

# The War, the Soldier, and the Conscience\*

## *About the Primacy of Politics and the Limits of Obedience in the German Bundeswehr*

BY JÜRGEN ROSE

### *Freedom of Conscience and the Right to Conscientious Objection in Germany*

After World War II and the fall of the Third Reich, the new West German constitution guaranteed every citizen the fundamental human rights to freedom of faith and conscience as well as right to refuse to perform military service involving the use of arms against their conscience. The three paragraphs of the relevant Article 4 read as follows:

1. Freedom of faith and of conscious, and freedom to profess a religious or philosophical creed, shall be inviolable.
2. The undisturbed practice of religion shall be guaranteed.
3. No person shall be compelled against their conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

While paragraph 1 caused little discussion, paragraph 3 evoked fierce debates. The later federal President Theodor Heuss, suspected that “*if we put here simply conscience, we will enshrine in the constitution a 'mass over-use of conscience' in the event of war*”.<sup>1</sup>

However, in the end he could not prevail against the stand taken by Social Democrats like Carlo Schmid, who replied that “[t]he citizen must be able to state for moral reasons: “I wish to serve my fatherland in it’s crisis in a manner

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<sup>1</sup> Quoted in Gerd Bucorius: “Verweigerung und Gewissen. Das Grundgesetz wurde gegen seine Väter ausgelegt”, *Die Zeit*, 23 December 1977.

other than by killing someone”,<sup>2</sup> and Fritz Eberhard, who argued that Germany had “gone through a ‘mass slumber of conscience’ during which millions of Germans said: orders are orders, and killed in view of that”. And he continued: “[T]his is why I believe that, precisely in this situation after the war and after the totalitarian system, now that we want to break with this notion that orders are orders – when in fact we want to build democracy – that paragraph is apposite”.<sup>3</sup>

One may wonder why conscientious objection was discussed as early as in January 1949, when neither rearming Germany or creating a new German army was an issue. However, there were several driving factor behind the debate. Most urgent was certainly the fear that during the emerging Cold War the occupation powers – adamant that the Krauts should defend their own soil instead of shedding the blood of allied soldiers should the conflict turn into hot water – would try to compel Germans to serve in some kind of military formations commended by foreign generals of the Allied Forces. The second and very important factor was the proximity of the experience that military courts during the the Third Reich<sup>4</sup> systematically sentenced unprecedented numbers of conscientious objectors to death and executed them according to the maxim: “He who fights may die, he who refuses to fight must die!” Last but not least, in the late 1940s conscientious objection was not yet internationally accepted as a fundamental human right. Conscientious objection was embodied in German Basic Law and thus everybody, including soldiers whether they are active, in the reserve or retired, regardless of whether they are conscripts or volunteers, may make use of that right at any time. However, for a professional soldier such an endeavor would not be easy at all, because he is legally obliged to meticulously expose his more or less sudden change of conscience to a board in charge of granting his motion for conscientious objection.

While universal conscientious objectors, after years of controversy among supporters and opponents of the German Bundeswehr, were increasingly accepted by the German public, the situation was different for those who additionally claimed the right to selective conscientious objection. It was only in 2005 that the Federal Administrative Court provided explicit clarification on this matter with its ruling against Major Florian Pfaff who on moral grounds refused to obey several orders while posted in Iraq. The judges claimed that Article 4 paragraph 1 of the German Basic Law applies also to soldiers. Secondly, the court conceded that soldiers may experience severe moral conflicts by obeying

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<sup>2</sup> Ibid.

<sup>3</sup> Quoted in Helmut Donat et. al.: “Der Deutsche Ausschuss für Fragen der Wehrdienstverweigerung 1953 bis 1957”, in: Zentralstelle für Recht und Schutz der Kriegsdienstverweigerer (ed.): “Die Freiheit, nein zu sagen: vom Recht der Kriegsdienstverweigerer 1957 – 1982”, Freiburg i. Br. 1983, p. 23.

<sup>4</sup> See Manfred Messerschmidt: “Die Wehrmachtjustiz 1933-1945“, Paderborn 2005.

orders in conflict with their conscience. Under such circumstances soldiers are entitled to refuse to obey the order on the basis of the individual's constitutional right to the inviolability of conscience.

However, the subject of this particular lawsuit involved not only the right to reject a specific order, but also the question of selective conscientious objection. Major Pfaff had argued that obeying the orders would in turn involve him in a war of aggression which he considered completely and utterly impossible not only on personal moral grounds, but also because of the German Constitution and international law. Hence the most important feature of the case was that an active field officer resolved upon an act of selective conscientious objection and the Federal Administrative Court, subordinate only to the Federal Constitutional Court, accepted such a courageous stance for the first time in the history of post-war Germany.

In their verdict the judges explicitly stressed the unconditional commitment of the armed forces to law and order: "The Basic Law imposes the commitment of the armed forces to basic rights, but does not restrict basic rights on decisions and requirements of the armed forces."<sup>5</sup> The judgment implies not only that the military is committed to the Constitution, but also that all of its members are strictly obliged to follow the special military laws and regulations, such as the *Soldatengesetz* and the *Wehrstrafgesetz* of the Federal Republic of Germany.

The relevant articles of paragraph 10 of the *Soldatengesetz* on the *duties of the superior* state that:

4. He is authorized to issue orders for official reasons only, and only when observing the rules of international law, national law and service regulations.
5. He is responsible for the orders he has given. He has to enforce orders by reasonable means.

Paragraph 11 of the *Soldatengesetz* is also relevant:

1. The soldier has to follow his superior. He must observe their orders completely, precisely and immediately. Disobedience does not apply when he refuses to obey an order that violates human dignity or that was not issued for official reasons; the erroneous assumption that such an order is given releases him from responsibility only if he was not able to avoid his error, and if he could not have been expected in the given circumstances to defend himself against the order by remedy.
2. An order must not be observed if that implies a criminal offence. If the subordinate follows the order anyhow, he will become guilty only if he

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<sup>5</sup> Bundesverwaltungsgericht, Urteil des 2. Wehrdienstsenats vom 21. Juni 2005 – BVerwG 2 WD 12.04, p. 112.

recognizes, or if it was obvious for him in the given circumstances, that obeying implied a criminal offence.<sup>6</sup>

In summary, the evolution of the modern German armed forces after World War II, as well as the recent jurisdiction on military affairs, reveals the significance of two essential aspects of what might be called the German "military constitution". These are the strong commitment of individual soldiers to their conscience as well as the strong commitment to law and order.

### *Old Values – New Missions*

In times of the *Global War on Terror*, preventive warfare, crimes against international law, and threats to fundamental human and civil rights, the frequently inhumane reality of the use of military force may create the suspicion that soldiers are just a kind of battle robot following orders without thinking.<sup>7</sup> This perception is enhanced when even NATO allies, all Western democracies, seem to abuse their armed forces in missions whose legality under international law is disputed.<sup>8</sup> Not least because of this, civil society has become aware of the problem of legitimacy of such wars under international law. The number of cases of disobedience in many intervention and occupation forces reveals that even amongst military professionals, who are expected to execute the combat missions agreed on by the political leadership, sensitivity has grown regarding the implications of the legal constraints on the initiation and conduct of war laid down in international law.

The fundamental question service members operating within the area of tension between their duty to obey, loyalty to the law, and freedom of conscience must answer is: How may or shall or must I act as a soldier who is strictly subject to the primacy of politics, if political leaders or military superiors

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<sup>6</sup> Bundesministerium der Verteidigung Führungsstab der Streitkräfte InfoM (ed): *Grundgesetz für die Bundesrepublik Deutschland. Werte und Normen für Soldaten*, Bonn 2003, pp. 112f.

The Law on Military Jurisdiction constitutes the basis for prosecuting offences against the legal norms mentioned above. The most relevant sections are: Section 5 (acting under orders), section 19 (disobedience), section 20 (bindingness of an order, error), section 32 (misuse of command authority for illegal objectives), section 33 (incitement to illegal actions), section 34 (unsuccessful incitement to illegal actions). See *Wehrstrafgesetz WStG*, March 30 1957, BGBl I 1957, 298, revised by proclamation of May 24 1974 I 1213.

<sup>7</sup> Jürgen Rose: "Gehorsam bis zum Hindukusch? Das Grundgesetz verbietet die Vorbereitung von Angriffskriegen. Trotzdem wird ein Bundeswehrosoldat, der sich weigert mitzumachen, degradiert." in *Sicherheit und Frieden – Security and Peace* 22/3 2004, p. 134.

Jürgen Rose: "Gehorsam bis zum Verfassungsbruch. Der 20. Juli und die Pflicht zur Verweigerung. Wer sich in der Bundeswehr daran hält, kann degradiert werden, wie der Fall des Majors Florian Pfäff zeigt" in *Freitag – Die Ost-West-Wochenzeitung*, 23 July 2004, p. 4.

<sup>8</sup> Jürgen Rose: *Ernstfall Angriffskrieg. Frieden schaffen mit aller Gewalt?*, Hannover 2009.

urge me into a war that inevitably will bring death and injury to human beings, if this war is potentially or even clearly a war of aggression, which clearly constitutes a crime against international law?

The service member involved has no choice but to confront the problematic nature of that virtually important issue. Since Nuremberg Tribunals service members can no longer appeal to a superior political or military authority in order to avoid responsibility for obeying illegal orders. In accordance with Kant's philosophy of law and morality<sup>9</sup>, the reason for this is the recognition that the conscience of each person sets the standard for any human action. For service members this means that superior orders alone are insufficient to legitimize military action. By obeying orders soldiers voluntarily transform the extrinsic will of another person into their own intrinsic determination, and before actualizing their own intention through their action soldiers have to scrutinize its legitimacy in relation to their conscience.<sup>10</sup>

Modern philosophy of law founded upon the traditions of the Enlightenment is reflected in the so-called Nuremberg Principles.<sup>11</sup> On the one hand the latter impinged on various bodies of military law.<sup>12</sup> On the other hand they were affirmed at the level of international law, for instance by the Code of Conduct on Political and Military Aspects of Security, which states in paragraphs 30 and 31 that:<sup>13</sup>

30. Each participating state will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that they are

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<sup>9</sup> Immanuel Kant: *Grundlegung zur Metaphysik der Sitten*, Hamburg 1965.

<sup>10</sup> This implies that ultimately every soldier decides which means and up to which point he would be prepared to fight. The functional imperatives of the military subsystem, at least in its current constitution, are incompatible with this moral imperative, which suggests, to paraphrase Hegel – this is so much worse for the military.

<sup>11</sup> Gregor Schirmer (ed): *Die Nürnberger Prinzipien – ein Umbruch im Völkerrecht*, Bulletin für Faschismus- und Weltkriegsforschung, Berlin 2006

Herbert R. Reginbogin (ed): *Die Nürnberger Prozesse: Völkerstrafrecht seit 1945*, Berlin 2006.

<sup>12</sup> The relevant regulations of German military law are discussed above.

In the United Kingdom soldiers are obliged to refuse any illegal order. In Denmark and France soldiers must refuse all obviously illegal orders. In addition they are authorized to refuse all other illegal orders. In Belgium, Luxembourg, the Netherlands, Poland and Spain, soldiers must refuse to obey illegal orders. But while soldiers in the Netherlands may refuse to obey any illegal order, soldiers in Germany, Luxembourg, and Spain are only authorized to refuse to obey a limited range of illegal orders. These embrace primarily orders that hamper human dignity.

See: Georg Nolte and Heike Krieger: *Europäische Wehrrechtssysteme*, Göttingen 2002. Jürgen Gross: *Demokratische Streitkräfte*, Baden-Baden 2005, pp. 93f.

<sup>13</sup> Auswärtiges Amt (ed): *Von der KSZE zur OSZE. Grundlagen, Dokumente und Texte zum deutschen Beitrag 1993-1997*, Bonn 1998, pp. 267f.

individual accountable under national and international law for their actions.

31. The participating states will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individual accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given. The responsibility of superiors does not exempt subordinates from any of their individual responsibility.

Time after time high-ranking military leaders have acknowledged and corroborated the axiom of law referring to the personal responsibility for one's activities, which applies to each soldier no matter whether superior or subordinate. Major General Hans Peter von Kirchbach commented on this in 1992:<sup>14</sup>

*The tension between liberty and obedience is manifest in [a soldier's] obedience to carry out orders on the one hand, and in obedience to a value system on the other. The tension is between obedience and allegiance to the state on the one hand and the knowledge that national action is the-next-to-the-last possibility. It means that a conscience bound to a higher system of values is the decisive court of appeal. Certainly, the state will not expect its citizens to act against the advice their conscience gives them. But an awareness of this tension and the realization that not every expectation can be fulfilled makes the ultimate difference between the soldier and the mercenary.*

Two years later former Chief of Staff of the German Armed Forces, General Klaus Naumann, even posited a soldier's obligation to insubordination in his official report to the General Inspection Committee:<sup>15</sup>

*According to our conception of the rule of law and ethics, the commander's claim to obedience is faced by both the right and the obligation to insubordination, where this rule of law and morality is no longer in accordance with the military mission. The soldier therefore would be positioned outside the free and democratic legal order.*

Also former US Secretary of Justice Ramsey Clark once said about the limits of the soldier's duty to obey orders: "The greatest cowardice consists in obeying an order which requires a morally unjustifiable action".<sup>16</sup>

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<sup>14</sup> Hans Peter von Kirchbach: "Offizier im Heer der Einheit" in *Truppenpraxis* 4/1992, p. 335.

<sup>15</sup> Klaus Naumann: *Generalinspektorsbrief 1*, Bonn 1994.

<sup>16</sup> Ramsey Clark: *Wüstensturm. US-Kriegsverbrechen am Golf*, Göttingen 1993, p. 268.

## *Selective Conscientious Objection and Situational Refusal to Obey Orders in the German Armed Forces*

Those considerations, regularly invoked by the Bundeswehr, were on the one hand posed with regard to the classic mission of defense of both the nation and the Alliance, and on the other hand referred back directly to the tradition of the military resistance fighters who attempted to assassinate Hitler on 20 July 1944. In their original historical context they would have appeared merely theoretical and abstract. But if the exercise of command and the execution of orders is strictly bound by both domestic and international law, this could not a priori exclude soldiers from occasionally refusing to take part in military missions which were either obviously illegal, doubtful or controversial under international law. And indeed, after the end of the Cold War, this matter became unexpectedly explosive, especially since the Bundeswehr has claimed to be defending Germany in the Balkans or even the Hindu Kush. Several members of the German armed forces preferred to follow their conscience as well as their oath of duty instead of obeying the orders which they considered to be irreconcilable with constitutional norms and international law.<sup>17</sup> All those conscientious objectors were acting under severe personal risk – after all insubordination and disobedience are criminal offenses under penalty of imprisonment under German military penal code.<sup>18</sup>

So early as 1999, in the course of NATO's air war against the Federal Republic of Yugoslavia, around a dozen German Air Force fighter pilots refused to board their ECR-TORNADO aircraft and fly the assigned SEAD (Suppression of Enemy Air Defense) missions.<sup>19</sup> At the time these events attracted hardly any media coverage, presumably because the government shied away from a trial which might have been fought all the way to the Federal Constitutional Court or the European Court of Justice and would have attracted considerable media coverage.

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<sup>17</sup> Jürgen Rose: *Gewissensnöte – Bundeswehrsoldaten, die sich Auslandseinsätzen verweigern*. Script for NDR Info *Das Forum*, "Streitkräfte und Strategien" by Andreas Flocken, July 10 2004.

Jürgen Rose: "Und sie verweigern doch! Mehr als Einziger. Seit die Bundeswehr an Interventionseinsätzen teilnimmt, sind bereits mehrfach Soldaten ihrem Gewissen gefolgt – Replik zu Andreas Zumach im 'Freitag' 02/08", *Freitag – Die Ost-West-Wochenzeitung*, 1 February 2008, p. 4.

<sup>18</sup> This does not imply any value judgement about the empirically very manifold manners of conscientious objection that range from AWOL, permanent desertion, or situational refusal to obey orders, to conscientious objection for principled reasons.

Referring to the typology of objectors:

Anonymous: *War Heroes of the Iraq War – War Resisters from within the Military*, <http://www.tomjoad.org/WarHeroes.htm>.

United for Peace.org (ed): *Iraq War Resisters*, <http://www.unitedforpeace.org/article.php?id=3455>

<sup>19</sup> Jürgen Rose: *Gewissensnöte* (op cit) p 13; and *Security and Peace* 3/2004 (op cit), p. 135.

However, subsequently the German armed forces leadership showed far less caution in dealing with the insubordinate behavior of soldiers as some significant stories illustrate. These cases are particularly relevant for both their juridical assessment and the sanctions they entailed. Three cases will be considered below. The first concerns that of Major Florian Pfaff, the second the author himself, and the third medical orderly Sergeant Major Christiane Ernst-Zettl. In addition there are several confirmed cases of conscientious objection by active or retired soldiers including officers, some of them accepted and others not, in which the protesters explicitly refer to the missions of the Bundeswehr as justification for their decisions of conscience.

### *Major Florian Pfaff*

As far as is known, Major Florian Pfaff<sup>20</sup> was the only soldier among the entire German armed forces who refused to obey orders which had he carried them out, would have led him to knowingly participate in what he considered a war of aggression launched by the US and Britain and which the well known German law philosopher Reinhard Merkel had denounced as an “outrage against international law”.<sup>21</sup>

Major Pfaff was requested to contribute to a software program which he and his superior whom he consulted on the issue could not rule out from being used directly or indirectly to give logistic support to the war against Iraq. After combat activities had started in Iraq, Major Pfaff told his superiors that he would not obey any orders if by executing them he would become guilty of collaborating in the “murderous occupation of Iraq by the US (and others)”.<sup>22</sup>

Immediately, disciplinary action was taken against Major Pfaff in April 2003, in the course of which he was demoted to the rank of captain with a court martial in February 2004.<sup>23</sup> Both the prosecutor and Pfaff lodged an appeal to

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<sup>20</sup> For the case of Florian Pfaff see inter alia:

Hans Georg Bachmann: “Militärischer Gehorsam und Gewissensfreiheit” in Holger Zetsche and Stephan Weber (eds): *Recht und Militär. 50 Jahre Rechtspflege der Bundeswehr*, Baden-Baden 2006, pp 156-268

<sup>21</sup> Reinhard Merkel: “Krieg. Was Amerika aufs Spiel setzt. Ein Präventivkrieg mag der Logik imperialer Macht entsprechen. Aber er untergräbt das Rechtsbewusstsein der Menschheit” in Kai Ambos and Jörg Arnold (eds): *Der Irak-Krieg und das Völkerrecht*, Berlin 2004, p. 28.

See also: Judgement from 21 June 2005 of the Second Senate for military jurisdiction of the Federal Administration Court BVerwG 2 WD 12.04, <http://www.bundesverwaltungsgericht.de/media/archive/3059.pdf>.

<sup>22</sup> Florian Pfaff quoted from Bundesverwaltungsgericht: loc. cit., p. 103.

<sup>23</sup> Truppendienstgericht Nord: Urteil im gerichtlichen Disziplinarverfahren – N 1 VL VL24/03 – vom 9 Februar 2004. Unpublished.

Although the First Chamber took for granted that the attack on Iraq had been a war of aggression(!), the judges denied the soldier’s right to refuse his orders because they did not accept the soldier’s personal involvement as cogently proven. They therefore found him guilty of breaches of article 7 (obligation for devote service),



the Federal Administrative Court. Almost a year and a half later the second Senate of the Federal Administrative Court rescinded the decision of the initial court martial, rejected the prosecutor's appeal as ill-founded and granted Major Pfaff a full discharge from one of the most serious charges that could be raised against a service member: insubordination and disobedience.<sup>24</sup>

The judgment considerably enlarged the scope of discretion regarding the issue of military obedience to cover even cases of uncertainty concerning the legitimacy of military intervention.<sup>25</sup> A German soldier confronted with a moral conflict and able to explain it in a serious and credible manner need not obey orders if by executing them he or she would be involved in legally "gray area" activities. The Court's decision de facto reassigned the burden of proof. The soldier no longer has to prove that his refusal to follow orders were required by law, but the government must explain to the "citizen in uniform" sent into battle that their mission complies with both international and constitutional law.<sup>26</sup> For the Bundeswehr, an army under the rule of parliament, the implications of the judgment are of vital relevance. The primacy of politics applies only within the limits of law and statutes. Beyond these the primacy of conscience rules: "In case of conflict between conscience and legal obligation," the court stated, "the freedom of conscience is inviolable".<sup>27</sup>

### *Lieutenant Colonel Jürgen Rose*

In order to play down its relevance as an unusual, isolated case, the German military leadership successfully prevented the Pfaff decision from becoming widely known in public<sup>28</sup>, and the litmus test on that historic judgment had to wait till 15 March 2007, when the author of the present text submitted a so-called "official request" to his disciplinary superior, which read:<sup>29</sup>

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article 10 (duties as superior), article 11 (obligation to obey orders) and article 17 (obligation to preserve respect and trust) of the German Military Code.

<sup>24</sup> Bundesverwaltungsgericht, loc. cit.

<sup>25</sup> Ibid. p. 72.

<sup>26</sup> Ibid., p. 116.

<sup>27</sup> Ibid., p. 106.

<sup>28</sup>Jürgen Rose: *Ignoriertes Urteil? Wie die Bundeswehr mit der Leipziger Entscheidung zur Gewissensfreiheit umgeht*. Script for NDR Info Das Forum, "Streitkräfte und Strategien" by Andreas Flocken, 14 January 2006.

Jürgen Rose: "Gewissensfreiheit statt Kadavergehorsam. Freispruch für Bundeswehroffizier" in *Wissenschaft und Frieden 1/2006*, pp .44-47.

<sup>29</sup> Jürgen Rose: "Aufklären, damit die anderen bomben können. Dokumentation. Antrag des Oberleutnants Jürgen Rose, von allen dienstlichen Aufgaben bei einem Tornado-Einsatz in Afghanistan entbunden zu werden" in *Freitag – Die Ost-West-Wochenzeitung* 23 March 2007, p. 7.

*With regard to the decision of the German government to deploy TORNADO weapon systems of the German Air Force to the Afghan war theatre, the German Parliament's approval on 9 March 2007 and the task order issued by the Armed Forces Logistics Command in the meantime, I hereby declare that it goes against my conscience to support the operation of TORNADO weapon systems in Afghanistan, because I cannot exclude the possibility that by virtue of my own action I will contribute to a mission of the German Armed Forces against which there are grave reservations with respect to constitutional, international, criminal and international criminal law. In addition, I request to be exempted from all further tasks connecting with "Operation Enduring Freedom" in general, as well as from deployment of the TORNADO weapon systems in particular.*

The above request was preceded by an "official statement" made one year previously which declared inter alia:<sup>30</sup>

*Whilst appreciating the primacy of politics and committed to my oath of duty, which is to devotedly serve the Federal Republic of Germany as well as to bravely defend the right and freedom of the German people, I hereby declare that it goes against my conscience to follow any orders which violate international or German law. While doing so I refer to article 4, paragraph 1 of the German constitution as well as the declaration of the Federal Administrative Court regarding freedom of conscience given on June 21, 2005 (BVerwG 2 WD 12.04)*

That official statement had been entered into my personal file without objection. While that announcement expressed my conscientious convictions regarding my service as a staff officer of the Bundeswehr in principle, the substantial reason for my refusal to obey the order to support the TORNADO mission of the German Air Force in Afghanistan was much more far-reaching and complex. In detail, I stated my reasons in my "declaration plus request" from 15 March 2007:<sup>31</sup>

*Serving as staff officer in the G3 division, department operations/exercises of the Military Sub District Command IV – Southern Germany – I am responsible for implementing orders for the logistic support of various international missions of the Bundeswehr, inter alia within the framework of EUFOR, KFOR, UNIFIL, ISAF. Since in my opinion these specified missions are based on an adequate legal basis in terms of constitutional as well as international law, I was able to fulfill my tasks with clear conscience up to the present.*

*However, the latter [ ] does not apply to the orders concerning the deployment of TORNADO weapon systems in Mazar-i-Sharif.*

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<sup>30</sup> Jürgen Rose: *Dienstliche Erklärung vom 1. Mai 2006* documented in Jürgen Rose: "Soldaten-Verweigerung gegen völkerrechts- oder grundgesetzwidrige Befehle" in *Friedens Forum – Zeitschrift der Friedensbewegung* 3/2006, p. 9.

<sup>31</sup> Jürgen Rose: "Dienstliche Erklärung/Dienstlicher Antrag an Herrn Oberst i.G. Bernhard Frank, Chef des Stabes WBK IV – Süddeutschland – vom 15 März 2007" Official document only available on the internet ([www.ag-friedensforschung.de/regionen/Afghanistan/tornado-rose.pdf](http://www.ag-friedensforschung.de/regionen/Afghanistan/tornado-rose.pdf)).

Extracts published in:

Jürgen Rose: Aufklären, damit die anderen bomben können (op. cit.).

*I hereby declare that it goes against my conscience to support the operation of TORNADO weapon systems in Afghanistan in any way, because I cannot exclude the possibility that by virtue of my own action I will contribute to a mission of the German Armed Forces against which there are grave reservations with respect to constitutional, international, criminal, international criminal law. Within that context, the following deliberations must be stressed in particular:*

- *The operation of TORNADO weapon systems of the Bundeswehr in Afghanistan inevitably implies that Germany is taking part in the military actions that are both illegal in terms of international law and not covered by the NATO treaty, for the reason that*
- *the results of reconnaissance sorties accomplished by Bundeswehr TORNADOs are submitted to the high command of the US forces; at the same time despite the restrictions in the ISAF operations plan indicated in the resolution submitted, it is not ensured that the results of reconnaissance sorties will not be utilized for other purposes under the Operation Enduring Freedom (OEF);*
- *the war of the USA under OEF is illegal in terms of international law in several respects, that is:*
  - *it both cannot be justified as self-defense and is not based on a UNSC mandate;*
  - *concerning its line of approach, especially with regard to the consequences for the civilian population, it exceeds even the authorization granted by the Karzai government;*
  - *it is incompatible with the rules for the protection of the civilian population stipulated by international law with regard to the so-called collateral damage which it accepts;*
  - *it violates fundamental principles of humanitarian law concerning treatment of POWs.*
- *By resolving to deploy TORNADO weapon systems in Afghanistan, the Federal Government is contributing to warlike operations by virtue of its own actions which are accomplished while resting on a military strategy that is incompatible with the basic principles of the United Nations Charter as well as article 1 of the NATO treaty, and furthermore it entangles the German Armed Forces herein.*

*Concurrently, I hereby request to be explicitly released from all tasks that could put me at risk to become guilty in the sense exposed above: Since my conscience instructs me that it cannot be morally justified under any circumstances at all to break the law – in the present case that is international as well as constitutional law – by virtue of my own action. Such action that is to say would be diametrically opposed to the “Categorical Imperative” postulated by the philosopher Immanuel Kant, which reads: “Act only on the maxim whereby thou canst at the same time will that it should become a universal law”<sup>32</sup>, or phrased similarly: “Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation”<sup>33</sup>. Accordingly, each ac-*

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<sup>32</sup> Immanuel Kant: *Grundlegung zur Metaphysik der Sitten*, Hamburg 1965, p. 42.

<sup>33</sup> Immanuel Kant: *Kritik der praktischen Vernunft*, Hamburg 1974, p. 36.

*tion which is in compliance with the principles defined by that “Categorical Imperative” is a priori morally right, while any action that goes against those principles is a priori morally wrong. It is evident that and requires no further explanation that one cannot want that breach of law becomes a universal rule under the “basic law of pure practical reason”<sup>34</sup> – because such violation would be self-contradictory and hence annihilate itself. Not to take part in breach of law by virtue of one’s action hence constitutes an inevitable obligation of moral law, and that is exactly why I shall, as a matter of principle, not take part in actions or support those by virtue of my own action that imply breach of [international and constitutional] law. In particular this applies to all measures linked with the decision to deploy TORNADO weapon systems in Afghanistan, because these obviously infringe the charter of the United Nations as well as the German Basic Law.*

*In addition, if I support the operation of TORNADO weapon systems in Afghanistan by virtue of my own action that give rise to grave reservations with respect to constitutional, international, criminal and international criminal law, I shall run the risk of breaking my oath of duty once sworn which urges me to inter alia “bravely to defend the law [ ] of the German people”, but definitely not to break and trample it. Beyond all questions, international law as well as Basic Law are among the central legal norms of the German people.*

The refusal to contribute to the logistic support of the TORNADO mission in Afghanistan became the subject of TV coverage, was broadly reported by many radio stations, and could be read in nearly all German newspapers. Not least because of the unforeseen publicity and a constitutional complaint files with the Federal Constitutional Court,<sup>35</sup> the relevant military authorities promptly decided to move the objector to another division of his department, just as it was settled in the Federal Administration Court’s decision regarding the soldier’s freedom of conscience. Apart from this, higher commands, including the Ministry of Defence, took no further action on this issue.

### *Sergeant Major Christiane Ernst-Zettl*

The case of the medical orderly Christiane Ernst-Zettl<sup>36</sup>, unlike the cases depicted above, does not refer to the so-called *ius ad bellum*, but to the *ius in bello* or Humanitarian Law.<sup>37</sup> Specialists of international law subsume the latter under the so-called *ius cogens*, that is, law that has to be followed at all times anywhere.

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<sup>34</sup> Ibid.

<sup>35</sup> Dietrich Murswiek: Organstreit Gauweiler/Wimmer – Antragsschrift vom 9. März 2007 (<http://www.jura.uni-freiburg.de/institute/ioeffr3/forschung/papers/murswiek/organstreit.pdf>).

<sup>36</sup> Jürgen Rose: “Die Sanitäterin im Krieg. Der Fall der Bundeswehrsoldatin Christiane Ernst-Zettl und der Bruch der Genfer Konventionen am Hindukusch”, in *ZivilCourage*, 1/2008, pp. 14–15.

<sup>37</sup> The law is primarily codified by the four Geneva Conventions from 1949 and the Additional Protocols from 1977.

The conflict was caused by assigning guard and security duties, that is, protection of military installations, to members of the German Armed Medical Corps during the war in Afghanistan. This not only included the custody and defence of army medical service facilities, such as a combat support hospital, but also implied the comprehensive military protection of the multi-national armed forces' bases in Afghanistan. For that purpose medical orderlies were even employed as machine-gunners, after having been ordered to take off their Red Cross armbands.

Sergeant Major Ernst-Zettl had been deployed to the surgical company of the medical detachment of the 7<sup>th</sup> contingent of the NATO International Security Assistance Force (ISAF). During that appointment she was ordered to perform armed service contrary to international law when as part of the protection of the ISAF garrison in Kabul, she was requested to undertake personal checks on Afghan women employed by ISAF. When she informed her superior that she was a non-combatant under international humanitarian law and could not be engaged for security tasks, she received a disciplinary fine of € 800 and was repatriated back to Germany. Her complaint against this treatment was rejected by the responsible *Military Service Court South*. The complex position of the case under international law resulting from the four Geneva Conventions and the Additional Protocols cannot be described in detail here. Still the core concern arising from it may be summarized as follows: The questionable nature of the procedure described is that it is likely to deter soldiers from facing up to the legal or moral implications of their action.

## *Conclusions*

The cases depicted above demonstrate that if both military superiors and their subordinates are insistently urged to act in accordance with national and international law, it can no longer be ruled out *eo ipso* that those in uniform, whatever their rank, will occasionally refuse to take part in military activities when these are recognizably in breach of or at least are dubious and controversial in terms of national and/or international law. Such cases of selective conscientious objection – mainly based on the argument of illegal participation in a war of aggression prohibited under international law – have occurred not only in the Bundeswehr, but also in the armed forces of Germany's allies.<sup>38</sup> These incidents take different forms ranging from being temporarily absent without leave through permanent

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<sup>38</sup> Manuel Ladiges: "Irakkonflikt und Gewissenkonflikte", *Wissenschaft & Sicherheit online*, 2/2007. Jürgen Rose: *Ernstfall Angriffskrieg*, op. cit., pp. 187–192.

desertion or the rejection of individual orders to complete rejection of war service on grounds of conscience.

Despite all of the differences between the cases of selective conscientious objection described above with regard to motives of the protagonists and the subsequent reactions of the various military and judicial figures involved, they have one aspect in common. This relates to the specific self-perception of the military in modern industrial societies.<sup>39</sup> There is no longer the unreserved readiness to go to war which characterizes the attitude of the military leadership, but rather caution and reluctance. And there is another factor:<sup>40</sup>

*Whether we like it or not: The military oath [...] has gradually lost its timeless and indissoluble effect as part of the general change of values. The oath now is no longer sworn to a general or an ideology, but to the nation and its Basic Law.*

It is precisely these cases of selective conscientious objection, that is disobedience to orders in the context of breaches of both *ius ad bellum* and *ius in bello*, that confirm this thesis. Therefore soldiers can no longer be regarded as mere artisans of war *with high-flying ideals and a blindfold in the national colours before their eyes*, as the prominent German pacifist journalist Kurt Tucholsky once wrote, but must be seen as constitutional patriots. In the Bundeswehr this latter type of soldier corresponds precisely with the model advocated above all by the General Baudissin after the Second World War, the *citizen in uniform* who does not abandon ethical convictions and political ideas even while on military service. But this latter point is not limited exclusively to the military in Germany, because elsewhere too “[...]the individual soldier, a company, a regiment or even a larger formation have quite often taken themselves the freedom to decide which orders should be obeyed, and which not.”<sup>41</sup> In addition, as argued above, soldiers are even obliged to refuse to obey orders which are criminal and contrary to international law.<sup>42</sup>

Today the crucial problem is the attitude and the motivation of troops and their identification with the mission.<sup>43</sup>

*If they trust their leaders and accept the “war aims”, then they will be ready for almost anything. But if their attitude differs radically from the view of their [military or political] leaders, this may lead to protests or at least passivity.*

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<sup>39</sup> Gustav Däniker: *Wende Golfkrieg. Vom Wesen und Gebrauch künftiger Streitkräfte*, Frankfurt am Main 1992. Jürgen Rose: “Vom Wesen und Gebrauch zukünftiger Streitkräfte” in *Truppenpraxis* 4/1993, pp. 346–351.

<sup>40</sup> G. Däniker: *Wende Golfkrieg*, op. cit., p. 203.

<sup>41</sup> Ibid.

<sup>42</sup> Michael Pesendorfer: “Handeln und Befehl – kriegsvölkerrechtlich ein Rechtfertigungsgrund?”, *Österreichische Militärische Zeitschrift* 35/5 1997, pp. 539–544.

<sup>43</sup> G. Däniker: *Wende Golfkrieg*, op. cit., p. 204.

The *refuseniks against wars of aggression*, whatever their origin, illustrate strikingly that orders for dubious purposes are no longer being obeyed without question: “*When the legitimacy of the order is not entirely clear and the just cause is not obvious to everyone, the formerly feared instruments [...] becomes recalcitrant rabble.*”<sup>44</sup> This means that to an ever-increasing extent, troops can no longer be used for whatever political purpose is desired, and that they can no longer be assumed to willingly participate in military interventions. Admittedly, at the moment the political and military decision-makers have no real reason to fear *mass disobedience* or even a *rampant over-use* of conscience. In reality the number of those who refuse orders for reasons of conscience is tiny. Moreover, not in a single instance was the operational readiness or functioning of the armed forces impaired or even touched.

Nevertheless, in the eyes of the authorities the existence of a new type of soldier who is not prepared to obey like a robot, against his or her own conscience and idea of what is right, and is not intimidated by the serious punishments possible under military jurisdiction, must present a serious threat. But as the cases of selective conscientious objection demonstrate, a good deal of pressure is applied to those who refuse to obey orders on grounds of conscience. This starts with the criticism of forbidden political activity, which allegedly calls into question the primacy of the political decision-makers, and culminates in the accusation that it amounts to a challenge to democracy itself. It also allegedly undermines military morale and discipline. The prosecution regularly insinuates that the conscientious objectors only used their conscience as a pretext to hide political motives. And just as regularly, the judicial authorities involved, whether military or civil, refuse to take any account of the reasons put forward to justify disobedience – that is, illegal and immoral wars of aggression and serious breaches of the laws of war, as codified in humanitarian international law. However, the political and military leaders cannot avoid recognizing *that not only the individual soldier, but even the toughest troop has a soul of his or her own, and a conscience which tells him or her what you can do and what you cannot.*<sup>45</sup> Remarkably, it was a US Army Officer, First Lieutenant Ehren K. Watada,<sup>46</sup> who demonstrated clearly that the modern soldier is sometimes very much aware of this, when he declared:

*To stop an illegal and unjust war, the soldiers can choose to stop fighting it. [...] If soldiers realised this war is contrary to what the Constitution extols – if they stood up*

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid. p. 205.

<sup>46</sup> J Rose: *Ernstfall Angriffskrieg*, op. cit., pp. 187–189. M Ladiges: *Irakkonflikt*, op. cit.

*and threw their weapons down – no President could ever initiate a war of choice again.*<sup>47</sup>

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<sup>47</sup> Jeremy Brecher & Brendan Smith: "Will the Watanda Mistrial Spark an End to the War", *The Nation*, 10 February 2007. <http://www.commondreams.org/views07/0209-23.htm>.