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On the distinguishing features between the offences of disobedience (Article 173 of the Military Penal Code in Peacetime), failure to carry out an assignment (Article 117 of the Military Penal Code in Peacetime), failure to comply with instructions (Article 125 of the Military Penal Code), and failure to report for duty (Article 123 of the Military Penal Code in Peacetime)

English version of the chapter *In merito agli elementi distintivi tra i reati di disobbedienza (art. 173 c.p.m.p.), omessa esecuzione di un incarico (art. 117 c.p.m.p.), omesso adempimento di istruzioni (art. 125 c.p.m.p.) e omessa presentazione in servizio (art. 123 c.p.m.p.)*, in Brigaglia M., Pino. G., Vallini A., *Obbedienza e responsabilità*, Roma Tre Press 2026, pp. 215–233.

ABSTRACT

This paper addresses the relationships between the various military criminal offences related to the conduct of failure to comply with orders. The author's perspective is to highlight the residual and subsidiary nature of the offence of disobedience (Article 173 of the Military Penal Code) and to clarify why this offence does not apply when the conduct of failing to comply with a command meets the constitutive criteria of the offences of failure to carry out an assignment (Article 117 of the Military Penal Code), failure to comply with instructions (Article 125 of the Military Penal Code), and failure to report for duty (Article 123 of the Military Penal Code).

KEYWORDS

Orders; Non-compliance; Offences; Plurality; Disobedience; Subsidiarity.

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On the distinguishing features between the offences of disobedience (Article 173 of the Military Penal Code in Peacetime), failure to carry out an assignment (Article 117 of the Military Penal Code in Peacetime), failure to comply with instructions (Article 125 of the Military Penal Code in Peacetime), and failure to report for duty (Article 123 of the Military Penal Code in Peacetime)

SUMMARY: 1. Preliminary remarks on the offence of disobedience (Article 173 of the Military Penal Code in Peacetime) – 2. The role of service and discipline in the structure of the crime – 3. The offence of failure to carry out an assignment (Article 117 of the Military Penal Code in Peacetime) – 4. The offence of failure to report for duty (Article 123 of the Military Penal Code in Peacetime) – 5. The offence of failure to comply with instructions (Article 125 of the Military Penal Code in Peacetime) – 6. The relationship between the aforementioned offences – 7. The subsidiary nature of the offence of disobedience – 8. In particular, on the relationship between the offence of disobedience and the failure to report for duty (Articles 173 and 123 of the Military Penal Code in Peacetime).

1. Preliminary remarks on the offence of disobedience (Art. 173 of the Military Penal Code in Peacetime)

My contribution has a narrower scope compared to the previous ones, with an exclusively 'domestic' approach and a very limited frame of reference, because it aims to examine whether and to what extent the pertinence to service and discipline, which constitutes one of the constituent requirements of a lawful and binding order, finds elements of precise specification in those further incriminating norms that contemplate facts of specific non-compliance with prescriptions, also binding, albeit variously defined, and concerning the performance of certain activities. All this with the perspective of understanding whether the provisions of these further incriminating norm set, with regard to the facts contemplated therein, tacit limits to the typical structure of the crime of disobedience: and therefore a reduction of its scope of application.

¹ President of the Military Court of Verona.

The offence of disobedience is provided for in Article 173 of the Military Penal Code in Peacetime (m.p.c.p.) in the clear terms of the act of 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. We are therefore in the presence of a situation in which the dominant role is played by the order provided with particular content requirements (pertinence to service or discipline), which responds to a relational module that entails a power and a subjection, consisting in submitting to the command and complying with it.

What therefore comes into consideration is a criminal offence with broad scope for application, inherent to every military system and a direct expression of one of its essential pillars: namely, the relationship of military hierarchy.

The historical events that have characterised this offence bear witness to its close correlation with the extent and intensity of the protection afforded to the relationship in question. And it does not take much effort to understand how the current legislation, precisely because of the necessary relevance of the order to service and discipline, marks a vast departure from eras in which disobedience was constituted by the mere fact of failing to comply with absolute promptness and timeliness with any order from a superior, without any further requirement for specification of content and within a framework in which the protection of the hierarchical relationship took on absolute contours. A framework of which the repealed – though only in 1985 – provision of Article 193 of the Military Penal Code² provided adequate evidence, and of which a vestige still in force is found in the specific case of disobedience provided for by Article 199 of the Military Penal Code of War, which classifies as a criminal offence the act of a prisoner of war, of any rank, who fails to obey the orders

² A rule that protected in a pervasive and all-encompassing manner the ascending hierarchical relationship, whatever the status of the superior and even when the act was committed on account of political, administrative or judicial functions exercised by the latter; and a rule that found further specification in the provision of the previous, and likewise repealed, Article 192, according to which the impairment of the hierarchical bond was to be deemed to exist even if the offensive act had been committed for reasons unrelated to service. This regulatory framework was profoundly altered by Law No. 689 of 26 November 1985, as a result of which (in particular, of the consequent new Article 199 of the Military Penal Code) the offences of insubordination and abuse of authority – that is, the typical safeguards for the criminal protection of the military hierarchy – do not apply when the acts they cover are committed for reasons unrelated to service and military discipline. Within this regulatory framework, provision is also made for certain situations capable of nullifying the effect of the hypothetical existence of a cause unrelated to service and discipline, and thus capable of attributing to the specific act committed, in every case and whatever the cause may have been, the specific legal classification of the offence of insubordination or abuse of authority. On this subject, see V. SANTORO, *La causa estranea al servizio e alla disciplina militare nella struttura dei reati di insubordinazione ed abuso di autorità*, in “Rassegna della Giustizia Militare”, supplement to no. 2, 2023.

– without any further specification of content – of a member of the Italian armed forces, even if not of a higher rank, charged with escorting, supervising or guarding him.

This is not the case with the offence of disobedience provided for in the Military Penal Code in Peacetime, where there is a precise and essential statutory definition of the substantive requirements of a binding order: the order must, first and foremost, and by immediate specification of the criminal provision, relate to service or discipline.

The description of the constituent requirements of the binding order is not, however, limited to the provision defining the offence of disobedience, but is supplemented by the provisions of Article 1349 of the Military Code (Legislative Decree No. 66 of 2010), which outlines the two further conditions that must be met for an order to be considered binding and for its violation to be punishable as the offence of disobedience: firstly, it specifies that “orders, in accordance with the regulations in force, must relate to discipline, concern the manner in which service is carried out and not exceed institutional duties”. It then continues, with a radical shift in perspective and a provision directed at the military personnel receiving the order, stipulating that they have a duty not to carry out an order “manifestly directed against the institutions of the State or the execution of which manifestly constitutes a criminal offence”. Not only do they have a duty not to carry out the order, but they must also inform their superiors as soon as possible.

Also relevant is the provision of Article 727 of the implementing regulation of the aforementioned legislative decree (Presidential Decree No. 90 of 15 March 2010), which begins, in direct connection with the criminal offence in question, by prescribing that orders must be clearly formulated so as to avoid doubts or hesitation in those receiving them, and reaffirming that they must be issued in compliance with and in the cases provided for by the Code.

Subsequently, with regard to the content of the order, the provision addresses the scenario of an order that derogates from service regulations and permits it only in cases where there are essential service-related requirements; furthermore, it imposes an obligation on the person issuing the derogatory order to promptly notify the authority that issued the provisions from which the derogation is made.

The rule ends with a provision concerning those within the chain of command and considers the possibility that the order may be issued by a person who is not the direct superior of the military personnel required to carry it out. Such a situation is permitted only when, due to the urgency of the matter, it is not possible to request the intervention of the direct superior, and with the provision of the obligation for the person who issued the order to identify himself and, if necessary, specify the position held and immediately report what he has done to the direct superior of the recipient of the order.

This latter provision must not lead to the misconception that all the requirements set out therein are essential for the order to be binding. We shall see below how it assumes overall relevance only in the context of a possible censure of the actions of the person issuing the order, should the conditions justifying the assumption of the authority to issue orders by a person other than the immediate superior prove to be lacking.

Finally, also relevant is the provision set out in Article 729 below, which incorporates Article 25(2) of the Military Discipline Regulations (Presidential Decree No. 545/1986) and provides that “a member of the armed forces who is given an order which they do not consider to be in accordance with the regulations in force must, in a spirit of loyal and active cooperation, bring this to the attention of the person who issued the order, stating the reasons, and is obliged to carry it out if the order is confirmed, unless the order is manifestly criminal, in which case they have a duty not to carry out the order”.

This provision also addresses the situation where a member of the armed forces is faced with an order that conflicts with one received previously; it is stipulated that in such a case, he is obliged to carry out the new order and inform the superior who had issued the previous order.

2. The relevance of service and discipline in the structure of offence of disobedience

From the legal framework outlined above, and in particular following a comprehensive consideration of all the elements that make up the structure of the offence of disobedience, it is evident that the requirement of a link to service or discipline constitutes a normative element of the offence, which postulates the reference to the body of rules safeguarding these fundamental interests and in respect of which there appears to be no significant scope for challenge by the subordinate; the latter, if he believes, in good faith but erroneously, that such relevance does not exist, faces a twofold obstacle: either they come up against the barrier of Article 39 of the Military Penal Code in Peacetime³, in the part where it establishes the inexcusability of mistakes relating to the duties inherent in their military status – except, following Constitutional Court judgment no. 61 of 1995, where the error is unavoidable; or they come up against the general obstacle of Article 5, on the

³ Art. 39 of the Military Penal Code: “A member of the armed forces may not invoke ignorance of the duties inherent in his military status as a defence”.

grounds that the body of rules on relevance to service and discipline forms part of the criminal provision and establishes its precise scope and sphere of protection⁴.

⁴ In this regard, it should be noted that in the configuration and discipline of the general defence of compliance with an order, provision is made, by virtue of the third paragraph of Article 51, only for the hypothesis that the person believed, due to a mistake of fact, that they were executing a lawful order. In this case, due to the unquestionable effect of the provision of Article 47 of the Criminal Code, the intentional element is lacking. In truth, the issue is highly controversial. In this regard, it is noted (see D. PULITANÒ, *L'errore di diritto nella teoria del reato*, Giuffrè, Milan 1976, p. 262; G. MARINUCCI, E. DOLCINI and G. L. GATTA, *Manuale di Diritto penale*, 8th ed., Giuffrè, Milan, 2019, p. 308), that the express provision of the sole defense of mistake of fact regarding the lawfulness of the order raises two orders of questions: one relating to the possible exculpatory effect of a mistake on rules integrating the justifying norm and of a culpable mistake regarding the lawfulness of the order. This is, of course, in relation to the eventuality that the offence committed through the corresponding conduct of executing the order is also provided for in a negligent form. The majority of legal scholars have therefore been inclined to recognize the full operativeness of the defense even when the erroneous belief depends on a mistake on an extra-penal norm, thereby aligning the scope of Article 51(3) exactly with that of Article 47 of the Criminal Code. In support of these theses, it has been noted that if exculpatory relevance were granted only to the defective perception of an empirical-naturalistic fact (from which the belief in the lawfulness of the order derives), one would end up applying inexplicably different treatment to the two protagonists of the hierarchical relationship, since for the superior the ordinary rules on mistake established by the entire Art. 47 of the Penal Code (mistake of fact on the act and mistake of law on the act) apply, while for the one who obeyed, the excusing field would be restricted, leaving out mistake on an extra-penal norm. A different doctrinal approach (D. SANTAMARIA, *Lineamenti di una dottrina delle esimenti*, Naples 1961, p. 93), which is adhered to by established case law, emphasizes that the discipline set forth by the third paragraph in question can reasonably assume exculpatory relevance only where the executor's mistake results in a distorted perception of material reality (for example: compliance with an arrest order based on finding a skilfully forged signature of the superior competent to issue it), without therefore affecting the legal requirements governing the hierarchical relationship with the superior: that is, the set of legal elements which, defining the legal framework of the hierarchical relationship between superior and subordinate, coincide with the requirements of formal legitimacy of the order. Therefore, a mistake regarding one of the prescribed formal requirements – for example: considering that a court clerk may issue a pre-trial detention order – ends up constituting the elements of a mistake on the unlawfulness of the act (and not on the elements of the justifying ground of compliance with a duty), as such, pursuant to Art. 5 of the Criminal Code, not excusable, unless it proves unavoidable. In this perspective, the purpose underlying the provision of the third paragraph of Art. 51 of the Penal Code is to prevent the surreptitious introduction of a derogation from the general operativeness of Art. 5 of the Penal Code. From this perspective, the underlying purpose of the provision in the third paragraph of Article 51 of the Penal Code is to prevent the surreptitious introduction of an exception to the general application of Article 5 of the Penal Code. As regards the issue of negligent error, there is disagreement – given the provision's silence on this point – over the possible application of the rules set out in Article 59(4) of the Penal Code; and therefore whether criminal liability can be attributed to a negligent mistake regarding the lawfulness of the order. However, the negative view tends to prevail, as it is considered preferable in that it allows Article 51 of the Penal Code to be treated as a provision in its own right, which thus takes the form of a provision more favourable to the agent, derogating from the general rule set out in Article 59 of the Penal Code, with the consequence that the subordinate is not

In this regard, it should also be noted, again in accordance with the aforementioned Article 729, that:

“A member of the armed forces must carry out orders received promptly, responsibly and accurately, within the limits established by the Code and the Regulations, and in strict compliance with specific instructions and service regulations. In particular, he must:

- (a) Refrain from making any comments other than those necessary for the proper execution of the order;
- (b) Obey orders received from a superior to whom they are not directly subordinate, informing their immediate superior as soon as possible”.

The provision in point (b) confirms, as already mentioned, that the detailed rules governing the circumstances in which an order may be given to a person not directly subordinate are designed solely for the purposes of potential disciplinary liability on the part of the person giving the order where the justifying conditions are not met. However, it is certain that the military personnel receiving the order must carry it out and cannot object on the grounds that the superior is not competent to issue the order.

Finally, it is worth mentioning the provision contained in the first paragraph of Article 716 of Presidential Decree No. 90 of 15 March 2010 (Code of Military Law), pursuant to which “the military personnel has a duty to act on their own initiative, within the discretionary powers conferred upon them by the assignment of a task or the issuance of an order, to achieve the best result”. This provision, the purpose of which is entirely clear, is further specified in the provision set out in point (b) of the following paragraph, which states that “the military personnel shall take the initiative [...] if, due to a contingent situation, they cannot carry out the orders received”.

The two provisions mentioned above demonstrate how the system for safeguarding the hierarchical order also encompasses the possibility that an order, particularly in circumstances where it aims to achieve a specific objective, may, in certain situations, entail an inherent obligation on the

liable to punishment in the event of negligent mistake (C. F. GROSSO, *L'errore sulle scriminanti*, Giuffrè, Milan 1961, p. 243; A. SANTORO, *L'ordine del superiore nel diritto penale*, UTET, Turin 1957, p. 255). This argument is further supported by the observation that, through this provision, the legislator intended to take due account of the condition of subordination in which the recipient of the order finds themselves due to the hierarchical relationship of subordination to the person who issued it. The moral conditioning generated by the relationship of subordination would therefore allow for the excusal of a lack of diligence in verifying the legitimacy of the order received and would, at the same time, permit a distinction to be drawn between the positions of the two parties in the hierarchical relationship, making the scope of the mistake (reasonably) broader for the subordinate than that enjoyed by the superior who issues the order (who, on the other hand, is subject to the normal regime provided for in Article 59(4) of the Criminal Code, which preserves liability for negligence in the event of an error regarding the legitimacy of the order imposed).

part of the recipient to act on their own initiative. This will occur in situations where, due to unforeseen factors, it becomes impossible to carry out the order in accordance with the planned procedure of execution, and it is, on the other hand, possible to implement it by opting for a different, conceivable, and available course of action⁵.

3. The offence of failure to carry out an assignment (Article 117 of the Military Penal Code in Peacetime)

At this point, we can review those specific cases which, setting aside lexical variations of no decisive significance, appear to cover instances of failure to carry out duties whose performance had been specifically requested: that is, instances that overlap with the offence of disobedience solely insofar as it concerns the failure to carry out a service-related order.

In this context, the first case to be highlighted is that of failure to carry out an assignment, provided for in Article 117 and consisting of the act of “a commander of a military force who, without justifiable cause, fails to carry out the assignment entrusted to him”.

This offence is provided for in both intentional and negligent forms and is punishable, respectively, by imprisonment for up to three years and up to one year⁶.

In the interpretation of this offence, legal scholarship⁷ has held that it contains elements which provide interpretative criteria for the concept of an order. In particular – it has been noted – unlike the characteristics of an order, it has a more complex subject matter and allows the recipient a certain margin of discretionary judgement.

However, from this perspective, it was further noted – in support of the significant similarities with the elements of the offence of disobedience – that the order referred to in the provision must have a specific content and concern the use of military force, understood as a contingent of military personnel and equipment; furthermore, it must be a task individually and formally assigned to the

⁵ Imagine the scenario of a member of the armed forces who, having been asked to carry out a nasal swab test for Covid-19 at a specific facility, finds that, for various unforeseen reasons, he is unable to do so at that facility. In such situations, in my view, the provision of the aforementioned Article 716 requires him, where feasible and practicable, to go to a different facility and carry out the task he has been asked to perform.

⁶ If the duty is not performed through negligence, the penalty is military imprisonment for up to one year. The offence of failure to carry out an assignment is also covered by the Military War Penal Code (Art. 100 C.p.m.p.), where, moreover, the typical conduct is described in terms of a commander who, without just cause, fails to carry out an order for a military operation or, in any case, an assignment entrusted to him (the original penalty was the death penalty).

⁷ On this point, see R. VENDITTI, *I reati contro il servizio e la disciplina militare*, Giuffrè, Milan 1974, p. 42.

commander by the competent military authority and which cannot, therefore, derive from general and abstract provisions⁸. And here an unquestionable element of similarity emerges with one of the fundamental characteristics of an order, namely its origin from an individual body.

Likewise, it cannot be overlooked that the assignment itself may well be characterised by elements of an unquestionably prescriptive nature. Thus, the distinguishing feature, rather than lying in the discretionary nature of the assignment, is to be found in the exemption of justifiable cause, by virtue of which, since the active subject is the ‘commander’, plays a fundamental role, regardless of the degree of binding nature inherent in the assignment: the supervening circumstances that necessitate a deviation from the prescribed procedures for carrying out the said assignment. This also explains the inclusion of negligence in the offence, to be linked to the possibility that the reasons leading to the deviation from the planned assignment arose from a negligent assessment of the factual circumstances.

4. The offence of failure to report for duty (Article 123 of the Military Criminal Code in Peacetime)

Secondly, comes into focus the offence of failure to report for duty, provided for in Article 123 and consisting of the act of “a member of the armed forces who, without justifiable cause, fails to undertake the duty to which he has been ordered”.

The offence, given that the prescribed penalty does not exceed six months, is prosecutable at the request of the unit commander; that is, subject to that specific condition provided for certain military offences under Article 260 of the Military Penal Code in Peacetime for the commencement or continuation of the criminal proceeding.

The prerequisite for the conduct, as regards the failure to undertake service, is that the military personnel have been ordered to perform a specific service, to be understood in the narrow sense of a defined service (service within service), and therefore not coinciding with the service generically implied in the duty to work.

Given that the conduct centres on failure to comply with an order whilst on duty, it has been emphasised that here, compared to the offences of desertion and breach of duty, the similarity to the

⁸ Rome Military Court of Appeal, judgment of 9 February 1984, in ‘Rassegna di giustizia militare’, 1984, pp. 573 ff.; Padua Military Court, judgment of 23 January 1993, in ‘Rassegna di giustizia militare’, 1993, pp. 373 ff.

offence of disobedience under Article 173 is closer, to the extent that even a delay in reporting for duty is considered criminally relevant, since the omission occurs at the time set for the start of duty⁹.

Indeed, in this case, there is an undeniable element of interference with the order constituting the offence of disobedience, given that the eloquent expression ‘on duty’ is used.

In this regard, legal scholars have observed that, with the provision in question, the legislator had in mind not the implications pertaining to military discipline, but exclusively the aspect of the inconveniences arising for the service; thus, the offence, in its exclusive reference to the service, must be regarded as distinct from the offence of disobedience, because otherwise it would be inapplicable. Hence the corollary that if the command for the performance of duty stems not from a service order but from an order directly issued by a superior, this specific case ceases to apply and is superseded by the offence of disobedience¹⁰.

However, there have been those who have observed¹¹ – and this point is entirely valid – that the offence of disobedience is not intended to safeguard the exclusive and undifferentiated interest in compliance with the will expressed by the superior; and that the alternative requirement of necessary relevance to service highlights its equally and co-essential offensive effect with respect to military service.

In this context, a fundamental role is played by the provision of Article 1346 of the aforementioned Legislative Decree No. 66 of 2010, according to which the concept of discipline, far from being defined in terms of a generalised obligation to conform to every wish of a superior, is deeply rooted in the entirety of military duties and amounts to the obligation to observe the rules pertaining to military status ‘in relation to institutional duties’.

⁹ See Supreme Military Court, judgment of 21 November 1978, in “Rassegna di giustizia militare”, 1979, pp. 139 ff.; Court of Cassation, judgment of 28 February 1990, in *Il diritto penale militare nella giurisprudenza della Corte costituzionale e della Suprema Corte di Cassazione (1980–1992)*, vol. I, edited by G. Scandurra, Giuffrè, Milan 1993, p. 367.

¹⁰ M. STECCANELLA, *Abbandono di posto e violazione di consegna nel sistema penale militare*, Giuffrè, Milan 1964, pp. 88, note 36, and p. 128, according to whom, precisely, the offence at issue should have been classified among those against discipline and that, where the command for the performance of duty is issued not by a service order but by an order directly given by a superior, the offence of disobedience must prevail.

¹¹ On this point, see D. BRUNELLI, *Reati contro la disciplina militare* (entry), in *Enciclopedia del diritto*, vol. XXXVIII, Giuffrè, Milan 1987, pp. 1226 ff. On this subject, including for further references to legal doctrine, see V. SANTORO, *Commento all’articolo 173 c.p.m.p.*, in *Codici penali militari. Rassegna di dottrina e giurisprudenza*, edited by D. Brunelli and G. Mazzi, Giuffrè, Milan 2001, pp. 777 ff.

5. *The offence of failure to comply with instructions (Art. 125 of Military Penal Code in Peacetime)*

Finally, the offence of failure to comply with instructions, provided for in Article 125, comes into focus; this consists in the fact of an officer entrusted with a mission, expedition, or military operation “failing, without justifiable cause, to comply with the instructions received”.

A prerequisite for this conduct is the assignment of a mission, expedition, or military operation, with corresponding instructions received from superior commands for its execution.

In relation to this specific case as well, it has been noted¹² that the instructions are of a general nature, as they primarily identify the terms and general procedures of the operation to be carried out; and that, therefore, they are not equivalent to an order, as they do not designate a purely executive activity and allow for a considerable degree of discretion in the adoption of decisions necessary for the achievement of the objective, as evidenced by the phrase ‘without justifiable cause’ contained in the provision.

In this context, and in view of the presumed margin of discretion afforded to the officer in charge, reference was made to the aforementioned provision of Article 716 of Presidential Decree No. 90 (previously contained in Article 13(1), (2) and (3) of the Military Discipline Regulations, approved by Presidential Decree No. 545 of 18 July 1986), which establishes the duty of a member of the armed forces, when they have discretionary power, to act on their own initiative in order to achieve the best result, and, in the absence of orders, the duty to act rationally and with a sense of responsibility in order to fulfil the task assigned and to achieve its purpose, even in the face of unforeseen circumstances.

The offence in question is provided for in both intentional and negligent forms¹³, with a penalty of up to three years in the former case and up to six months in the latter, and is expressly punishable only if “it has prejudiced the outcome of the mission, expedition or operation”.

The offence, therefore, is not committed merely by failing to comply with the instructions received. It is necessary, in fact, that this occur without justifiable cause, and it is also necessary that such conduct has prejudiced the outcome of the mission, expedition, or operation. This latter provision constitutes, according to established opinion, an objective condition for criminal liability.

Even in relation to this offence, it has been noted that the instructions nevertheless constitute orders – a term, moreover, used in the repealed military criminal codes for the army and navy – with

¹² D. BRUNELLI and G. MAZZI, *Diritto penale militare*, 4th ed., Giuffrè, Milan 2007, p. 311.

¹³ Also covered, with any member of the armed forces as the perpetrator, by Article 101 of the Military Penal Code of War.

the consequence that we are dealing with a special case of disobedience, once again confined solely to the variant of omission¹⁴.

As regards the existence of a justifiable cause, there is agreement that this should be linked to the circumstance that the officer in charge of the duty has an adequate margin of discretion inherent in the duty itself. In this regard, we may reiterate what has been said concerning the conditions for the validity of justifiable cause and its role, where well-founded, as a factor justifying partial or total non-compliance with the instructions received.

6. The relationship between the aforementioned offences

Summarising the points highlighted above, we can observe that, given the broad scope of application of the offence of disobedience and its general reference to service-related orders, we have two offences (Articles 117 and 125 of the Military Penal Code in Peacetime) in which: a) there is the additional requirement of the specific subjective status of the recipient of the order (the commander of a military force; the officer in charge of a particular activity), so that we are dealing with offences that require a double subjective qualification¹⁵; b) the conduct of non-compliance relates to provisions concerning the deployment of military force and to provisions concerning the conduct of a mission or a military expedition or operation; c) the offence exists only if, with regard to the two types of offence, the non-compliance is not supported by a justifiable cause and, with regard to the offence referred to in Article 125, if the objective condition for criminal liability – namely, prejudice to the outcome of the military operation in question – has also been met.

Unlike the two offences mentioned above, the further offence provided for in Article 123 of the Military Penal Code in Peacetime, in which criminally relevant non-compliance is always defined by the absence of a justifiable cause, is characterised by an unspecified reference to any type of service, provided it possesses the characteristics of definiteness and punctuality, and is therefore not to be confused, as already noted, with the generic performance of service that constitutes the content of ordinary work.

We shall immediately highlight a distinctive feature of this latter offence, which concerns the prison term and which forces us to acknowledge that, for the legislator, the offence of failure to report

¹⁴ See S. MALIZIA, *Violazione di doveri inerenti a speciali servizi* (entry), in *Enciclopedia del diritto*, vol. XLVI, Giuffrè, Milan 1987, pp. 813 ff.

¹⁵ That is to say, offences in which a further subjective qualification is required beyond that required by the general category of military offences, which therefore constitute offences in their own right.

for duty, based exclusively on conduct of omission, is considered less serious than disobedience to a service-related order, given that the lesser penalty of military imprisonment for up to six months is provided for, and given further that, for proceedings to be brought for this offence, a request from the Corps Commander is required.

Given this peculiarity, it could be argued that the offence of disobedience would arise in the event that, being aware of having been ordered to report for duty, the serviceman announces his refusal to perform it; and opposes such refusal at a time prior to that set for the commencement of duty.

The first justification that comes to mind in response to this argument is that, in the case of a radical and immediate refusal to perform the duty, the subordinate's conduct constitutes an act of radical rebellion against the superior, involving a blatant opposition of his will to that expressed by the superior through the order to perform the duty. Thus, an act that appears to be the polar opposite of the conduct required of a subordinate, as set out in Article 1347 of the Code of Military Law, which prescribes the absolute nature of the duty of obedience and sets as its sole limit the case of an order manifestly directed against the institutions of the State or the execution of which manifestly constitutes a criminal offence, to which is moreover linked the further duty "to inform superiors as soon as possible".

In the event of a blatant refusal to carry out the order, therefore, an element of offensiveness would come to the fore, which primarily undermines the disciplinary bond.

In reality, the matter is not so clear-cut, because it raises the question of whether the offence of disobedience is committed in a situation where the military personnel, having initially refused to carry out the order, subsequently carries it out within the timeframe and in accordance with the terms of the order: a matter of radical disagreement between the established case law¹⁶ and the view expressed by legal scholars, who note that "if the threshold of punishability is brought forward to the mere expression of the intention to omit – in which refusal is manifested – the complete divergence between such an interpretative approach and the principle of offensiveness becomes evident"¹⁷. Furthermore,

¹⁶ In case law, the affirmative view prevails, holding that "the refusal to comply with an order by a subordinate who subsequently, in due course, complies with the order without engaging in any conduct involving an omission, is criminally relevant under Article 173 of the Military Penal Code in Peacetime". In these terms, Military Court of Appeal, Disciplinary Section Verona, judgment of 20 September 1985, cited in G. SCANDURRA, *Il diritto penale militare nella giurisprudenza della Corte costituzionale e della Suprema Corte di cassazione*, Giuffrè, Milan 2002, pp. 202 ff.

¹⁷ In these terms, see A. CADOPPI, *Brevi note in tema di disobbedienza*, in "Rassegna della giustizia militare", 1986, pp. 288 ff., who adds that the criticised approach also reveals a significant shift towards the criminal prosecution of mere *cogitatio*, thereby undermining the very principle of materiality (*nullum crimen sine actione*). On this point, see

it must be noted that, whilst there are undoubtedly drawbacks in both cases, it is difficult to shake off the feeling that the conduct of those who, without any prior notice or justification, fail to perform the duty for which they have been ordered is more serious, often generating more far-reaching detrimental consequences, for example in services requiring multiple personnel, and forcing the military authorities to scramble to find a solution in the face of a sudden breakdown in service and to find a replacement.

That said, let us go into detail and attempt to ascertain what commonalities exist between the aforementioned cases and that of disobedience, and whether and to what extent the conduct of refusal followed by compliance with the request is relevant within the framework of the aforementioned cases, given the structural formula that characterises them.

Firstly, it seems self-evident that what is presented as an explicit limit to the duty of obedience and as a precursor to an actual act of disobedience (manifest criminality of the order and an order directed against the institutions of the State) also applies as a limit to the corresponding duty outlined in the three cases mentioned above¹⁸. Indeed, it does not seem to us to be disputable that the fundamental interests protected by the provisions setting a limit on the duty of obedience retain their relevance in all criminal cases involving the prerequisite of a binding order to perform a service.

Secondly, given that all three offences under consideration involve solely the conduct of failing to perform the (variously termed) required activity, the question arises as to whether, even in relation to these offences, the distinct offence of disobedience can be immediately established in cases where the person required to carry out the activities envisaged in each of them opposes an immediate and outright refusal to comply and subsequently, within the time limits specified in the order, proceeds to carry out punctually what they were required to do.

Finally, and with regard to the offence referred to in Article 125, given that the criminal offence is established as a result of an omission without justifiable cause which has also prejudiced the outcome of the mission, expedition or operation; and given that the prejudice to the outcome of the mission, expedition or operation is unanimously regarded by legal doctrine as an objective condition for punishability, one must ask whether criminal liability remains under another offence for the case of blatant and unjustified conduct involving failure to comply with a prescriptive instruction that did not entail any negative consequences for the mission.

V. SANTORO, *Commento all'articolo 173 del codice penale militare*, in *Codici penali militari. Rassegna di dottrina e giurisprudenza*, op. cit., pp. 590 ff.

¹⁸ For example, with regard to the offence under Article 125, the conduct of a military operation requiring, with a clearly subversive intent, the use of tanks and an armed storming of Parliament.

7. The subsidiary nature of the offence of disobedience

Let us attempt to answer the questions set out above, which intuitively relate to the precise scope of application of the fundamental, but undoubtedly subsidiary, offence of disobedience under Article 173, taking into account, with an initial digression into the offence of failure to report for duty, that the possibility of recognising concurrence between the two offences of disobedience and failure to report for duty has been denied in the case of a military personnel who fails to comply with an order to undertake a duty to which they had already previously been assigned. This is because, in such a scenario, the order is simply intended to reinforce a previous order already addressed to the recipient via the duty roster and which has resulted only in a charge of failure to report for duty, since the soldier cannot be assigned new duties or duties different from those already entrusted to him¹⁹.

This approach is well aligned with the residual nature of the offence of disobedience, designed to protect the military organisation in its static-institutional aspect and coexisting with further criminal provisions that specifically protect, even in the preliminary phase, specific duties, the latter falling within the scope of offences against the service.

From this perspective, it is emphasised that the offence of disobedience causes immediate and specific harm to the overall essence of the military organisation²⁰; that is, a legal interest embodying the comprehensive and undifferentiated need for the orderly and precise functioning of the organisation and in which the necessary interpenetration between service and discipline finds precise expression.

In other words, there is no strict dichotomy between the two interests of military service and military discipline, as demonstrated by the law setting out the fundamental principles of military discipline (Law No. 382 of 11 July 1978)²¹, which affirms that the duties constituting military status must be closely aligned with the requirements of service and significantly defines the scope within which legitimate protection of so-called discipline may be exercised, establishing – in contrast to the framework inherited from tradition – that what justifies and substantiates the application of the criminal provision is the harm caused to the service, even if carried out indirectly.

¹⁹ Court of Military Appeal, Naples District Section, judgment of 5 November 1985, in “Rassegna di giustizia militare”, 1986, p. 108.

²⁰ See D. BRUNELLI, *Reati contro la disciplina militare* (entry), in *Enciclopedia del diritto*, vol. XXVIII, Giuffrè, Milan 1987, p. 1227.

²¹ This law was subsequently incorporated into the aforementioned Legislative Decree No. 66 of 15 March 2010 (Code of Military Law).

The offence of disobedience, therefore, safeguards the hierarchical relationship through the direct protection of the operational mechanism by which the chain of command is functionally implemented, extending from the soldier to the highest-ranking officer in the armed forces.

The noted link between military service and discipline has led legal scholarship²² to identify offences against military discipline as acts that undermine military public order, understood as the set of minimum conditions for the existence of that part of the military system which coincides with the organisation of the armed forces, its structures, and the relationships between its components.

On this basis, it seems entirely plausible to conclude that the offence of disobedience is currently called upon to play a role in the auxiliary protection of military service, criminalising conduct that violates interests instrumental to the proper functioning of the service, distinct from and in addition to those contemplated and protected through orders concerning a particular service; and therefore relevant as the prerequisite for the existence of specific criminal offences.

In other words, given the existence of criminal offences that cover orders in specific services and penalise their non-execution, as opposed to the generic and undifferentiated service that is at issue in the offence of disobedience, it seems necessary to conclude that, should the prerequisite all three offences provided for in Articles 117, 123 and 125 of the Military Penal Code occur²³, the criminal protection of the performance of that particular service is exhausted within the framework of the specific criminal offence and that, consequently, whatever the actual conduct of the person to whom the order was addressed (for example, a pre-announced refusal to carry it out), it will be necessary to await the prescribed period for compliance and only in that context to take note of any unjustified compliance.

This means that if a military personnel ordered to perform one of the specific duties covered by the offences set out in Articles 117, 123 and 125 of the Military Penal Code announces their refusal to carry it out and then in fact carries it out within the prescribed time, there will be no criminally relevant consequences. Similarly, where there is always an initial refusal, the criminal relevance of the act will in any case be linked to the conduct of objective and unjustified failure to perform the duty, and the provision to be applied will be solely that which provides for and penalises such failure.

It therefore seems that should be excluded the interpretative option according to which, in the presence of an order in one of the services referred to in the provisions of Articles 117, 123 and 125, the specialising scope of these criminal provisions – based solely on a conduct of omission – would only arise in the absence of conduct constituting a radical refusal to carry out the order, because in

²² On this point, citing the relevant doctrine, see V. SANTORO, *Commento all'articolo 173 del codice penale militare*, in *Codici penali militari. Rassegna di dottrina e giurisprudenza*, op. cit., pp. 569 ff.

²³ A condition that may be fulfilled either by a written order issued whilst on duty or by an order given orally.

such a scenario the crime of disobedience would apply. This, in fact, would reverse the relationship between the aforementioned offences and the offences of disobedience and would assign to the former that subsidiary nature which is, according to the prevailing view, attributed to the latter offence.

Given these premises it is also easy to resolve the question of the possible criminal relevance of the omission referred to in Article 125 in cases where the condition for punishment has not been met. The answer that appears consistent and plausible is that the act is of no criminal relevance, and therefore it must be ruled out that the omission, which is undoubted and unjustified, constitutes the separate offence of disobedience.

8. In particular, on the relationship between the offence of disobedience and the offence of failure to report for duty (Articles 173 and 123 of the Military Penal Code in Peacetime)

To better understand the distinction outlined above, it is necessary, precisely with regard to the delicate boundary between an order relating to service (protected by the offence of disobedience) and a command to perform a specific service (protected by the offence under Article 123), to clarify what constitutes the specific service referred to in the offence under Article 123, so as to avoid the absurd implication that any conduct required of a military personnel is to be considered service.

In this context, the argument that one of the key distinguishing features between the two aforementioned offences is the ‘personalisation’ of the instruction given to the military personnel must be considered with caution. It is argued in this regard that where military personnel are ordered to perform a duty by means of a service order, any failure to carry out that duty constitutes the offence of failure to report for duty. Conversely, where there is direct communication between the person ordered to serve and their superior, the offence of disobedience is established, since the hierarchical relationship – which also underlies the service order and thus the failure to report for duty – is made explicit, which constitutes the typical prerequisite for the offence provided for in Article 173 of the Military Penal Code in Peacetime²⁴.

²⁴ Court of Military Appeal, judgment of 17 April 2013, No. 62, which states the following: “one of the elements of greatest discriminatory value between the two offences of failure to report for duty and disobedience is the personal nature of the order given to the military personnel. As a rule, where a service member is ordered to report for duty by means of a service order, any failure to comply constitutes the offence of failure to report for duty. Conversely, where there is direct communication between the person ordered to report for duty and their superior, in the Court’s view, the offence of disobedience is established, since the hierarchical relationship – which also underlies the service order and thus the failure to report for duty – takes on a direct form, which constitutes the typical prerequisite for the offence provided for in Article 173 of the Military Penal Code in Peacetime. In other words, the offence of failure to report for

In other words, according to this approach, the offence of failure to report for duty does not involve a personal and direct order giving rise to the obligation to undertake a specific duty; by contrast, the offence of disobedience is characterised by such a direct order, from which arises the obligation to act in accordance with it, that is, to undertake the duty, in relation to which the conduct of refusal, omission and delay, as constituent elements of the offence of disobedience, comes to the fore.

In my view, such a thesis, which emphasises the form of expression of the order to perform a duty and shifts the focus of criminal liability for failure to perform, does not appear to be grounded in the literal wording of the offence and amounts to attaching excessive importance to what, in the absence of specific provision, is merely one of the various forms of service orders.

In reality, it does not appear that, within the structure of the offence of failure to report for duty, only a written order is of relevance. What the provision requires, in fact, is merely the order to report for duty and says nothing about the methods and forms through which such an order must be issued.

From this perspective, what really seems to be of specific and precise relevance in the criminal offence in question, and which constitutes its distinctive feature and its particular scope of application, relates to the specific service covered by the order and the precise source from which the order to report for duty must originate.

As regards this latter aspect, it appears to us that the case in question differs from the undifferentiated source from which the order leading to disobedience may emanate (any superior in the hierarchy) and requires a specific and precise authority vested in the person issuing the service order, who must be among the institutional figures who, in relation to the specific organisational context, hold the power to issue that service order.

Consider, in this regard, the order to carry out a mobile patrol service or the order to place a specific site under surveillance. In such a case, it seems entirely reasonable to conclude that not all hierarchical superiors who happen to be on duty within that particular organisational and operational context can issue such an order. That is to say, only those institutional figures (for example, the commander of the Carabinieri station or individuals holding positions of authority within higher-level bodies) authorised to organise and regulate the shifts for carrying out the specific duty and the individuals required to perform it may do so.

As for the second aspect, and as has already been mentioned several times, it must be a specific service distinct from typical and ordinary work duties, just as is the case with the separate offence of

duty does not involve a personal and direct order giving rise to the obligation to undertake a specific duty, whereas the offence of disobedience is characterised by such a direct order, from which arises the obligation to act in accordance with it, that is, to undertake the duty.

failure to deliver, provided for by Art. 120 of the Military Peace Code; consequently, it must be characterised as a service that is not limited to a single, momentary act but which, as a rule, unfolds over a period of time that allows the initial moment to be identified, against which to assess the conduct of the military personnel who “fails to undertake it”.

Outside this context, the subsidiary relevance of the offence of disobedience comes to the fore, within which orders relating to duties that do not possess the characteristics of the duties covered by the offence of failure to report for duty are relevant (for example, orders requiring the performance or abstention from specific acts, even if falling within the scope of ordinary work duties)²⁵.

²⁵ For example, the order to sign the character references, or – though there is disagreement on this point – to sign to acknowledge receipt of the document initiating disciplinary proceedings.