Ruling

of the 2nd *Wehrdienstsenat* (Military Service Division)

of the
Bundesverwaltungsgericht – BVerwG – German Federal Administrative Court
(Supreme Court)

of June 21, 2005 – *BVerwG* 2 *WD* 12.04

(1st Instance: Truppendienstgericht Nord (Federal Military Court of Northern Germany)
of February 9, 2004 – ref. no.: TDG N 1 VL 24/03 –)

Legal sources:

Grundgesetz -GG – (German Basic Law – Constitution)	Art. 1 para. 3, art. 4 paras. 1 and 3, art. 12a, 17a, 25, 26 para. 1 sentence 1, art. 65a, 73 no. 1, art. 87a, 115a ff.
UN Charter	Art. 2 no. 4, arts. 39, 42, 51, 103
Customary International Law	
Fifth Hague Convention of October 18, 1907	
NATO Treaty	
NATO Status of Forces Agreement (SOFA)	
Supplementary agreement to the NATO SOFA	
Aufenthaltsvertrag (Agreement concerning the presence of foreign armed forces in the Federal Republic of Germany, *AV*)	
Soldatengesetz - SG –(Act concerning the Legal Position of Soldiers)	§§ 7, 10 paras. 2 and 5, § 11 paras. 1 and 2, § 17 para. 2 sentence 1
Wehrdisziplinarordnung – WDO – (German Military Disciplinary Code)	§§ 90, 107

Keywords:

Order; obedience; non-bindingness of orders; freedom of conscience; decision of conscience; right to conscientious objection; prohibition of the use of force under international law; right to self-defense; functional ability of the *Bundeswehr*; practical concordance; Iraq war, SASPF IT project; NATO; acts of assistance; AWACS; overflight rights; guarding US facilities; stopover rights; definition of aggression; state responsibility; neutrality law; indictment; *ZDv* 15/2; legal advisor.

Guiding principles:

1. An indictment is only sufficiently definite if it lets it be known what breaches of duty the accused soldier is charged with. This requires that a concrete and comprehensible course of events relating to the soldier's actions must be described and set in relation to the accusation derived therefrom. The accusation made in the indictment must be clear in the exact link between the description of the alleged acts and the conclusions drawn therefrom by the *Wehrdisziplinaranwalt* (military disciplinary attorney).

2. The central obligation of every soldier in the *Bundeswehr*, as established in § 11 para. 1 sentences 1 and 2 *SG* to carry out issued orders "conscientiously" (to the best of his abilities, completely, and immediately) does not demand unconditional obedience, rather it demands obedience while thinking for oneself and in particular giving consideration to the consequences of carrying out the order – especially in respect of the limits of applicable law and the ethical "boundaries" of one's own conscience.

3. Legal limits to obedience result from the *Basic Law (Grundgesetz, GG)* and the Act Concerning the Legal Position of Soldiers (*Soldatengesetz, SG)*, which can be summarized in seven sub-groups. A soldier at any rate does not need to carry out an order issued to him on the grounds that it cannot be expected of him if he can in this respect call upon the protection of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*). The protective effects of art. 4 para. 1 *GG* are not supplanted by the fundamental right to recognition as a conscientious objector (art. 4 para. 3 *GG*).

4. A decision of conscience is any serious moral decision, i.e. oriented to the categories of "good" and "evil", which the individual in a particular situation experiences as binding in and of itself and as creating an imperative inner obligation, with the result that he could not act against it without a serious moral dilemma.

5. The soldier's call of conscience "as an inner voice" can only be deduced indirectly from corresponding indicators and signals that point to a decision of conscience and moral dilemma, and moreover primarily via the medium of language. What is required is the positive ascertainment of an outwardly expressed, rationally communicatable and according to the context intersubjectively comprehensible demonstration of the seriousness, depth and inalienability (in the sense of an absolute obligation) of the decision of conscience. Here the rational comprehensibility of the demonstration relates solely to the "whether", i.e. to the sufficient likelihood of the presence of the dictate of conscience and of its behavioral causality, but not to whether the decision of conscience itself can be assessed as "false", "wrong" or "right".

6. There were and are serious legal concerns about the war started on March 20, 2003 by the USA and the United Kingdom (UK) against Iraq in respect of the prohibition of the use of force under the UN Charter and other applicable international law. The governments of the USA and UK could not support their case for war either with empowering resolutions from the UN Security Council nor by the right to self-defense granted in art. 51 UN Charter.

7. Neither the NATO Treaty, the NATO Status of Forces Agreement (SOFA), the supplementary agreement to the NATO SOFA nor the *Aufenthaltsvertrag* (Agreement concerning the presence of foreign armed forces in the Federal Republic of Germany, *AV*) provide an obligation on the part of the Federal Republic of Germany, contrary to the UN Charter and applicable international law, to support acts in contravention of international law by NATO partners.

8. If a soldier has made a decision of conscience that is protected by the fundamental right to freedom of conscience (art. 4 para. 1 *GG*), he is entitled not to be prevented by official powers from acting in accordance with the dictates of his conscience which are binding upon him and impose an imperative obligation upon him.

a) This entitlement is to be taken into account by providing him with an alternative action that he can perform with a clear conscience in order to resolve a conflict affecting him in his mental and moral existence as an autonomous personality between the dictates of a sovereign power and the dictates of his conscience.

b) If in the concrete individual case, alternative actions that can be performed with a clear conscience have to be offered to a soldier per art. 4 para. 1 *GG* owing to a highly personal decision of conscience taken by him, this does not mean the suspension of the general validity

of the general duty of obedience for him and other soldiers which follows from § 11 paras. 1 and 2 *SG*.

c) Art. 4 para. 1 *GG* does not establish the right of a superior to demand particular behavior from subordinates by means of an order according to the standards of his own conscience.

9. The fundamental right to freedom of conscience (art. 4 para. 1 *GG*) is not subject to a statutory reservation. It is also not subject to a numerical reservation; its use is guaranteed to every subject of fundamental rights independently of whether, and if so to what extent, it is also made use of by others.

10. Also for soldiers, the fundamental right to freedom of conscience is not supplanted by the military constitutional law provisions of the *Basic Law (Grundgesetz, GG)*.

a) A soldier's making use of the fundamental right does not restrict the competence of the Federal Republic to legislate in matters of "defense" (art. 73 no. 1 *GG*). Just because the legislature is empowered by a provision of the constitution such as art. 73 no. 1 *GG* to take particular legislative action, the "legislative product" does not as a result have constitutional status.

b) It does not follow from the constitutional decision standardized in art. 87a para. 1 *GG* to set up armed forces – which are subject to an additional statutory reservation – "for defense" that fundamental rights of soldiers always have to take second place if the invocation of the fundamental right appears to be a "disturbance" for the *Bundeswehr* or a "burden" on operational duties in the eyes of the superior concerned. It is always part of guaranteeing the "functional ability of an effective national defense" in accordance with the *Basic Law (Grundgesetz, GG)* to ensure that the protection imperatively prescribed by the constitution, including of the fundamental right to freedom of conscience, is not restricted.

c) The Federal Defense Minister's "power of command and authority" guaranteed in art. 65a *GG* and the command authority of military superiors derived therefrom are subject to a reservation of fundamental rights and hence reservation of exercise that are specially protected constitutionally by art. 1 para. 3 *GG*.

d) The difficulties and detrimental effects resulting for military operational routine when soldiers claim freedom of conscience are to be taken into account by creating "practical concordance".

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Summary of the matters of fact:

In April 2003 a major of the German Bundeswehr refused to carry out two orders of his superior to collaborate on the further development of a military software program (SASPF). Giving his reasons he stated that he could not reconcile it with his conscience to follow orders that were suited to supporting acts of war in Iraq. At the same time he asserted that before issuing the order his superior had expressly not been able to rule out, to him, that working on the project would support the participation of the *Bundeswehr* in the war against Iraq which he saw as being contrary to international law. In this context he criticized the fact that members of the *Bundeswehr* were stationed in Kuwait, that German soldiers were taking part in AWACS flights and guarding US bases in Germany, and that overflight and landing rights had been granted (by the German Government) for the armed forces of the USA that were operating in Iraq. He considered these to be acts of assistance contrary to the constitution and international law.

The Federal Military Court (*Truppendienstgericht*) demoted the soldier to the rank of a captain (*Hauptmann*) owing to his disciplinary offense. The soldier appealed against this and filed an application for acquittal. The military disciplinary attorney (*Wehrdisziplinaranwalt*) also filed an appeal and demanded that the soldier should be dismissed from the army.

The *Senat* has acquitted the soldier because it could not be proved that he had committed a disciplinary offense.

For the reasons:

3.1 In respect of point 1, the (disciplinary) indictment of the military disciplinary attorney (*Wehrdisziplinaranwalt*) does not fulfill the requirement for definiteness, with the result that, to this extent, there is a lack of sufficient accusation within the meaning of § 99 para. 1 German Military Disciplinary Code (*Wehrdisziplinarordnung, WDO*) and the soldier is therefore to be acquitted of this accusation of having committed an offense. Per § 123 sentence 3 in conjunction with § 107 para. 1 *WDO*, only those breaches of duty may be made the subject of the reached verdict as the soldier is accused of in the (disciplinary) indictment (and if applicable its appendix) as disciplinary offenses. At the same time, per § 99 para. 1 sentence 2 *WDO*, the indictment must present the facts in which culpable breach of duty is seen, as well as the evidence, in an orderly way. These facts also include the circumstances

that fulfill the subjective operative facts of a breach of duty (ruling of June 29, 1978 – *BVerwG* 2 *WD* 18.78 –). The accusation made against the soldier must be so clear and plain in the indictment that the soldier can prepare himself for it in his defense (established legal practice: cf. e.g. rulings of April 14, 1977 – *BVerwG* 2 *WD* 1.77 – <*NZWehrr* 1978, 61>, of July 19, 1995 – *BVerwG* 2 *WD* 9.95 – <*BVerwGE* 103, 265 = Buchholz 236.1 § 7 *SG* no. 4 = *NZWehrr* 1996, 164 = *NVwZ-RR* 1996, 213 = ZBR 1996, 58, in so far as not published>, of May 6, 2003 – *BVerwG* 2 *WD* 29.02 – <Buchholz 235.01 § 107 *WDO* 2002 no. 1 = *NZWehrr* 2004, 31 = *NVwZ-RR* 2004, 46 = *DokBer* 2004, 1> , of September 18, 2003 – *BVerwG* 2 *WD* 3.03 – <*BVerwGE* 119, 76 = Buchholz 235.01 § 38 *WDO* 2002 no. 11 = *NZWehrr* 2005, 122 = *NVwZ-RR* 2004, 426 = *DokBer* 2004, 141> and of March 16, 2004 – *BVerwG* 2 *WD* 3.04 – <*BVerwGE* 120, 193 = Buchholz 235.01 § 93 *WDO* 2002 no. 1 = *NZWehrr* 2004, 213 = *HFR* 2005, 363 = *DokBer* 2004, 294>). For this it is not sufficient to point to a historic course of events without making it clear with sufficient precision which “breaches of duty ... the soldier is charged with as disciplinary offenses” (cf. § 107 para. 1 *WDO*). The presentation of a concrete and comprehensible course of events in respect of the conduct of which the soldier is accused must be placed in relation to the accusation derived therefrom of one of more breaches of duty, and here it is irrelevant whether the legal opinion on which the indictment is based is shared or not by the court in its later decision. The sole decisive factor is that in the concrete link between the presentation of the historical course of events and the conclusions drawn by the military disciplinary attorney from these, the accusation made by him should be clear. The legal requirement is binding, despite the wording of § 99 para. 1 sentence 2 *WDO* which is designed as a directory provision, in so far as it relates to this necessary content of the indictment (cf. Dau, *WDO*, 4th ed., 2002, § 99 margin no. 5 with further notes). This follows in particular from the regulatory purpose and from reasons pertaining to the rule of law in a constitutional state (art. 20 para. 1 Basic Law (*Grundgesetz, GG*)). According to the established legal practice of the *Senat* (cf. e.g. rulings of May 18, 2001, – *BVerwG* 2 *WD* 42.00, 43.00 – <*BVerwGE* 114, 258 = *Buchholz* 236.1 § 8 *SG* no. 3 = *NJW* 2002, 980 = *DVBl.* 2002, 122 = *ZBR* 2002, 316> and of April 28, 2005 *BVerwG* 2 *WD* 25.04) the indictment must on the one hand enable the person concerned to prepare his defense. In addition, the facts of the case recorded therein also form the irrevocable basis for the court hearing and decision of the competent military court and to this extent are binding on the military disciplinary attorney. The military courts cannot and may not either expand or narrow the facts of the case as charged by the military disciplinary attorney. Therefore, for example, it also cannot remain open which statements by witnesses are considered to be accurate or

which facts based on witnesses' testimony and other evidence are considered as proven and in the view of the military disciplinary attorney justify an imputation of wrong against the person concerned (ruling of May 18, 2001 *BVerwG 2 WD 42.00, 43.00* <loc. cit.>). It therefore follows from this double task of the indictment – which is essential in a state governed by rule of law – that a sentence of accusation is only sufficiently definite content of a indictment if the accusation of culpable breach of duty which it makes can be understood in this sense concretely and clearly from the point of view of the recipient of the indictment, when considered objectively. If doubts persist in this respect, there is a lack of sufficient accusation within the meaning of § 99 para. 1 *WDO*.

The indictment does not fulfill these legal requirements in accusation point 1.
– is further explained –

3.2 In accusation point 2, by contrast, the indictment does satisfy the described requirements as it is sufficiently clear of what the soldier is accused.

…

4. The soldier did not commit any disciplinary offense through the acts of which he is accused in accusation point 2. For with regard to the duty of service incumbent upon him per § 11 para. 1 sentence 1 Act Concerning the Legal Position of Soldiers (*Soldatengesetz, SG*) he was not disobedient (see 4.1) and in other respects he did not violate his duties of loyal service per § 7 *SG* (see 4.2), of supervision per § 10 para. 2 *SG* (see 4.3), of carrying out his own orders per § 10 para. 5 sentence 2 *SG* (see 4.4) and of keeping respect and trust per § 17 para. 2 sentence 1 *SG* (see 4.5).

4.1 No violation against the duty of obedience (§ 11 para. 1 sentences 1 and 2 *SG*)

The two instructions issued to the soldier on April 7, 2003 by his superior *Oberst i.G.* M. did fulfill the legal requirements of an order (see 4.1.1). But the duty of a subordinate to be obedient is subject to legal limits (see 4.1.2) and in this case is at any rate limited by the fundamental right to freedom of conscience (see 4.1.3).
The soldier made a decision of conscience that is protected under art. 4 para. 1 Basic Law (*Grundgesetz, GG*), and therefore was entitled to be offered an alternative course of action

that he could perform with a clear conscience (see 4.1.4). This results both from the concrete context of the soldier's action (see 4.1.4.1) and from his comprehensible and credible portrayal of circumstances which indicate the seriousness, depth and inalienability of the decision of conscience he asserted, particularly also the credibility of his personality and his willingness to accept the consequences (see 4.1.4.2). By his actions as recorded in accusation point 2 the soldier also did not exceed the inherent bounds of the basic right to freedom of conscience (art. 4 para. 1 *GG*) which he exercised (see 4.1.5). Art. 4 para. 1 *GG* contains no statutory reservation (see 4.1.5.1). Furthermore, it is not subject to a numerical reservation of recourse (see subsection 4.1.5.2) and – at any rate in this case – is also not supplanted by the provisions of military constitutional law (arts. 12a, 65a, 73 no. 1, arts. 87a and 115a ff. *GG*) from the point of view of the necessary "functional ability of the *Bundeswehr*" (see 4.1.5.3).

Consequently there is no need here subsequently to examine and decide on the question of whether the two orders – regardless of the protective effects of art. 4 para. 1 *GG* – additionally also were not legally binding because their execution did not correspond to the tasks of the *Bundeswehr* as set down in the *Basic Law*, within the meaning of § 11 para. 1 sentence 3 phrase 1 alternative 2 *SG* would have served non-official purposes (see 4.1.2.2), violated human dignity (see 4.1.2.1) (§ 11 para. 1 sentence 3 phrase 1 alternative 1 *SG*) or caused criminal offences (see 4.1.2.3) (§ 11 para. 2 sentence 2 *SG*), been impossible (see 4.1.2.4), directly violated the "general rules of international law" – art. 25 *GG* – (see 4.1.2.5) or the ban on preparing for a war of aggression – art. 26 para. 1 sentence 1 *GG*.

4.1.1 Order

The Act Concerning the Legal Position of Soldiers (*Soldatengesetz, SG)* does not define the term "order" but it supposes it to have the same content as is defined in § 2 no. 2 German Military Criminal Code (*Wehrstrafgesetz, WStG*) (established legal practice: cf. e.g. ruling of November 8, 1990 – *BVerwG* 1 *WB* 86.89 – <*BVerwGE* 86, 349 = *NZWehrr* 1991, 69 = *NJW* 1990, 1317 = *NVwZ* 1991, 579 [LS] = *ZBR* 1991, 152 [*LS*]>). Accordingly an order is to be seen as any instruction to perform a particular act, which a military superior (§ 1 para. 5 *SG* in conjunction with the Ordinance regulating the relationship of being a military superior (*Vorgesetztenverordnung, VorgV*)) issues to a subordinate in writing, orally or by other means generally or for the individual case and with a demand of obedience (established legal practice: cf. e.g. rulings of June 22, 2004 – *BVerwG* 2 *WD* 23.03 – <*NZWehrr* 2005, 83 =

DokBer 2005, 43> with further notes; Scherer/Alff, *SG*, 7th ed. 2003, § 10 margin no. 40 with further notes).

These requirements were met in this case.
– is further explained –

However, the soldier was allowed to refuse to carry out these two orders in his post in S.

4.1.2 Legal limits of obedience

Per § 11 para. 1 sentence 1 *SG*, every soldier in the *Bundeswehr* must obey his superiors. He must carry out their orders per § 11 para. 1 sentence 2 *SG* to the best of his abilities completely, conscientiously and immediately. The duty of obedience is one of the central duties of every soldier (established legal practice: cf. e.g. rulings of November 14, 1991 – *BVerwG* 2 *WD* 12.91 – <*BVerwGE* 93, 196 [199], of August 3, 1994 –*BVerwG* 2 *WD* 18.94 – <*NZWehrr* 1995, 211>, of July 4, 2001 – *BVerwG* 2 *WD* 52.00 – <*Buchholz* 236.1 § 10 *SG* no. 46 = *NZWehrr* 2002, 76> and of July 2, 2003 – *BVerwG* 2 *WD* 47.02 – <*Buchholz* 235.01 § 38 *WDO* 2002 no. 8 = *NZWehrr* 2004, 80 = *NVwZ-RR* 2004, 191 = *DokBer* 2004, 43>). However, the obedience required by the legislature (in the Act Concerning the Legal Position of Soldiers) is not “blind” or “unconditional” obedience that for example art. 64 para. 1 of the constitution of the German Reich of April 16, 1871 (*Reichsgesetzblatt* (Reich Law Gazette, *RGBl.*) p. 63) or the official oath of soldiers of the *Wehrmacht* of August 20, 1934 (*RGBl.* I p. 785) in the version of the amendment of July 20, 1935 (*RGBl.* I p. 1035) demanded of every soldier.

In the Basic Law and the Act Concerning the Legal Position of Soldiers there are legal limits to the military command authority. These can be summarized in seven sub-groups, although the preconditions and mutual dependencies of each have not so far been sufficiently clarified and therefore first need to be determined (see 4.1.2.1 to 4.1.2.7). At any rate, when he made his deliberate decision not to carry out the two orders issued to him, the soldier could call upon his basic right to freedom of conscience per art. 4 para. 1 *GG* (see 4.1.3).
4.1.2.1 In § 11 para. 1 sentence 3 phrase 1 alternative 1 *SG* the law expressly states, following the standardization of the fundamental duty of obedience, that a soldier is not being disobedient if he fails to follow an order that violates human dignity. Human dignity, which

per art. 1 para. 1 *GG* is “inviolable” (sentence 1) and is to be respected and protected with “all the powers of the state” (sentence 2), is violated if owing to the order the subordinate or a third party affected by the order is subject to treatment that gives expression to contempt or disregard for the value inherent in man by virtue of his being a person (cf. e.g. *BVerfG*, ruling of December 15, 1970 – 2 *BvF* 1/69, 2 *BvR* 629/68 and elsewhere – <*BVerfGE* 30, 1 [25 ff.]>).
– is further explained –

In the present case it can remain open as to whether the non-bindingness justification of § 11 para. 1 sentence 3 phrase 1 alternative 1 *SG* (“human dignity”) also includes the protection of freedom of conscience per art. 4 para. 1 *GG*, since in any case it does not curtail this protection.

4.1.2.2 According to the provision set out in § 11 para. 1 sentence 3 phrase 1 alternative 2 *SG*, failure to obey an order is also not disobedience if the order was not issued for official purposes. An order is only issued for “official purposes” in this sense if military service requires it in order to fulfill the tasks of the *Bundeswehr* as specified by the constitution (established legal practice: cf. the documentation in Scherer/Alff, loc. cit. § 10 margin no. 47 and § 11 margin no. 15). The primary task of the *Bundeswehr* results from art. 87a para. 1 *GG*, according to which the Federal Republic of Germany sets up armed forces “for defense”. What is to be understood as a case of “defense” according to the Basic Law (*Grundgesetz, GG)* can be gathered firstly from the rules concerning the “defense case” in art. 115a *GG*, especially from its wording (“federal territory is attacked by armed forces” or “there is a direct threat of such an attack”) and the history of its origins (cf. Claus Arndt in *DÖV* 1992, 618 [619]; Bähr, *Verfassungsmäßigkeit des Einsatzes der Bundeswehr im Rahmen der Vereinten Nationen*, 1994, pp. 91 ff., 102 ff. with further notes). Since the standard text of art. 87a paras. 1 and 2 *GG* speaks of “defense” but not – unlike the originally proposed version (cf. Bähr, loc. cit. p. 91) – of “defense of the country” and since additionally the legislature that amended the constitution when it adopted the provision in 1968 also considered deployment as part of a NATO alliance case as constitutionally permissible, it can be assumed that “defense” is to encompass everything that under the applicable international law can be counted as the right to self-defense under art. 51 of the Charter of the United Nations (UN Charter), which the Federal Republic of Germany has effectively acceded to. Art. 51 UN Charter guarantees and limits in this article for every state the right – also generally

recognized under customary international law – of “individual” and of “collective self-defense” against “armed attack”. At the same time the right to “collective self-defense” also permits the use of military force – over and above the term “defense” in art. 115a *GG* – by way of requested emergency assistance in favor of a state attacked by a third party (e.g. “alliance case”). Therefore the deployment of the *Bundeswehr* “for defense” is only ever allowed as defense against a “military attack” (“armed attack” per art. 51 UN Charter), but not to pursue, implement and secure economic or political interests. Apart from “for defense” in the described sense, the armed forces of the *Bundeswehr*, as the constitutional standard of art. 87a para. 2 *GG* compulsorily states, may only be deployed in so far as the Basic Law “expressly” allows this; this is the case for deployments of the *Bundeswehr* per art. 87a para. 3 (protection of civilian property and traffic regulation in the event of defense and tension) and para. 4 *GG* (supporting the police in the protection of civilian property and in combating organized and militarily armed insurgents in the federal territory) and per art. 35 paras. 2 and 3 *GG* (especially assistance in the event of natural disasters and particularly serious accidents). In addition, according to the established legal practice of the German Federal Constitutional Court (*Bundesverfassungsgericht*), use of the armed forces of the *Bundeswehr* on the basis of art. 24 para. 2 *GG* as part of a “system of reciprocal collective security” is one of the tasks for the fulfillment of which the *Bundeswehr* may be deployed, in so far as the deployment is in accordance with the rules of the system concerned (ruling of July 12, 1994 – 2 *BvE* 3/92 – and elsewhere – <*BVerfGE* 90, 286 [346 ff., 355 ff.]>), that is, in particular, compatible with the UN Charter.

An order that does not satisfy these requirements and does not keep within these bounds does not serve an “official purpose” in the sense of § 11 para. 1 sentence 3 phrase 1 alternative 2 *SG*. A soldier who fails to follow such an order therefore is not committing disobedience toward his superior, since the order is not issued for a – constitutionally permissible – official purpose.

Disputes in this regard must if necessary be decided in the individual case by the respectively competent courts, to whom the (ultimately binding) clarification of disputed legal questions is entrusted by the Basic Law (art. 20 para. 1 art. 19 para. 4 art. 92 *GG*).

Since the soldier can at any rate successfully call upon the protective effect of his fundamental right to freedom of conscience (art. 4 para. 1 *GG*) with respect to the two orders of April 7,

2003 that are at issue here (see 4.1.3 and 4.1.4), which right is not supplanted either by the provisions of ordinary law concerning the duty of obedience per § 11 para. 1 sentence 3 phrase 1 alternative 2 *SG* or by other provisions of constitutional law (see 4.1.5), in the present case there is no need for any closer examination or decision concerning the question of whether carrying out these orders in view of the Iraq war which began on March 20, 2003 would have in part – as the soldier feared – actually served non-official purposes in the described sense and whether they were already for this reason therefore non-binding.

4.1.2.3 In the present proceedings the question of a violation of § 11 para. 2 sentence 1 *SG* also requires no closer examination. In this respect it is standardized in this rule that orders are (also) non-binding if to follow them would mean committing a criminal offense. This provision captures all orders which, if they were carried out, would fulfill the elements of a criminal offense under national criminal law (cf. e.g. Schölz/Lingens, *WStG*, 3rd ed. 1988, § 2 margin nos. 38 ff. with further notes; Scherer/Alff, *loc. cit.*, § 11 margin nos. 23 ff.) or a tort under international criminal law (cf. e.g. Horst Fischer/Sascha Rolf Lüder <eds.>, *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof*, 1999; Hans-Peter Kaul in *Humanitäres Völkerrecht - Informationsschriften* [*HuV-I*] 14 <2001>, 251 ff.; Khan in Ambos/Arnold <eds.>, *Der Irak-Krieg und das Völkerrecht*, 2004, pp. 449 ff.). These provisions of ordinary law also do not supplant the constitutional protective effect of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) which the soldier can successfully call upon in the present case.
4.1.2.4 The aforementioned provisions in § 11 para. 1 sentence 3 phrase 1 alternatives 1 and 2, and para. 2 sentence 1 *SG* do not finally list the reasons on account of which a military order is non-binding. This is generally recognized and is in line with established legal practice of the adjudicating *Senat* (cf. e.g. Schölz/Lingens, *loc. cit.*, § 2 margin no. 34; Scherer/Alff, loc. cit, § 11 margin no. 16 each with further notes).
– is further explained –

4.1.2.5 In addition, according to the provision of constitutional law in art. 26 para. 1 sentence 1 *GG*, an order is not legally binding if to issue it or carry it out can be qualified as an act "suited to and performed with the intention of disturbing the peaceful coexistence of peoples, in particular to preparing to wage a war of aggression" (cf. e.g. Scherer/Krekeler, *WPflG*, 3rd ed. 1966, § 25 note IV 7; Frank in *Alternativkommentar zum Grundgesetz <AK-GG>*, vol. 1, 2nd ed. 1989, art. 26 margin no. 23; Brunn in Umbach/Clemens <eds.>, *GG*, vol. I 2002,

art. 4 margin no. 101; Starck in von Mangoldt/Klein/Starck, *GG*, 4th ed. 1999, art. 4 margin no. 148). It is true that the prohibition of a war of aggression, standardized in art. 26 para. 1 *GG*, which takes up the concept from international law (cf. Hartwig in Umbach/Clemens <eds.>, *loc. cit.*, art. 26 margin no. 15 with further notes), in its wording "only" covers (as well as other actions that disturb the peace) the "preparation" for such a war. Preparation is any activity occurring chronologically before a war of aggression that promotes its causation or even its start. However, if it is already forbidden by the constitution to "prepare" for a war of aggression, then according to the obvious sense and purpose of the rule, it is especially forbidden to wage or support such a war (cf. also *BTDrucks* V/2860, p. 2). For waging a war of aggression and promoting and supporting it do not happen only in the phase of preparation – which according to the Basic Law (*Grundgesetz, GG)* is already unconstitutional. These occur rather in the stage of realization of what is (already in earlier stages) forbidden. A war of aggression per art. 26 para. 1 sentence 1 *GG* is unconstitutional regardless of with what subjective aims it is being waged. This rule assumes that such a war conflicts with the constitution in every case, and indeed evidently for the reason that it is always objectively suited to "disturbing the peaceful coexistence of peoples". This applies irrespective of whether the action covered by art. 26 para. 1 sentence 1 *GG* is also a criminal offense. For all actions covered by the provisions of art. 26 para. 1 sentence 1 *GG* are, by virtue of this verdict which is pronounced by the Basic Law (*Grundgesetz, GG)*, unconstitutional, moreover irrespective of whether the national legislature has made them criminal offenses based on art. 26 para. 1 sentence 2 *GG* or not (on the question of the difference between the constitutional penalization task in art. 26 para. 1 sentence 2 *GG* and the implementation rule under criminal law in § 80 *StGB* cf. e.g. Klug in Baumann <ed.>, *Misslingt die Strafrechtsreform?*, 1969, p. 162; F. Müller, *Die Pönalisierung des Angriffskrieges im GG und im StGB der Bundesrepublik Deutschland*, diss. Heidelberg, 1970, pp. 90 ff.; Düx in Hannover/Kutscha/Skrobanek <eds.>, *Staat und Recht in der Bundesrepublik Deutschland*, 1987, pp. 369 ff.; Hartwig in Umbach/Clemens <eds.>, *loc. cit.*, art. 26 margin no. 31; *Generalbundesanwalt beim Bundesgerichtshof*, resolution of March 21, 2003 [press release] <JZ 2003, 908 [909]>). The expression "unconstitutional" is intended – as in particular results from the history of the origins of this norm – "to express the strongest legal condemnation in a constitution of an act"; on account of the constitution the act is placed outside the protection of the law ("*hors la loi*") (cf. above all the statements of the chairman of the main committee of the Parliamentary Council *(Parlamentarischer Rat*), Carlo Schmid [SPD] and of the Member of the German Bundestag Kaufmann [CDU] in the 6th session of the main

committee on November 19, 1948, minutes pp. 69 ff. [72]; *JöR n.F.* 1 <1951>, 237 ff., whom the legislator of the constitution followed). The concrete legal impact of this severe verdict depends on the subject matter being judged. Whereas the Federal Constitutional Court (*Bundesverfassungsgericht)* has sole competence for ascertaining the unconstitutionality of a law per art. 11 *GG*, the unconstitutionality of other sovereign acts, e.g. which violate art. 26 para. 1 sentence 1 *GG*, is ascertained if a dispute arises – as also otherwise (cf. art. 19 para. 4 and art. 92 *GG*) – by the respectively competent court (cf. also Hernekamp in von Münch/Kunig <eds.>, *GG*, vol. 2, 5th ed. 2001, art. 26 margin no. 25). Hence this also applies to the question of whether an order is aimed towards an act being carried out which falls within the scope of art. 26 para. 1 sentence 1 *GG* and is therefore unconstitutional, with the result that the order is therefore non-binding. No court assessment of this kind is required in the present case because here the soldier (already) due to the protective effect of his fundamental right to freedom of conscience (art. 4 para. 1 *GG*) did not need to carry out the orders issued to him; an alternative action that he could reconcile with his conscience had to be offered to him personally. Consequently in this case it did not come to the question of the general non-bindingness of an order directed towards further collaboration on the SASPF IT project.

4.1.2.6 Furthermore, an order issued is non-binding if to issue it or carry it out violates the "general rules of international law". Per art. 25 *GG*, these are a "component of federal law" (sentence 1). They "take priority over all other laws and generate rights and obligations directly for inhabitants of the federal territory" (sentence 2). This constitutionally absolute priority effect applies with respect to all acts of the (German) state, especially also those of the "executive power". This also particularly demands that the executive power and the courts are obligated to forbear from everything that would give validity to an action in violation of "general rules of international law" that was carried out by non-German organs of sovereign power in the area of validity of the German Basic Law (*BVerfG*, ruling of May 21, 1987 – 2 *BvR* 1170/83 – <*NJW* 1988, 1462 [1463]>), and that they are prevented from having decisive involvement in any act violating such rules by non-German organs of sovereign power (cf. e.g. *BVerfG*, ruling of March 31, 1987 – 2 *BvM* 2/86 – <*BVerfGE* 75, 1 [19]> and Hofmann in Umbach/Clemens <eds.>, *loc. cit.*, art. 25 margin no. 20). In accordance with the priority effect of art. 25 sentence 2 *GG*, in the *Bundeswehr* a military order from a superior that conflicts with the "general rules of international law" cannot demand obedience of subordinates per § 11 para. 1 sentences 1 and 2 *SG*. If an order violates "general rules of

international law" of this kind, the subordinate is therefore to follow these rules instead of the order issued to him. Art. 25 *GG* supplants to this extent the legal effects of § 11 para. 1 sentences 1 and 2 *SG* and is directly binding on the subordinate (cf. e.g. Jescheck in Schüle/Scheurer/Jescheck, *Bundeswehr und Recht*, 1965, pp. 82 ff.; Jescheck/Weigend, *Lehrbuch des Strafrechts*, 5th ed. 1996, § 35 II 2 b, p. 393; Schölz/Lingens, loc. cit., § 2 margin no. 40). According to the established legal practice of the Federal Constitutional Court, the "general rules of international law", for whose binding declaration in questions of doubt the Federal Constitutional Court is called upon per art. 100 para. 2 *GG*, as well as those norms to which the quality of international law "*ius cogens*" (= inalienable "imperative" international law in the sense of art. 53 of the Vienna Convention on Treaties of May 23, 1969 <*BGBl.* 1985 II, p. 927>) is attributed, include customary international law and the generally recognized legal principles in the sense of art. 38 para. 1 letter c of the Statute of the International Court of Justice (cf. e.g. *BVerfG*, rulings of October 30, 1962 – 2 *BvM* 1/60 – <*BVerfGE* 15, 25 [34 ff.]> and of May 14, 1968 – 2 *BvR* 544/63 – <*BVerfGE* 23, 288 [317]> with further notes). Components of "*ius cogens*" are, among others, the prohibition of the use of force under international law, which finds expression in art. 2 no. 4 of the UN Charter, and the basic rules of the humanitarian international law of war (cf. e.g. Hofmann in Umbach/Clemens <eds.>, *loc. cit.*, art. 25 margin no. 13 with further notes; on illegal armed acts of damage cf. e.g. the overview in Knut Ipsen, *Völkerrecht*, 4th ed. 1999, § 68 margin no. 10 ff.). The existence of customary international law presupposes a variety of practices – representing all existing legal cultures worldwide – followed by states ("general practice"), which are generally practiced in the conviction that there is an obligation to do so on account of international law ("*opinio iuris*"). In ascertaining the norms of customary international law, in the first instance account should be taken of the acts that are binding under international law of those government organs which by virtue of international law or by virtue of national law are appointed to represent the state in matters of international law. In addition, such a practice may also manifest itself in the acts of other government organs, such as those of the legislature or of the courts, at least in so far as their actions are directly relevant for international law, such for example as may serve to fulfill an obligation under international law or to fill scope for implementation under international law (established legal practice of the *BVerfG*: cf. e.g. rulings of December 13, 1977 – 2 *BvM* 1/76 – <*BVerfGE* 46, 342 [367]>, of April 12, 1983 – 2 *BvR* 678/81 and elsewhere – <*BVerwGE* 64, 1 [24]>, of March 31, 1987 – 2 *BvM* 2/86 – <*BVerfGE* 75, 1 [21 ff.]> and of May 21, 1987 – 2 *BvR* 1170/83 – <*NJW* 1988, 1462 [1463]> and ruling of December 18, 1984 – 2 *BvE* 13/83 – <*BVerfGE* 68, 1

[89]>). By contrast, arrangements under the law of international agreements, i.e. agreements and treaties signed between subjects of international law by legal transactions, as a rule do not belong to the "general rules of international law" within the meaning of art. 25 *GG*, unless legal norms of "*ius cogens*" or of customary international law (declaratory) find their expression therein. Of course this changes nothing in respect of the fact that military orders – also below the threshold of non-bindingness per art. 25 sentence 2 *GG* – may be issued only within the limits drawn by § 10 para. 4 *SG*, namely among other things "only in observance of the rules of international law", i.e. of international law as a whole, including the law of international agreements (on this point cf. e.g. Jescheck, loc. cit, p. 63 [71]; Scherer/Alff, loc. cit, § 10 margin no. 48).

Whether the carrying out of the two orders at issue here would actually – as the soldier contends – have causally brought about a violation of the "general rules of international law" requires no closer examination or decision here because the soldier in any case was able to call upon art. 4 para. 1 *GG* with respect to the bindingness of the orders that was claimed by his superior. It is apparent that – at any rate in the present case – art. 25 *GG* did not stand in the way of this.

4.1.2.7 Finally a military order is also non-binding on a subordinate if, after weighing up all the relevant circumstances, he cannot be expected to carry out that order.

As a starting point, this has long been recognized in established legal practice and in the specialist literature (cf. e.g. *BDH* ruling of March 8, 1958 – *WB* 2.58 – <*BDHE* 4, 181 = *NZWehrr* 1959, 13>; *OLG* Hamm, ruling of July 16, 1965 – 3 *Ss* 375/65 – <*NZWehrr* 1966, 90 = *NJW* 1966, 212 [213]>; ruling of September 30, 1970 – *BVerwG* 1 *WDB* 1.70 – <*DokBer* B 1971, 3915>; Scherer in *NZWehrr* 1959, 130; Schreiber in *NZWehrr* 1965, 1; Schölz/Lingens, loc. cit., § 2 margin no. 45; Scherer/Alff, loc cit., § 11 margin no. 17 with further notes).

However, the specific preconditions have not been sufficiently clarified to date (see 4.1.2.7.1 to 4.1.2.7.4). Yet it results from art. 1 para. 3 *GG* and from the wording, the history of its origins and from the regulatory context of art. 4 para. 1 *GG* that a military order at any rate is unreasonable and does not need to be followed if the subordinate concerned can in this respect call upon the protection of the fundamental right to freedom of conscience (see 4.1.3).

4.1.2.7.1 …

– is further explained –

4.1.2.7.2 …

– is further explained –

4.1.2.7.3 The military service divisions (*Wehrdienstsenate*) of the Federal Administrative Court (*Bundesverwaltungsgericht*) have also repeatedly recognized that a subordinate can call upon his basic right to freedom of conscience per art. 4 para. 1 *GG* with respect to a military order issued to him.

a) The 1st military service division (*Wehrdienstsenat*) decided for the first time in its ruling of September 30, 1970 – *BVerwG* 1 *WDB* 1.70 – <loc. cit.> that a soldier's duty of obedience does not exist if

> "...an order, failing to respect the principle of reasonableness encroaches particularly deeply into the sphere of the personality, with the result that following it would be unreasonable (*BDH* 4, 181, 183). No further grounds are required that this personal sphere is touched if a soldier is asked to carry out an order against his conscience. …"

– is further explained –

b) The adjudicating *Senat* has followed this opinion and has explicitly also extended it to the area of service under arms (ruling of November 25, 1987 – *BVerwG* 2 *WD* 16.87 – <*BVerwGE* 83, 358 [360 ff.] = *NZWehrr* 1988, 122>).

– is further explained –

Since then the 2nd *Wehrdienstsenat* has several times reaffirmed this established legal precedent. It its ruling of December 17, 1992 – *BVerwG* 2 *WD* 11.92 – <*BVerwGE* 93, 323 [329] = *NZWehrr* 1993, 206 = *NVwZ-RR* 1993, 638 = *RiA* 1994, 181> it stated on this point:

> "The Federal Republic of Germany needs the political commitment of its soldiers, for whom § 8 *SG* expressly makes it a duty to espouse the upholding of the free and democratic constitutional system in the spirit of the Basic Law. Since, in circumstances in conflict with other constitutional provisions, in the concrete situation in which it becomes inwardly absolutely necessary to decide, the greater weight can fall upon the fundamental right to freedom of conscience per art. 4 para. 1 *GG* with respect to an order, with the consequence that the order is non-

> binding (*BVerwGE* 83, 358 <360>), a soldier may consider his own attitude to the deployment of armed force with particular means for a concrete political or military purpose and in particular give thought to what personal decision of conscience he would take in a particular situation if he, for example, should be ordered to take part in the use of ABC weapons. Hence he may also give expression to his doubts of conscience and moral concerns about the ethical bases of a strategy of securing the peace, which in the event of its failure possibly would destroy the values for the sake of which the military service is performed and destroy an existence fit for human beings on large parts of the earth. The *Bundeswehr* must face such questions, which come from a soldier's conscience, and should encourage such a person, who suffers under the ethical problems of his service, to articulate openly that which is inwardly weighing on his mind, if necessary also without protection (cf. Beestermöller, *Verantwortung wagen, Zweifel ertragen – Ethische Aspekte der Menschenführung in der Bundeswehr - Information für die Truppe*, vol. 5, 1992, 16). This possibility is offered by § 33 *SG*, according to which soldiers are to receive schooling in civic matters and international law and are to be taught their duties and rights in peacetime and in war under civic and international law.
>
> The duty per § 7 *SG* would only be violated if a soldier intended his statements to undermine the loyalty of his comrades or to incite them to disobedience, or if, for example, he should let it be known that under particular conditions he would dissociate himself from his duties. But in the soldier's mind this is not what the declaration is aimed at achieving."

– is further explained –

In its ruling of January 27, 1993 – *BVerwG* 2 *WD* 23.92 – the *Senat* again confirmed this legal opinion. In the ensuing period the 2nd *Wehrdienstsenat* also stood by this ruling and with its ruling of September 7, 1993 – *BVerwG* 2 *WD* 15.93, 24. 93 – again reaffirmed it (pp. 61 ff. in the reprint of the ruling). It confirmed the ruling again in its ruling of September 9, 1993 – *BVerwG* 2 *WD* 11.93 –. – is further explained –

4.1.3 Orders and freedom of conscience (art. 4 para. 1 *GG*)

After again examining the issue in detail, the adjudicating *Senat*, confirming and developing its established legal practice which has already found expression in the cited rulings of November 25, 1987, December 17, 1992, January 27, 1993, September 7, 1003 and September 9, 1993, has arrived at the conclusion that a soldier, even if he has not applied to be recognized as a conscientious objector per art. 4 para. 3 *GG*, can call upon the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) with respect to an order issued to him by a military superior. The protective effect of art. 4 para. 1 *GG* in conjunction with art. 1 para. 3 *GG* (see 4.1.3.1) is not supplanted by art. 4 para. 3 *GG*. Therefore the subordinate who

legitimately within the protective scope as a fundamental right of art. 4 para. 1 *GG* calls upon its protective effect with respect to a military order issued to him is not disobedient and does not unlawfully violate his duty resulting from § 11 para. 1 sentences 1 and 2 *SG*. The following reasons are decisive.

4.1.3.1 Protective effect of art. 4 para. 1 *GG*

4.1.4.1.1 It results already from the wording of the basic provision concerning a soldier's duty of obedience in § 11 para. 1 sentence 2 *SG* that a soldier is to carry out an order issued to him "conscientiously" (according to the best of his abilities, completely, and immediately). This formulation contains in its term "*gewissenhaft*" (= "conscientious") a direct reference to the conscience (Lat. "*conscientia*", Gk. "*syneidesis*"), from which the adjectives [in German] "*gewissenhaft*" (conscientious) and "*gewissenlos*" (conscienceless) are derived (on this point cf. e.g. Kluge, *Etymologisches Wörterbuch der deutschen Sprache*, 23rd ed. 1999, p. 323). Thus what is demanded of the soldier is not "conscienceless" but "conscientious" carrying out of an order. That means that to this extent a soldier is to proceed with what is, for him, all possible care and responsibility and is to act accordingly. "Unconditional" or "absolute" obedience is not reconcilable with this normative imperative. Rather what is demanded is someone who thinks for himself (cf. ruling of June 6, 1991) – *BVerwG* 2 *WD* 27.90 – <*BVerwGE* 93, 100 [104] = *NZWehrr* 1992, 34 = *NJW* 1992, 387>) and in particular "thinking" obedience that considers the consequences of carrying out the order – especially in respect of the limits of applicable law and the ethical "boundaries" of one's own conscience. At the same time, in the present case, there is no need for a closer examination and decision concerning the question of when, under which concrete conditions in exceptional cases, imperative dictates of one's own conscience also justify or even demand the refusal to carry out an order, if – as in the case of the attempted coup d'état of July 20, 1944 ("rebellion of conscience") – this is associated with violations of applicable laws. For the Basic Law provides precisely for the possibility of a soldier pleading freedom of conscience (art. 4 para. 1 *GG*). The issuing of a military order is subject to a corresponding reservation of conformity with fundamental rights.

4.1.3.1.2 Above all this results from the history of the origins and the regulatory context of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) and the standardizations concerning a soldier's duty of obedience.

Since there have been constitutions in Germany that guarantee fundamental rights and human rights, these have been restricted for the sphere of military service. In the charter of the Prussian constitution of January 31, 1850 (*PrGS* pp. 17 ff.) articles 38 and 39 expressly provided for the restriction of fundamental rights for military purposes. Whereas in the constitution of the German Reich of April 16, 1871 (*RGBl.* p. 63) there were no fundamental rights, art. 133 para. 2 sentence 2 of the Weimar Reich constitution of August 11, 1919 (*RGBl.* p. 1383) standardized the principle that a Reich Military Act (*Reichswehrgesetz*) was to determine "to what extent individual fundamental rights are to be curtailed for members of the *Wehrmacht* for the fulfillment of their tasks and to maintain manly discipline". The constitution therefore made the fundamental rights subject to this further statutory reservation and thus enabled the ordinary legislature to make corresponding curtailments for soldiers. Based on this authority, the *Reichswehrgesetz* (§§ 36, 37) curtailed the freedom of political activity, the right to vote, the freedom to take part in assemblies and belong to associations, and the subscription to newspapers (on this point cf. e.g. Anschütz, *Die Verfassung des Deutschen Reiches*, 5th ed. 1926 and 14th ed. 1933, art. 133 note 3; Hahnenfeld, *Wehrverfassungsrecht*, 1965, p. 49). Under the Nazi regime, which did not in fact formally suspend the Weimar Reich constitution, the fundamental rights were suspended for all citizens and therefore also for soldiers "until further notice" from the time that the Reich president, following the burning of the Reichstag, under pressure from the Nazi government, passed the "Ordinance for the protection of people and state" (*Verordnung zum Schutz von Volk und Staat*) of February 28, 1933 (*RGBl.* I, p. 83). They were therefore without any practical significance until the final destruction of the Nazi regime in 1945. In this era which ended with the end of the Second World War, it was unimaginable to grant "soldiers" in general the same civic rights as "civilians". This corresponded to efforts in the legal doctrine which had already been successful in the constitutional monarchy of the German empire to characterize the "armed force" (*bewaffnete Macht*) as an "institution" (*Anstalt*) (on this point cf. e.g. Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 4, 4th ed. 1901, p. 34; Otto Mayer, *Deutsches Verwaltungsrecht*, vol. 2, 3rd ed. 1924, pp. 268 ff.) One aim of this doctrine was to circumvent the "difficulties" that resulted in principle from the strictness of the principle of the constitutional state that demanded a legal authorization for any intervention in "freedom and property", and to keep open scope for action by the executive that was free of statutory constraints. Its purpose to this extent was to achieve a state of affairs whereby the deployment of means of coercion by the executive could be justified without this requiring a special

assignment of competence by the legislature (on this point cf. Lepper, *Die verfassungsrechtliche Stellung der Streitkräfte im gewaltenteilenden Rechtsstaat*, 1962, p. 101 with further notes). Additionally, particular importance attached to the doctrine of "armed force" as an "institution" above all to the extent that the idea of a "special relationship of subordination" (*besonderes Gewaltverhältnis*) could be built upon it (on this point cf. e.g. Otto Mayer, *loc. cit.*, pp. 285 ff.; Forsthoff, *Lehrbuch des Verwaltungsrechts – Allgemeiner Teil*, 9th ed. 1966, p. 121 with further notes). This opened up the possibility of intervening generally in "freedom and property" of the category of persons covered by the special relationship of subordination without a special legal basis (cf. Forsthoff, *loc. cit.*). This had a special practical significance in the military sphere in particular, since there the soldier/state relationship was only very rudimentarily formed (cf. e.g. Lepper, *loc. cit.*, p. 102).

In contrast to this, in the setting up of the *Bundeswehr*, which took place in the years 1955/56, and the passing of the relevant Military Service Acts (*Wehrgesetze*) it was expressly determined that soldiers of the *Bundeswehr* have "the same civil rights as any other citizen". In § 6 sentence 1 *SG* this concept of the "citizen in uniform" finds clear expression. Although § 6 sentence 2 *SG* provides that these rights of the individual soldier are "restricted as a result of his legally founded obligations" "within the scope of the requirements of military service", this simple legal provision does not cancel the guarantee of the "same civil rights" that is established in sentence 1. Fundamental rights guaranteed in the Basic Law can be restricted in conformity with the constitution only to the extent that the respective constitutional provision itself permits. This is made unmistakably clear not least by the provision of art. 17a *GG* which was introduced into the Basic Law by art. 3 of the law of March 19, 1956 (*BGBl.* I p. 111). Its first paragraph stipulates that "laws concerning military service and civil alternative service" can determine to restrict, for members of the armed forces (and those in civil alternative service) during the period of their military (or civil alternative) service, the basic right freely to express and disseminate their own opinion in words, writing and images (para. 5 para. 1 sentence 1, phrase 1 *GG*), the fundamental right to freedom of association (art. 8 *GG*), and the right of petition (art. 17 *GG*). In addition, in accordance with art. 17a para. 2 *GG*, "laws which serve the purposes of defense including protection of the civilian population" can decide also to restrict the fundamental rights of freedom of movement (art. 11 *GG*) and the inviolability of the home (art. 13 *GG*). Thus it is true that art. 17a para. 1 and 2 *GG* allow, constitutionally, a more extensive restriction of the fundamental rights listed there individually than is the case for citizens who are not serving in the *Bundeswehr*. In as much as art. 17a *GG* allows the five

individual fundamental rights named there to be restricted (beyond the limits otherwise applying to all citizens), it at the same time unmistakably gives expression to the fact that apart from these enumeratively listed restrictions, additional fundamental rights within the context and specifically for the purposes of the military service relationship may not be touched. The application of the enumeration principle in art. 17a *GG* therefore contains a constitutional guarantee for soldiers of all fundamental rights not expressly listed in this provision (as, rightly, e.g. Martens, *Grundgesetz und Wehrverfassung*, 1961, p. 118; Hahnenfeld, loc. cit., p. 47).

Further, the amendment of art. 1 para. 3 *GG*, which was enacted in the law of March 19, 1956, is of central importance for the question of the extent to which fundamental rights also apply for soldiers. Whereas paragraph 3 of art. 1 *GG* in the version of May 23, 1949 originally made it standard that the fundamental rights be binding on the "administration" [*Verwaltung*] as well as the legislature [*Gesetzgebung*] and administration of justice [*Rechtsprechung*]) as directly applicable law, the amendment to the Basic Law replaces the word "*Verwaltung*" with "*vollziehende Gewalt*" (executive power). This is intended to make it clear that the armed forces of the *Bundeswehr* are included as part of the "executive power" in the strict commitment to fundamental rights standardized by art. 1 para. 3 *GG*. This was the expression of the efforts by the authors of the constitution to prevent the armed forces being given any exceptional status in the democratic and social constitutional state established by the Basic Law (art. 20 para. 1 *GG*) in respect of the commitment to the fundamental rights (art. 1 para. 3 *GG*) and to justice and the law (art. 20 para. 3 *GG*).

Therefore soldiers are also entitled to freedom of conscience (art. 4 para. 1 *GG*). The freedom of conscience guaranteed in art. 4 para. 1 *GG* – as well as the freedom of religion and freedom of belief (religious or ideological) also enshrined therein – is an independent fundamental right. This results directly from the wording of the provision and is generally acknowledged in the Basic Law (cf. e.g. Böckenförde, *VVDStRL* 28 <1970>, 33 [50]; Herzog in Maunz/Dürig, *GG*, art. 4 margin no. 123; Preuß in *AK-GG*, 3rd ed. 2001, art. 4 margin no. 34; Starck, Bonner *GG*, vol. 1 <1999>, art. 4 margin no. 58 in each case with further notes).

4.1.3.1.3 Content of freedom of conscience

Conscience is to be understood as a psychological phenomenon that can be experienced in real terms, the demands, exhortations and warnings of which for people are directly evident commands of an absolute imperative. According to the established legal practice of the *Bundesverfassungsgericht*, a decision of conscience is "any serious moral decision, i.e. one oriented to the categories of 'good' and 'evil' ..., which the individual experiences in a particular situation as binding in and of itself and directly inwardly binding, with the result that he cannot act against it without a serious moral dilemma" (c.f. e.g. *BVerfG*, ruling of April 13, 1978 – 2 *BvF* 1/77 and elsewhere – <*BVerfGE* 48, 127 [173 ff.]> after established legal practice: cf. e.g. ruling of December 20, 1960 – 1 *BvL* 21/60 – <*BVerfGE* 12, 45 [54 ff.]>). The process of the formation of conscience involves psychological phenomena including cognitive, affective and socio-psychological components. The cognitive component of conscience comprises the awareness of specific important ethical obligations and standards with respect to oneself and/or others (on this point cf. e.g. Klier, *Gewissensfreiheit und Psychologie*, 1978, pp. 141 ff.; similarly Geissler, *Das Recht der Kriegsdienstverweigerung nach Art. 4 Abs. III des Grundgesetzes*, dissertation 1960, p. 44 with further notes). The "ethical link" of conscience, i.e. the relationship to a recognition of "good" and "evil" in its most general form through to specific cognitions, is inherent in every process of conscience. A decision of conscience is always based upon a recognition of values and a value assessment. The affective component of conscience refers to the feeling of being bound to these ethical duties and standards with the consequence of painful emotions in the case of their infringement by the person concerned. The socio-psychological component of conscience concerns the absorption of these ethical duties and standards in the inner personality and hence the process that leads to the setting up of the conscience as a "censor" (on this point cf. e.g. Klier, loc. cit., pp. 142. ff. with further notes; Preuß, loc. cit., art. 4 para. 1 margin no. 38 with further notes). Owing to its cognitive, affective and socio-psychological components the process of the formation of conscience is a complex psychological process in the subjective formation of the individual personality. For the recognition as a fundamental right of this psychological phenomenon it is immaterial whether the formation of standards is based on predominantly rational or emotional reasons. The "cognition" concerning the ethical dictates under discussion here may come from all areas of life and thus be taken, for example, from the Christian or another religion, from humanism or other *weltanschauung*, or also from applicable law in which ethical decisions have found their expression. To this extent all that is important is that the conscience has internalized these values as ethically binding behavioral standards and as result is able to warn against

disregarding them (on this point cf. e.g. Geissler, loc. cit., pp. 47 ff.) At the same time, it is not possible to constitute objectively imperative predetermined contents (cf. Morlok in Dreier <ed.>, *GG*, 2nd ed. 2004, margin no. 81 with further notes). The criterion for the existence of a decision of conscience within the meaning of art. 4 para. 1 *GG* cannot be take from its "truth" in the form of agreement with general legal principles, with a moral law determined by natural law or otherwise, with basic ethical convictions prevailing in society and thus predominantly represented, with a particular "system of values", or similar. This would negate precisely the individuality and freedom of the conscience.

The subject of protection of the freedom of conscience under the Basic Law (*Grundgesetz, GG)*, as results precisely also from the text formulation of art. 4 para. 1 *GG*, lies in the guarantee of its inviolability. The individual should remain undisturbed and unviolated in that which makes up his inner self, the core of his personality. Conscience and the application of conscience are to be inviolable – in relation to any official power (cf. art. 1 para. 3 *GG*) – in that the formation of convictions of conscience (in the legal sense) is to be able to take place freely and in that nobody – in the limits drawn by the constitution – may be forced to carry out an act that contradicts the dictate of his own conscience (cf. Böckenförde, loc. cit. 33 [64, 69 ff.]) The fundamental right thus comprises the prohibition, which is directly binding on the legislature, executive power and jurisdiction, of all violations of freedom of conscience. The constitutionally guaranteed freedom of conscience comprises not only the freedom to have a conscience but also generally also the freedom not to be obligated by official powers to act contrary to the conscience's dictates and prohibitions (established legal practice of the *BVerfG*: cf. e.g. rulings of June 30, 1988 – 2 *BvR* 701/86 – <*BVerfGE* 78, 391 [395]>, of August 26, 1992 – 2 *BvR* 478/92 – <*NJW* 1993, 455 ff.> and of August 11, 1999 – 1 *BvR* 2181/98 and elsewhere – <*NJW* 1999, 3399>). In this dimension pertaining to the right of defense, the fundamental right of freedom of conscience has a negatory function. Accordingly the citizen concerned in each case has the right to fend off conflicts of conscience that are forced upon him by official powers. Here it is no longer matters that the "inviolability" guaranteed in art. 4 para. 1 *GG* of the fundamental rights named therein additionally also has an objective dimension and that – just as with individual other fundamental rights – state duties of assurance and protection are gathered from them (cf. e.g. *BVerfG*, ruling of May 16, 1995 – 1 *BvR* 1087/01 – <*BVerfGE* 93, 1 [16]> with further notes; Wenkstern in Umbach/Clemens <eds.>, *loc. cit.*, art. 4 para. 1 margin no. 32; cf. in general on the state's duty of protection in the context of guaranteeing fundamental rights e.g. Grimm, *Die Zukunft*

der Verfassung, 1991, p. 221 [231 ff.]; *BVerfG*, rulings of May 6, 1997 – 1 *BvR* 409/90 – <*BVerfGE* 96, 56 [64]> and of March 26, 2001 – 2 *BvR* 943/99 – <*DVBl* 2001, 984 = *NVwZ* 2001, 908 = *BayVBl* 2001, 495>). For in the present case all that needs to be taken into account is the negatory dimension of the fundamental right to freedom of conscience.

According to the wording of art. 4 para. 1 *GG*, the guarantee of this fundamental right is not restricted to particular conflicts of conscience. Freedom of conscience – just like the freedom of religion and freedom of religious or ideological belief – is "inviolable" in every respect. There "merely" needs to be a conflict of conscience to trigger the (negatory) protective effect. Now it would admittedly be wrong to assume that the freedom of conscience of art. 4 para. 1 *GG* established an entitlement as it were completely and for purely personal, arbitrary reasons "to live and to act according to one's own law". In the social reality – also in the military sphere – the conscience does not become evident constantly, everyday and as it were at every opportunity. Rather it becomes evident as a regulatory and challenging authority above all when the personality, as a result of a possible action or of demands for action which other persons place upon it, is affected in a critical way in its structure and the possibility of preserving its own identity. An inner ethical commanding authority, a "calling voice", the conscience as a rule becomes active only when the personality as such is critically threatened in its identity ("I cannot be such a person as does this"). Hence the fear of an "inflation" of decisions of conscience fails to apprehend the social reality (as rightly e.g. Böckenförde, loc. cit., 33 [67, 69]; similarly R. Eckertz, *Die Kriegsdienstverweigerung aus Gewissensgründen*, 1981, p. 25 with further notes). In the protective scope of art. 4 para. 1 *GG* this is, in this respect, no different than in the protective scope of art. 38 para. 1 *GG*, which protects the freedom of conscience of Members of the Bundestag (German House of Representatives) with respect to any form of bindingness of orders and instructions.

The normative scope of art. 4 para. 1 *GG* does not coincide with the fundamental right to the free development of one's personality that is guaranteed in art. 2 para. 1 *GG*, and from which the general freedom of action is taken. Instead, the fundamental right to freedom of conscience merely guarantees, for specific individual cases of conflict, a (partial) exemption from duties that weigh on the conscience. In its dimension as a subjective right, the freedom of conscience develops its defensive function with respect to an imposed conflict situation that is felt as a severe burden on one's mind as a result of the imposed or demanded duties. According to its psychological structure, the conscience is an inner "authority of censorship

and control", which in a concrete personal conflict situation reacts in a negatory way to an impulse that comes to the individual from within or without (cf. Klier, loc. cit., p. 137 with further notes). Freedom of conscience at any rate comprises the freedom in the sense of an exemption from the duty to fulfill legal dictates that weigh on the conscience because they force a conflict upon the individual and thereby mobilize the defense function of the conscience (cf. e.g. Preuß, loc. cit., margin no. 43 with further notes). The constitutional guarantee of freedom of conscience has the task and the purpose of expanding the scope for alternative actions when the legal system presents the individual (otherwise) with the alternative of acting in conformity with conscience and illegally or against the conscience and lawfully (cf. Podlech, *Das Grundrecht der Gewissensfreiheit und die besonderen Gewaltverhältnisse*, 1969, pp. 33 ff.) In respect of the provision of alternative actions that can be carried out with a clear conscience it must be ensured at the same time that use can be made of these alternatives without stigmatization and discrimination. It can here remain to be seen whether this follows directly from the guarantee of "freedom" of conscience standardized in art. 4 para. 1 *GG* or from the constitutional prohibitions of discrimination (especially art. 3 paras. 1 and 3 *GG*). At any rate attention must be paid that the use of the fundamental right to freedom of conscience must not be made subject to the acceptance of serious disadvantages for the bearer of the fundamental right (cf. Kluth in Muckel <ed.>, *Kirche und Religion im sozialen Rechtsstaat. Festschrift für Wolfgang Rüfner*, 2003, p. 459 [475 ff.] with further notes). Of course the guarantee of fundamental rights in art. 4 para. 1 *GG* does not require that the bearer of the fundamental right concerned is exempted from every disadvantage that he might possibly have to endure on account of his decision; it is enough that the alternative action open to him or opened to him is reasonable (thus in conclusion also ruling of December 13, 1991 – *BVerwG* 7 *C* 26.90 – <*BVerwGE* 89, 260 [264] = Buchholz 415.1 *Allg.KommR* no. 115 = *NJW* 1992, 773 = *DVBl.* 1992, 433>), i.e. it can be performed with a clear conscience and is free of discrimination.

Art. 4 para. 1 *GG* does not leave it up to the individual bearer of a fundamental right himself to decide whether he wants to observe the applicable law or not. He is equally subject to the law as are all citizens (art. 3 para. 1 *GG*). Freedom of conscience as part of applicable law is guaranteed and granted in that in the event of a conflict the law is to offer and (must) make available to the individual concerned alternative actions that he can perform with a clear conscience. The constitutional sense and purpose lies in protecting the individual person in a reasonable way from crises of conscience. The freedom of conscience which is protected as a

fundamental right does therefore, it is true, release the specific individual who finds himself in a serious conflict of conscience, in the individual case – on account of the constitution – from the legal obligation to perform a commanded act that weighs on the conscience through such a provision of alternative actions that can be performed with a clear conscience and are free of discrimination. However, this in no way comprises the suspension of the general applicability of the legal obligation or even generally the subjugation to the law (on this point cf. also *BVerfG*, rulings of October 19, 1971 – 1 *BvR* 387/65 – <*BVerfGE* 32, 98 [109]> and of April 11, 1972 – 2 *BvR* 75/71 – <*BVerfGE* 33, 23 [32]>). It "merely" allows, in implementation of the guarantee of the fundamental right, an alternative action in order to solve an unavoidable conflict between sovereign dictates and the dictates of the conscience that affects the person concerned in his mental and moral existence as an autonomous personality. It is just as inadmissible, referring to one's own conscience, to demand the same decision of conscience from others. The negatory function of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) is directed only towards fending off "unreasonable demands on the conscience" which are concretely felt by the person who is concerned individually, and therefore highly personally. It also – unlike for example the fundamental rights to the freedom to practice religion (art. 3 para. 2 *GG*) and freedom of expression (art. 5 para. 1 *GG*) – does not protect active promotion (propaganda) for a particular action by other people. Just as little does it justify, with reference to one's own conscience, intervening in the legal interests of others.

Therefore, if in the concrete individual case, alternative actions that can be performed with a clear conscience are (and must be) offered to a soldier per art. 4 para. 1 *GG* owing to a highly personal decision of conscience taken by him, this also does not mean the suspension of the general validity of the general legal duty of obedience for him and other soldiers which follows from § 11 para. 1 *SG*. Just as little does art. 4 para. 1 *GG* establish a soldier's right as a superior to be able to demand, for example by means of an order, a particular action from other soldiers in accordance with his own conscience. He cannot and may not by means of an order realize or "implement" among others his highly personal individual decision of conscience and demand a coequal decision of conscience over and above the dimension of the right to defense per art. 4 para 1 *GG*. However, based on the guarantee of fundamental rights he can demand not to be prevented by official powers from acting in accordance with the dictates of his conscience, which are binding and directly obligating upon him.

4.1.3.1.4 Determining a decision of conscience

Since freedom of conscience is guaranteed as an independent fundamental right by standardized (constitutional) law and a decision of conscience per art. 4 para. 1 *GG* is a factual requirement for the legal consequences provided by the fundamental rights and asserted by the concrete bearer of the fundamental right to occur, the legal preconditions for this must be met in the individual case. Only then does the obligation of state organs of sovereign power, which is standardized in art. 4 para. 1 *GG*, to provide alternatives for action that can be performed with a clear conscience, exist (on this point cf. e.g. R. Eckertz, loc. cit., 1981, p. 23). The "whether" of a decision of conscience must be positively ascertained in the disputed case – if necessary by hearing evidence. Thus the application and observance of this right, therefore also the determination of its limits, is in the disputed case necessarily a matter for the competent court, to whose judges per art. 92 *GG* the binding interpretation and application of applicable law is entrusted.

However, the existence of a decision of conscience that is protected by art. 4 para. 1 *GG*, which is an internal mental and moral process of the personality, generally can be ascertained externally only with difficulty. The call of conscience as an "inner voice" of man is not directly perceptible in the external environment. Rather it can only be deduced indirectly from corresponding indices and signals which indicate a decision of conscience and moral dilemma. Since the medium of such signals and indices is primarily language, the seriousness, depth and inalienability of the decision of conscience asserted by the bearer of the fundamental right in or for the concrete case of conflict can find expression in this medium (cf. H.H. Rupp, *NVwZ* 1991, 1033 [1034]). Therefore, in the specialist literature (cf. e.g. Bäumlin, *VVDStRL* 28 <1970>, 3, 8 ff.; Denninger in *AK-GG*, vol. 1, 1st ed. 1984, art. 4 margin no. 51 [and likewise Preuß in the 2nd ed. 1989, margin no. 51]; H.H. Rupp, loc. cit.) and in established legal practice (ruling of February 3, 1988 – *BVerwG* 6 *C* 31.86 – <*BVerwGE* 79, 24 = Buchholz 448.6 § 1 *KDVG* no. 24 = *NVwZ* 1989, 60>), a demonstration of the seriousness, depth and inalienability of the decision of conscience that is outwardly expressed, rationally communicatable and according to the context intersubjectively comprehensible is required for a positive ascertainment on the real facts – precisely also, correctly, because of the associated legal consequences. At the same time the rational comprehensibility of the demonstration does not relate to the question of whether the decision of conscience itself can be evaluated for example as "false", "wrong" or "right" (cf. e.g. *BVerfG*, ruling of December 20, 1960 – 1 *BvL* 21/60 – <*BVerfGE* 12, 45 [56]>; ruling of April 2, 1970 – *BVerwG* 8 *C* 61.68 – <Buchholz 448.0 § 25 *WPflG* no. 29 = *DÖV* 1970, 710 =

NJW 1970, 1653>; Adolf Arndt in *NJW* 1957, 361 [362]), but solely to the “whether”, that is to the sufficient probability of the presence of the dictate of conscience and its behavioral causality.

4.1.3.2 Art. 4 para. 1 *GG* is not supplanted by art. 4 para. 3 *GG*.

a) It does not result from the wording of the provision of art. 4 para. 3 *GG* that a soldier who has not filed an application for recognition as a conscientious objector is no longer able to call upon his fundamental right to freedom of conscience (art. 4 para. 1 *GG*). On the contrary: according to the standard text the possibility for conscientious objection in art. 4 para. 3 *GG* becomes, for a specific area of regulation, with respect to the fundamental right of general freedom of conscience in art. 4 para. 1 *GG*, an independent fundamental right which every person, and therefore also a soldier, is entitled to.

No concrete indication results from the wording of the provision of the Basic Law that the fundamental right to conscientious objection guaranteed in art. 4 para. 3 *GG* supplants for the category of persons of “soldiers” the fundamental rights enshrined in the preceding paragraphs of art. 4 *GG*, namely the “freedom of conscience” (art. 4 para. 1 *GG*) as “*lex specialis*”. The operative fact of “conscience” contained in art. 4 para. 3 *GG* does indeed (cf. e.g. Dürig, *JZ* 1967, 426 [427]; Kempen in *AK-GG*, 3rd ed. 2001, art. 4 para. 3 margin no. 5), just like the corresponding provision in art. 4 para. 1 *GG*, follow general linguistic usage and is not a “*terminus technicus*” of specialist language (as also the general opinion in the specialist literature, cf. e.g. Böckenförde, loc. cit., 33 [74]; Herzog, *loc. cit.*, margin no. 197). But this does not result in art. 4 para. 1 *GG* additionally being no longer applicable in the military sphere.

b) Above all the history of the origins of art. 4 *GG* supports the notion that the guarantee of the right to conscientious objection that is standardized in art. 4 para. 3 *GG* is intended to specify and reinforce the general protection of “freedom of conscience” (art. 4 para. 1 *GG*). By contrast, the intention is not to restrict the protection of freedom of conscience per art. 4 para. 1 *GG*.

The “Draft of a Basic Law” drawn up by the “Constitutional committee of the Minister-Presidents’ conference of the Western occupied zones” (*Verfassungsausschuss der*

Ministerpräsidenten-Konferenz der westlichen Besatzungszonen), which was a component of the "Report on the constitutional convention at Herrenchiemsee of August 10 to 23, 1948" (*Bericht über den Verfassungskonvent auf Herrenchiemsee vom 10. bis 23. August 1948*, *HCh-Entwurf*) and formed the basis for discussions of the Basic Law in the Parliamentary Council, did not yet provide for the enshrinement of a right to conscientious objection. In art. 6 *HCh-Entwurf* there was merely a general guarantee of freedom of belief, conscience and religion ("1) Belief, conscience and conviction are free. 2) The state guarantees the undisturbed practice of religion."). The later art. 4 para. 3 *GG* goes back to a motion introduced (by the SPD parliamentary party) in the 26th session of the Parliamentary Council's framework committee on November 30, 1948 to include the following provision in the fundamental rights part of the Basic Law (*Grundgesetz, GG)*:

> "Everyone is entitled for reasons of conscience to refuse military service under arms."

This motion was accepted in the 27th session of the framework committee on December 1, 1948 in the following wording:

> "Nobody may be forced against his conscience to render military service under arms. The law shall determine the details [*das Nähere*]."
> (Shorthand minutes, session of November 30, 1948, pp. 80 ff.; appendix to 27th summary record of December 1, 1948, p. 2; and Eberhard, *Wie kam Artikel 4, 3 GG zustande?*, in: Gillig/Schultz <eds.>, *Grundrecht nach Bedarf*, 1978, p. 19 [20]).

The declaration made by the SPD member of parliament (MdB) Bergstraeßer in justification of the article at its first reading in the 17th session of the main committee of the Parliamentary Council on December 3, 1948, provides information on the regulatory intention that was pursued with the motion:

> "We have placed this additional motion here because it is here that the freedom of religion and of conscience is addressed. The content of the additional motion is in particular that people – here we had in mind Mennonites, Jehovah's witnesses and members of other sects – owing to their religious belief and their conscience do not want to render military service under arms." (17th session of the main committee of December 3, 1948, minutes p. 209. reprinted in Lutz, *Krieg und Frieden als Rechtsfrage im Parlamentarischen Rat* 1948/49, 1982, p. 82).

With this he was replying to an objection from *MdB* Strauss (CDU), who argued that a provision concerning the right to conscientious objection did not belong in the article that

dealt with the protection of freedom of thought, conscience and religion. Nevertheless, the motion of the SPD parliamentary party was passed by eleven to three votes in the first reading.

In the second reading of the provision (at that time art. 5 para. 5) in the 43rd session of the main committee, at first *MdB* Theodor Heuss (FDP) moved to delete the planned enshrinement of a right to conscientious objection in the Basic Law (*Grundgesetz, GG)*, referring to a threat of a "mass 'inflation' or 'erosion' of the value of conscience" ("*Massenverschleiß des Gewissens*") that threatened compulsory military services as the "legitimate child of democracy"; he called for the settlement of this question to be left entirely to an ordinary law (43rd session of the main committee of January 18, 1949, minutes p. 545). However, this ran up against fierce resistance in the main committee. The SPD Member of the *Bundestag* Fritz Eberhard replied to the position of Theodor Heuss with a speech that included the following:

> "I believe absolutely that one cannot defend either democracy or peace in all circumstances simply through a declaration of conscientious objection. Despite this, and especially following this terrible war and the totalitarian system, I am in favor of inserting a paragraph of this kind. Herr Dr. Heuss, you spoke of your fears of a "mass erosion of conscience" [*Massenverschleiß des Gewissens*]. I think what we have behind us is a mass sleeping of conscience [*Massenschlaf des Gewissens*]. In this mass sleeping of conscience the Germans in their millions said: an order is an order, and they killed. This paragraph may have a great educational effect and we hope that it will do so. ... This is why I believe, particularly in this situation after the war and after the totalitarian system, where we have to put a stop the view that 'an order is an order' – if in fact we want to build democracy – that this clause is appropriate."
> (cf. minutes of the session of the main committee of January 18, 1949, p. 546; Lutz, loc. cit., pp. 102 ff.; Doemming/Fuesslein/Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes*, *JöR n.F.* 1 <1951>, p. 78; Eberhard, loc. cit., p. 19 [23 ff.])

This position was ultimately accepted. Theodor Heuss's motion of deletion was rejected by the main committee by 15 to 2 votes; the article as a whole (*Drs.* 535) was accepted with 17 votes on January 18, 1949 in the second reading of the main committee. Also in the third reading on February 8, 1949, the ruling gained a clear majority in the main committee and was passed unanimously (*Drs.* 604; minutes pp. 603, 613 ff.) In the subsequent fourth reading of the main committee on May 5, 1949, a motion to delete the planned "*KDV-Regelung*" (conscientious objection provision, at that time art. 5 para. 5), filed at first by *MdB* Lehr (CDU) and other members of the Bundestag, did not gain a majority. Following a final

statement by *MdB* Zinn (SPD), the provision was passed by 13 votes to 7 in the version which today is valid as art. 4 para. 3 *GG* (minutes pp. 745 ff.) In the 9th plenary session of the Parliamentary Council on May 6, 1949, the provision was then adopted with two dissenting votes in the overall vote on art. 4 *GG* as paragraph 3 thereof.

It results from this history of its origins that with the insertion of the right to conscientious objection (art. 4 para. 3 *GG*) nobody wished to limit the reach and the protective scope of the fundamental rights enshrined in art. 4 para. 1 *GG*. No Member of the Bundestag expressed an opinion in this direction. The embodiment of the right to conscientious objection took place against the background of the painful experiences of the Nazi era, which at that time were only a few years in the past. The authors of the constitution were of the opinion that the simple guarantee of "freedom of conscience" was not sufficient and needed to be stated more specifically and thereby reinforced in order to help prevent another "mass sleeping of conscience" ("an order is an order"). This decision by the authors of the constitution was made in the context that – as formulated in the preamble to the Basic Law – they were "inspired by the will" "to serve world peace as an equal member in a united Europe". Consequently, particular value was attached not only to making the Basic Law "friendly towards international law" but also in art. 25 to enshrining a specific prohibition of wars of aggression and of all acts that "are suited to and performed in the intention of disturbing the peaceful coexistence of peoples". With this the authors of the constitution were tying in with corresponding provisions in several *Länder* (German Federal States) constitutions, which – like for example the constitution of the state of Hesse – provided an express "proscription of war". In the provisions of the constitutions of the *Länder* and in the provisions of *Länder* law that were planned and enacted for their concretization, the explicit guarantee of the right to conscientious objection was not linked to any restrictive and particularly not to the precondition of a decision of conscience (cf. for example art. 69 para. 1 of the Hessian state constitution of December 18, 1946 and § 1 of the provided implementing statute; art. 3 of the Baden constitution of May 22, 1947 ["No citizen of the state of Baden may be forced to perform military service."]; Bavarian law no. 94 concerning exemption from punishment for conscientious objection of September 21, 1947 <*BayGVBl.* p. 216> ["No citizen may be forced to render military service or to participate in acts of war. No disadvantage may arise for him as a result of asserting this right."]; law no. 1007 of Württemberg/Baden concerning conscientious objection of April 28, 1940 <*RegBl.* p. 70> ["No-one may be forced to perform military service under arms."] and art. 21 para. 2 of the Berlin constitution of September 1,

1950 [“Everyone has the right to conscientious objection, and no disadvantages may arise for him as a result.”]).

If in the Parliamentary Council – as described – the right to conscientious objection was in contrast linked to reasons of conscience (“Nobody may be forced against his conscience ...”), this was not an intention to reduce the general freedom of conscience guaranteed as a fundamental right in art. 4 para. 1 *GG*. The intention was only – as has been shown historically – to place a particular area of danger explicitly under the protection of the constitution.

c) This results also from the regulatory context. On its own, the reason that – just like in art. 4 para. 1 *GG* – also in art. 4 para. 3 *GG* the conscience is protected does not mean that the latter provision is to be seen, as it were, as a concluding special provision for the military sphere that takes priority over the basic norm of art. 4 para. 1 *GG*. Elsewhere in the Basic Law (*Grundgesetz, GG)* the “conscience” is again the subject of a further special provision: Members of the Bundestag, who per art. 38 *GG* as “representatives of the people as a whole” are not bound by orders and instructions, are “subject only to their conscience”. Art. 38 para. 1 *GG* leaves the protection of conscience per art. 4 para. 1 *GG* untouched for the members of parliament concerned and does not restrict it. Rather it opens up, in addition to it, (negatory) effects with respect to any attempts to bind members of the Bundestag to orders and instructions or to hamper their decision of conscience. Of all things it most certainly does not supplant in its scope of application the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) of every single member of the German parliament.

On the contrary, it must be noted that the standard command enshrined in art. 4 para. 3 sentence 1 *GG* (“Nobody may be forced against his conscience to render military service under arms”), with respect to art. 4 para. 1 *GG*, is an independent provision with an independent regulatory content.

This is already supported by the fact that the provision was incorporated into the Basic Law (*Grundgesetz, GG)* subsequently to art. 4 para. 1 *GG*. It can also be seen from the authorization of the ordinary legislature contained in sentence 2 of the provision of art. 4 para. 3 *GG* in respect of the formulation of the prohibition standardized in constitutional law of any compulsion “to render military service under arms”, to regulate “the details” [*das Nähere*] in a

federal law, that a specific and therefore independent provision was intended to apply for the area of regulation covered by art. 4 para. 3 *GG*. For art. 4 para. 1 *GG* does not contain any such reservation of formulation. Yet this means at the same time: the provision of art. 4 para. 3 *GG* only represents a supplementary or modificatory "special rule" for the general protection of "freedom of conscience" to the extent that its scope of application (regulatory content) reaches. In other respects the general provision of art. 4 para. 1 *GG* remains unaffected.

d) This is also supported by the regulatory purpose. The regulatory content of art. 4 para. 3 sentence 1 *GG*, and of art. 12a para. 2 *GG* which is closely connected to it, is the constitutional prohibition of compulsion to "render military service under arms". According to the established legal practice of the Federal Constitutional Court (*Bundesverfassungsgericht)*, the term "military service under arms" [*Kriegsdienst mit der Waffe*] also includes "peacetime military service" [*Friedenswehrdienst*], "since the civil alternative service ... is intended particularly also to take the place of military service in peacetime" (cf. e.g. ruling of December 20, 1960 – 1 *BvL* 21/60 – <loc. cit. [56]>). It is hereby made clear, according to the *Bundesverfassungsgericht* in its established legal practice, that art. 4 para. 3 *GG* – following the introduction of compulsory military service – "comprises the right to refuse military service under arms even in peacetime"; this "makes sense not only because the state can have no interest in training persons liable for military service under arms, who in the event of war would refuse to bear arms, but also from the point of view of the individual, upon whom training cannot be forced that has the sole purpose of preparing him for an activity that he refuses for reasons of conscience."

According to the established legal practice of the Federal Constitutional Court, art. 4 para. 3 *GG* according to its regulatory content protects only those who for reasons of conscience plainly reject and refuse "military service under arms" (and hence also "peacetime military service") (ruling of December 20, 1960 – 1 *BvL* 21/60 – <*loc. cit.* [56 ff.]>). Accordingly there exists "simply in the idea" of having to kill "people in war with whatever weapons are used in the specific case" "according to the Basic Law for the individual the severe inner burden that justifies recognizing his opposing decision of conscience, even though it leads to the refusal of a civic duty that is generally imposed by the constitution and by law and therefore – at least superficially – conflicts with the interests of the state." The scope of application of art. 4 para. 3 *GG* thus relates to the "area of military service", i.e. to the

compulsory recruitment into “military service under arms” and into “peacetime military service”. The right to conscientious objection that is enshrined in this norm is intended precisely to exempt people from the aforementioned under the more detailed conditions governed by the federal law enacted in this regard.

However, it cannot be derived from the regulatory purpose of art. 4 para. 3 *GG* that citizens who do not refuse the obligation, established by law, to render “military service under arms”, but who even voluntarily join the *Bundeswehr* as a short-term member of the armed forces or professional soldier and thereby affirm their essential willingness to render military service, lose their option to call upon their general fundamental right, i.e. to which every citizen is entitled, to inviolable “freedom of conscience” per art. 4 para. 1 *GG*. It is true that soldiers can also, in the sense of art. 4 para. 3 *GG*, apply for recognition of the entitlement to refuse “military service under arms” (cf. § 4 *KDVG*) However, this is concerned with attaining the status of a recognized conscientious objector, which – according to established legal practice – can only be required of a person who completely refuses “military service under arms”, i.e. in principle in any and every war. It can further be concluded from this: any person who is willing to join the *Bundeswehr* or who wishes to remain in the *Bundeswehr* as a soldier cannot make an application per art. 4 para. 3 *GG* to be recognized as a conscientious objector (cf. also § 1 *KDVG*). To do so would be self-contradictory. The provision of art. 4 para. 3 *GG* precisely does not relate to soldiers who do not entirely refuse “military service under arms”, but who after the establishment of their relationship of service wish to fulfill within the *Bundeswehr* their service obligations that are imposed upon them in the scope of the constitution and laws. This provision, in the formulation of content established by the legislature and in established legal practice precisely protects only against the “civil duty generally imposed in constitution and law” to render military service (cf. *BVerfG*, ruling of December 20, 1960 – 1 *BvL* 21/60 – <*loc. cit.* [57]> and established legal practice). Yet this means at the same time: soldiers do not forfeit their inviolable fundamental right to “freedom of conscience” per art. 4 para. 1 *GG* if they do not make an application for recognition as a conscientious objector and wish to remain soldiers of the *Bundeswehr*. Soldiers too are protected by art. 4 para. 1 *GG*, and moreover whenever they – in the way that is to be discussed in more detail – can demonstrate that their conscience forbids them from performing a particular act that is demanded of them.

Overall it can be gathered from current established legal practice of the *Bundesverfassungsgericht* that art. 4 para. 3 *GG* governs the effects of freedom of conscience (only) “in the area of military service”. By contrast, if what is at issue in the individual case is not the application of a person liable for military service to be exempted from compulsory military service through recognition as a conscientious objector per art. 4 para. 3 *GG*, but a soldier calling upon his “freedom of conscience” per art. 4 para. 1 *GG* with respect to a military order from his superior, there is not to date any relevant established legal practice of the *Bundesverfassungsgericht*.
– is further explained –

Nor did the Federal Constitutional Court (*Bundesverfassungsgericht*) in its decision of April 13, 1978 – 2 *BvF* 1/77 and elsewhere – (*BVerfGE* 48, 127) comment on the relationship between art. 4 para. 3 and art. 4 para. 1 *GG*.
– is further explained –

According to the established legal practice of the *Bundesverwaltungsgericht* concerning art. 4 para. 3 *GG*, an “ad hoc” conscientious objection “due to the current situation”, and hence a recognition of a person liable for military service as a conscientious objector who does not entirely reject military service under arms but merely refuses to participate in particular wars, is not protected by art. 4 para. 3 *GG* (cf. e.g. ruling of March 5, 1986 – *BVerwG* 6 *C* 34.84 – <*BVerwGE* 74, 72 [74] = Buchholz 448.6 § 1 *KDVG* no. 7 = *NVwZ* 1986, 752 = *DVBl.* 1986, 1104> with further notes).

Irrespective of the question of whether the concerns expressed in public and in the specialist literature about the current refusal to recognize conscientious objection “due to a circumstantial situation” per art. 4 para. 3 *GG* (on this point cf. e.g. Adolf Arndt, *NJW* 1968, 979; Heinemann, *NJW* 1961, 355 ff.; R. Eckertz, *Die Kriegsdienstverweigerung aus Gewissensgründen als Grenzproblem des Rechts*, 1986, pp. 352 ff.) are justified or not, this changes nothing in the fact that the case of an application for recognition as a conscientious objector per art. 4 para. 3 *GG* and hence exemption from military service must be strictly distinguished from the case of a soldier calling upon his fundamental right to freedom of conscience per art. 4 para. 1 *GG* with respect to an order. For a soldier who calls upon the fundamental right of art. 4 para. 1 *GG* precisely does not wish to be exempted from his military service obligation and does not wish to be recognized as a conscientious objector.

Rather he is concerned with making use in the concrete individual case in his continuing relationship of service of his fundamental right to freedom of conscience (art. 4 para. 1 *GG*). The adjudicating *Senat* has in the numerous decisions listed above and hence in established legal practice repeatedly confirmed that “under certain circumstances in conflict with other constitutional provisions” in a concrete situation, in which it inwardly becomes absolutely necessary to decide, that the greater weight can fall upon the fundamental right to freedom of conscience per art. 4 para. 1 *GG* with respect to an order, with the consequence that the order (e.g. to use weapons) “is non-binding”. The *Senat* stands by this decision. As described above at the start, such an understanding of the relationship between art. 4 para. 1 and art. 4 para. 3 *GG* in particular corresponds also to the history of their origins and to the regulatory context of the two fundamental rights. For it is evident that the authors of the constitution were concerned with strengthening the freedom of conscience and concretizing it for a special area, alongside the guarantee of the fundamental right to freedom of conscience per art. 4 para. 1 *GG*, through the express embodiment of a right to conscientious objection in art, 4 para. 3 *GG*, and not with restricting the freedom of conscience guaranteed in art. 4 para. 1 *GG*.

In other respects it additionally follows also from art. 17a *GG*, as stated above in a different context, that (also) for soldiers the fundamental right to freedom of conscience per art. 4 para. 1 *GG* may not even be restricted by a statute. This is also consistent, since according to the established legal practice of the *Bundesverfassungsgericht* the Basic Law (*Grundgesetz, GG)* views “the free human personality and its dignity as the highest legal value” and “with logical consistency in art. 4 para. 1 *GG* has recognized the freedom of conscience and its decisions, in which the autonomous moral personality directly expresses itself, as ‘inviolable’” (cf. e.g. ruling of December 20, 1960 – 1 *BvL* 21/60 – <loc. cit. [53 ff.]>).

4.1.4 The soldier’s decision of conscience

There was a decision of conscience by the soldier within the meaning of art. 4 para. 1 *GG* in this case. This is, namely, a serious moral decision, i.e. oriented to the criteria of “good” and “evil”, which the soldier in a particular situation inwardly experienced as binding in and of itself and as creating an inner obligation, with the result that he could not act against it without a serious moral dilemma. This results both from the concrete context of the soldier’s action (see 4.1.4.1) and from his understandable credible portrayal of circumstances which indicate the seriousness, depth and inalienability of the decision of conscience that he

asserted, particularly also the credibility of his personality and his willingness to accept the consequences (see 4.1.4.2).

4.1.4.1 The concrete decision of conscience that the soldier took on April 7, 2003 occurred in a context which was determined and shaped by circumstances that were exceptional even for a professional soldier who is (still) willing in principle to use weapons in a war. The soldier neither superficially and carelessly entered into this situation nor deliberately brought it about.

What provided the background for and initiated his action was the war against Iraq which was launched by the governments of the USA and UK on March 20, 2003, which continues today despite the military occupation of the country which has taken place in the course of the fighting. There were and there continue to be serious concerns about this war in respect of international law (see 4.1.4.1.1) which on the real facts the soldier adopted. In connection with this war, the government of the Federal Republic of Germany provided concrete support for the benefit of the armed forces of the USA and UK, which were also subject to serious concerns with respect to international law and triggered severe conflicts of conscience in the soldier (see 4.1.4.1.2). The Federal Republic of Germany was not exempted from the requirements of international law in this respect by the NATO Treaty or by other treaties with NATO signatories (see 4.1.4.1.3). According to the ascertainments of the *Senat*, at the point in time that is decisive here of the breach of duty of which the soldier is accused on April 7, 2003, it could at any rate not be ruled out that the SASPF IT project, on which the soldier was collaborating in the context of the tasks associated with his post at the *S.* at that time, might also be of relevance for these acts of assistance in the war against Iraq in favor of the armed forces in action there, which in the concrete case was sufficient as grounds for a decision of conscience by the soldier that is protected by art. 4 para. 1 *GG* (see 4.1.4.1.4). In view of this, in the present proceedings it can ultimately remain open as to whether the services required of the soldier as part of the SASPF IT project with the two orders of April 7, 2003 would have actually – as he feared and was characterized as possible by his superior, the witness M. – have made a causal contribution to assisting and supporting the war of the USA and its allies which has been waged since March 20, 2003. For any such serious possibility was in itself sufficient as a context for the severe burdens on his conscience that the soldier asserted.

4.1.4.1.1 Even at that time there were grave legal concerns about the offensive military action initiated against Iraq by the governments of the USA and UK on March 20, 2003 in respect of the UN Charter's prohibition of the use of force and other applicable international law.

In principle, per art. 2 para. 4 UN Charter, "any" threat and use of military force against another state is contrary to international law. According to the established legal practice of the International Court of Justice, this strict prohibition of the use of force (cf. e.g. *Military and Paramilitary Activities in and against Nicaragua* <ICJ Reports 1996, pp. 14, 97 ff., no. 183 ff.>) is at the same time part of customary international law and is counted as "*ius cogens*" (on this point cf. e.g. Heintschel von Heinegg in Knut Ipsen <ed.>, *Völkerrecht*, loc. cit., § 15 margin no. 53 ff. [59]; Kadelbach, *Zwingendes Völkerrecht*, 1992, pp. 228 ff. with further notes). It is directly binding on all states, and moreover independently of whether they are a member of the United Nations or not. Consequently the prohibition of the use of force also per art. 25 *GG* belongs to the "general rules of international law", which according to this constitutional rule are a "component of federal law" that "take priority" over national laws and "generate rights and duties directly for the inhabitants of the federal territory".

Military force may be applied against the will of the state concerned within the validity of the UN Charter – in the exceptional case – only if a ground of justification legally recognized under international law permits this in the individual case.

The UN Charter provides only two such grounds of justification. Firstly the UN Security Council, following the formal determination of an "act of aggression", a "breach of the peace" or at least a "threat to international peace and security" per art. 39 UN Charter, can decide to apply military measures and either carry these out under its own responsibility (arts. 42, 43 UN Charter) or authorize other states (art. 48 UN Charter) or a "regional system" (art. 53 UN Charter) to do so. Further, the use of military force is also allowed if a state is entitled to the right of self-defense alone or acting with its allies in accordance with art. 51 UN Charter.

A state which – for whatsoever reasons – without any such ground of justification disregards the prohibition of the use of force under international law in the UN Charter and resorts to military force is acting contrary to international law. It is committing an act of military aggression.

a) The governments of the USA and UK, contrary to the legal opinion(s) expressed by them at the beginning of military action in formal diplomatic notes to the UN Security Council, could not invoke any resolution(s) of the UN Security Council that would give them authorization per arts. 39 and 42 UN Charter. It is true that in these notes, the government of the USA on March 21, 2003 (UN Doc.S/2003/351) exclusively and the government of the UK (UN Doc.S/2003/350) to a substantial degree cited resolutions 678 (1990) and 687 (1991) which were passed by the UN Security Council following the military occupation of Kuwait by Iraqi armed forces in 1990 (cf. Bothe, *Archiv des Völkerrechts* <*AVR*> 2003, 255 [259 ff.]). However, in early 2003 these did not constitute a basis for authorization under international law of military action against Iraq.

UN resolution 678 of November 29, 1990, with which the allies of Kuwait at that time were authorized by the UN Security Council to use “all required means” (including military means) to free Kuwait from the Iraqi troops who had invaded at that time, no longer came into consideration for the military action of the USA and its allies against Iraq in early 2003 – and hence more than a decade later – as a ground for authorization (on this point cf. e.g. Bothe, *AVR* 2003, 255 [263 ff.] with further notes). For the objective of that authorization from the year 1990, namely to drive out the Iraqi aggressors from Kuwait, had already been achieved in the years 1990/91. It had therefore become irrelevant and consequently was ruled out as an authorization for the use of military force in 2003. In addition, in 1990/91 neither the USA nor its allies were authorized to topple the regime of Saddam Hussein in Iraq with military means, to disarm it and to bring about a change of political system, which however were the declared or at least subsequently admitted objectives of the war which was begun in early 2003.

Resolution 687 (1991) of April 3, 1991, concerning the signing of an armistice with Iraq, which was additionally referred to by the governments of the USA and the UK in their notes (UN Doc.S/2003/351 and UN Doc.S/2003/350) sent to the UN Security Council at the beginning of their military campaign against Iraq also no longer came into consideration in early 2003 as a ground for authorizing the war. The extensive resolution at the time contained numerous conditions for a formal “cease-fire” between Iraq and Kuwait and the UN member states that were cooperating with Kuwait. First of all the text made reference to the earlier resolutions passed by the UN security council and established that Kuwait had regained its sovereignty, independence and territorial integrity and that its government had returned. On

the other hand Iraq at that time was threatened with “serious consequences” in the event of a further deployment of gaseous or bacteriological weapons. Section C of the resolution records the obligations of Iraq with respect to its stocks of munitions, sub-systems and components and all research, development, support and production facilities. In section no. 32 of the resolution, the UN Security Council requires Iraq to “inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism.” In section no. 33 of the resolution, the UN Security Council at that time declared “that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990)”. In accordance with this, the UN Security Council in the further resolution 707 (1991) that it passed on August 15, 1991 determined that in consideration of Iraq’s written agreement, which had subsequently been given, to implement the contents of resolution 687 (1991) in full, the preconditions set in section no. 33 of the named resolution for a “cease-fire” had been fulfilled. Although in resolution 707 (1991) the UN Security Council observed numerous violations by Iraq against resolution 687 (1991), it refrained from suspending the cease-fire. Nor was there any later suspension of this cease-fire, which had come into force with legal effect. The claim of individual states, notwithstanding this, to decide independently on the termination of this cease-fire, therefore came into conflict with this already for this reason. Furthermore it contradicted the declaration made in resolution 687 (1991) by the UN Security Council, that further steps would be decided in the UN Security Council itself. Despite the cease-fire which came into existence with legal effect in 1991, the cited UN resolutions do not constitute any ground for justification for the commencement of military action against Iraq on March 20, 2003 by the USA and its allies without the preceding authorization by the UN Security Council (in conclusion likewise e.g. *Ausarbeitung für die Wissenschaftlichen Dienste des Deutschen Bundestages* of January 2, 2003, in Ambos/Arnold <eds.>, loc. cit. p. 224 [227 ff.]; Bothe, *AVR* 2003, 255 [263 ff.]).

This also applies – following the end of Iraq’s war against Kuwait in 1991 – to resolutions 688 (1991) of April 5, 1991, 707 (1991) of August 15, 1991, 715 (1991) of October 11, 1991, 986 (1995) of April 14, 1995 and 1284 (1999) of December 17, 1999 which were passed by the UN Security Council in the ensuing period. In so far as the UN Security Council passed

these resolutions concerning the appointment and dispatch of the UN inspection team (UNSCOM and since 1999 UNMOVIC) to track down and destroy atomic, biological and chemical weapons systems that might have existed in Iraq, these especially do not authorize the use of military force against Iraq. They did not provide that cooperation with the UN inspection team would be enforced by military means, let alone that the regime of Saddam Hussein should be toppled through war. This results directly from the wording of the named resolutions and requires no further substantiation.

Also all further resolutions concerning the Iraq conflict that were drafted by the UN Security Council in the ensuing period contained no authorization for military action by the government of the USA and its allies against Iraq (as also *Ausarbeitung für die Wissenschaftlichen Dienste des Deutschen Bundestages* of January 2, 2003, loc. cit. [pp. 228 ff.]; Bothe, *AVR* 2003, 255 [264 ff.]; Murswiek, *NJW* 2003, 1014 [1015 ff.]; Bruha in Lutz/Giessmann <eds.>, *Die Stärke des Rechts gegen das Recht des Stärkeren*, 2003, pp. 289 ff. and on the website of the *Deutsche Gesellschaft für die Vereinten Nationen e.V.*, www.dgvn.de/publikationen). This applies in particular to resolution 1441 (2002) which was passed by the UN Security Council on November 8, 2002 after weeks of negotiations (original text in English at www.un.org/doc; German translation in: *VN* 2002, 232 ff.). This did indeed specify a relatively precise regime in terms of content and timing for the demands directed at the Iraqi government and the principles for the work of the UNMOVIC inspection team and the International Atomic Energy Agency (IAEA), which was supposed to begin no later than 45 days following the passing of the UN resolution, therefore no later than December 23, 2002, with its activity in Iraq and conclude with a report to the UN Security Council an additional 60 days later, i.e. no later than February 21, 2003. In the event that the Iraqi authorities did not cooperate fully with the inspection team in the implementation of the resolution or impeded this in any way, the head of UNMOVIC, Hans Blix, and the Director General of the IAEA, Mohamed ElBaradei, were instructed to report this immediately to the UN Security Council so that the latter could discuss the situation that had arisen in order to safeguard “international peace and security”. It was left open as to what decisions the UN Security Council would then take in such a situation. However, in section no. 13 of this resolution the UN Security Council calls to mind that in the past it has repeatedly warned Iraq and threatened that Iraq will have to expect “serious consequences” (“serious consequences as a result of its continued violations of its obligations”). It did not state in concrete terms what these “serious consequences” would consist of. However, after weeks of discussions the UN

Security Council in this resolution 1441 (2002) in section no. 14 itself unequivocally stated that the matter would remain (even after passing the resolution) for it to deal with. It therefore on the real facts made it clear that it was not willing to give up the matter, but – as provided in the UN Charter – that it (also) in future wished to decide on what consequences should result from misconduct by Iraq in connection with the implementation of the relevant UN resolution(s). Therefore with this resolution 1441 (2002) and in particular with the wording "serious consequences" chosen in section no. 13, it [the UN Security Council] ultimately expressed "merely" a warning that was not defined more closely, and yet deliberately distanced itself from approving of or otherwise legitimizing the use of force which the governments of the USA and UK were striving for. Only if the UN Security Council as shown in the resolution text – within the limits drawn by the UN Charter – had positively approved of the use of force would measures involving the use of military force against Iraq have been permissible according to the UN Charter. A "silence" in this respect or leaving open the nature of the threatened "serious consequences" was not sufficient as a ground for authorization. For in principle, per art. 2 para. 4 UN Charter "any" threat and use of military force against another state is contrary to international law unless the UN Security Council in accordance with the UN Charter has decided to the contrary in respect of the use (and the threat) of force or the exceptional case of the right to self-defense exists per art. 51 UN Charter. This cannot be countered by claiming that the representatives of the USA and the UK in the UN Security Council would not have voted for the version of resolution 1441 (2002) that was finally passed if they had not at least seen so much room for interpretation in the compromise formulations that were reached therein that their assessment of an authorization of the war against Iraq having been given was at least defensible. For the determination of what the UN Security Council decided in such a resolution it is not decisive what the government representatives "thought" in the discussion and decision-making in the UN Security Council. Rather it depends on what has found expression in the text of the passed resolution. If this is missing, to this extent there is a lack of a corresponding decision. Mental reservations of government representatives or their employers are in this respect not relevant under international law. As the text of resolution 1441 (2002) shows, an exception from the fundamental prohibition of the use of force was precisely not decided by the UN Security Council. At no point is there mention of an authorization or empowerment of any government whatsoever or of a state to use force per Chapter VII of the UN Charter. The term "authorization" does not occur even once in the text of the resolution in this context. The later attempt by the governments of the USA, the UK and the Kingdom of Spain, immediately

before the war began, once again to secure an authorization for the use of military means did not gain a majority in the UN Security Council. In order to avoid being defeated on a vote, the corresponding draft resolution was withdrawn.

b) The governments of the USA and of its allies also could not call upon art. 51 UN Charter for the military campaign against Iraq which began in early 2003.

According to its wording, art. 51 UN Charter merely grants the “inherent right” to individual or collective defense “if an armed attack occurs” (from the English version, which in this respect does not differ from other four languages of the agreement which are equally authoritative per art. 111 UN Charter), until the UN Security Council has taken the measures required to guarantee world peace and international security. Even if a large number of questions of doubt exist in respect of the reach and boundaries of this right to self defense, it at any rate intervenes solely “if” an “armed attack occurs”. Military force must already have been used or be used by the attacker before military strikes in self-defense are allowed.

Admittedly at present there is not sufficient clarity concerning the point in time at which an “armed attack” within the meaning of art. 51 UN Charter exists (on this point cf. the individual documentation of opinions in the specialist literature in Germany and abroad by Nolte in Ambos/Arnold <eds.>, loc. cit., p. 303 [306 ff.]; Bothe in: Graf Vitzthum <ed.>, *Völkerrecht*, 2nd ed. 2001, 8th section, margin no. 9; Breitwieser, *NZWehrr* 2005, 45 [56 ff.]).

The governments of individual states have on various occasions, with reference to art. 51 UN Charter or customary international law, also made use of so-called “preventive self-defense”. Here it has been argued, in view of the level of development and the destructive abilities of modern weapons and the short warning times that it is not advisable to expect states to have to “wait” for their impending devastation from the opponent’s first use of the weapon before they themselves become militarily active. However, this has remained disputed (on this point cf. on the one hand Randelzhofer in Simma <ed.>, *Charta der Vereinten Nationen*, 1st ed. 1991, art. 51 margin nos. 9 to 14 and 34; the same in Simma <ed.>, *The Charter of the United Nations*, 2nd ed. 2002, art. 51 margin no. 39 with further notes; Horst Fischer in Knut Ipsen, *Völkerrecht*, loc. cit., § 59 margin no. 30, and on the other hand the documentation e.g. Murswiek, loc. cit., [1016, footnote 12] and Nolte, loc. cit. [p. 307]). Despite this, in the ensuing period individual governments have admittedly time and again claimed such a right

for themselves and others. Yet this has not received general recognition that is relevant to customary international law. Such military deployments have to date regularly encountered opposition (on this point cf. the individual documentation by Bothe in Graf Vitzthum <ed.>, loc. cit., footnote 22; *Ausarbeitung für die Wissenschaftlichen Dienste des Deutschen Bundestages* of January 2, 2003, loc. cit. [pp. 227 ff.]).

Even by those who support an extended interpretation of art. 51 UN Charter, the use of military force according to what is known as the Webster formula of April 24, 1841 (going back to the US foreign minister of that time, Daniel Webster) is at most considered permissible in a situation of danger (on this point cf. the individual documentation by Nolte, loc. cit. [p. 307]) which is "instant, overwhelming, leaving no choice of means and no moment for deliberation" (cf. State Secretary Webster, quoted after Horst Fischer in Knut Ipsen, *Völkerrecht*, loc. cit., § 53 margin no. 30). By contrast, it cannot be stated that a concurrent practice by states under international law and a common legal opinion ("*opinio iuris*") have formed concerning the existence of a "preventive right to self-defense" going beyond this and hence the existence of corresponding customary international law. Any such dangerous situation ("instant, overwhelming, leaving no choice of means and no moment for deliberation") did not exist in early 2003 even according to the submissions of the governments of the USA and UK. In their diplomatic notes – which were already discussed above – to the UN Security Council of March 21, 2003, nothing to the contrary is claimed with supporting facts. The claim originally asserted publicly of a threat from ABC weapons from Iraq as a justification for the use of military force remained in the realm of political explanations but it particularly was not a component of the legal justification towards the UN Security Council. In addition it was relativized or even taken back by relevant members of the US government (on this point cf. e.g. Tomuschat, *FW* 78 <2003>, 141 [149], incl. with reference to an interview, published by the US Department of Defense, with the US Deputy Defense Secretary Paul Wolfowitz in Vanity Fair magazine of May 9, 2003; in this interview, Wolfowitz explained that the government's official justification for the war was intended for the public and developed in order to overcome "bureaucratic" resistance in the administration and because it was "the one issue that everyone could agree on"; he said it was more important that with success in the Iraq war the presence of US troops in the neighboring Kingdom of Saudi Arabia would tend to become superfluous [www.defenselink.mil/transcripts/2003/tr20030509-depsecdef0223.html]). Evidently – as the content of their diplomatic note to the UN Security Council of March 21, 2003 also shows –

the decision-makers in the US government were themselves of the opinion that Iraq was not a suitable case for justifying an invocation of the right to self-defense per art. 51 UN Charter (as rightly e.g. Bothe, *AVR* 2003, 253 [261 ff.]; cf. also e.g. Horst Fischer, *HuV-I* 16 <2003>, 4 ff., 6; Tomuschat, loc. cit. [144 ff.]; Kurth, *ZRP* 2003, 195 ff., in each case with further notes).

Accordingly the General Secretary of the United Nations, Kofi Annan, described the military invasion of Iraq carried out by the USA and its allies in early 2003 as an "illegal act" (cf. e.g. dpa report of September 16, 2004).

4.1.4.1.2 According to the observations of the *Senat*, it is established that the federal government of the Federal Republic of Germany in connection with this war which began on March 20, 2003 in particular made and fulfilled the promises to grant the USA and the UK "overflight rights" for the airspace above the German sovereign territory, to enable the use of their "facilities" in Germany and to ensure the "protection of these facilities" to an extent more closely specified; in addition in connection with the Iraq war it approved the further deployment of German soldiers in AWACS aircraft "to monitor Turkish airspace". This is expressly recorded in the "*Punktationspapier*" (bulleted paper) that the witness S. submitted to the *Senat* in the appeal hearing, which the witness had received in his capacity at that time of chief legal counsel of the S. at his request from the relevant office of the German Federal Defense Ministry in the context of his official duties. The *Senat* has no cause to call into doubt the correctness of the facts portrayed in this paper, particularly since neither the *Bundeswehrdisziplinaranwalt* (Federal military disciplinary attorney) nor the soldier raised objections against them in the appeal hearing.

Serious legal concerns exist concerning the permissibility under international law of these acts of assistance. On the real facts they were cause for the soldier to refuse to carry out the two orders with which he was issued because he otherwise feared involvement in the war.

A violation of the prohibition of the use of force under international law cannot be denied simply because the government of the Federal Republic of Germany has repeatedly stated in public (cf. e.g. declaration of Chancellor Schröder on March 19, 2003, 15th legislative period, 34th session, *Verh. des Deutschen Bundestages*, vol. 216 p. 2727 C) "that German soldiers will not get involved in the fighting". Support for military action in contravention of

international law can be provided not only through military participation in fighting but also in other ways. An offense under international law can also be committed by an action or – if there is an obligation under international law to perform an action – by failure to act. (On this point cf. e.g. von Münch, *Das völkerrechtliche Delikt,* 1963, p. 134 with further notes). Assisting an offense under international law is itself an offense under international law (specifically on the Iraq war cf. in this respect e.g. Puttler, *HuV-I* 16 (2003), 7 ff.; Bothe, *AVR* 2003, 255 [266] with further notes).

The starting points and yardsticks for answering the question of when assistance by a non-conflict party in favor of a warring state is contrary to international law result for the area of supporting a military attack by a third-party state in contravention of international law among other things from the "definition of aggression" adopted by the general assembly of the United Nations on December 14, 1974 without a formal vote by way of the general consensus as a component of resolution 3314 (XXIX) (reprinted e.g. in the collection "*Wehrrecht*" <Beck-Verlag, last revised November 1, 2004> under no. 15), from the work of the International Law Commission (ILC) of the United Nations and from neutrality law under international law. The latter has its basis in customary international law and in the Fifth Hague Convention (5th H.C.) concerning the rights and obligations of neutral states in the event of a land war of October 18, 1907 (*RGBl.* 1910 p. 151), which has been in force in Germany since October 25, 1910 (cf. German Federal Justice Ministry <ed.>, *Fundstellennachweis B*, last revised: December 31, 2004, p. 238).

In art. 3 letter f) of the "definition of aggression" mentioned above it states that among other things the following action is to be viewed as an "act of aggression" within the meaning of art. 39 UN Charter:

> "The action of a state that consists in its tolerance of its sovereign territory, which it has made available to another state, being used by this other state to commit an act of aggression against a third state."

Even if to the present day it remains doubtful as to whether the acts of damage listed in art. 3 constitute not only an "act of aggression" within the meaning of art. 39 UN Charter but also a case of "armed attack" within the meaning of art. 51 UN Charter, article 3 at any rate gives expression to an important conviction that exists in the community of states: if the organs of a territorial state tolerate the undertaking of acts of aggression by a "third party state" or if they

fail to prevent military acts of aggression being undertaken from within this territory then the acts of aggression are therefore in the case of art. 3 letter f) of the "aggression definition" also to be attributed to the territorial state concerned (on this point cf. e.g. Kersting, *NZWehrr* 1981, 130 [139]). However it must not be overlooked that the General Assembly of the United Nations and the states represented in it with all major legal systems, with this resolution that was adopted with a consensus at that time did not claim thereby to be "establishing international law in a binding way". However, the "aggression definition" at least constitutes a not insubstantial element of a universal process of consensus building and hence formation of law in respect of international law (on this point cf. Bruha, *Die Definition der Aggression*, 1980, pp. 274 ff., Fischer in Knut Ipsen <ed.> *Völkerrecht*, loc. cit. § 59 margin no. 10).

Furthermore art. 16 of the draft on states' liability of July 26, 2001 (reprinted in Tomuschat <ed.>, *Völkerrecht*, 2001, pp. 97 ff.), drawn up by the ILC, which was given the corresponding codification task by the General Assembly of the United Nations (on this point cf. e.g. von Münch, loc. cit., pp. 52 ff.; Knut Ipsen in: the same <ed.>, *Völkerrecht*, loc. cit., § 39 margin nos. 1 ff.>) is also of importance in this context. This draft expresses the basic opinion present in the various systems of international law and reads as follows:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State."

Additionally of importance for determining according to international law the limits of assistance that a state not directly involved in a military conflict provides for a party to the conflict is above all the Fifth Hague Convention (5th H.C.), the provisions of which have also been incorporated into the *Zentrale Dienstvorschrift* (central service regulations, *ZDv*) 15/2 approved by the German Federal Defense Ministry in August 1992.

According to general international law, it is true that a state is in principle free to decide whether to participate in a military conflict. But of course it is anyway allowed to do this only on the side of the victim of an armed attack, not on the side of the attacker (cf. no. 1104 *ZDv* 15/2; Bothe in Fleck <ed.> *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, 1994, p. 389). A state that is not involved in an armed conflict between other states has the status of a "neutral state" (cf. no. 1101 *ZDv* 15/2; Bothe, *ibid.*, p. 386 with

further notes). Apart from the rules that in the case of legally established "constant neutrality" (e.g. Switzerland and Austria) already apply in peacetime, the obligation of a state that is not involved in an armed conflict between other states ("neutral state") to be neutral within the meaning of the 5th H.C. begins with the outbreak of the armed conflict (cf. no. 1106 *ZDv* 15/2). The consequences of the neutral status are mutual rights and obligations between the neutral state on the one hand and the parties to the conflict on the other. According to art. 1 5th H.C. the territory of a "neutral" state, i.e. one not involved in the armed conflict, is "inviolable"; any act of war on it is forbidden (on this point cf. also no. 1108 *ZDv* 15/2), especially "leading troops or munitions or supply columns through the territory of a neutral power" (art. 2 of 5th H.C.). A "neutral state" – hence therefore in respect of the war waged against Iraq solely by the USA and its allies since March 20, 2003 also the Federal Republic of Germany – may not support "any of the parties to the conflict" on its territory (cf. no. 1110 *ZDv* 15/2), and in particular may not "tolerate any of the acts described in articles 2 to 4" (art. 5 of 5th H.C.). This applies both to moving troops, munitions or supply columns through the territory (art. 5 para. 1 in conjunction with art. 2 of 5th H.C.; no. 1115 *ZDv* 15/2: transportation of troops or supplies must "not take place" on neutral territory; Heintschel von Heinegg in Horst Fischer/Ulrike Froissart/Wolff Heintschel von Heinegg/Christian Raap <eds.>, *Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck*, 2004, p. 221 [226]) and to setting up or using a radiotelegraphic ("*radiotélégraphique*") station or any other system that is intended to facilitate communication with the warring land or sea forces" (art. 5 para. 1 in conjunction with art. 3 letters a) and b) 5th H.C.). Furthermore, the parties to the conflict are "forbidden to penetrate into neutral airspace with military aircraft, rockets or other flying objects" (no. 1150 *ZDv* 15/2 with reference to art. 40 of the Hague Rules of Air Warfare of February 19, 1923 (*HLKR* – part 14 of *ZDv* 15/3); Bothe, AVR 2003, 255 [267]). Relative to a party to a conflict who contravenes the prohibitions of arts. 1 to 4 of the 5th H.C., and thus within the meaning of the 5th H.C. uses the territory of a neutral state as the basis for military operations in the broadest sense, the "neutral state" has an obligation to take action and hence to intervene in order to end the violation of neutrality (on this point cf. e.g. 1109 *ZDv* 15/2 with reference to art. 5 of 5th H.C. and arts. 2, 9 and 24 of 13th H.C.; Bothe, *ibid.*; Heintschel von Heinegg in *Festschrift für Dieter Fleck, loc. cit.*, p. 224). The "neutral state" is required under international law to "reject any violation of its neutrality, if necessary by force", although this obligation is admittedly restricted by the prohibition of the use of force under international law. The armed forces of a party to a conflict that are located in the territory of the "neutral

state" are to be prevented from taking part in the fighting; troops of parties to a conflict that "enter" the neutral territory, i.e. who arrive in the neutral territory after the armed conflict has begun, are "to be interned" (art. 11 para. 1 of 5th H.C.; no. 1117 sentence 1 *ZDv* 15/2; Bothe, *ibid.*; Heintschel von Heinegg, *ibid.*, p. 225). Only officers who give their word of honor not to leave the neutral territory without permission may be freed (art. 11 para. 3 of 5th H.C.; Heintschel von Heinegg, *ibid.*, p. 225). The obligation of internment results from the sense and purpose of neutrality law, since only in this way is it possible to prevent fighting being supported from within the neutral territory and as a result an escalation of the armed conflict involving the neutral state (cf. Heintschel von Heinegg, *ibid.*, p. 225).

4.1.4.1.3 In the case of the war which was begun on March 20, 2003, against which there are serious concerns under international law, the Federal Republic of Germany is not exempted from the above obligations under international law by virtue of being (then and now) a member of NATO, of which the war-waging USA and UK (and other members of the war coalition) are also members.

In the "*Punktationspapier*" from the German Federal Defense Ministry that was submitted to the *Senat* in the appeal hearing and, according to the credible statements of the witness S., was agreed with the heads of the ministry, it is indeed stated that the federal government has with its promises "taken into account its political obligations, which result from the NATO Treaty and from the corresponding agreements" (similarly Chancellor Schröder in the speech quoted above of March 19, 2003, *loc. cit.*, p. 2728). However, neither the NATO Treaty of April 4, 1949 (*BGBl.* 1955 II p. 289) – see a) below – nor the NATO Status of Forces Agreement (SOFA) of June 19, 1951 (*BGBl.* 1961 II p. 1190) or the additional agreement concerning the NATO Status of Forces Agreement of August 3, 1959 (*BGBl.* 1961 II pp. 1183, 1218) in the version of the agreement of March 18, 1993 which is authoritative here (*BGBl.* 1994 II pp. 2594, 2598) – see b) below – provide for an obligation on the part of the Federal Republic of Germany, contrary to the UN Charter and applicable international law to support acts – in contravention of international law – by NATO partners. The same applies in respect of the provisions on the "*Vertrag über den Aufenthalt ausländischer Streitkräfte in der Bundesrepublik Deutschland*" (Agreement concerning the presence of foreign armed forces in the Federal Republic of Germany, a.k.a. *Aufenthaltsvertrag*, *AV*) of October 23, 1954 (*BGBl.* 1955 II p. 253) – see c) below. Any "political" expectations or intentions over and above this may be taken into account by the federal government, which is bound strictly to

"justice and the law" per art. 20 para. 3 *GG* in the democratic constitutional state of the Basic Law (*Grundgesetz, GG)*, only in so far as this is compatible with applicable international and constitutional law.

a) A NATO state that plans and implements a war contrary to international law violates not only the UN Charter but also at the same time art. 1 of the NATO Treaty. In this, all NATO states have undertaken,

> "as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."

Although art. 1 of the NATO Treaty, when it was signed, was the expression of the will of all contracting states to exploit on one hand the possibilities of the UN Charter to create an effective defense organization based on art. 51 UN Charter, on the other hand it expresses the will to keep strictly within the limits drawn by the UN Charter. This means at the same time that a war that is not justified by art. 51 UN Charter also cannot constitute or justify a "NATO alliance case" per art. 5 NATO Treaty: NATO cannot and may not decide upon and implement that which violates the UN Charter, not even at the request or under pressure from the governments of particularly important member states. Art. 7 NATO Treaty again particularly emphasizes that all NATO states are bound by the UN Charter. In this provision it unequivocally states that the NATO Treaty does not affect "the rights and obligations under the Charter [= UN Charter] of the Parties [to the NATO treaty] which are members of the United Nations"; it "shall not be interpreted as affecting, in any way" these rights. Consequently a war of aggression by a NATO state that violates the UN Charter cannot become a war of defense even by declaring the "NATO alliance case".

In the case of the war begun on March 20, 2003 by the governments of the USA and UK (together with other allies) against Iraq, there was a further reason for no NATO "alliance case" being given. Art. 5 NATO Treaty standardizes a duty of assistance under international law for each party to the treaty "only" in the case of an armed attack "against one or more of them in Europe or North America". At the same time the scope of this duty of assistance is expressly left open. In the second phrase of the article it states that every party to the treaty

> "will assist the Party or Parties so attacked by taking forthwith, individually, and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

The geographical location of the object of attack is decisive for the occurrence of an alliance case: according to art. 6 NATO Treaty, an armed attack within the meaning of art. 5 on one or more parties is considered to be any attack by armed forces

> "1. on the territory of any of the Parties in Europe or North America, (since annulled: on the Algerian Departments of France,) on the territory of Turkey or on the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
>
> 2. on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer."

It follows from this that no armed attack has occurred within the meaning of art. 5 NATO Treaty if, for example, ships or aircraft are attacked outside the treaty area defined more closely in art. 6 or even "merely" if intervention occurs in the political, economic or military interests of one or more parties to the NATO Treaty without a military attack taking place and needing to be repulsed in the "NATO territory" defined by art. 6 NATO Treaty. An attack in contravention of international law, provoked through the use of force by a NATO member state, also does not come under the definition of an attack – which definition is strictly oriented to art. 51 UN Charter – within the meaning of arts. 5 and 6 NATO Treaty.

The wording of the treaty does not expressly provide for who shall take the decision as to whether an "armed attack" within the meaning of art. 6 NATO Treaty has occurred. Formerly in the specialist literature the opinion was expressed that the NATO alliance case occurred automatically if the conditions standardized in art. 6 NATO Treaty were fulfilled. The wording of the provision could possibly support this to the extent that it states therein that an "armed attack" within the meaning of art. 5 NATO Treaty "is deemed to include" any armed attack on one of the target objects named in nos. 1 and 2. However, art. 5 para. 1 NATO Treaty expressly describes the duty of assistance to the effect that each party in the alliance case "individually, and in concert with the other Parties" shall take such action as "each of them" "deems necessary" to restore and maintain the security of the North Atlantic area. The contracting states are "merely" required to coordinate at the alliance level the actions that

their organs appointed for this purpose (according to national constitutional law) consider to be necessary. Art. 5 NATO Treaty does not prescribe any defined counter-measures.

In its report of June 6, 1949, the US Senate Committee on Foreign Relations (as part of the ratification process) expressly pointed out this consequence which already results from the regulatory context of arts. 5 and 6 NATO Treaty, and declared that in the case of conflict "the responsibility is incumbent upon each party to decide the question of fact for itself", i.e. whether an attack has occurred within the meaning of art. 6 NATO Treaty. The other parties to the Treaty did not oppose this American position either in the negotiations or later. Instead they implicitly accepted it (on this point cf. e.g. Heindel and others in American Journal of International Law (AJIL) 1949, 634 [647]; Knut Ipsen, *Rechtsgrundlagen und Institutionalisierung der Atlantisch-Westeuropäischen Verteidigung*, 1967, pp. 47 ff.; the same, *JöR* 21 <1972>, 23 ff.; the same, *AöR* 94 <1969>, 554). Accordingly the *Bundesverfassungsgericht* (Federal Constitutional Court) decided "that the NATO Treaty leaves it to each contracting state to judge whether an alliance case exists within the meaning of art. 5 para. 1" (ruling of December 18, 1984 – 2 *BvE* 13/83 – <*BVerfGE* 68, 1 [93]>). As well as the successful American negotiating position expressed by the competent US Senate Committee, the maxim of interpretation of international law of "*in dubio mitius*" also speaks in favor of this interpretation. If neither the text of the Treaty nor other clues as to the true will of the parties provide sufficient information as to what was agreed, then provisions of international law that contain restrictions on states' freedoms to decide on and influence legal relationships by unilateral declaration are to be interpreted restrictively in case of doubt.

As far as can be seen, there has not to date been an explicit authentic interpretation by the parties to the Treaty (art. 31 paras. 2 and 3 *WVK*). In the sole case to date of an actual (positive) ascertainment of the NATO alliance case (cf. art. 31 para. 3 letter b) *WVK*), the NATO states following the terrorist attacks of September 11, 2001 in New York and Washington proceeded according to the maxim that the NATO Treaty leaves it to each contracting state to judge whether an alliance case exists within the meaning of art. 5 para. 1. At the start of October 2001, their representatives, following decisions taken previously by their respective governments in the NATO Council, (unanimously) formally declared such a case per arts. 5 and 6 NATO Treaty. Only after the passing of this resolution did an "alliance case" within the meaning of the NATO Treaty exist according to the common conviction of the NATO states.

In the case of the war that was begun on March 20, 2003 against Iraq, the NATO Council did not decide on such an "alliance case". Independently of the fact that a "preventive war" that is not justified by art. 51 UN Charter cannot constitute or justify a "NATO alliance case" per art. 5 NATO Treaty, therefore already for this reason no NATO state was obligated under the NATO Treaty to assist NATO partners with military means in the Iraq war. A war that is not justified per art. 51 UN Charter already per arts. 1, 5 and 6 NATO Treaty does not establish obligations of assistance. Rather it precisely conflicts with these – as in particular the provision of art. 1 NATO Treaty makes clear.

The NATO Treaty in addition to this contains an express legal reservation according to which no party to the Treaty can be forced by the NATO Treaty or by later decisions in the implementation of the treaty (e.g. resolutions in the NATO committees) to violate its own constitution (called the "protective clause"). At the insistent instigation at that time of the US government administration of President Truman, in 1949 the clause was included in the "original version" of the NATO Treaty, which in art. 11 sentence 1 makes both its ratification and its implementation subject to an express constitutional reservation. It is explicitly determined in this provision that the NATO Treaty "shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes". Hence possible conflicts between the NATO Treaty, its implementation and obligations resulting from this (for the member states) on the one hand and the respective constitutions of the individual member states on the other hand are decided in advance. In the event of a conflict the provision under the constitutional law of each respective partner to the alliance and the treaty take precedence over the provision in the NATO Treaty (and the decisions taken for carrying out the treaty). Therefore according to the NATO Treaty there is no legal obligation under the alliance outside of the constitutional law of the respective member state and hence also not beyond the commitment established in art. 20 para. 3 *GG* of (German) "executive power" to "justice and the law" and to the "general rules of international law" (art. 25 *GG*).

b) Nor does anything to the contrary result from the provisions of the NATO Status of Forces Agreement or from the additional agreement to the NATO Status of Forces Agreement.

According to general international law, which also finds expression in international agreements (cf. e.g. art. 1 of the Convention on International Civil Aviation of December 7,

1944 – known as the Chicago Convention <*BGBl.* 1956 II, p. 411>) – every state possesses "full and exclusive air sovereignty" in the airspace over its territory. However, if – as in Germany – foreign troops are stationed there, then the extent and limits of their freedom of movement are generally regulated in special agreements under international law. Following the termination of the occupation regime on May 6, 1955, this happened in Germany in the form of the "*Zusatzabkommen*" (supplementary agreement, *ZA-NTS 1959*) which supplemented the NATO Status of Forces Agreement and came into force on July 1, 1963 (cf. *BGBl.* 1993 II p. 745).

In the version of this supplementary agreement that was valid until 1994, which in this area largely continued the arrangements from the occupation period as law of contract, the US troops stationed in Germany as part of NATO were granted very extensive freedom of movement in German airspace: a "force" was entitled, using aircraft, "to cross the borders of the Federal Republic of Germany and to move in and over the federal territory" (art. 57 para. 1 *ZA-NTS 1959*). In the course amending this supplementary agreement, this provision was changed in 1994 (*BGBl.* 1994 II pp. 2594, 2598). Subsequently, the "force" stationed in Germany in principle always requires a permit from the German federal government if, using land vehicles, water-craft or aircraft it wishes to "enter or move in and over the federal territory" (art. 57 para. 1 sentence 1 phrase 1 *ZA-NTS 1994*). The reservation of approval is already clear from the wording of the provision. However, this basic obligation to obtain a permit is then partly restricted in the following second phrase of art. 57 para. 1 sentence 1 *ZA-NTS 1994*. This provision reads:

> "Transportation and other movements within the bounds of German legal provisions, including this agreement and other international agreements to which the Federal Republic of Germany and one or more of the sending states are a contractual party, and of associated technical agreements and processes, are considered to be approved."

In other words: provided this second phrase intervenes, there is no need for a permit for "entry" and all movements in aircraft "in and over the federal territory". How far the scope of application of this provision reaches is to be determined according to the general rules of interpretation of international law.

According to its wording, per art. 57 para. 1 sentence 1 phrase 2 *ZA-NTS* the decisive question for the fictive "advance permission" resulting from this provision ("considered to be

approved") is whether the "transportation and other movements" of the stationed troops take place within the bounds of German legal provisions and the named agreements. If an activity by the stationed troops in Germany or in the airspace over it violates such a legal provision, then the "advance permission" resulting from the supplementary agreement does not apply.

Further, the context in which it stands (cf. art. 31 para. 1 *WVK*) is important for the interpretation of the provision. In this respect the rule/exception relationship must be observed: it is formulated as an exception from the generally applicable principle under international law of the full sovereignty of every state over its territory and its "full and exclusive air sovereignty" above its territory. Therefore, being an exceptional provision, it should be interpreted narrowly according to general principles of interpretation ("*singularia non sunt extendenda*").

The provision of art. 57 para. 1 sentence 1 *ZA-NTS* – and moreover both in its original version and in the new version of 1994 – additionally concerns, as results already from its wording, only the movements of aircraft by a "force" (and by a "civilian component", of their "members and relations"), consequently therefore not every "entry" of military aircraft from a contracting state into the Federal Republic of Germany. What is to be understood as a "force" within the meaning of this provision is defined in art. I para. 1 letter a) of the NATO SOFA: According to this, "force" is the personnel belonging to the land, sea or air armed services of one Contracting Party (to the NATO SOFA), "when in the territory of another Contracting Party" – in this case, Germany – "in connexion with their official duties". Thus the "entry into the Federal Republic of Germany" and freedom of movement "in and above the federal territory" which are generally approved in art. 57 para. 1 sentence 1 phrase 2 *ZA-NTS* under certain conditions for military aircraft of contracting states solely concerns the units that are stationed as part of the NATO framework. For the authorization to be stationed on German soil was granted to the USA and the UK "for the sake of their position as members of the North Atlantic defense community and in view of the obligations resulting therefrom" (*BVerfG*, ruling of December 18, 1984 – 2 *BvE* 13/83 – <*loc. cit.* [98]>). By contrast, if the units stationed in the USA or UK outside of the NATO framework should for example merely use German airspace on their way to the war zone or make stops at airstrips in Germany that have been permitted to use, in order to refuel, take on materials or weapons and then – without a "NATO mission" – fly on to the war zone situated outside the "NATO area", then

the fundamental requirement for permission still applies. The war by the USA and UK against Iraq was not a “NATO war”. It took place outside the decision structures of NATO.

The same applies to the military bases situated in Germany. At these sites, which the stationed armed forces have been “permitted the exclusive use of”, these armed forces per art. 53 para. 1 *ZA-NTS* “may take the action necessary for the satisfactory fulfillment of their defense obligations”. Per para. 2 of the provision this applies “correspondingly for action in the airspace above the sites”. Notwithstanding all other difficulties of interpretation, it results from this for the competent German authorities, i.e. above all the federal government, in the event of conflict, to carry out – at any rate legally – checks on the stationed armed forces’ authority in respect of whether in the individual case these forces are exclusively performing “defense duties” within the meaning of the supplementary agreement and the NATO Treaty at the sites (and in the airspace above them) that they have been permitted use of or whether they are preparing or even carrying out other actions. At the same time art. 53 para. 3 *ZA-NTS* is intended – according to the text of the agreement – expressly to ensure that the German authorities are able to carry out “actions required in Germany’s interest” within the sites. What is required “in Germany’s interests” here is, as far as can be seen, not defined specifically either in this provision or in other agreements. Hence the concretization of “German interests” and the determination of the means of their implementation is first and foremost a task for the competent German authorities and hence particularly for the federal government, which at the same time, of course, is bound to “justice and the law” per art. 20 para. 3 *GG* and per art. 25 *GG* to the “general rules of international law”. To “secure Germany's interests” within the meaning of the provisions mentioned at any rate also includes, among other things, that all required action should be initiated and carried out to prevent, for example, acts of war that contravene international law from taking place or being assisted from within the territory of the Federal Republic of Germany. This applies all the more so since Germany in the course of reunification in art. 2 of the *Vertrag über die abschließende Regelung in Bezug auf Deutschland* (Agreement concerning the final arrangements with respect to Germany, known as the Two-plus-Four Agreement) of September 12, 1990 (*BGBl.* II p. 1318), which provides the authoritative basis for the creation of the unitary state of Germany in 1990, undertook under international law to ensure “that only peace will ensue from German soil”.

c) Nor does anything different result from the "*Vertrag über den Aufenthalt ausländischer Streitkräfte in der Bundesrepublik Deutschland*"(Agreement concerning the presence of foreign armed forces in the Federal Republic of Germany) of October 23, 1954, known as the *Aufenthaltsvertrag, AV*). It is true that in art. 1 para. 4 *AV* the provision is made that the Federal Republic of Germany "on the same basis according to which this is usual between other parties of the North Atlantic pact" (= NATO Treaty) "or is agreed with effect for all member states of the North Atlantic pact organization" among other things grants to American and British armed forces the right "to enter, cross and leave the federal territory on the way to or from Austria (for as long as these [forces] continue to be stationed there) or [to or from] any member state of the North Atlantic pact organization". Irrespective of the question of whether the *Aufenthaltsvertrag* per its art. 3 with the "conclusion of a peace treaty arrangement with Germany" in the form of the Two-plus-Four agreement of September 12, 1990 has ceased to be in force or whether it provisionally continues to be in force owing to the diplomatic notes exchanged between the governments involved, art. 1 para. 4 *AV* is clearly restricted already according to its wording to entering, crossing and leaving the federal territory on the way to or from "... any member state of the North Atlantic Treaty Organization". Therefore the rights granted in art. 1 para. 4 *AV* relate solely to transit activities from the territory of a NATO member state into the federal territory or from the federal territory into the territory of another NATO member state. The *Aufenthaltsvertag* precisely does not contain a provision for entering, crossing or leaving the federal territory "on the way to or from" any non-member state of NATO.

d) This also applies in the event that secret agreements under international law have been concluded between the Federal Republic of Germany and the USA and UK, which in the event of a military conflict provide to the contrary, but which – contrary to art. 102 UN Charter – are not registered and published with the Secretariat of the United Nations.

Irrespective of whether such secret agreements are able to trigger legal effects at all, it is imperative to follow the provision of art. 103 UN Charter, which has the following wording:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Art. 103 UN Charter establishes in a quite general way the precedence of the law of the UN Charter over obligations resulting from all other agreements under international law. In the present context this has the consequence that from such secret agreements – which are not apparent to the *Senat*, but which nevertheless cannot be ruled out – at any rate no rights and obligations can be derived for the USA and the UK with respect to Germany which contradict the UN Charter, and thus for example violate the prohibition of the use of force of art. 2 number 4 UN Charter.

4.1.4.1.4 Assessment of the military acts of assistance under international law

As results from the explanations above (in 4.1.4.1.1 to 4.1.4.1.3), serious concerns in relation to international law exist about the Federal Republic of Germany's assistance in favor of the USA and UK in connection with the war against Iraq which began on March 20, 2003, which was listed in the "*Punktationspapier*" from the German Federal Defense Ministry and noted by the *Senat* in the appeal hearing.

This applies at any rate for the granting of overflight rights for military aircraft of the USA and UK, which in connection with the Iraq war flew across the federal territory into the war zone in the Gulf region or came back from there. This also applies for the approval to send troops, transport weapons and military supplies and materials from German soil into the war zone and for all operations that could result in the territory of Germany serving as a starting point or "hub" for military operations directed against Iraq. For the objective sense and purpose of these actions was to facilitate or even support the military proceedings of the USA and UK. Owing to these objectives, there are serious concerns in respect of international law about the actions of the federal government in this connection with regard to the prohibition of the use of force under international law and the listed provisions of the 5th H.C. (cf. Bothe, *AVR* 2003, 255 [268]).

Whether these serious concerns under international law also apply to the involvement of *Bundeswehr* soldiers in deployments of AWACS flights over Turkey and their use to monitor barracks and military and civil facilities of US armed forces in Germany is not without doubt. In the case of the AWACS flights the answer to the question depends substantially on whether the data gained from these missions was significant for the acts of war in Iraq and whether the armed forces of the USA and UK *de facto* had access to this data. The compatibility with

applicable international law of the protection and guarding of facilities of the US forces situated in Germany by the *Bundeswehr* depended on whether as a result corresponding tasks of the units relocated to the war zone were performed as it were on their behalf and compensatorily in order to enable or facilitate the US to move corresponding troops into the war zone. If this had been the case, serious concerns under international law would exist on account of this violation against the prohibition standardized in art. 5 para. 1 in conjunction with art. 2 of the 5th H.C. “not to support any of the parties in the conflict” (cf. no. 1110 sentence 1 *ZDv* 15/2).

4.1.4.1.5 Possible connection between the SASPF IT project and the military assistance to the USA and its allies

In the context of the war waged against Iraq by the USA and its allies which engendered serious concerns under international law and the German military acts of assistance, the soldier – understandably – saw himself confronted with the question of whether he personally through the continued collaboration on the SASPF IT project in the S. which was concretely required of him, was himself for his part making a contribution at least indirectly to facilitating or even supporting the conduct of the war.

At the same time however there is in this connection no need for a subsequent examination of and decision by the adjudicating *Senat* on the question of whether the soldier through his further collaboration – which he refused on April 7, 2003 – on the SASPF IT project during the Iraq war – which continues to this day – directly or indirectly would have causally effectively supported or at least made a relevant contribution to these or other acts of assistance by the Federal Republic of Germany for the USA and its allies, which was denied by the *Truppendienstgericht* (Federal Military Court) in the judgment under appeal without giving further reasons (“plain for anyone to see”). For at that point in time he at any rate had an understandable cause to fear this.

The soldier’s superior (at that time), the witness M., both in the trial before the *Truppendienstgericht* (Federal Military Court) and also in the appeal hearing before the *Senat* confirmed the soldier’s testimony that the soldier had enquired of him as to what basis in reality his fears had in respect of a possible connection between the SASPF IT project and the German military assistance in the Iraq war. To this question which was particularly besetting

the soldier, the witness M. in his capacity as leader of the SASPF IT project in the S. stated that he could not rule out this possibility. In the appeal hearing the witness M. explained further on this point that the SASPF IT project was intended among other things to optimize the “processes” in the *Bundeswehr* as a whole, also particularly in the area of logistics. Here it was not a case of using a particular piece of software but of optimizing processes. In his opinion if the planned software product SAP should turn out to be unsuitable, it would be possible to use an alternative product without a great deal of time and effort. He stated that since at the time of the talks with the soldier in early 2003 that are in question here he did not know and also does not know how long the Iraq war which was begun on March 20, 2003 would last, he honestly could not rule out the possibility that the SASPF IT project in individual areas would prove to be relevant for the war even before the project’s planned final roll-out.

The *Senat* has no cause to call into doubt the correctness of the content of this testimony or the personal credibility of the witness M.
– is further explained –

It is true that in the official information of September 2004 requested by the *Senat* from the German Federal Defense Ministry it is stated that the SASPF IT project in early 2003 was still in the trial phase; it states that SASPF-based assistance to militarily and politically allied states was at this time not (yet) possible. However the SASPF IT project was designed to support deployments of the *Bundeswehr* armed forces within their “extended range of tasks”, i.e. also outside the area of defending the Federal Republic of Germany or (in the alliance case) a NATO ally, and also to this extent to make available command-relevant information from the areas of logistics, personnel, accounting, etc. “online” and “everywhere”. This was intended to enable “network-based operational command” for the *Bundeswehr* armed forces and “interoperability with the armed forces of other nations”. It states that interoperability is the key to joint deployments with complementary division of tasks (burden sharing).

Since for the soldier – as also for the relevant head of the IT division in the S., it was not foreseeable at the start of the Iraq war in March 2003 how long this was going to last, it was at any rate understandable in this concrete context if the soldier in view of the potential application of the SASPF IT project that had become discernible to him drew from this the grave conclusion for himself that under these circumstances, if he carried out the orders issued

to him on April 7, 2003 and hence if he continued his activity at his post in the S. he had to reckon on becoming himself involved in facilitating and/or supporting the waging of the Iraq war.

The soldier did not have to reckon on such a situation either upon joining the *Bundeswehr* or upon his appointment, according to his application, as a professional soldier. It is true that he had to be aware, especially as a professional soldier, that he is under obligation as a soldier "loyally to serve" (§ 7 *SG*) the *Bundeswehr*. According to the established legal practice of the *Senat*, this duty requires the soldier in service and outside of service to contribute to maintaining the functional ability of the *Bundeswehr* as a military unit and to refrain from doing anything that could weaken the *Bundeswehr* in its remit as specified by the constitution and laws that concretize the constitution (cf. e.g. ruling of January 28, 2004 – *BVerwG* 2 *WD* 13.03 – <*BVerwGE* 120, 106 [107] = Buchholz 236.1 § 10 *SG* no. 53 = *NZWehrr* 2004, 169 = *ZBR* 2005, 256>). He had also consciously decided during his career as a soldier to remain a soldier and in particular not to file an application for recognition as a conscientious objector or an application to leave the *Bundeswehr*.

Notwithstanding this, the soldier could and should have been able to assume that in the context of his service in the *Bundeswehr*, military orders would be issued to him only in observance of the limits that result from the Act Concerning the Legal Position of Soldiers (*Soldatengesetz, SG)* and the Basic Law (*Grundgesetz, GG)* and that in a democratic constitutional state he should only have to carry out such orders from his superiors.

In contrast, he did not have to assume that the government of the Federal Republic of Germany, which is bound to justice and the law (art. 20 para. 3 *GG*) and hence also to applicable international law would decide upon and render military assistance in favor of the USA and its allies in connection with a war about which there are serious concerns under international law, and that in this context of the Iraq war there existed a possibility that could not be ruled out that with his concrete service activity he would become involved in such acts of assistance.

4.1.4.2 Furthermore, based on the outcome of the appeal hearing, it is established in the full conviction of the *Senat* that the decision of conscience asserted by the soldier is oriented to the categories of "good" and "evil" (see 4.1.4.2.1) and was marked by the required

seriousness, depth and inalienability of that which, for him, was ethically demanded, that he could not act against it without a serious crisis of conscience (see 4.1.4.2.2). At the same time the Senat has been able to convince itself of the personal credibility of the soldier and of his serious willingness to accept the consequences, for which the representative of the *Bundeswehrdisziplinaranwalt* (Federal military disciplinary attorney) – without approval in the matter – showed respect in the appeal hearing.

4.1.4.2.1 It is true that the grave concerns of the soldier about the German assistance for the armed forces of the USA and UK that is in question here resulted at first mainly from his serious doubts as to their compatibility with central precepts of the Basic Law and of applicable international law. But it does not follow from this that he had, as it were, merely raised legal concerns about the war and complained only about their lack of legality. Rather the *Senat* in the appeal hearing gained the certainty that for this soldier who strongly shows Christian traits, in the question of the moral “good” or “evil” of supporting a war, the “ethical minimum” is fixed in the applicable international law and in the relevant provisions of the Basic Law, which for him was and is the starting point though of course not the sole frame of reference for his standards of conscience. In this opinion of the socio-ethical significance of law he is on the real facts following the basic line of, among others, Georg Jellinek (*Die sozialethische Bedeutung von Recht, Unrecht und Strafe*, 1878, p. 42; on this point cf. also Radbruch, *Rechtsphilosophie*, 1932 <reprinted 1999>, p. 47) and similar philosophical currents. Here it is decisive that the soldier, starting from this basic position, not least owing to his recognizably strong Christian character and conviction, had internalized this “ethical minimum” in his conscience as an ethically binding standard of behavior. As a result, in the concrete conflict, he found himself in the situation of being warned against any disregard and the consequences that would result for him. Anyway, as shown above in a different context, it does not matter for the protection as a fundamental right of this complex socio-psychological process whether the process of forming ethical standards is ultimately based on predominantly rational or more on emotional reasons. For the relevant ethical dictates for the individual according to his conscience may come from very different areas of life and experience. The circumstance that they have (also) found expression in applicable law does not strip them of their ethical content and character. It is at any rate at least understandable that for a democratic constitutional state there exists or should exist a necessary connection between law and morality (cf. e.g. Kriele, *Recht und praktische Vernunft*, 1979, p. 111 [117]; here cf. also Ralf Dreier, *Recht-Moral-Ideologie*, 1981, p. 180 [198 ff.] with further notes).

4.1.4.2.2 The required seriousness, depth and inalienability of the soldier's decision of conscience result according to the ascertainments of the *Senat* in particular (a) from his statements and from his behavior before and during the escalation of the conflict, and (b) from the credibility of his personality and his willingness to accept the consequences.

a) The soldier did not make his decision on the spur of the moment. Rather he gave it serious consideration after he had previously sought advice from various authorities and attempted to discuss his serious concerns.
– is further explained –

It further supports the seriousness of the soldier's conflict of conscience that he intensively and sustainedly made efforts to obtain a statement addressing the subject matter of, as he saw them, the serious legal and moral objections to the Iraq war and the participation of the *Bundeswehr*, and which he summarized as an enclosure with a letter to the German Federal Defense Minister and the Federal Chancellery on March 27, 2003. In this he (in enclosure 3) explicitly concerns himself among other things with the claim asserted by the US president that God had personally given him, the President of the USA, the task of starting the war against Iraq. He [the soldier] was deeply disgusted at this – as he perceived it – presumptuousness. In contrast he insisted that his – the soldier's – God was a different one. He here referred explicitly to a "Prayer of the United Nations" published by the Catholic Military Episcopate (*Katholisches Militärbischofsamt*, *KMBA*) in Berlin, and a further "Prayer no. 62" published by them, in which it states:

> *„Friede ist immer möglich -*
> *aber was kann ich dafür tun?*
> *Hilf mir heute, Herr, mit Frieden*
> *im Kleinen anzufangen:*
> *die Meinung der anderen zu achten,*
> *ein grobes Wort nicht zu erwidern,*
> *einen Nachteil auch einmal in Kauf zu nehmen,*
> *einem Unrecht nicht beizustimmen,*
> *guten Rat anzunehmen,*
> *nicht immer zuerst an mich zu denken …*
> *Friede ist möglich, aber nicht immer leicht.*
> *Ich möchte den Mut aufbringen, Dinge zu ändern,*
> *die ich ändern kann.*
> *Gib mir diesen Mut, Herr,*
> *damit heute meinem guten Willen auch die Tat folgt."*

> “Peace is always possible –
> but what can I do in order to save it?
> Help me today, Lord, to practice
> peace in small things:
> to respect the opinions of others,
> not to reply to a coarse word,
> to accept a disadvantage once in a while,
> not to agree with an injustice,
> to accept good advice,
> not always to think of myself first ...
> Peace is possible, but not always easy.
> I wish to summon the courage to change the things
> that I can change.
> Give me this courage, Lord,
> so that today deeds may follow my good intentions.”

On this basis, the soldier formulated the conclusion for himself that he was “not only legally but also morally obligated to the best of his abilities to advocate passively and actively the restoration of the law and an end to the involvement of the Federal Republic of Germany in the murderous occupation of Iraq by the USA (and others).” The conflict of conscience that resulted from this is logical in itself and therefore comprehensible.

b) Finally the *Senat* was convinced of the seriousness, depth and inalienability of the soldier’s decision of conscience especially also owing to the impression it gained in the appeal hearing of the credibility of his personality and his willingness to accept the consequences.
– is further explained –

Owing to and as a consequence of his action the soldier brought considerable strains upon himself. In order to remain true to himself and not to disregard what according to his credible statements were the imperative dictates of his conscience, he was also willing, under the real pressure of going through a disciplinary process in court and an investigation under criminal law, to accept the serious consequences that might result for him in certain circumstances. As the indictment and the motions of the *Wehrdisziplinaranwalt* (military disciplinary attorney) made clear, he had to reckon even on being dismissed from service, or at the least expect serious disadvantageous consequences for his subsequent career path. He did not allow himself to be deterred by this.

4.1.5 By his behavior as recorded in accusation point 2 (failure to carry out the two orders issued to him by his superior M. on April 7, 2003) the soldier also did not exceed the inherent bounds of the basic right to freedom of conscience (art. 4 para. 1 *GG*) which he exercised. Art. 4 para. 1 *GG* contains no statutory reservation (see 4.1.5.1) in this matter. Furthermore, the fundamental right is not subject to a numerical reservation of recourse (see subsection 4.1.5.2) and – at any rate in this case – is also not supplanted by the provisions of military constitutional law (arts. 12a, 65a, 73 no. 1, 87a and 115a ff. *GG*) from the point of view of the necessary "functional ability of the *Bundeswehr*" (see 4.1.5.3).
4.1.5.1 Since art. 4 para. 1 *GG* – unlike art. 135 of the Weimar Reich constitution (*Weimarer Reichsverfassung*, *WRV*) – does not contain any statutory reservation, a restriction of the freedom of conscience by law or owing to a law is inadmissible and therefore unconstitutional. In respect of art. 1 para. 3 *GG* neither the legislature nor any other official power may restrict this fundamental right in its material content. With the rules that it creates, the legislature is merely allowed to disclose the limits that are contained in the terms of art. 4 para. 1 *GG* itself or in other provisions of the constitution. This has repeatedly been the decision of the *Bundesverfassungsgericht* (Federal Constitutional Court) in its established legal practice concerning the fundamental right in art. 4 para. 3 sentence 1 *GG*, which even – unlike art. 4 para. 1 *GG* – provides a statutory reservation on the regulation "of the details" [*des Näheren*] (cf. e.g. rulings of April 13, 1978 – 2 *BvF* 1/77 and elsewhere – <*BVerfGE* 48, 127 [163]> and of April 24, 1985 – 2 *BvF* 2/83 and elsewhere – <*BVerfGE* 69, 1 [23]>).

This results for art. 4 para. 1 *GG* not only from the lack of statutory reservation but also directly from the standard text itself. For the constitutional provision instructs that in the conflict between conscience and legal obligations the freedom of conscience is "inviolable". Even a slight violation is inadmissible.

According to the established legal practice of the *Bundesverfassungsgericht*, however, inherent limits may result from other provisions of fundamental rights or other provisions of the constitution for the fundamental rights that are guaranteed without statutory reservation such as art. 4 para. 1 and art. 5 para. 3 *GG*. Accordingly, for example, religious rites involving sexual acts in a temple, human sacrifice, suttee or polygamy are not covered by the freedom of conscience, religion or belief (religious or ideological) owing to violation of art. 1 para. 1, art. 2 para. 2, and art. 6 para. 1 *GG*. Concerning the fundamental rights guaranteed without reservation that result from art. 4 para. 1 *GG*, the *Bundesverfassungsgericht* has repeatedly

expressed that their limits are found only in the limits determined by the constitution itself (cf. e.g. ruling of October 19, 1971 – 1 *BvR* 387/65 – <*BVerfGE* 32, 98 [108]):
– is further explained –

In a ruling of August 11, 1999 – 1 *BvR* 2181/98 and elsewhere – <*NJW* 1999, 3399> the 1st chamber of the 1st *Senat* of the *Bundesverfassungsgericht* again reaffirmed this legal practice and expressly applied it to the freedom of conscience guaranteed without reservation in art. 4 para. 1 *GG*.

4.1.5.2. In view of the guarantee of a fundamental right that every individual is entitled to without statutory reservation, it also cannot be held against a soldier who takes a serious decision of conscience within the meaning of art. 4 para. 1 *GG* and as a result sees himself as prevented from carrying out an order issued to him that not only he but also others have called upon or could call upon the freedom of conscience in a similar case. If for soldiers the protection of freedom of conscience as a fundamental right depended on the numerical extent of its use by other bearers of the fundamental right in the same or similar situations, the fundamental right to freedom of conscience would no longer be “inviolable” since it would be subject to a numerical reservation. This cannot be gathered either from art. 17a *GG* nor from other provisions of the Basic Law (*Grundgesetz, GG)*.

4.1.5.3 A provision of constitutional law, even if it concerns a fundamental right guaranteed without statutory reservation, may not be interpreted with respect to the individual rule in isolation. Rather the regulatory context in which the rule stands must always be observed. This is part of the necessary “systematic interpretation” and at the same time also of the “principle of the unity of the constitution” which is applied by the *Bundesverfassungsgericht* as established legal practice. Accordingly, a provision of constitutional law is always to be interpreted so that conflicts with other constitutional norms are as far as possible avoided. For it cannot be supposed that the authors of the constitution in the same body of legal code made mutually contradictory provisions and hence wished to issue different instructions for the application of the law for the same regulatory area. The principle of the unity of the constitution therefore demands, taking into account the wording of the provisions concerned, that possible contradictions should be harmonized. However, reference to the principle of the unity of the constitution must not be used to make a determination of content that deviates from the provisions of constitutional law made by the authors of the constitution in the

relevant parts of the Basic Law. This would go beyond a concretization of the constitution that is oriented to standardization and is methodically checkable. The starting point and yardstick for harmonization bound to justice and the law (cf. art. 20 para. 3 *GG* and art. 97 *GG*) must therefore always be the respective applicability content of the provisions of the constitution concerned, which is to be ascertained through their methodically proper interpretation. If in the individual case owing to such an interpretation a collision of the applicability content of multiple provisions of fundament rights or other constitutional norms is found in the sense of a (partial) overlapping of their material areas of applicability, then the task arises of creating “practical concordance”. This requires, in order to avoid logical and systematic contradictions, an “optimization” of the applicability content of all the constitutional norms involved with the greatest possible “preservation” of their respective claims to regulation. The applicability content of the norms in question may only be inherently restricted in so far as “appears logically and systematically imperative”; at the same time “their material content in basic values ... must be respected in every case” (cf. e.g. ruling of May 26, 1970 – 1 *BvR* 83/69 and elsewhere – <*BVerfGE* 28, 243 [261]>).

This task of differentiating conflicting interests from each other is in the first instance the responsibility of the legislature (cf. *BVerfG*, rulings of June 6, 1969 – 1 *BvR* 921/85 – <*BVerfGE* 80, 137 [160 ff.] and of November 27, 1990 – 1 *BvR* 402/87 – <*BVerfGE* 83, 130 [142]). Only in so far as – constitutional – legal demarcations are not present, is there scope as part of this creation of “practical concordance” for absolutely necessary delimitations by the judges of the competent court who are appointed to make a decision, and who in the event of dispute per art. 92 *GG* are “entrusted” with the judicial decision, i.e. with the binding interpretation and application of applicable law.

Here the aim is to interpret colliding provisions in such a way that in their specific impact they each become optimally effective. However it should be stressed that the precondition for the necessity of “practical concordance” is always that there is actually a collision between the material areas of applicability of multiple provisions of the constitution which make it appear logically and systematically imperative to carry out a mutual optimization (on this point cf. Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1995, § 10 II 2 margin nos. 317 ff. with further notes; Stein/Frank, *Staatsrecht*, 19th ed. 2004, § 32 III 1, p. 264 with further notes).

At any rate in the present case of the soldier's refusal to carry out orders that conflicted with his conscience, no limits result from other provisions of fundamental rights or other constitutional norms – with respect to the freedom of conscience guaranteed in art. 4 para. 1 *GG* – that drive back the protective effect of the fundamental right.

4.1.5.3.1 Express limits for the fundamental rights guaranteed in art. 4 para. 1 *GG* result generally for example from art. 7 paras. 2 and 3 *GG*, art. 140 *GG* in conjunction with art. 136 para. 3 sentence 2 *WRV*, art. 140 *GG* in conjunction with art. 137 para. 3 sentence 1 *WRV* and art. 140 *GG* in conjunction with art. 137 para. 6 *WRV*. All of these limits, which are expressly contained in the Basic Law, are however not relevant here and therefore are not able in the present connection to restrict a soldier's fundamental right to freedom of conscience with respect to a military order.

4.1.5.3.2 The constitutional norms of arts. 12a, 65a, 73 no. 1, art. 87a para. 1 and art. 115a ff. *GG*, according to their regulatory content resulting from their wording, history of their origins, regulatory context and normalizing purpose, do not collide with the protective scope of art. 4 para. 1 *GG* and do not supplant it.

However, in several decisions the *Bundesverfassungsgericht* (Federal Constitutional Court) has gathered from the provisions of arts. 12a, 73 no. 1, arts. 87a and 115b GG a "basic decision under constitutional law for an effective military national defense", by virtue of which the "establishment" and "functional ability" of the Bundeswehr have "the status of constitutional law". This judicial decision has come up against considerable criticism both among individual judges in the *Bundesverfassungsgericht* (on this point cf. the dissenting opinion of judges Mahrenholz and Böckenförde on the ruling of April 24, 1985 – 2 *BvF* 2/83 and elsewhere – <*BVerfGE* 69, 1 [57 ff.]>) and in the specialist literature (cf. e.g. Kempen, *JZ* 1971, 452; R. Eckertz, *Die Kriegsdienstverweigerung aus Gewissensgründen als Grenzproblem des Rechts*, 1986, pp. 159 ff. with further notes).

Art. 4 para. 1 *GG* does not conflict with the applicability content of the named provisions of military constitutional law.

(a) Art. 12a *GG* makes available to the legislature the competence of obligating men over 18 years of age to serve in the armed forces, in the *Bundesgrenzschutz* (Federal Border Guard,

BGS) or in a civil defense unit (para. 1). Anyone who for reasons of conscience refuses military service under arms can be compelled to perform a “civil alternative service” (para. 2). In addition, the further provisions of art. 12a *GG* provide that in the case of defense citizens can be called upon to fulfill particular service duties by law or based on a law. The exercise of these powers under constitutional law that are granted by art. 12a *GG* to the legislature and administration is clearly not hampered or even prevented by soldiers making use of their fundamental right per art. 4 para. 1 *GG* with respect to a military order issued to them. This does not need to be explained in more detail.

b) Art. 73 no. 1 *GG* merely contains a legislative competence. The extent to which this may be made use of by the legislature within areas protected as fundamental rights results not from this competence norm but depends on the respective area protected as a fundamental right and on the respective statutory reservation provided (or indeed not provided) by the authors of the constitution. Just because the legislature is empowered by a provision of the constitution (e.g. art. 73 no. 1 *GG*) to take particular legislative action, “that which it does”, i.e. the legislatory “product” does not yet receive any constitutional status (as correctly e.g. R. Eckertz, *Die Kriegsdienstverweigerung aus Gewissensgründen* 1981, p. 36). The exclusive legislative competence of the Federal Republic over “foreign affairs and defense” (art. 73 no. 1 *GG*) in the case of a use by a soldier of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) *de jure* and *de facto* is neither restricted nor otherwise curtailed. For the legislative activity can only be carried out by the legislature itself.

c) The constitutional norms of arts. 115a ff. *GG* are also not restricted in respect of the legal consequences provided therein. The competences granted to the state organs named therein are neither suspended nor even only curtailed if a soldier with respect to a military order from his superior that is a severe burden on his conscience calls upon his fundamental right resulting from art. 4 para. 1 *GG* and desires an alternative action that he can perform with a clear conscience.

d) Just as little does a soldier’s calling upon the fundamental right to freedom of conscience per art. 4 para. 1 *GG* call into question the constitutional standardization in art. 87a para. 1 sentence 1 *GG* according to which the Federal Republic sets up “armed forces for defense”. For irrespective of whether this is merely an empowerment or an imperative constitutional

dictate, the regulatory content of this norm remains untouched even in the case of a use of the fundamental right resulting from art. 4 para. 1 *GG*.

Even if it can be assumed that the legislature, when amending the constitution by adding art. 87a para. 1 *GG*, has positively standardized the stationing of "armed forces for defense" as a decision under constitutional law, this does not however mean that consequently soldiers' fundamental rights, especially when they are granted without statutory reservation, always have to take second place to this decision under constitutional law concerning the deployment of "armed forces for defense" whenever the invocation of the fundamental right appears to be a "disturbance" for the *Bundeswehr* or a "burden" on routine in the eyes of the superior concerned. Further it should be noted that the authors of the constitution (the "German people by virtue of their constituent power"), "inspired by the will to serve world peace as an equal member in a united Europe" (preamble to the Basic Law (*Grundgesetz, GG)*), deliberately decided that the "inviolable and inalienable human rights", therefore also the fundamental right to freedom of conscience (art. 4 para. 1 *GG*), are to be the "basis" for any civilized, therefore any state-based "community, for peace and for justice in the world" (art. 1 para. 2 *GG*). By acknowledging in this way the human rights that are individually concretized in the Basic Law (*Grundgesetz, GG)* and making them the foundation, i.e. the precondition and basis for their work, the authors of the constitution understand these as existing in advance of their writing of the constitution (as e.g. Robbers, *loc. cit.*, art. 1 margin no. 72) or at any rate as a central point of orientation and yardstick for the constituted statehood. The concrete exercise of state tasks and powers by legislature, jurisdiction and executive power is to be orientated to the dictates and standards of fundamental rights, not the other way round. This also applies for the armed forces. The Basic Law (*Grundgesetz, GG)* thus standardizes the binding of the armed forces to the fundamental rights, but not a binding of the fundamental rights to the decisions and needs of the armed forces. It does not make the fundamental rights subject to any general or specific reservation in respect of the needs of the *Bundeswehr*.

In any case the armed forces – in contrast to the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) – are subject to an (ordinary) statutory reservation. This follows not only from art. 20 para. 3 *GG* but also from art. 87a para. 1 sentence 2 *GG*. Accordingly the numerical strength and the essential features of the organization of the *Bundeswehr* must result from the budgetary plan, hence from the *Haushaltsgesetz* (German Budgetary Act). According to the established legal practice of the *Bundesverfassungsgericht* (Federal

Constitutional Court), additionally “the provisions of the Basic Law relating to the armed forces ... – in the various stages of their shaping – are always aimed at not leaving the *Bundeswehr* as a power potential solely to the executive but of fitting it as a ‘parliamentary army’ into the democratic constitutional system of a constitutional state, i.e. ensuring parliament has a legally relevant influence on the structure and deployment of the armed forces” (ruling of July 12, 1994 – 2 *BvE* 3/92 and elsewhere – <*BVerfGE* 90, 286 [381 ff.]>). Unlike the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) which is guaranteed without statutory reservation, the armed forces must, constitutionally, respect a broad reservation of regulation by the ordinary legislature, to which they are subject. This constitutional decision may not be disregarded either in the determination of the differentiated protective scopes of the fundamental rights granted without reservation in art. 4 para. 1 *GG* on the one hand and the cited provisions of military law on the other, or – in a “collision” determined in the concrete individual case – in the context of creating “practical concordance”.

The terms “setting up” [*Einrichtung*] and “functional ability” [*Funktionsfähigkeit*] of the *Bundeswehr*, which, as shown, for its part is subject as a “parliamentary army” in several respects to an express statutory reservation, may therefore be interpreted and applied in particular only in observance and preservation of the regulatory content pertaining to fundamental rights, i.e. “in conformity with fundamental rights”. Even in the case of defense, the binding of the armed forces to the fundamental rights (art. 1 para. 3 *GG*) and to “justice and the law” (art. 20 para. 3 *GG*) is precisely not suspended. In this the “defense case” regulated in arts. 115a ff. of the Basic Law (*Grundgesetz, GG)* differs particularly from the “state of siege” provided in early constitutional eras, which could be declared in the case of “war” or “revolt” (cf. e.g. the Prussian *Gesetz über den Belagerungszustand* (State of Siege Act) of June 4, 1851 <*PrGS* 1851, 451>, which was applicable until 1918 as provisional Reich law). In the “state of siege” according to this law, the armed forces could be empowered to take over the executive functions of the civil authorities, to set up extraordinary courts-martial and to intervene in civil rights (on this point cf. e.g. H. Boldt, *Rechtsstaat und Ausnahmezustand*, 1967, pp. 195 ff.). In the “defense case” of the *Basic Law*, in contrast, as results from art. 115c para. 2 *GG*, only the fundamental rights expressly cited there (art. 14 para. 2 sentence 2, art. 104 para. 2 sentence 3 and para. 3 sentence 1 *GG*) and per art. 12a *GG* also art. 12 para. 1 *GG* may be restricted. By contrast – even in this exceptional case – the other fundamental rights may not be restricted and hence also not art. 1 *GG*, which protects

human dignity, and art. 4 para. 1 *GG*, which guarantees freedom of conscience. Even in the "defense case" the *Basic Law* provides no general or universal suspension or non-appliance or withdrawal of the fundamental rights. This means at the same time that if no "defense case" – declared in accordance with the constitution – exists, the restrictions of fundamental rights provided for such a case also do not take effect. This applies both to deployments of the *Bundeswehr* "for defense" (art. 87a para. 2 *GG*) and for uses on the basis of art. 24 para. 2 *GG* as part of and according to the rules of a "system of mutual collective security" and also otherwise in deployments expressly permitted in the *Basic Law* (art. 87a para. 2 in conjunction with art. 35 paras. 2 and 3, art. 87a para. 3 and 4 *GG*).

It would therefore – especially outside of a deployment case – be constitutionally wrong first to refer to requirements in terms of needs, effectiveness or functionality defined by the armed forces or by their respective political leadership and then to contrast these with the fundamental right of freedom of conscience and to "weigh them up" against each other. It is always part of guaranteeing the "functional ability of an effective national defense" according to the *Basic Law* to ensure that the protection imperatively prescribed by the constitution including of the fundamental right to freedom of conscience is not restricted. Not only the legislative and the executive have to observe this. The courts are also compelled to take this as their basis in the interpretation and application of the law (art. 1 para. 2 *GG*).

e) Admittedly the soldier's calling upon his fundamental right to freedom of conscience (art. 4 para. 1 *GG*) with respect to the two orders issued to him as a subordinate on April 7, 2003, are in a relationship of tension with art. 65a *GG*, which assigns the Federal Defense Minister the "power of command and authority" over the armed forces. Of course this does not mean that with this is also associated the power to restrict fundamental rights that are guaranteed without reservation by acts of the executive power. For not even the legislative is entitled to such a power (cf. art. 1 para. 3 *GG*). If in the concrete individual case with respect to an order that is issued by the holder of the "power of command and authority" (art. 65a *GG*) or on his behalf by a military superior, a soldier calls upon his fundamental right to freedom of conscience per art. 4 para. 1 *GG*, then the constitutionally guaranteed "power of command and authority" per art. 65a *GG* is not suspended or even only called into question. For here what matters is only that in their execution and exercise the precepts of the constitution that are standardized in the constitution and particularly in the fundamental rights, must be observed. This legal situation results for all parts of the executive power directly from art. 1

para. 3 *GG*, which belongs to the "principle(s) set down in articles 1 and 20" which also by way of an amendment to the constitution per art. 79 para. 3 *GG* are not amendable. Therefore it is an integral part of the constitution and hence also of the "power of command and authority" standardized in art. 65a *GG* that what is imperatively prescribed by the constitution must be observed both in the giving of orders and in the carrying out of orders. To this extent the "power of command and authority" of the Federal Defense Minister guaranteed by art. 65a *GG* – just as the power of command transferred by him to military superiors – is subject to a constitutional reservation of exercise. Namely, the strict binding to "justice and the law" (art. 20 para. 3 *GG*), to the "general rules of international law" (art. 25 *GG*) and to the fundamental rights (art. 1 para. 3 *GG*) which results from the constitution may not be pushed to one side and relaxed by "weighing up" the respective applicability contents and claims to applicability, even if this may seem politically or militarily expedient in the individual case in some circumstances. Real conflicts and detrimental effects resulting in the individual case are to be resolved or avoided according to the precept of "practical concordance". Here a balance that preserves both legal positions in their respective regulatory areas is to be aimed for. This task of separating conflicting interests from each other is in the first instance the responsibility of the legislature (cf. ruling of November 27, 1990 – 1 *BvR* 402/87 – <*BVerfGE* 83, 130 [142 ff.]>). Only in so far as no – constitutional – legal demarcations exist is there scope for absolutely necessary delimitations by the competent court applied to.

Here in the course of creating "practical concordance" solutions are to be sought that restrict the two conflicting subjects of protection as little as possible, i.e. allow both to be optimally effective (on this point cf. Konrad Hesse, *loc. cit.*). In the scope of application of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*) efforts must be made to alleviate and resolve the conflict of conscience that has occurred while defending justified interests of the *Bundeswehr* in a way that does not call into question but instead guarantees the standardized "inviolability" of freedom of conscience.

This requires constructive participation and collaboration on both sides.

It can be expected of the soldier in question that he should explain his moral dilemma to his relevant superior immediately if possible and not "at an inopportune moment" and insist upon a fair clarification of the underlying problems as soon as possible. This results not least from his duty, standardized in § 7 *SG*, "loyally to serve" the Federal Republic of Germany.

According to the established legal practice of the adjudicating *Senat*, this duty requires the soldier to contribute, during service as well as when not in service, to the functional ability of the *Bundeswehr* as a military unit and to refrain from weakening the *Bundeswehr* in its task area as specified by the constitution (cf. e.g. rulings of July 31, 1996 – *BVerwG* 2 WD 21.96 – <*BVerwGE* 103, 361 [368 ff.] = Buchholz 236.1 § 7 *SG* no. 9 = *NZWehrr* 1997, 117 = *NJW* 1997, 536 = *NVwZ* 1997, 395> and of January 28, 2004 – *BVerwG* 2 WD 13.03 – <*loc. cit.*> with further notes and additional individual documentation in Scherer/Alff, *loc. cit.*, § 7 margin no. 5).

On the other hand, his military superiors are required to face the decision of conscience asserted by the soldier. They may not – already in view of their obligation to ensure the soldier's welfare (§ 10 para. 3 *SG*) – negate or ridicule or even suppress this decision. In this respect, also in the present context the above mentioned secure and established legal practice of the adjudicating *Senat* should be remembered, which for cases in which moral dilemmas with respect to a military order are derived from or supported by, among others, norms of international law, has stated in its decisions of December 17, 1992, which are named above individually – *BVerwG* 2 WD 11.92 – <*loc. cit.*> and of January 27, 1993 – *BVerwG* 2 *WD* 23.92:

> "The *Bundeswehr* must face such questions, which come from a soldier's conscience, and should encourage such a person, who suffers under the ethical problems of his service, to articulate openly that which is inwardly weighing on his mind, if necessary also without protection (cf. Beestermöller, *Verantwortung wagen, Zweifel ertragen – Ethische Aspekte der Menschenführung in der Bundeswehr, Information für die Truppe*, vol. 5, 1992, 16). This possibility is offered by § 33 *SG*, according to which soldiers are to receive schooling in civic matters and international law and are to be taught their duties and rights in peacetime and in war under civic and international law."

It is necessary in such a case of conflict that the soldier should receive information that is as complete as possible concerning the facts relevant to the conflict, especially the actual impacts, which he fears, of the action he is ordered to perform and the consequences of not carrying out the order for the armed forces or other subjects of protection. Furthermore this also includes in particular informing all those involved as objectively as possible about the relevant legal situation. This information must – in conformity with fundamental rights – be oriented to how a constitutional court, if considering the question, would be likely to assess the matter.

If, despite this, the soldier concerned sticks to his position that his conscience forbids him from carrying out the order in question, and if this is understandable in the sense described, a balance must be aimed for that protects both sides.

In so far as the legislature has granted the soldier possibilities of legal protection, he may use these to protect his fundamental right to freedom of conscience. As part of their duty of care (§ 10 para. 3 *SG*), superiors for their part can be required to point out this way of bringing about a binding clarification of the questions that are raised. For it results from the duty of care that every superior is in principle under obligation to tell the subordinate about his obligations and rights and where necessary also to provide him with information (ruling of April 23, 1980 – *BVerwG* 1 *WB* 126.78 – <*BVerwGE* 73, 9; in so far as not published>; Scherer/Alff, *loc. cit.*, § 10 margin no. 29). In this process in accordance with the *Wehrbeschwerdeordnung* (Regulations for complaints by members of the armed forces, *WBO*) it can then if necessary be clarified in court per §§ 17 ff. *WBO* by the *Truppendienstgericht* ((Federal) Military Court (for disciplinary proceedings against soldiers or for complaints submitted by soldiers)) and – e.g. for legal issues of fundamental importance at the submission of the *Truppendienstgericht* (§ 18 para. 4 *WBO*) – by the competent *Wehrdienstsenat* (military service division) of the *Bundesverwaltungsgericht* (Federal Administrative Court), as to whether the order issued to the soldier is non-binding for the reasons described above or at any rate does not need to be followed owing to the protective effect of art. 4 para. 1 *GG*. Subsequently the soldier can if necessary appeal to the *Bundesverfassungsgericht* (Federal Constitutional Court) also by way of a constitutional complaint, against a decision that is negative for him.

A complaint filed on the grounds of the *Wehrbeschwerdeordnung* against a military order has no suspensory effect. The soldier is therefore acting in contravention of his duty to serve, even after having submitted a complaint, if he refuses obedience with respect to a military order, in so far as this order is not non-binding, i.e. provided that no grounds for non-bindingness intervene. In such a situation, if the soldier for reasons of conscience does not follow the issued order, invoking art. 4 para. 1 *GG*, until a final decision has been reached concerning his complaint, the subsequent authoritative decision concerning the bindingness or non-bindingness of the order might then under certain circumstances have to be taken only in the

course of judicial disciplinary proceedings, if – as in the present case – such proceedings are instituted.

If the soldier – for example through ignorance or as in this case owing to individual negative experiences he has had in doing so – refrains from taking the route of filing a complaint, it is true that this does not make a non-binding order into a binding one. However it does bear the considerable risk that judicial disciplinary proceedings,, and possibly also criminal proceedings, will be initiated against him owing to insubordination (§ 20 *WStG*). Moreover this makes it clear that for soldiers to assert a conflict of conscience and to invoke art. 4 para. 1 *GG* is generally anything but easy and consequently a "mass erosion" [*Massenverschleiß*] of conscience is not to be expected. In such cases of conflict, the individual soldier acting alone in any case regularly finds himself in danger of isolating himself from his comrades, of being branded an outsider, or of otherwise running the risk of rejection in his professional social relationships. In criminal proceedings instituted on account of disobedience, he is also threatened with being sentenced to a penalty for a criminal offence as well as, in addition, in judicial disciplinary proceedings, having a severe disciplinary measure imposed and in consequence having to accept considerable disadvantages for the rest of his professional career when it comes to promotions, postings and other promotional measures.

Until a binding clarification of the legal questions that are addressed by the competent court, the soldier's superiors are required to examine, in order to create "practical concordance" between guaranteeing fundamental rights and the military needs ("functional ability"), whether according to the respective factual position in the concrete individual case it is temporarily possible to refrain from carrying out the order and whether the soldier can be offered an alternative action that he can perform with a clear conscience (e.g. other duties, being ordered away, transfer or similar). Moreover this is already demanded by the duty of care enshrined in § 10 para. 3 *SG*. By virtue of the duty of care which is standardized therein, every superior is to treat subordinates in accordance with justice and the law. This provision additionally obligates superiors to exercise their powers with appropriate consideration of the personal interests of the subordinate. In all his actions the superior must be guided by goodwill towards the subordinate and always endeavor to protect the subordinate from disadvantages and harm (established legal practice, cf. e.g. rulings of July 6, 1976 – *BVerwG* 2 *WD* 11.76 – <*BVerwGE* 53, 178 [181]>, of February 13, 2003 – *BVerwG* 2 *WD* 33.02 – <Buchholz 235.01 § 38 *WDO* no. 1 = *NVwZ-RR* 2003, 574>, of January 27, 2004 – *BVerwG*

2 *WD* 2.04 – <Buchholz 236.1 § 10 *SG* no. 52 = *NZWehrr* 2005, 79> with further notes, of February 19, 2004 – *BVerwG* 2 *WD* 14.03 – <*BVerwGE* 120, 166 = Buchholz 235.01 § 38 *WDO* 2002 no. 16 = *NZWehrr* 2004, 209> and of March 16, 2004 – *BVerwG* 2 *WD* 3.04 – <*BVerwGE* 120, 193 = Buchholz 235.01 § 93 *WDO* 2002 no. 1 = *NZWehrr* 2004, 213>).

These legal requirements to create "practical concordance" between the soldier's entitlement to respect for his fundamental right to freedom of conscience (art. 4 para. 1 *GG*) and the organization of the concrete operational duties did not correspond to the way the relevant superior dealt with the soldier up until his removal on April 8, 2003 from his official duties in the S. that are in question here.
– is further explained –

Also in other respects, according to the observations of the *Senat*, in the period of time in question here following the start of the Iraq war and the public debates concerning the permissibility of the assistance promised by the federal government, no information was provided at any rate to the members of the IT division of the S. concerning the relevant soldierly, constitutional and international law issues. The soldier credibly explained this in the appeal hearing, without this being called into doubt by any other participant in the proceedings. The head of the IT division in the S., the witness M., on the real facts expressly confirmed the soldier's testimony and testified that also in the ensuing period no sufficiently large meeting room was available for such instruction.

Also the "*Punktationspapier*" which according to statements of the witness S. was sent to him, the witness, on request at short notice from the competent office of the Federal Defense Ministry and that served him as the basis for the talk with the soldier, contained no information or explanations of the issues relating to international law in the Iraq conflict. It merely outlines the "promises" of the federal government with respect to "the USA and Great Britain" in connection with the Iraq war. Over a total of one page it further states that the federal government with its "promises" has taken into account its "political obligations" in view of the decades-long "solidarity in action" of its partners; the question of whether a further UN Security Council resolution was required to legitimize "coercive military action" against Iraq was "deliberately left open" when resolution 1441 (2002) was passed; "given these facts" the federal government would continue to fulfill "its obligation of solidarity" with its partners in the spirit of the NATO Treaty and the "political obligations" deriving

therefrom. The "*Punktationspapier*" hence restricts itself to purely political argumentation. It refrains from explaining the outcome (and the decisive reasons therefor) of its examination of the legal preconditions of the war and of its assistance provided in connection therewith. Yet there was particular cause to do so in view of the grave concerns under international law as described above about the waging of and support for the war against Iraq and the debates conducted in public and in the specialist literature about this, at any rate in respect of the intended use of the "*Punktationspapier*" by legal advisers in cases of conflict in this connection. Most recently, Dreist has also pointed to the serious legal problems that arose as a result of the *Bundeswehr*'s acts of assistance that are at issue here in connection with the Iraq war, in his contribution, appearing in the journal "*Bundeswehrverwaltung*", entitled "*50 Jahre Bundeswehr – Rahmenbedingungen für Einsätze im Ausland im Spannungsfeld zwischen Politik und Recht – Teil II*" (vol. 3 March 2005, pp. 49 ff. [59]), and expressed the following view with reference to the relevant specialist literature:

> "Contrary to all public statements the situation of the Federal Republic during the IIIrd Gulf conflict should be viewed as extremely delicate: in particular owing to the active support of the deployment efforts of the USA and its allies and giving its permission to these to use military airstrips in Germany as landing bases for the deployment and for supplies and for carrying out battle missions, and owing to the failure to take returning allied soldiers into custody who actively took part in military action, it [the Federal Republic] from the point of view of international law can be seen as a party to the conflict which as a result of these acts has given up its neutral status in this conflict."

The sufficient clarification of these questions in the present case was also a dictate of the duty of care (§ 10 para. 3 *SG*), which is incumbent upon every military superior with respect to his subordinates and to which particular importance attaches in the military relationship of superordination and subordination in view of the associated consequences and risks. It exists alongside the employer's duty of care (§ 31 *SG*) and demands that subordinates be protected against disadvantages and harm (cf. the individual documentation in Scherer/Alff, *loc. cit.*, § 10 margin no. 21). The duty of care can also require that a soldier be informed of the possibility of, if necessary, consulting an attorney whom he trusts. The witness Padberg in his capacity as (at that time) *Disziplinarvorgesetzter* (superior) of the soldier indeed did this according to the findings of the appeal hearing. In the present case this was not sufficient in view of the complexity of the relevant issues relating to military personnel law, constitutional law and international law and the uncertainties concerning the concrete impacts of the SASPF IT project on the Iraq war which began in early 2003 and whose duration could not be

estimated, and the *Bundeswehr*'s acts of assistance in connection with it. It was not permissible either for the commanders of the *Bundeswehr* or the competent military superiors to evade the sufficient clarification of these questions particularly also for reasons of care towards the soldiers they were in charge of and to refrain from drawing the obviously necessary consequences from this.

In the present case, admittedly, the concrete resolution of conflict to relieve his conscience which the soldier demanded with reference to his fundamental right to freedom of conscience (art. 4 para. 1 *GG*), and which was also offered, was brought about by the competent authorities on April 7/8, 2003. This occurred through the other duties in the S. to which the soldier was assigned with his agreement from April 8, 2003 onwards, and then later through ordering and transferring the soldier to the *Sanitätsamt der Bundeswehr* (Federal Armed Forces Medical Office) in Munich. These personnel measures were – as the soldier expressly confirms – free of discrimination. In outcome they correspond to the constitutional requirements and in particular to the precept of creating "practical concordance". Not least, finally, this is also substantiated by the fact that according to the observations made by the *Senat* in the appeal hearing, they have in the meantime been felt to be proper by all concerned, even if at first the soldier owing to his specialist knowledge in the S. seemed hardly to be dispensable.

4.1.6 …
– is further explained –
4.2 The acts of the soldier recorded in accusation point 2 also did not constitute a violation of his duty to serve loyally (§ 7 *SG*).
– is further explained –

4.3 The soldier with his conduct as recorded in accusation point 2 also did not violate his duty as a superior of supervision resulting from § 10 para. 2 *SG*.
– is further explained –

4.4. Furthermore, the soldier did not violate his duty to carry out his own orders (§ 10 para. 5 sentence 2 *SG*), ...
– is further explained –

4.5 Finally the soldier with his behavior recorded in accusation point 2 also did not violate his duty to keep respect and trust while on active service per § 17 para. 2 sentence 1 *SG*.

– is further explained –

…

Summary

1. An indictment is only sufficiently definite if it lets it be known what breaches of duty the accused soldier is charged with. This requires that a concrete and comprehensible course of events relating to the soldier's actions must be described and set in relation to the accusation derived therefrom. The accusation made in the indictment must be clear in the exact link between the description of the alleged acts and the conclusions drawn therefrom by the military disciplinary attorney (*Wehrdisziplinaranwalt*).

2. The central obligation of every soldier in the *Bundeswehr*, as established in § 11 para. 1 sentences 1 and 2 Act Concerning the Legal Position of Soldiers (*Soldatengesetz, SG*) to carry out issued orders "conscientiously" (to the best of his abilities, completely, and immediately) does not demand unconditional obedience, rather it demands obedience while thinking for oneself and in particular giving consideration to the consequences of carrying out the order – especially in respect of the limits of applicable law and the ethical "boundaries" of one's own conscience.

3. Legal limits to obedience result from the German Basic Law (*Grundgesetz, GG)* and the Act Concerning the Legal Position of Soldiers (*Soldatengesetz, SG*), which can be summarized in seven sub-groups. A soldier at any rate does not need to carry out an order issued to him on the grounds that it cannot be expected of him if he can in this respect call upon the protection of the fundamental right to freedom of conscience (art. 4 para. 1 *GG*). The protective effects of art. 4 para. 1 *GG* are not supplanted by the fundamental right to recognition as a conscientious objector (art. 4 para. 3 *GG*).

4. A decision of conscience is any serious moral decision, i.e. oriented to the categories of "good" and "evil", which the individual in a particular situation experiences as binding in and of itself and as creating an imperative inner obligation, with the result that he could not act against it without a serious moral dilemma.

5. The soldier's call of conscience "as an inner voice" can only be deduced indirectly from corresponding indicators and signals that point to a decision of conscience and moral dilemma, and moreover primarily via the medium of language. What is required is the positive ascertainment of an outwardly expressed, rationally communicatable and, according to the context, intersubjectively comprehensible demonstration of the seriousness, depth and inalienability (in the sense of an absolute obligation) of the decision of conscience. Here the rational comprehensibility of the demonstration relates solely to the "whether", i.e. to the sufficient likelihood of the presence of the dictate of conscience and of its behavioral causality, but not to whether the decision of conscience itself can be assessed as "false", "wrong" or "right".

6. There were and are serious legal concerns about the war started on March 20, 2003 by the USA and the United Kingdom (UK) against Iraq in respect of the prohibition of the use of force under the UN Charter and other applicable international law. The governments of the USA and UK could not support their case for war either with empowering resolutions from the UN Security Council nor by the right to self-defense granted in art. 51 UN Charter.

7. Neither the NATO Treaty, the NATO Status of Forces Agreement (SOFA), the supplementary agreement to the NATO SOFA nor the Agreement concerning the presence of foreign armed forces in the Federal Republic of Germany (*Aufenthaltsvertrag*) provide an obligation on the part of the Federal Republic of Germany, contrary to the UN Charter and applicable international law, to support acts in contravention of international law by NATO partners.

8. If a soldier has made a decision of conscience that is protected by the fundamental right to freedom of conscience (art. 4 para. 1 *GG*), he is entitled not to be prevented by official powers from acting in accordance with the dictates of his conscience which are binding upon him and impose an imperative obligation upon him.

a) This entitlement is to be taken into account by providing him with an alternative action that he can perform with a clear conscience in order to resolve a conflict affecting him in his mental and moral existence as an autonomous personality between the dictates of a sovereign power and the dictates of his conscience.

b) If in the concrete individual case, alternative actions that can be performed with a clear conscience have to be offered to a soldier per art. 4 para. 1 *GG* owing to a highly personal decision of conscience taken by him, this does not mean the suspension of the general validity of the general duty of obedience for him and other soldiers which follows from § 11 paras. 1 and 2 *SG*.

c) Art. 4 para. 1 *GG* does not establish the right of a superior to demand particular behavior from subordinates by means of an order according to the standards of his own conscience.

9. The fundamental right to freedom of conscience (art. 4 para. 1 *GG*) is not subject to a statutory reservation. It is also not subject to a numerical reservation; its use is guaranteed to every subject of fundamental rights independently of whether, and if so to what extent, it is also made use of by others.

10. Also for soldiers, the fundamental right to freedom of conscience is not supplanted by the military constitutional law provisions of the Basic Law (*Grundgesetz, GG).*

a) A soldier's making use of the fundamental right does not restrict the competence of the Federal Republic to legislate in matters of "defense" (art. 73 no. 1 *GG*). Just because the legislature is empowered by a provision of the constitution such as art. 73 no. 1 *GG* to take particular legislative action, the "legislative product" does not as a result have constitutional status.

b) It does not follow from the constitutional decision standardized in art. 87a para. 1 *GG* to set up armed forces – which are subject to an additional statutory reservation – "for defense" that fundamental rights of soldiers always have to take second place if the invocation of the fundamental right appears to be a "disturbance" for the *Bundeswehr* or a "burden" on operational duties in the eyes of the superior concerned. It is always part of guaranteeing the "functional ability of an effective national defense" in accordance with the Basic Law (*Grundgesetz, GG)* to ensure that the protection imperatively prescribed by the constitution, including of the fundamental right to freedom of conscience, is not restricted.

c) The Federal Defense Minister's "power of command and authority" guaranteed in art. 65a *GG* and the command authority of military superiors derived therefrom are subject to a reservation of fundamental rights and hence reservation of exercise that are specially protected constitutionally by art. 1 para. 3 *GG*.

d) The difficulties and detrimental effects resulting for military operational routine when soldiers claim freedom of conscience are to be taken into account by creating "practical concordance".