

Notes on the acquittal of a soldier who refused to carry out military service in connection with the Iraq War

- Summary of a document for the Green/EFA hearing on 14 March 2006 on the unlawfulness of the Iraq War -

1. A charge may only be regarded as adequate if it clearly states which breaches of duty the accused soldier is charged with. This means presenting a detailed account of events and relating it comprehensibly to the soldier's conduct and to the resulting charge. The charge must be made evident by establishing a precise connection between the description of the conduct of which the soldier is accused and the conclusions drawn from it by the army prosecutor.

2. The primary duty of every soldier in the German armed forces under the first and second sentences of Section 11(1) of the Military Act (Soldatengesetz) to execute orders 'conscientiously' (as completely and quickly as one is able) requires not unconditional obedience, but obedience which is discerning and which in particular considers the consequences of carrying out the order, in terms of the legal boundaries and the ethical limits of one's own conscience.

3. The Basic Law (Grundgesetz) and the Military Act lay down legal limits for obedience that can be divided into seven groups. A soldier does not have to carry out an order, on the ground that it is unreasonable, if he can invoke protection of the fundamental right to freedom of conscience (Article 4(1) of the Basic Law). The protection afforded by Article 4(1) of the Basic Law is not overridden by the fundamental right to recognition as a conscientious objector (Article 4(3) of the Basic Law).

4. A decision of conscience is any serious moral (i.e. relating to 'good' and 'bad') decision which an individual in a particular situation regards as a binding inner duty, making it impossible for him to act against it without serious moral distress.

5. The call of the 'voice of conscience' within a soldier can only be indirectly inferred from corresponding indications and signs suggestive of a decision of conscience and moral distress, and particularly through the medium of speech. What is needed is an outward, rationally communicable and, depending on the context, intersubjectively comprehensible demonstration that the decision of conscience is serious, deeply-held and inalienable (in the sense of an absolute obligation). The rational comprehensibility of this demonstration relates only to whether the presence of the dictate of conscience and its effect on behaviour is sufficiently likely, and not to whether the decision of conscience itself can be judged to be 'mistaken', 'wrong' or 'right'.

6. There were and still are serious legal objections to the war against Iraq launched on 20 March 2003 by the USA and the UK, relating to the UN Charter's prohibition of the use of violence and other provisions of international law. The US and UK governments could not use as their basis for the war either decisions of the UN Security Council authorising them to go to war, or the right to self-defence set out in Article 51 of the UN Charter.

7. The Federal Republic of Germany is not required under either the NATO Treaty, the NATO Status of Forces Agreement, the NATO Status of Forces Supplementary Agreement or the Convention on the Presence of Foreign Forces in the Federal Republic of Germany to support acts by its NATO partners which contravene the UN Charter and violate international law.

8. Where a soldier has reached a decision of conscience that is protected by the fundamental right to freedom of conscience (Article 4(1) of the Basic Law), he is entitled not to be prevented by the authorities from obeying the binding and compelling dictates of his conscience.

a) Due allowance must be made for this by offering the soldier an alternative means, and one that protects his conscience and is non-discriminatory, of resolving the conflict which has arisen between official dictates and the dictates of conscience and which affects his spiritual and moral existence as an independent person.

b) Although Article 4(1) of the Basic Law requires a soldier to be offered alternatives that protect his conscience in specific cases where he has taken a highly personal decision of conscience, this does not release him from the general duty to obey as laid down in the first and second sentences of Section 11(1) of the Military Act, which applies to him and to other soldiers.

c) Article 4(1) of the Basic Law does not give a superior officer the right to order his men to perform whatever actions his conscience deems fit.

9. The fundamental right to freedom of conscience (Article 4(1) of the Basic Law) is not subject to any legal reservations. There are also no numerical reservations: it may be exercised by anyone regardless of whether and to what extent others are also exercising it.

10. The fundamental right to freedom of conscience is not overridden by the military provisions of the Basic Law, even for soldiers.

a) A soldier's reliance on the Basic Law does not affect the Federal authorities' power to enact legislation on 'defence' (Article 73, No 1 of the Basic Law). The 'legislative product' does not then have constitutional status simply because the legislature is empowered by a provision such as Article 73 No 1 of the Basic Law to take a particular legislative action.

b) The constitutional decision regulated in Article 87a(1) of the Basic Law to establish armed forces – subject to broad legal provisos – 'for purposes of defence' does not mean that soldiers' fundamental rights must always come second where reliance on the Basic Law is seen by their superior officers as 'disruptive' for the armed forces or 'detrimental' to the service. Guaranteeing the 'operability of an effective national defence' under the Basic Law involves always ensuring that the protection required under the constitution for the fundamental right to freedom of conscience, among other things, must not be undermined.

c) The 'command of the armed forces' vested in the Federal Minister of Defence under Article 65a of the Basic Law and the power of military officers to give orders which is derived from this are subject to constitutional reservations as to how they may be exercised which relate to fundamental rights and which are protected under Article 1(3) of the Basic Law.

d) The difficulties and disagreements which result for the military service when soldiers exercise their freedom of conscience are to be dealt with through 'practical concordance'.

Summary

1. A charge may only be regarded as adequate if it clearly states which breaches of duty the accused soldier is charged with. This means presenting a detailed account of events and relating it comprehensibly to the soldier's conduct and to the resulting charge. The charge must be made evident by establishing a precise connection between the description of the conduct of which the soldier is accused and the conclusions drawn from it by the army prosecutor (see 3.1).

2. The primary duty of every soldier in the German armed forces under the first and second sentences of Section 11(1) of the Military Act to execute orders 'conscientiously' (as completely and quickly as one is able) requires not unconditional obedience, but obedience which is discerning and which in particular considers the consequences of carrying out the order, in terms of the legal boundaries and the ethical limits of one's own conscience (see 4.1.2 and 4.1.3).

3. The Basic Law and the Military Act lay down legal limits for obedience that can be divided into seven groups.

a) According to the first alternative in the first half of the third sentence of Section 11(1) of the Military Act a soldier is not insubordinate if he does not carry out an order which would harm his human dignity or that of a third person affected by the order (see 4.1.2.1).

b) According to the second alternative in the first half of the third sentence of Section 11(1) of the Military Act failure to carry out an order also does not constitute insubordination if the order has not been given for the purposes of the service, in other words not for the fulfilment of the tasks of the Federal armed forces as defined in the Basic Law (see 4.1.2.2).

c) According to the first sentence of Section 11(2) of the Military Act an order may also not be carried out if doing so would involve committing a crime under national law or international criminal law (see 4.1.2.3).

d) The rules laid down in the first and second alternatives in the first half of the third sentence of Section 11(1) of the Military Act do not, as is clear from Section 22(1) of the Military Penal Act (Wehrstrafgesetz) and generally recognised in case-law and specialist literature, give a definitive list of reasons why an order is not mandatory and need not be carried out. For example, orders are not mandatory if they are objectively impossible to carry out, are contradictory in substance or have been rendered pointless by a fundamental change in the situation (see 4.1.2.4).

e) Under the first sentence of Article 26(1) of the Basic Law an order is also not mandatory if its issuing or execution may be classified as an act tending to and undertaken with intent to disturb peaceful relations between nations, especially to prepare for a war of aggression. 'Preparation' in this sense is any activity prior to a war of aggression which promotes its occurrence or even its outbreak. This applies irrespective of the subjective aim of the war of aggression and of whether the act

covered by the first sentence of Article 26(1) of the Basic Law constitutes a criminal act (see 4.1.2.5).

f) An order is also not mandatory if its issuing or execution infringes the 'general rules of international law' within the meaning of Article 25 of the Basic Law, including the international prohibition of the use of violence and the basic humanitarian laws of war. In the area covered by the Basic Law these take precedence over national law and create direct rights and obligations for the inhabitants of the Federal territory and thus for all soldiers too (see 4.1.2.6).

g) A military order is also not mandatory for a subordinate soldier if he cannot be expected to carry it out after weighing up all the relevant circumstances. A soldier does not need to carry out an order, on the ground that it is unreasonable, if he can invoke the protection of his fundamental right to freedom of conscience (Article 4(1) of the Basic Law) (see 4.1.2.7 and 4.1.3). The protection provided by Article 4(1) of the Basic Law is not overridden by the fundamental right to recognition as a conscientious objector (Article 4(3) of the Basic Law) (see 4.1.3.1 and 4.1.3.2).

4. Since a decision of conscience is a factual precondition under Article 4(1) of the Basic Law for the legal consequences derived from the fundamental right and invoked by the soldier, the legal conditions for it must have been fulfilled and established in each individual case.

a) According to the consistent case-law of the Federal Constitutional Court and the Federal Administrative Court, which the Senate follows, a decision of conscience is any serious moral (i.e. relating to 'good' and 'bad') decision which an individual in a particular situation regards as a binding inner duty, making it impossible for him to act against it without serious moral distress.

b) Whether a decision of conscience involving cognitive, affective and socio-psychological components can be recognised as a fundamental right does not depend on whether the relevant rules are based on predominantly rational or emotional foundations. 'Knowledge' of the ethical dictates at issue here can come from all areas of life and be derived from Christianity or some other religion, say, or from humanism or other philosophies, or even from the law, which is the embodiment of ethical decisions.

c) The call of the 'voice of conscience' within a soldier can only be indirectly inferred from corresponding indications and signs suggestive of a decision of conscience and moral distress, and particularly through the medium of speech. What is needed is an outward, rationally communicable and, depending on the context, intersubjectively comprehensible demonstration that the decision of conscience is serious, deeply-held and inalienable (in the sense of an absolute obligation). The rational comprehensibility of this demonstration relates only to whether the presence of the dictate of conscience and its effect on behaviour is sufficiently likely, and not to whether the decision of conscience itself can be judged to be 'mistaken', 'wrong' or 'right'.

5. In the present case the accused soldier's decision of conscience was taken in a context determined and characterised by circumstances which were special even for a professional soldier, who is still in principle trained for the use of arms in battle. The soldier neither accepted this situation lightly and thoughtlessly, nor did he deliberately cause it (see 4.1.4.1).

a) There were and still are serious legal objections to the war against Iraq launched on 20 March 2003 by the USA and the UK, relating to the UN Charter's prohibition of the use of violence and other provisions of international law (see 4.1.4.1.1). The US and UK governments could not use as their basis for the war either decisions of the UN Security Council authorising them to go to war (see 4.1.4.1.1a), or the right to self-defence set out in Article 51 of the UN Charter (see 4.1.4.1.1b).

b) Following the Senate's findings on the war against Iraq the Federal Republic of Germany promised the US and UK governments, and kept its promise, to grant them rights to overfly German territory, to use their 'installations' in Germany and to provide 'protection for these installations' on a clearly defined scale. It also approved the use of German soldiers in AWACS aircraft to 'monitor Turkish airspace'.

c) There were/are serious objections in international law to the provision of this support, which led the soldier to refuse to carry out both of the orders given to him, because he feared that otherwise he would himself be implicated in the war. The basis and yardstick for assessing the legality in international law of providing support for a war which is unlawful in international law may be found in the 'Definition of Aggression' (Article 3(f)) adopted by consensus by the UN General Assembly on 14 December 1974, the work of the International Law Commission, and the right to neutrality in international law, regulated primarily in the Fifth Hague Convention of 18 October 1907, which has been in force in Germany since 25 October 1910 and whose rules were also incorporated in Central Service Regulation (Zentrale Dienstvorschrift) 15/2 of August 1992 issued by the Federal Minister for Defence (see 4.1.4.1.2 and 4.1.4.1.4).

d) The Federal Republic of Germany was not exempted from its obligations under international law in the Iraq War by the fact that it was and is a member of NATO alongside the States prosecuting the war (the USA, UK and other members of the war coalition) (see 4.1.4.1.3). The Federal Republic of Germany is not required under either the NATO Treaty (see 4.1.4.1.3a), the NATO Status of Forces Agreement, the NATO Status of Forces Supplementary Agreement (see 4.1.4.1.3b) or the Convention on the Presence of Foreign Forces in the Federal Republic of Germany (see 4.1.4.1.3c) to support acts by its NATO partners which contravene the UN Charter and violate international law.

e) In the present proceedings there was no need for a definitive examination and ruling on whether the accused soldier's continued participation in the SASPF IT project, as ordered by his superiors but refused by him, would have actually and effectively furthered or at least made a relevant contribution to the support which Germany provided for the Iraq War waged by the USA and its allies. According to the Senate's findings he had reason to fear that this would be the case, which made his decision of conscience understandable (see 4.1.4.1.5).

6. According to the Senate's findings the decision of conscience which the accused soldier took related to considerations of 'good' and 'evil' (see 4.1.4.2.1) and his ethical dictates were serious, deeply-held and inalienable, so that he could not act against them without serious moral distress (see 4.1.4.2.2).

7. Where a soldier has reached a decision of conscience that is protected by the fundamental right to freedom of conscience (Article 4(1) of the Basic Law), he is

entitled not to be prevented by the authorities from obeying the binding and compelling dictates of his conscience (see 4.1.3.1.3).

a) Due allowance is made for this by offering the soldier an alternative means, and one that protects his conscience and is non-discriminatory, of resolving the conflict which has arisen between official dictates and the dictates of conscience and which affects his spiritual and moral existence as an independent person.

b) Although Article 4(1) of the Basic Law requires a soldier to be offered alternatives that protect his conscience in specific cases where he has taken a highly personal decision of conscience, this does not release him from the general duty to obey laid down in the first and second sentences of Section 11(1) of the Military Act, which applies to him and to other soldiers.

c) Article 4(1) of the Basic Law does not give a superior officer the right to order other soldiers to perform whatever actions his conscience deems fit.

8. The fundamental right to freedom of conscience (Article 4(1) of the Basic Law) is not subject to any legal reservations (see 4.1.5.1). There are also no numerical reservations: it may be exercised by anyone regardless of whether and to what extent others are also exercising it (see 4.1.5.2).

9. The fundamental right to freedom of conscience is not overridden by the military provisions laid down in Articles 12a, 65a, 73 No 1, 87a and 115a et seq. of the Basic Law, even for soldiers (see 4.1.5.3).

a) A soldier's reliance on the Basic Law does not affect the Federal authorities' power to enact legislation on 'defence' (Article 73, No 1 of the Basic Law). The 'legislative product' does not then have constitutional status simply because the legislature is empowered by a provision like Article 73 No 1 of the Basic Law to take a particular legislative action (see 4.1.5.3.2b).

b) The constitutional decision regulated in Article 87a(1) of the Basic Law to establish armed forces – subject to broad legal provisos – 'for purposes of defence' does not mean that soldiers' fundamental rights must always come second where reliance on the Basic Law is seen by their superior officers as 'disruptive' for the armed forces or 'detrimental' to the service. Guaranteeing the 'operability of an effective national defence' under the Basic Law involves always ensuring that the protection required under the constitution for the fundamental right to freedom of conscience, among other things, must not be undermined (see 4.1.5.3.2d).

c) The 'command of the armed forces' vested in the Federal Minister of Defence under Article 65a of the Basic Law and the power of military officers to give orders which is derived from this are subject to constitutional reservations as to how they may be exercised which relate to fundamental rights and which are protected under Article 1(3) of the Basic Law (see 4.1.5.3.2e).

d) The difficulties and disagreements which result for the military service when soldiers exercise their freedom of conscience are to be dealt with through 'practical concordance'. Efforts must be made to alleviate and resolve the conflict of conscience that has arisen while still protecting the clearly identifiable, justified interests of the Federal armed forces, in such a way that the 'inviolability' of freedom of conscience required under constitutional law is not undermined, but guaranteed

and secured. This requires the constructive cooperation of 'both sides' (see 4.1.5.3.2e).

aa) The soldier in question may be expected to explain his moral distress to his commanding officer as promptly as possible and not 'at an inappropriate time', and to press for a fair resolution of the underlying problems as soon as possible.

bb) His superiors, on the other hand, are required to take the soldier's decision of conscience on board. They must not, in view of their duty of care, deny, mock or suppress it.

cc) If a soldier's moral distress concerning an order he has been given is derived from or based on rules of international or constitutional law (among other things), the facts that are relevant to the moral conflict, and in particular the practical effects which the soldier fears will result from providing the service ordered and the consequences of not carrying out the order for the armed forces or other subjects of protection, must be discussed openly as soon as possible. As part of this, all the parties involved must be informed of the relevant legal position, which must take account of how a constitutional court would probably judge the issue.

dd) If, regardless of this, the soldier still maintains that his conscience will not allow him to carry out the order, and if this is understandable in the sense described earlier, then a compromise must be reached which protects both sides (use elsewhere, transfer, reassignment, etc.).

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