

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 –)

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.