuitive way of understanding delay relates to the fact that someone orders another person to do something, and that other person does not carry it out straight away, immediately. However, the notion of delay could also have an interpretation which, whilst still taking into account the purely chronological aspect, also considers the reasons why the person receiving the order does not carry it out immediately or without delay, that is, a notion of delay that takes into account the fact that execution is delayed because the individual believes the matter requires further consideration, such that it may end up raising further questions which in fact extend the time between the request to act and the actual execution. From a purely chronological point of view, therefore, this could be understood as a delay, but perhaps from a – shall we say – more normative, more axiologically dense perspective, it might not be understood as a delay. Let's put it this way: the party would certainly be at fault, were it not for the fact that they have valid reasons for allowing this time to elapse, such that, by virtue of these good reasons, they might ultimately not be

deemed to be at fault. So, in your view, is there scope for an understanding of the concept of delay that takes this sort of consideration into account?

One point must be clarified straight away. If there is a fixed deadline and the order is not carried out by that deadline, there is simply a failure to comply. So it is not a delay, but a failure to comply. In other words, if a soldier is required to do something within 24 hours and fails to do so by the deadline, clearly we are not talking about a delay, but about a failure to comply, pure and simple.

As for the delay itself, it should be noted that the delay must always be considered in relation to the requirements of service and discipline. Let me explain: in this case, there is no specific deadline, or rather, the law does not specify a deadline in this instance, since Article 173(1) of the Military Penal Code for peacetime merely states 'omits or delays'. Now, how does one determine what constitutes a delay of criminal significance? Well, a delay that is criminally relevant must be assessed in relation to the requirements of discipline or service, that is, those requiring that the task be carried out by a specific time or in any case in accordance with certain procedures. In this assessment, the discretion of the courts naturally comes into play; however, the courts are very careful to evaluate the underlying circumstances and factual situations, and thus also the procedures to which you referred. In other words, it is not the case that people are convicted for delaying the execution of an order without an assessment of the reasons that may be put forward to justify such a delay, and likewise of those that may be raised against the execution of the order. It is clear that if there are valid reasons, then the offence is ruled out. Many military personnel have been acquitted because the reason for the delay was found to be justified. Of course, it always depends on what is put forward during the trial. This forms part of the judgment on the merits delivered by the military courts and the military courts of appeal. And if that judgement is supported by adequate reasoning, then it clearly stands up to scrutiny in the Court of Cassation – where, as you well know, the judges' findings on the merits are not assessed if they are supported by rigorous reasoning. What is certain is that the military courts carry out a very thorough investigation into this aspect of the delay.

At this point, we would move on to the core of questions of a more criminal nature. In this regard, we would like to ask you: what is your experience as a judge with the issue of carrying out criminal orders? And, in relation to this question, what is your experience with a soldier's disobedience of a criminal order not due to negligence or laziness, but because the order is considered unjust?

To tell the truth, this has been a very long experience, spanning years, particularly since the entry into force of Law No. 772 of 15 December 1972 on the recognition of conscientious objection. I have had the opportunity to apply this legislation since I joined the judiciary in 1982, and for many years thereafter. Now, it must be borne in mind that until this law came into force, there was what was generally referred to as the 'spiral of convictions'. What happened was that those who were ordered to undertake military service – which in practice consisted of an order to wear the uniform – and who refused ended up receiving multiple convictions that followed one after another over time. This was particularly the case for Jehovah's Witnesses, who were in fact the main recipients of this type of order. In effect, they faced a conviction that would not exempt them from military service at all. Thus, the first conviction was followed by a second, then a third, a fourth and so on, until the person reached the age of 45, which was the age for permanent discharge and the point at which, therefore, the military orders to wear the uniform would cease. Law 772 of 1972, in fact, changed a great deal, because with the first conviction a sentence was already being served. Law 772 established that serving a prison sentence would ultimately exempt a person from military service. Consequently, as the individual was no longer subject to military orders, they would not receive any further call-ups. This effectively put an end to the phenomenon of the 'spiral of convictions'.

At the time, I was serving as a magistrate in Padua, and it was in Padua that we adopted an interpretation of the legislation through which we began to grant conditional suspension of sentences. In this way, if the person did not commit any further offences, we could consider the sentence served. So, in short, the procedure remained the same: Jehovah's Witnesses were still required to wear the uniform. They refused and were therefore reported to the judicial authorities. They then stood trial, at the end of which they were sentenced to a term equivalent to the duration of military service, i.e. 12 months' imprisonment. However, where possible, conditional suspension of the sentence began to be granted, and so the sentence was ultimately deemed to have been served. Obviously, these events are now of purely historical significance. In the years that followed – up until 2004 and, in particular, until 1 January 2005, when military service was suspended – conditional suspension of the sentence was no longer granted at all. Previously, sentences of ten months and twenty days had already been handed down, which were subsequently settled through plea bargaining. Thus, through plea bargaining, it was possible to further reduce the sentence by one-third, ultimately arriving at a total sentence of approximately five months' imprisonment. At that point, the custodial sentence was converted into a fine. The result was that the original severity of the law was greatly reduced.

As regards criminal orders, there have been many such instances here too. For example, one of the most common cases involved a superior who had a driver and used the official car for private purposes. Just to give a trivial example: the superior asks the driver to take him shopping. In this case,

quid iuris: we are faced with an order of a criminal nature, but can it really be considered a manifestly criminal order? Well, if it had truly been manifestly criminal, then the driver would also have had to be prosecuted for temporary misappropriation of public property, since, in addition to the superior, the subordinate would certainly have been held liable for the offence. Yet, this obviously never happened because the order was indeed criminal, but not manifestly criminal, and the subordinate, in this case, would certainly have had no grounds to question it. To put it another way, let us imagine, for example, a scenario in which the superior orders the driver to stop five metres before the supermarket, without explicitly stating that the destination was in fact the supermarket. How could this order have been manifestly criminal and thus give the subordinate grounds for disobedience? There you have it: it is quite possible that the order may not be manifestly criminal. In short, I have gained a great deal of experience with cases of this sort. It has been far more difficult, however, to encounter cases of manifestly criminal orders that would have entailed an obligation on the part of the subordinate not to comply. In short, in my experience I have encountered many cases of criminal orders, but few that were manifestly criminal. In fact, at least personally, I have never found myself condemning a subordinate for having obeyed a manifestly criminal order.

On the other hand, of course, it is worth remembering that this is generally a particularly significant issue. Suffice it to say that the draft International Penal Code also contains an article addressing this issue, setting out the principle that if a crime covered by the Code is committed on the orders of a superior, then the person who gave the order shall always be held responsible for the crime (Art. 11, para. 1). This is a generally applicable principle, including within our legal system and the ordinary Penal Code. The provision then adds that the person who carried out the order is also liable for the crime, unless the order was not subject to review and the criminal nature of the order was not known to them or was not apparent (Art. 11, para. 1). So – let us say – even in the international arena we have a system similar to that provided for in our legal system. This rule applies to war crimes, where it is essentially stated that if the order is manifestly criminal, then it must not be carried out. Conversely, if it is not manifestly criminal, then it may be carried out. In the latter case, if the subordinate decides to comply, they are nevertheless exempt from liability and therefore not punishable, as they are not responsible for the offence that has been committed.

Conversely, it must be remembered that with regard to international crimes and crimes against humanity, and thus also the crime of genocide, there is an absolute presumption of manifest criminality. This means that the aforementioned rules do not apply to the crime of genocide and crimes against humanity. Therefore, a subordinate who carries out an order involving genocide or a crime against humanity is always liable for the offence committed, and is obviously liable alongside

their superior. Personally, this seems to me to be a fair and reasonable principle: genocide and crimes against humanity are, by their very nature, generally criminal.

Actually, we have two questions to put to you regarding this specific point, namely concerning the manifest criminality de jure*, so to speak, of the crimes of genocide and crimes against humanity. You see, manifest criminality is not relevant in the case of war crimes. May we ask for your opinion on this?*

Certainly. The point here is that there is certainly a different contextual element between the crime of genocide or crimes against humanity, on the one hand, and war crimes, on the other. A war crime, in fact, is one that essentially occurs in a situation of internal or international armed conflict and in which – let's say – we must admit that factual situations may arise which can generally also concern everyday life, situations which, however, once a certain contextual element is introduced, may end up constituting war crimes. In my view, therefore, precisely because of the nature of the offence, it might be more difficult to perceive the manifest criminality of the order. Let us say, we must admit that there is a margin within which the manifest criminality of an order may not be manifest. Conversely, in the case of crimes against humanity or in the case of the crime of genocide, we are instead faced with acts that are extremely serious in themselves and, as such, unequivocal. We must recognise that it is impossible for the person carrying out the order not to have realised the manifest criminality. In my view, therefore, the distinction between crimes against humanity or the crime of genocide and war crimes, with regard to the presumption of manifest criminality, is one that has its own basis, its own rationale.

However, at this point a doubt may still remain, and it is a doubt linked to a consideration of this kind: a subordinate, it is likely, could still participate in a crime of genocide through a variety of acts, yet it may be that not all these acts, even if ultimately they end up contributing to the crime, have the same significance and thus the same level of manifest criminality. I wonder: would greater margins of discretion perhaps be desirable when assessing such conduct?

Look, what you say is certainly true, and in some ways I do agree with it. In short, it is undeniable that such cases can arise in practice. However, we must also remember that case law exists, and so do mechanisms for establishing the facts, which are also valued. In particular, it is perhaps sufficient to

recall that the general principles of law are the same in both the military criminal justice system and the civilian criminal justice system. Therefore, even in the military sphere, if there were no intent, then clearly the charge would not stand. So, in principle, I consider valid what we have discussed today regarding the concept of responsible obedience and, consequently, with respect to the principle of manifest criminality. That said, of course, in practice there may be cases where, even in the face of crimes such as genocide, the criminality of the order might not be so manifest. However, this principle of absolute presumption may still be overturned as a result of this assessment of intent.

To conclude, it should also be remembered that, for better or worse, these are topics we deal with as matters of academic study. As you know, in fact, we have not incorporated the Code of International Crimes into our legal system and, although there is a great deal of campaigning for this to happen, the fact remains that we currently do not have the Code of International Crimes. So, in short, these remain academic scenarios, and it is worth bearing that in mind.

Thank you. Moving on to a related point, we have a further question. If we have understood correctly, you have never punished a subordinate for carrying out a criminal order on the basis of the 'manifest criminality' clause. So, we would like to ask you this: why is that? Is it simply the case that, in the cases you have dealt with, the subordinates were effectively in a position where they had carried out orders which, whilst criminal, were not manifestly criminal; or do you believe that the military judiciary is attempting to correct, in practice, certain potential distortions or injustices that might arise by placing the burden of assessing the criminality of an order on the subordinate? On the other hand, in such cases, there would appear to be the problem whereby the subordinate finds himself, so to speak, between a rock and a hard place, that is, between disobedience on the one hand and liability as an accomplice to the offence on the other.

I find this question very interesting. I believe that case law has certainly had to adapt to this type of problem, which in practice boils down to the subordinate's subjection to the hierarchical order, and therefore to their inferior rank. In particular, in such cases, I believe that case law has had to consider whether the hierarchical order effectively produces a sort of *metus*. In other words, there are certainly specific situations in which a full application of the principle of responsible obedience might prove difficult, just as it would be difficult to establish a dialectical relationship with the superior that allows the subordinate to put forward their own arguments. There are certainly many factors that have led military courts to give particular consideration to the fear to which the subordinate is subjected. For

this reason, I cannot rule out that we are indeed faced with an approach by military judges characterised by greater understanding of the subordinate's position.

That said, you know, the military world is the result of a combination of many factors. Among these, there are some that remain at least partially outside any regulatory framework. For example, there may be senior officers who draft the 'evaluation reports'. Well, it is undeniable that, in some way, these may end up inducing the subordinate not to adopt an excessively oppositional, or at least critical, attitude. This is a problematic issue that is particularly prominent in cases and scenarios that are very much of the moment. For example, let us imagine a scenario in which there is a very high-ranking commander who has his own administrative department at his disposal. We must also consider how the requests that the commander may issue to his administrative staff, concerning, for example, the execution of expenditure or contracts, might well appear dubious, even if it is by no means certain that they are manifestly criminal. Now, with regard to this type of situation, a number of potential issues arise that must be taken into account. First of all, could it really happen that a subordinate, who is subject to the 'evaluation report' provided by their superior, might oppose an order by expressing their doubts to their superior regarding an order perceived as criminal, but perhaps not manifestly criminal? In this case, on the other hand, we might indeed be faced with a criminal order, but not necessarily one that is manifestly criminal, such that the subordinate would not be criminally liable for any execution of the order. But again, still with regard to this case, let us consider a further factor: we might be dealing with individuals who have administrative responsibilities, such that it could well be the case that the content of the order is not manifestly criminal in an objective sense, but may be so for individuals who possess certain expertise by virtue of the duties they perform and their level of professionalisation. And so the opposite might also be true. In cases such as these, it is essential first and foremost to take particular account of the position of the subordinate who, as you pointed out, finds themselves 'between a rock and a hard place': whilst there is indeed an obligation to disobey a criminal order, there is also an obligation, or at the very least an opportunity, to comply with the wishes of the superior. In this regard, I would suggest that it would undoubtedly be beneficial for the superior to have a greater awareness of the legitimacy of the orders they are able to issue. This is an issue that concerns not only ethical considerations but also criminal law: in other words, the superior must have knowledge and awareness of the content of the orders to avoid imposing the execution of unlawful orders on the subordinate. And this must apply above all when the subordinate is a person with specific technical expertise, such that they could not fail to realise that the order is manifestly criminal.

In my professional experience, I have encountered cases in which certain subordinates have been charged with aiding and abetting the offence in question precisely because they possessed

technical expertise such that, even if the order was not manifestly criminal in an objective sense, it was considered that they could not have failed to realise its criminal nature. This is certainly a case of a manifestly criminal order from a subjective point of view. Situations of this kind serve as a reminder that the manifest criminality of an order must also be assessed in light of the professional training and skills acquired by the individual. An order, in fact, can be manifestly criminal not only in an objective sense, but also in a subjective sense. For example, let us imagine that a subordinate in the administrative service of a superior is ordered to purchase white marble for the latter's private home. This is clearly a manifestly criminal order. However, not all cases are so clear-cut: there are more nuanced cases where the boundaries are likely to be less clear. Indeed, in cases such as these, it is certainly right for the judge to also take into account the subordinate's *metus*, that is, their position of psychological coercion vis-à-vis the military hierarchy, since this is undoubtedly a factor that characterises this aspect of obedience or disobedience to a criminal order.

To conclude this set of questions, we would ask you for a general assessment of current Italian law in relation to these aspects. In general, do you consider Italian legislation to be adequate? In particular, do you consider it fair that the principle, established in Article 51 of the Penal Code, according to which the subordinate who carries out an offence committed in execution of an unlawful order must, in principle, always be held liable as well? If so, do you think it would be fair, in such a case, to provide for a mitigating circumstance in favour of the subordinate?

First of all, regarding the specific issue of Article 51 of the Penal Code and, consequently, the possibility of providing for a mitigating circumstance, I believe that a mitigating circumstance might indeed be applicable. On the other hand, according to Article 51 of the Penal Code, the subordinate would in any case be liable as an accomplice to the offence, and therefore a mitigating circumstance could apply all the more so, for example, considering the fact that they may have had only a minimal role in the commission of the offence. That said, of course, our legal system does not provide for a specific mitigating circumstance, but Article 133 of the Penal Code exists for the determination of the sentence.

As regards the assessment of the legislation, however, I believe that its practical implementation has not posed many problems. On the other hand, it has also been broadly adopted by other criminal laws, such as in the 'Nordio' bill on international crimes. Here, for example, the framework of Article 51 of the Penal Code is essentially reproduced verbatim, although a sort of presumption of manifest criminality is included in relation to particularly serious offences. Let us note, however, that even

with regard to this provision, case law may also act to introduce certain corrective measures. One example relates to what we mentioned earlier concerning the criminal nature of the order, which, even if not objectively manifest, could well be so in a subjective sense. Let me try to explain this better: as we were saying, let us imagine that a person possesses technical expertise enabling them, unlike an ordinary citizen, to recognise the criminal nature of an order that cannot be said to be objectively criminal. For this qualified person, the order will appear manifestly criminal, and this is certainly a factor that must be taken into account in court proceedings to establish criminal liability.

To conclude the discussion on the concept of responsible obedience and disobedience to a criminal order, I might add one further point. As I mentioned, there may indeed be cases where a member of the armed forces recognises that an order is criminal – even if not manifestly so – and either fails to carry it out or carries it out despite recognising it as criminal. Now, if, despite having perceived a non-manifestly criminal order as criminal, the soldier carries it out, then I believe this will never be relevant. In other words, I believe they will not be held criminally liable for carrying it out. On the other hand, however, if they have perceived the criminal nature of the order, then they would be well advised not to carry it out, and this is because no one can hold it against them for failing to carry out a order. With regard to these situations, therefore, I would be inclined to support a somewhat more flexible and broad interpretation. In short, a soldier who perceives the criminal nature of an order, even if it is not manifestly criminal, and decides not to carry it out, should not be charged with insubordination. This seems to me to be a reasonable and correct interpretation.

We would now like to move on to the final set of questions. In particular, based on your experience or your impressions, in contexts of armed conflict, is the Italian soldier, on average, instinctively inclined to trust in the lawfulness of the orders received, or does he possess the necessary cultural tools to assess such lawfulness for himself? In the latter case, do they actually enjoy a degree of discretion that allows them, if necessary, to disobey without suffering consequences? Could you recount any significant cases you have dealt with in this regard?

I must say, first of all, that I have had no direct experience, in my work as a magistrate, of cases involving situations of armed conflict. This is because the Military Prosecutor of Rome has jurisdiction over armed conflicts, at least those taking place abroad, whilst in Italy, on the other hand, we have not had any armed conflicts. Therefore, the Military Prosecutor of Rome could provide a more precise answer, as he is directly involved and informed. I do, however, believe that the Italian soldier certainly possesses the necessary cultural tools to assess the lawfulness of an order. Rather, I

believe that what needs to be assessed is whether the system as a whole allows the subordinate to exercise judgement regarding an order, or whether, in the end, a sort of fear prevails in asserting one's own judgement regarding the possible unlawfulness of an order received. In other words, we need to see whether, in the face of their own perception regarding the possible illegality of an order received, subordinates feel able to raise their doubts with their superiors. Not least because, clearly, a comment of this sort could end up affecting the hierarchical relationship. This consideration seems to me to be essential. Furthermore, I would take it for granted that the cultural level of non-commissioned officers, particularly Senior Corporals or Corporals, who occupy the lowest positions on the hierarchical ladder, is high; that is to say, that they possess a certain level of knowledge and sensitivity. Here we return once again to the issues we have already addressed regarding responsible obedience. The latter, in fact, if properly valued, would be precisely the means by which one could also voice any observations to a superior regarding the order he is issuing. Then, of course, how can one be sure of being able to disobey, or challenge an order, without facing consequences? In addition to the fear of damaging the hierarchical relationship, the fear of consequences is also a form of pressure that the subordinate finds themselves under. Let us suppose that the subordinate receives an order, perhaps one whose lawfulness is merely uncertain. In that case, all the more so, it may well be that the fear of consequences could influence whether they oppose it or seek further clarification.

We would now like to ask you one final question. Do you perceive a difference in approach, or in sensitivity, between a military judge and an ordinary judge, and between an Italian judge and international criminal judges, regarding the issue of orders from a superior?

Well, I would say that the answer to this question is certainly yes: between a military judge and an ordinary judge, definitely yes. In the sense that the military judge, precisely because of their training, is particularly sensitive to this type of issue. On the other hand, these issues are the subject of attention – I wouldn't say on a daily basis, but very frequently. Therefore, a military judge's approach to problems of this kind is undoubtedly of a more specialised nature, and thus manifests itself with characteristics that are certainly different from those of an ordinary judge's approach. An ordinary judge, in fact, has general jurisdiction and, as a rule, knows little about the military world. Let's say that this issue of obedience to an order from a superior is just one of many matters that may come to their attention, and it may happen that they come to their attention for reasons of connection. So I would say that there is certainly a difference in approach between a military judge and an ordinary judge, and I believe this is due to a greater awareness of the need to safeguard the hierarchical

relationship, which the military judge in some way upholds, unlike the ordinary judge who does not always understand its basis, origins and characteristics.

I would also say that there may be some differences between Italian judges and international criminal judges, but these are less pronounced than those with ordinary judges. International criminal judges, such as those at the International Criminal Court, certainly have very in-depth knowledge – I would say as in-depth as that of Italian military judges. So, in this respect, the Italian military judge and the judge at the International Criminal Court certainly have more similar experiences, and with a similar frequency, compared to those of an ordinary judge. If only because they deal with more cases of this kind. That is my view. Let's say that, in fact, the jurisdiction of international courts – in particular, the International Criminal Court – deals for the most part with these issues, namely the question of obedience and charges arising from the failure to comply with or compliance with orders from superiors, which often turn out to be manifestly criminal.

Questions submitted prior to the interview

(1) There are several psychological studies suggesting that receiving orders (even in the case of individuals professionally embedded in military-style hierarchies) reduces the executor's sense of responsibility regarding the conduct adopted in carrying out the order, making it more difficult to exercise rational control over the act of obedience. Do you consider that studies of this kind are relevant when assessing criminal liability for offences committed in the course of carrying out orders?

(2) How would you define 'responsible obedience'?

(3) An influential conception of authority suggests that recognising someone as an authority requires submitting to their directives and refraining from following one's own judgement. Do you think this understanding of authority corresponds to the conception prevalent in the military? Do you believe this conception is compatible with the principle of responsible obedience?

(4) What do you believe are the implications, for the actual possibility of responsible obedience, of the methods of military training, the organisation of military work (transfers, service notes, career progression, etc.), and the organisation of the military system (disciplinary regulations, recognition of trade union rights, etc.)?

(5) How do you think the language used in military orders might influence subordinates' perception of authority and responsibility?

(6) In your view, what are the main linguistic differences between orders that promote blind obedience and those that encourage responsible obedience?

(7) How might the communication models and language used in military manuals and regulations influence behaviour regarding obedience?

(8) Do you think that addressing the linguistic dimension could improve military training in a way that fosters a more critical and responsible interpretation of orders? If so, how?

(9) How important do you consider 'linguistic transparency' to be in the context of official communications, and how might this factor influence responsible obedience?

(10) To what extent do you think the tone and wording of military orders can influence the motivation and compliance of those carrying them out?

(11) Which linguistic strategies do you consider most effective in promoting responsibility and compliance with orders among subordinates?

(12) Have you ever, in your professional experience, dealt with cases concerning the execution of criminal orders? How many? Do you consider these to be relatively frequent cases?

(13) In your professional experience, have you ever dealt with cases involving a military offence of insubordination committed by a service member not out of indolence, but out of a firm conviction that the order was unlawful? How do you believe such cases should be handled? Do you consider that a defence might apply? Do you consider that a mitigating circumstance might apply?

(14) Do you consider that Italian criminal law – including special legislation and the military penal codes – applicable in cases of offences committed in compliance with an unlawful order is sufficiently clear and consistent, and that it therefore provides military personnel with sufficiently predictable guidelines for conduct? If not, why, and what changes would you consider appropriate?

(15) Do you consider the principle, established in Article 51 of the Penal Code, to be correct, namely that, in principle, the subordinate who carries out an offence committed in execution of an unlawful order must always be held liable for it? And, if so, do you think it would be fair, in such a case, to provide for a mitigating circumstance in favour of the subordinate?

(16) Do you consider that the fact that the subordinate, before carrying out the order, pointed out that it was, in his opinion, unlawful, and that, despite this, the order was reiterated by the superior, makes a significant difference to his criminal liability? Is it your experience, even indirectly, that such a report might lead the superior to reconsider in a significant number of cases?

(17) In general, do you consider that a rule so strict as to exclude the possibility of exculpation for carrying out a criminal order is justified from a special and general preventive point of view?

(18) Do you consider it appropriate that the criminal law governing obedience to a superior's order should be the same whether such obedience results in an 'ordinary' offence, a military offence, or the commission of an international crime?

(19) Do you agree with the approach of the Rome Statute (later incorporated into the proposed Code of International Crimes put forward by the Palazzo-Pocar Commission), whereby an order to commit crimes against humanity and genocide must always be presumed to be manifestly criminal, whilst it is possible, where appropriate, to accept that an order to commit a war crime is not manifestly criminal?

(20) Realistically, do you believe that a member of the armed forces, operating in various capacities within a context of armed conflict, is more sensitive to the imperatives of international law, or to those of Italian law, or to orders from a superior? If you believe that the answer should vary depending on the armed force to which they belong, their role or other characteristics and functions, please briefly explain your reasoning.

(21) Based on your experience or impressions, in contexts of armed conflict, is the Italian military personnel, on average, instinctively inclined to trust in the lawfulness of the orders received, or do they possess adequate cultural tools to assess such lawfulness for themselves? In the latter case, do they effectively enjoy a degree of discretion that allows them, if necessary, to disobey without suffering consequences? Could you describe any significant cases you have dealt with in this regard?

(22) Do you consider it appropriate for the Italian legal system to adopt special legislation on the subject of international crimes – such as, for example, a Code of International Crimes, featuring specific provisions in its general part, such as those concerning compliance with orders from superiors – or do you believe that existing laws already provide sufficient assurance of the adequacy of our legal system in relation to the requirements of international law?

(23) Do you perceive a difference in approach, or in sensitivity, between military judges and ordinary judges, and between Italian judges and international criminal judges, with regard to the issue of orders from superiors?