WHEN SOLDIERS SAY NO
Selective Conscientious Objection in the Modern Military

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Introduction
‘Sometime they’ll give a war and nobody will come’

Andrea Ellner, Paul Robinson, and David Whetham

In a lecture delivered in 1539, entitled *De Iure Belli (On the Law of War)*, Francisco de Vitoria commented that:

If the war seems patently unjust to the subject, he must not fight, even if he is ordered to do so by the prince. This is obvious, since one may not lawfully kill an innocent man on any authority, and in the case we are speaking of the enemy must be innocent. … So even soldiers, if they fight in bad faith, are not excused. … And from this flows the corollary that if their conscience tells subjects that the war is unjust, they must not go to war even if this conscience is wrong.

Vitoria’s view was that a soldier was not obliged to determine for himself whether a war was just or unjust; the soldier was quite entitled to leave that deliberation to his rulers. But if for some reason he happened to come to the conclusion that his rulers were wrong and the war was unjust, then he must refuse to fight. In this respect, he followed the advice of Thomas Aquinas that human beings must always follow their conscience, as long as the judgements of their conscience are well informed.

In our enlightened age, and nearly half a millennium after Vitoria’s careful considerations, there are almost no armies anywhere in the world that offer their soldiers this option. Most states do recognize that pacifists who object in principle to all wars have a right to refuse to fight in them. Even if in practice states often make life very difficult for those who try to exercise this right, conscientious objection of this absolute sort is relatively uncontroversial. By contrast, very few states are willing to allow people to refuse to fight if it is a particular conflict which they consider to be unjust. A soldier who tries to follow Vitoria’s advice...

is liable to be punished for disobeying orders, desertion, or some other crime relating to disobedience or duty. Although there are some notable exceptions, such as Germany, most states adhere to a position similar to that adopted by the US Supreme Court, which in a landmark case in 1971 (Gillette v. United States) ruled that ‘the exemption for those who oppose “participation in war in any form” applies to those who oppose participating in all war and not to those who object to participation in a particular war only.’

Conscientious objection to specific wars rather than to wars in general is often referred to as ‘selective conscientious objection’. Until recently, few people challenged the distinction between absolute and selective conscientious objection. However, in the past ten years, this has changed. Acts of selective conscientious objection in Israel during the intifada and in the United States and the United Kingdom during the war in Iraq have led some to reappraise the situation and argue that selective conscientious objection ought to be permitted. Whereas previously there had been little academic discussion of the topic, a critical mass of writing on the subject has recently emerged to bring it out of the darkness and into the forefront of ethical debate. This includes a special volume of the *Israel Law Review* in 2002, a number of articles in the *Journal of Military Ethics* and other academic journals, and several book chapters which either explicitly support selective conscientious objection or strongly imply support for it. Together these provide the basis for carrying out a deeper and more thorough review of the topic.

Several factors lie behind the new interest in selective conscientious objection; some of these are political, some social, and some philosophical. On the political side, the war in Iraq, in particular, undermined one of the key arguments against selective conscientious objection, namely that soldiers should accept that their political masters know best and have information at their disposal which they do not, so they should accept the decisions of the politicians. Those who reluctantly swallowed their doubts about Iraqi weapons of mass destruction and then found that the doubts were actually very well-founded and that the politicians had seemingly misinformed them are now less inclined to accept this argument again.

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On the social side, modern soldiers are more educated and better informed than their predecessors in generations past. The argument that they are in a state of ‘invincible ignorance’ and not in a position to make an informed decision seems less convincing given the ubiquitous nature of the contemporary media. At the same time, ethical education, which is taken seriously across all Western military training and educational institutions, focuses on building morally autonomous individuals, which seems incompatible with claims that the same soldiers must ignore their consciences regarding the justice of the wars in which they fight.

On the philosophical front, recent work by Jeff McMahan and David Rodin in particular has challenged some of the traditional philosophical foundations of the rejection of selective conscientious objection. The traditional position has been that the ethics of whether it is just to wage war at all (jus ad bellum) and the ethics of what one is permitted to do during war (jus in bello) are related but still are also distinct from each other. It follows from this that having a just cause does not afford greater license to conduct that war beyond the rules of in bello, and a soldier can (and must) fight justly even in an unjust war. The larger justice of the war is not therefore his or her concern since it has no relevance to the morality of his or her actions or what he or she is permitted to do. McMahan and Rodin, however, have put forward powerful arguments suggesting that the jus in bello and ad bellum may be far more interdependent than previously assumed, and that therefore it is logically impossible to fight justly in an unjust war. If the war itself is wrong, killing someone in order to prosecute that injustice cannot be made acceptable through some arcane and arbitrary notion that morality is judged by different rules when applied to war. If this is so – and this is far from universally accepted – then refusing to fight in an unjust war becomes a moral obligation.

Together, these factors mean that the time is ripe for a fresh and thorough evaluation of the topic of selective conscientious objection. This collection of essays will examine the subject from a number of different perspectives, both theoretical and practical, looking both at the arguments for and against selective conscientious objection and at how different nations have dealt with, and continue to deal with, soldiers who refuse to fight in wars which they consider unjust.

Before analysing these arguments in more detail, we need first to define selective conscientious objection more precisely. The key word is ‘conscientious’. Somebody who believes that a particular war is stupid, counter-productive, or ineffective policy does not qualify as a conscientious objector. He or she must believe that the war is morally wrong, and that participation in it would therefore be contrary to his or her conscience. The first does not necessarily imply the second: a soldier might consider a war unjust but still consider it his or her duty to participate due to other issues which are more important than the injustice of the war. He or she might, for instance, feel that the obligation not to abandon his...
or her comrades outweighs the requirement not to fight. Selective conscientious objection thus refers to a fairly narrow set of cases.

As Asa Kasher has pointed out, determining what defines conscience in this context is difficult, as a result of which he concludes that introducing selective conscientious objection would be ‘bound to involve conceptual tensions and inconsistencies’.11 Following similar logic, some opponents of selective conscientious objection claim that most of those who claim such status do not really object to the wars in question on grounds of conscience but on grounds of politics, i.e. their objections are at their core political rather than moral. Such writers therefore draw a distinction between those who carry out conscientious objection and those who carry out civil disobedience and state that people who make a claim to belong in the first category in reality often belong in the second.12

For some, the common conflation of political and conscientious objection and the difficulties of distinguishing between the two are major reasons to maintain the prohibition against selective conscientious objection. Certainly, these issues raise serious practical questions about how one can determine whether somebody really is a conscientious objector. On the other hand, supporters of selective conscientious objection might point out that conscientious objection tribunals in many countries have been successfully making assessments of people’s intent for decades, and the problem of determining whether somebody’s objections are truly ones of conscience should in theory be no more difficult for a selective objector than for an absolute one.13

The primary distinction here is one of intent: the political objector aims through his civil disobedience to change policy; the selective conscientious objector aims to protect his own conscience. The latter may, of course, also hope to change policy, and may therefore have two motives, but the second one is what defines his objection as conscientious.14 Issues of intent are not, however, the only ones. Also important are concerns about the consequences of permitting selective conscientious objection and about whether it is compatible with democratic values and more specifically with military ethics. The subject thus crosses the boundaries of deontological, consequentialist, and virtue ethics.

The case for selective conscientious objection rests in large part on Aquinas’s assertion, mentioned at the start of this chapter, that a person should always obey his or her conscience, even if there is a possibility of being wrong. A soldier who cannot in good conscience fight in a given war would be acting immorally if he

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or she nevertheless chose to fight, whether it be due to fear of punishment or any other reason. Aquinas did, however, add an important proviso, which was that conscience needs to be informed. If you act according to your conscience and turn out to be mistaken, this is forgivable if you were in a state of ‘invincible ignorance’, such as when you have made a genuine effort to make an informed judgement but facts were hidden from you which caused you to make a mistake. In this case, it is not your fault that you were ignorant of the truth. If, however, you acted without proper consideration even though you could have discovered the truth if you had tried, you would be in a state of ‘vincible ignorance’; your ignorance of the truth is your own fault. In this case, mistakes cannot be justified.

A crucial question in the debate about selective conscientious objection is whether soldiers exist in a state of invincible ignorance. According to some, they do not; soldiers are quite capable of judging the justice of wars correctly. They are often very well educated, and most of the relevant information is in the public domain. If they choose to fight in an unjust war, they will therefore be in the realm of vincible ignorance, as they could have discovered the truth if they had but tried.

According to others, however, most soldiers are simply not in a position to know all the relevant facts about a government’s decision to go to war and so are not able to reach an informed judgement on the justice or injustice of the war. While in some contexts, the position taken by one’s state might be clear enough, in others it might be horrendously complex and the ability to find out the truth about what is really going on may be compromised in many ways. In such circumstances, surely, they cannot be to blame for fighting in the war, only held accountable for their actions actually within the war if those actions violate the dictates of conscience directly, such as targeting non-combatants. If they have doubts about the justice of the actual war, they should exercise humility and accept that they should not follow the inner voice of their consciences but defer to those who are in a better position to judge. This might of course require a good deal of faith in one’s chain of command – soldiers must have a genuine belief that the right questions have been asked by the right people at the top of that chain and that only once those senior officers have been satisfied with the answers will orders be issued to everyone else in the chain of command. This is exactly how the Chief of the General Staff in the UK, General Sir Peter Wall, views it:

It is for the high command to ensure that intended operations satisfy *jus ad bellum* and to be prepared to reassure the members of the force that this is the case through the chain of command. To do otherwise would be a distraction of the highest order – potentially leading to chaos...

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In this view, the responsibility is very clearly on the senior military leadership alone to examine the justice of the war and to try, through giving advice to the ruler, to avert a conflict if it is deemed unjust (even if those arguments are ultimately ignored or overruled).\textsuperscript{17} Everyone else can rest assured that the appropriate questions have been asked. If such faith in their senior commanders is present, and it is indeed true that soldiers beneath this highest level of command are or can be invincibly ignorant, then they bear no responsibility for an unjust war in which they fight, only for their actual actions during a war. Thus \textit{ius ad bellum} and \textit{ius in bello} remain entirely distinct. For this reason, soldiers on both sides of the battle – just and unjust – can be justified in fighting and should be treated equally. From this follows the principle of the ‘moral equality of combatants’ – because of the lack of metaphysical certainty over who is objectively in the right or wrong, ‘it cannot matter who started it’\textsuperscript{18}

The subject of selective conscientious objection is thus closely bound up with debates about the validity of the \textit{ad bellum/in bello} divide and of the concept of the moral equality of combatants. If these ideas are valid, then a soldier need not worry about fighting in an unjust war as he or she bears no moral blame for it. The state, which does shoulder the responsibility, is then within its rights to oblige him or her to participate in the war.

However, as noted above, this traditional divide has come under real challenge from a number of angles. The moral equality of combatants in particular seems incompatible with modern ideas of human rights. The soldier fighting on the just side in a war has done nothing to justify another soldier’s taking away his right to life. As Vitoria said, he is ‘innocent’. If you are fighting on the unjust side there is no way that you can kill someone on the morally blameless side justly. It follows that \textit{ius in bello} is intimately connected to \textit{ius ad bellum} and that it is impossible to fight justly in an unjust war. If, therefore, you believe that the war is unjust, you should not participate in it.

Of course, this is all very well in theory, but the view runs into practical difficulties, since once one eliminates the divide between the two aspects of just war theory and eliminates also the traditional assumption of moral equality of combatants, one opens the door for everybody who considers himself or herself ‘just’ (in other words almost everybody) to consider that he or she is subject to different rules from his or her opponents, thereby undermining the laws which restrain behaviour in war. This could have seriously negative practical consequences. For this reason, Jeff McMahan concludes that even though the moral equality of combatants is not a morally valid concept, for legal reasons we need to preserve it.\textsuperscript{19}


\textsuperscript{18} Whetham, ‘The Just War Tradition’, p. 74.

This introduces an important distinction between morality and law. If the arguments against the ad bellum/in bello divide are correct, then from a moral point of view the soldier whose conscience tells him that the war is unjust should refuse to fight, but that does not necessarily mean that states should permit selective conscientious objection as a matter of law. In essence, the soldier must follow his conscience, but he or she should not complain about being punished for doing so. As John Rawls puts it:

No doubt it is possible to imagine a legal system in which conscientious belief that the law is unjust is accepted as a defence for noncompliance. … But as things are, such a scheme would presumably be unstable even in a state of near justice. We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.  

In a military context, Colonel John Mattox comments that ‘Army officers must recognize their responsibility … to refuse an order … [but] they must also possess the maturity to recognize, and the fortitude to accept, the personal consequences of refusal.’ Against this, however, Robinson observes that this view is ‘a little perverse … in that it is proposed to weed out the morally righteous by punishing them.’ David Enoch argues also that what he calls a ‘willingness to pay the price’ is in no way linked to the moral justification of refusal to fight, which is either right or wrong regardless of the willingness. The sharp distinction between the morality and the law of war is not one which everybody accepts.

McMahan’s conclusion regarding this distinction draws on consequentialist reasoning. This is true also of many of the arguments against selective conscientious objection. States are essential to human flourishing – we need them to provide law, order, and security. But they are under continual threat and need to defend themselves. They therefore require armies and have to be able to rely on these armies whenever they need to use them. States could not carry out their basic task of protecting themselves and their citizens if they were uncertain whether their troops would fight. Selective conscientious objection would introduce such uncertainty. The higher social good therefore requires that it be prohibited by law. Following on from this, in the eyes of some, selective conscientious objection

24 For example, see Henry Shue, ‘Do We Need a Morality of War?’, in Rodin and Shue (eds), Just and Unjust Warriors, pp. 106-11.
is incompatible with democratic values and could have a damaging impact on
democratic states. Democracies operate on the principle of majority rule: people
agree to submit to collective decisions. If you allow people to opt out of any such
decisions they do not like, you will undermine democracy. This is a particular
concern in Israel, where there are fears of left-wing objectors refusing to fight
against the Palestinians and right-wing objectors refusing orders to remove
settlers from Palestinian land. Given the alleged confusion between political and
conscientious objection, permitting the latter in such highly politically charged
circumstances could have grave consequences and make it very difficult for the
state to enact any policy effectively.\textsuperscript{25}

The fear (or hope) here is that expressed by American poet Carl Sandburg,
‘Sometime they’ll give a war and nobody will come’ in the title of this chapter.\textsuperscript{26}
For opponents of selective conscientious objection, this would seriously undermine
states’ ability to function. Supporters see it as perhaps a good thing: if sufficiently
large numbers of people objected to a given war to make it difficult to fight, then
that might be a very good sign that there was something wrong about the war,
which the state ought to heed.\textsuperscript{27}

Both opponents and supporters, however, face the same problem that confronts
anybody making a consequentialist argument, namely that they do not actually know
what the consequences of introducing selective conscientious objection would be.
One can draw on evidence from general conscientious objection, which would
suggest that the number of objectors is not sufficient to detract from states’ ability
to wage war, but since very few states have introduced selective conscientious
objection, and even fewer have applied it during war time, we lack the evidence to
draw firm conclusions. This is likely, therefore, to remain a highly disputed area.

Since agreement on consequentialist grounds is most unlikely, a more profitable
avenue of debate is provided perhaps by virtue ethics. The issues here revolve
around what behaviour is appropriate for soldiers given the specific role morality
of the military profession and the virtues which that morality demands. Official
lists of military virtues vary from country to country and also vary between
services within countries. Most common are variations of loyalty or comradeship,
courage, discipline or obedience, self-sacrifice, and integrity.\textsuperscript{28}

\textsuperscript{25} For a discussion of this issue, see: Barak Medina, ‘Political Disobedience in the
IDF: The Scope of the Legal Right of Soldiers to be Excused from Taking Part in Military
Activities in the Occupied Territories’, \textit{Israel Law Review}, 38/1 (2002), pp. 73-110,
especially pp. 91-4.

\textsuperscript{26} Sandburg, \textit{Complete Works of Carl Sandburg}, p. 464.

\textsuperscript{27} Robinson, ‘Integrity’, pp. 43-4; Malament, ‘Selective Conscientious Objection’,
p. 382; J.E. Capizzi, ‘Selective Conscientious Objection in the United States’, \textit{Journal of

\textsuperscript{28} Paul Robinson, ‘Introduction: Ethics Education in the Military’, in Paul Robinson,
Nigel de Lee, and Don Carrick (eds), \textit{Ethics Education in the Military} (Aldershot: Ashgate,
2008), pp. 5-7.
practical reasons for all of these. One does not, as a general rule, want soldiers who are endlessly questioning orders and putting their own interests and concerns before those of their comrades or the good of the mission. Selective conscientious objection runs deeply counter to many of these military virtues, which perhaps explains the visceral reaction that many military people have to the idea. On the surface it seems incompatible with the professional military ethic.

To take the example of comradeship, Asa Kasher comments that, ‘Comradeship is an essential value of military ethics. … Acts of civil disobedience that takes the form of refusal by reserve officers and NCOs to serve within the framework of their combat units cause damage to the necessary sense of military comradeship. Thereby they inflict damage on the democratic regime, which owes its citizenry an effective military force of self-defence.’29 The selective conscientious objector puts saving his own conscience above his responsibility to help his comrades. This is incompatible not only with the necessary virtue of comradeship but also with the virtue of self-sacrifice.

Similar arguments about the incompatibility of selective conscientious objection and the military professional ethic can be made with regard to other key virtues, most notably obedience and discipline. Obedience by soldiers to civil authority, and by junior soldiers to more senior ones, is arguably essential for the smooth running of any military force as well as for civil-military relations. The idea that soldiers can pick and choose which orders to obey based on their own consciences is anathema to the way that most people view the military.

Having said all that, it is perhaps unwise to view virtues as absolutes rather than as Aristotelian means. The key Aristotelian virtue of prudence or practical wisdom requires one to understand when a given virtue is appropriate and when it is not, and to what extent. Courage is a good thing, but not when it turns into recklessness. Obedience is virtuous, but not when it becomes submissiveness and obsequiousness. Loyalty is desirable, but not when it leads us to turn a blind eye to the faults of others. Among the military virtues listed above is integrity, which implies cohesion of belief and action. Arguably, a soldier cannot hold onto strong beliefs about the injustice of a war and yet submit to orders to fight in that war without destroying his integrity.30 According to this line of argument, the professional military ethic demands that soldiers refuse to obey unethical orders. Thus Richard Gabriel comments that, ‘Soldiers fail to live up to their oath to serve the nation if they do not speak out when they conclude that civilian authorities or military superiors are carrying out policies that they think are ethically wrong.’31 This is closely linked to questions of individual autonomy. As Gabriel notes, ‘It is a well-established principle of ethics that human beings cannot abandon their ethical autonomy and judgement to other human beings and thereby escape responsibility for their actions. So, too, soldiers as ethical beings and as members of an ethical

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29 Kasher, ‘Refusals’, p. 177.
30 See Robinson, ‘Integrity’, for a detailed argument to this effect.
profession cannot escape responsibility by acquiescing to unethical orders, even if the orders are legal and issued by a legitimate civilian or military authority.  

Contemporary military ethics education in many cases aims deliberately at producing soldiers who are capable of autonomous moral decision-making. This fits with the perception that the conditions of modern warfare, in the era of the ‘strategic corporal’, mean that soldiers are no longer automata who have to do little more than stand in line and fire when told to, but will find themselves in difficult situations in which they have to decide for themselves what to do. For supporters of selective conscientious objection, it seems inconsistent that military forces should attempt to make their members morally autonomous and then punish them for displaying that autonomy when they determine that the war in which they have been told to fight is morally wrong. Against this, though, opponents of selective conscientious objection might argue that the realm of soldiers’ moral autonomy is limited to the narrow tactical sphere in which they operate and does not, and should not, extend to higher areas of policy, such as the decision whether to wage war.

The contributions to this volume explore and develop all these themes, starting with the theory and then moving onto the practice. Part I explores the arguments for and against selective conscience objection. To begin with, Brian Imiola, himself a serving Lieutenant Colonel in the US Army and professor at West Point, argues that in order to attempt to answer the question of whether or not to fight, soldiers must employ moral diligence and not simply default to claiming invincible ignorance. While one might question the ability of every ‘common soldier’ to employ moral diligence, some are certainly capable. Because of this, one might divide soldiers into different groups based on whether they are ‘in the know’, ‘willingly ignorant’, or truly ‘can’t know’. Different degrees of moral culpability for participating in an unjust war might logically follow from this categorization.

In the next chapter, Emmanuel Goffi explores the very notion of military obedience itself. He notes that the understandable obligation to obey orders in the military is deeply ingrained and this, unsurprisingly, leads to an apparent fit with deontological or duty-based moral reasoning such as that of Kant. However, Goffi warns us that this relationship is actually very superficial – the type of duty that Kant articulated was neither about passively obeying orders nor about subordination to arbitrary rules. Blindly following orders (or what Goffi calls ‘low cost deontology’) leaves no room for nuance and leads to intellectual poverty, since it gives no margin to military personnel to interpret those rules in the most appropriate manner. Both low cost deontology and its corollary, ‘passive obedience’, are fertile ground for irresponsibility and are therefore antithetical to what Kant would have understood as duty, which is actually about individual rationality and the ability of human beings to think autonomously about their duties. As such, this

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understanding fits most comfortably with the Mission Command model used by both the British and US armed forces where subordinates are empowered to carry out their mission in the way that is most pertinent given the situation they are in, in accordance with the commander’s overall intent, rather than by simply obeying specific orders given out regardless of local factors or events unfolding subsequent to those orders, although, of course, even the Mission Command model does not empower (or even permit) those same subordinates to question the overall intent or, indeed, the *ad bellum* justifications for the military action in the first place. Goffi argues that there is no actual moral duty to blindly obey any orders and that deontology, narrowly understood, is not only inappropriate when it comes to military behaviour, but is actually profoundly dangerous if applied without consideration for the likely consequences of one’s actions.

In her chapter, Melissa Bergeron, explores selective conscientious objection starting with the military covenant between the state and its military. The implicit agreement is that the state (or its prince) is entitled to demand military service and in return, those who fight are absolved of responsibility for their actions – the responsibility for the war lies with the leader and not with those who simply act on behalf of the state. This is what underpins the assumption of the moral equality of combatants and also, Bergeron argues, forms the basis for many of the objections to embracing selective conscientious objection. To accept selective conscientious objection would be to damage the social contract and lead to an undermining of the democratic accountability for decisions to wage war. It is precisely the fact that those in military service who dissent to particular deployments are punished that gives their dissent moral value – something that would be lost should it just be one of the available options of normal service. While she finds the *status quo* to be morally obscene when one considers what is actually done by unjust combatants, she also argues that the assumption of the moral equality of combatants is, in practice, like having to accept that some guilty people will have to be allowed to go free to ensure that the many innocent do not suffer and are also permitted to remain free.

Michael Skerker proses a slightly different line of reasoning in an *Empirical Defence of Combatant Moral Equality* by challenging the recent trend towards the individualisation of moral reasoning and accountability within the military sphere. While the assassination of Caesar by a group of senators can be reduced to individual acts and individual as well as group culpability for those acts, the nature of contemporary military activity and the huge range of supporting tasks and roles required for someone to actually be involved in delivering lethal force is why all Western military institutions take on something akin to a corporate responsibility for all actions. As long as selective conscientious objection is not permitted and only legal orders are obeyed, this relieves individuals within those organisations from being ethically or morally culpable for participating in military activity. This formal equality of combatants becomes much more problematic if selective conscientious objection is allowed, but Skerker also presents a number of other practical reasons as to why it would be untenable if adopted as a policy by states.
In *Who Guards the Guards?* David Fisher provides a traditional-style defence of the importance of civilian masters maintaining objective control of the state’s military. This objective control requires and maintains the very clear and strict division of moral responsibility between the *jus ad bellum* level of war, where political decisions about whether to go to war are determined and justified, and the *jus in bello* level, where military actions are actually taken to pursue those political goals in a military environment.

Written from the point of view of a soldier with multiple tours of duty under his belt, Dan Zupan concludes this section of the book with a chapter that reflects the tensions and challenges for the individual soldier of trying to apply all of the potentially conflicting requirements of loyalty and integrity along with duties to various different concepts and institutions. Zupan accepts that a curtailment of certain individual liberties is permitted due to the nature of the service offered when joining an all-volunteer force. The chapter refers to real life cases in which any requirement to investigate the moral basis for a short notice deployment would be hopelessly impractical for those hurriedly loading equipment onto military transporters, arguing that it is precisely the practical difficulties in ascertaining epistemic certainty in many cases that requires us to keep the *ad bellum*/in *bello* distinction and the corresponding division of moral responsibility. However, Zupan also argues that not all situations are like this and that even while accepting the traditional divide in moral responsibility in practice he can see ‘no version of a social contract, agreed upon for the purpose of securing justice, that would bind me knowingly to participate in the mass murder that is unjust war’. A just society is therefore required to accept selective conscientious objection for those who are convinced that the war they are being ordered to participate in is unjust.

The case studies section of the book begins with an examination of the evolution of conscientious objection in Australian legal and political thought by Stephen and Nikki Coleman (with Richard Adams). Beginning with the 1903 Australian Defence Act, ground-breaking in its recognition of the right of a conscripted individual to be exempted from military service on the grounds of conscientious belief, it then looks at individual cases from the two World Wars, through periods of national service and the war in Vietnam, through to the 1991 Gulf War and beyond, charting how those cases were dealt with, and how the jurisprudence evolved as a result. The chapter concludes by referring to the difference in attitudes in law between those who are conscripted and those who volunteer, arguing that is morally objectionable that those who have volunteered to serve their country and to risk life and limb in the process, should be thought to have fewer rights than those who are compelled into the same service.

Stephen Deakin looks at the way that selective conscientious objection has historically been dealt with by the British military establishment and how a pragmatic approach has, at least until now, prevented it from becoming an overtly political issue. In cases where military law has not been broken in a blatant manner, the practical approach of simply discharging or moving those soldiers who raise objections of this type, means that those who are prepared to fight do not have to go
to war alongside those who are not. This position is seen institutionally, implicitly if not explicitly, as being preferable to damaging corporate morale and cohesion.

Yossi Nehushtan then turns attention to the Israeli experience. Nehushtan argues that the distinction between conscientious objection and selective conscientious objection as understood by the state is actually meaningless from a moral point of view because one cannot choose one’s deepest beliefs. Having explored the implications of this argument, the chapter then discusses some recent Israeli cases that demonstrate the ‘misguided approach’ of the Israeli Supreme Court when ruling on examples of political or selective conscientious objections.

Yves LeBouthillier’s chapter examines the subject of this volume from a slightly different perspective by exploring how the Federal Court of Canada and the Federal Court of Appeal have dealt with applications for refugee status from those who have entered Canada from abroad claiming refugee protection by asserting selective conscientious objection to military service in their home state. The chapter notes that through the evolution of jurisprudence in this area, the courts have given primacy to the concept of ‘state protection’ and have proven unwilling to grant refugee status to those who cannot prove that state protection is lacking in their home country. Only once this hurdle has been passed will the Canadian courts consider whether they face persecution at home. This means that it is very difficult for a claimant from a democratic state to receive refugee status, although it is theoretically possible for those from non-democratic states.

The context of total defeat and the fall of the Nazi regime following World War II led to the adoption of a new German constitution in 1949. This ‘Basic Law for the Federal Republic of Germany’, guaranteeing all Germans certain fundamental human rights, is the backdrop to Jürgen Rose’s chapter, which forms a bridge between the case studies section and the final section of the volume. German citizens have the right to freedom of faith and conscience as well as the right to refuse to perform military service. Unlike in many other states, this right does not become suspended just because someone joins the military and remains applicable to everyone, soldier or civilian, regular or reservist, conscript or volunteer. At the time of the introduction of this law, many feared that such an interpretation would forever neuter the ability of the German state to defend itself and its people. This chapter explores the practical implications of the German position and the implications for the relationship between the individual, the military and the state.

Building upon the preceding chapters, the final part of this volume looks at the practical advantages and disadvantages of implementing a policy of selective conscientious objection within the state and proposes some potential frameworks that might structure such responses. Carl Ficarotta proposes some guidelines for how a system of selective conscientious objection could be implemented if the principle itself were to be embraced by a state. He suggests that given the profound moral and psychological barriers that are present when one is considering disobeying a legal order, any system that would permit selective conscientious objection should, ideally, be designed to be as straightforward as possible, with a simple application procedure to avoid putting even more ‘roadblocks’ in the
way. However, while he demonstrates that the difficulties of introducing and administering such a straightforward process would not be insurmountable, he also accepts that a more complex and difficult-to-use approach would probably be more acceptable to any state for political reasons – i.e. being realistic, even if a state did embrace selective conscientious objection, it is likely to want to keep as many roadblocks as possible to ensure it is a very difficult thing for any individual to claim this right. Despite conceding this, Ficarotta concludes that such an imperfect system would still be preferable to having no system at all.

Andrea Ellner rounds off this section by examining the role of war resisters in the US and Britain and the implications that this has for traditional assumptions about civil military relations, the military covenant and the practicality of selective conscientious objection. The chapter explores the experience of dissenters to the recent conflicts in Iraq and Afghanistan, their motivations, their actions and the results of these actions. Ellner demonstrates the profound moral courage shown by many of these resisters as they seek to uphold their moral beliefs regarding conceptions of justice or respect for human life in the face of substantial cost, both in professional and personal terms. Using this evidence drawn from recent experience, she challenges the traditional epistemic assumptions about the division of moral labour into those who can be expected to know enough to make informed decisions at the top of the chain of command and those who cannot at the bottom. Acknowledging that no-one in the chain of command should be considered to be a mere moral automaton would be a good step in positively reinforcing ethical behaviour, functioning as a bottom-up corrective for systemic problems that can result in breaches of ethical standards. When combined with the setting of clear ethical standards of behaviour from above, this approach would support a military culture that is likely to reduce ethically problematic orders and behaviour.

The concluding chapter then draws together and engages with the wide range of arguments presented in the volume and looks at the costs and benefits, military and societal, for both retaining the status quo and the possible implementation of different forms of selective conscientious objection. Referring to their 2010 editorial for the Journal of Military Ethics, Deane-Peter Baker proposes applying the ‘Cook-Syse test’ when writing on military ethics. The purpose of such writing is not merely to produce ‘wonderfully logically developed, conceptually clear, rigorously argued – and in the end professionally irrelevant’ material, but instead to offer something that can also be of actual, ‘real-world guidance for policymakers, military commanders and leaders, or operational decision-making’. The editors of this volume hope that through exploring this subject with an eye on the practical rather than just the theoretical implications, we have managed to shed some much-needed light on this complex subject and in the process, satisfy the

35 Martin L. Cook and Henrik Syse, ‘What Should We Mean by ‘Military Ethics’?’, *Journal of Military Ethics*, 9/2 (2010), p. 120.
Cook-Syse test. The subject of selective conscientious objection is an issue of profound importance, both to the military and to the society that the military is supposed to serve. In an age of discretionary conflicts where the survival and even vital national interests of the state are rarely if ever at stake, the issue of when it is right and proper for individuals to take life on behalf of that political community is likely to become more problematic rather than less.
Chapter 11
Conscience in Lieu of Obedience: Cases of Selective Conscientious Objection in the German Bundeswehr

Jürgen Rose

Freedom of Conscience and the Right to Conscientious Objection in Germany

After World War II and the fall of the Third Reich, the new West German constitution, the so-called ‘Basic Law for the Federal Republic of Germany’, was adopted and proclaimed in May 1949. In it every citizen was guaranteed the fundamental human right to freedom of faith and conscience as well as the right to refuse to perform military service involving the use of arms against their conscience. The three paragraphs of the relevant Article 4 read as follows:

(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) No person shall be compelled against their conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

While paragraph 1 caused little discussion, paragraph 3 evoked fierce debates, because some, such as the later Federal President Theodor Heuss, suspected that, ‘if we put here simply conscience, we will enshrine in the constitution a “mass over-use of conscience” in the event of war’.¹

However, in the end he could not prevail against the stand taken by Social Democrats like Carlo Schmid, who replied that ‘[t]he citizen must be enabled to state for moral reasons: “I wish to serve my fatherland in its crisis in a manner other than by killing someone’”,² and Fritz Eberhard, who argued that

we have gone through a ‘mass slumber of conscience’. During that ‘mass slumber of conscience’ millions of Germans said: orders are orders, and killed in view of


² Ibid.
that. That paragraph can have great pedagogical effect, and we hope it will do… this is why I believe that, precisely in this situation after the war and after the totalitarian system, now that we want to break with this notion that orders are orders – when in fact we want to build democracy – that paragraph is apposite.³

One may wonder why the issue of conscientious objection was discussed as early as in January 1949, when nobody was talking about rearming Germany or even creating a new German Army. However, there were several driving factors behind the debate. Most urgent was certainly the fear that during the emerging Cold War the occupation powers – adamant that the Krauts should defend their own soil instead of shedding the blood of allied soldiers if the conflict turned into a hot war – would try to compel Germans to serve in some kind of military formations commanded by foreign generals of the Allied Forces. The second and very important factor was the proximity of the experience that military courts during the Third Reich⁴ had systematically sentenced unprecedented numbers of conscientious objectors to death and executed them according to the maxim: ‘He who fights may die, he who refuses to fight must die!’ Last but not least, the third consideration was that in the late 1940s conscientious objection was not yet internationally accepted as a fundamental human right. That is why the basic right to universal conscientious objection, but not to selective conscientious objection, was embodied in the new German Basic Law so early. As a result everybody, including soldiers no matter whether they are active, in reserve or retired, and regardless of whether they are conscripts or volunteers, may make use of that right at any time.⁵

While universal conscientious objectors, after many years of fierce controversy among supporters and opponents of the new German Bundeswehr, were increasingly accepted by the broad German public, this was not the case for those who additionally claimed a right to selective conscientious objection. It was only in 2005 that the Federal Administrative Court provided explicit clarification on this matter with its judgement in a lawsuit against a Major in the German Army who had refused to obey several orders during the war against Iraq on moral grounds.⁶ First of all, the judges explained unmistakably that Article 4 paragraph 1 of the German Basic Law unreservedly applies to soldiers, too. Secondly, they conceded that soldiers may experience severe moral conflict by obeying an order

⁴ On this point, see Manfred Messerschmidt, Die Wehrmachtjustiz 1933–1945 (Paderborn: Ferdinand Schöningh, 2005).
⁵ However, for a professional soldier such an endeavour would not be easy at all, because he is legally obliged to meticulously expose his more or less sudden change of conscience to a particular board of examiners that is in charge of granting his motion for conscientious objection.
⁶ The case of Major Florian Pfaff is described below.
that clashes with their conscience. Under such circumstances, in their opinion, one must not expect them to obey the order, and hence they are entitled to reject it on the basis of the individuals’ constitutional right to the inviolability of conscience. However, the subject of this lawsuit involved not only the right to refuse a single specific order, but also the question of selective conscientious objection. That is, because the Major had argued that obeying his orders would have involved him in a war of aggression which he considered completely and utterly impossible not only on personal moral grounds, but also because of the German Constitution and international law. Hence perhaps the most important feature of the case was that an active field officer resolved upon an act of selective conscientious objection and the Federal Administrative Court, subordinate only to the highest German court, the Federal Constitutional Court, accepted such a courageous stance for the first time in the history of post-war Germany.

Of inestimable significance within the context of the lawsuit described above was that the judges explicitly stressed the unconditional commitment of the armed forces to law and order: ‘The Basic Law imposes the commitment of the armed forces to basic rights, but does not restrict basic rights on decisions and requirements of the armed forces.’ That judgement implies not only that the military is committed to the Constitution, but also that all of its members are strictly obliged to follow the special military laws and regulations, for example the ‘Soldatengesetz’ (Law on Soldiers) and the ‘Wehrstrafgesetz’ (Law on Military Jurisdiction) of the Federal Republic of Germany. The relevant articles of paragraph 10 of the Law on Soldiers on the ‘duties of the superior’ state that:

(4) He is authorized to issue orders for official reasons only, and only when observing the rules of international law, national law and service regulations.

(5) He is responsible for the orders he has given. He has to enforce orders by reasonable means.

Paragraph 11 of the Law on Soldiers (§ 11 SG) is also relevant:

(1) The soldier has to follow his superior. He must observe their orders completely, precisely and immediately. Disobedience does not apply when he refuses to obey an order that violates human dignity or that was not issued for official reasons; the erroneous assumption that such an order is given releases him from his responsibility only if he was not able to avoid his error, and if he could not have been expected in the given circumstances to defend himself against the order by remedy.

(2) An order must not be observed if that implies a criminal offence. If the subordinate follows the order anyhow, he will become guilty only if he recognizes, or if it was obvious for him in the given circumstances, that obeying implied a criminal offence.\(^8\)

In summary, the evolution of the modern German armed forces after World War II, as well as the recent jurisdiction on military affairs, reveals the significance of two essential aspects of what might be called, in short, the German ‘military constitution’. These are the strong commitment of individual soldiers to their conscience as well as the strong commitment to law and order. These two elements also constitute the foundations of the revolutionary new concept of ‘Inner Leadership’ in the German Bundeswehr.

**The Philosophy of Innere Führung (Inner Leadership)**

Kant defines a state as a ‘union of men under law’. By extension such a state’s army must then be considered an assembly of free, republican citizens under arms for the purpose of protecting that very polity. It is on the basis of this logic that Wolf Graf von Baudissin, three-star General military philosopher, peace researcher and ‘father’ of Innere Führung, made the ‘citizen in uniform’ the centre of his concept or philosophy.\(^9\) That is because Innere Führung calls for situating such a ‘citizens’ army’ within the framework of a democratic, according to Kant, republican, state under the rule of law that is also embedded in an international peace order (Friedensordnung) as a subject of international law. The historical background and the starting point for military reform based on the concept of Innere Führung was the catastrophe of the Second World War during which the traditional German military, that is the Wehrmacht, had willingly served the National Socialist dictatorship in a war of aggression and genocide. It, or at least its senior leadership, was utterly delegitimized at the end of the War. Rebuilding the German armed

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\(^8\) Bundesministerium der Verteidigung Führungsstab der Streitkräfte InfoM (ed.): *Grundgesetz für die Bundesrepublik Deutschland. Werte und Normen für Soldaten* (Bonn, 2003), p. 112f. The Law on Military Jurisdiction constitutes the basis for prosecuting offenses against the legal norms mentioned before. The most relevant are: section 5 (acting under orders), section 19 (disobedience), section 20 (refusal to obey orders), section 21 (careless failure to follow an order), section 22 (bindingness of an order, error), section 32 (misuse of command authority for illegal objectives), section 33 (incitement to an illegal action), section 34 (unsuccessful incitement to an illegal action). See *Wehrstrafgesetza* WStG, March 30, 1957, BGBI I 1957, 298, revised by proclamation of May 24, 1974 I 1213, http://www.juris.de

forces and integrating them into the Atlantic Alliance was driven by a desire for
a complete break with the past – never again should the German military commit
crimes against international law. With this in mind, Innere Führung amounts to a
code of the armed forces of the Federal Republic of Germany; it embodies so to
speak the basic legal and ethical underpinnings of the Bundeswehr.

The answer General von Baudissin once gave to the fundamental question
of how to define Innere Führung was: ‘demilitarization of the military’s self-
conception.’ That precept refers to three dimensions of the military profession,
namely an organizational one, a societal one, and an international one. All three
of them ultimately merge in one focal point that can, positively put be defined
as civilizing the military. That goal of civilizing the military is achieved when
service in the armed forces is compatible with human rights, democracy and
peace, and when, as Graf von Baudissin once posed, ‘democracy does not end at
the barrack’s gate.’

Considering first of all the military, Innere Führung safeguards the fundamental
human and civil rights the constitution guarantees to all citizens, including when
they are doing their military duty in the Bundeswehr, because those rights are to
be defended in case of emergency (Ernstfall), if necessary by risking life and limb.
Considering the functional imperatives that apply within the military as a ‘total’
institution, this idea seems bold or even revolutionary. Innere Führung strives to
overcome the suppression of human individuality that prevails within a tightly
regulated system rooted in strictly enforced order and obedience. At the same time,
the role model of the citizen in uniform who is critically-minded, discriminating
and has the courage of his or her convictions, is intended to banish a spirit of
subservience once and for all from the military:

There can no longer be a relationship between subordinates and superiors, or
a concept of the military as a ‘tool of combat’ among citizens who are united
to perform their duty under arms, but here they are clearly partners in different
functions with equal dignity following equal responsibility.

Secondly, Innere Führung defines a fundamentally new relationship between the
military and society. Historically, the German military had been shaped by an
elitist, closed shop mentality, the so-called esprit de corps that prepared the ground
for the disastrous notion of a state within a state. The revolutionary essence of

Entwicklungsgeschichte von Truppeninformation’, in Information für die Truppe, 8 (1991),
p. 64.

11 Detlef Bald, Die Bundeswehr: Eine kritische Geschichte 1955 – 2005 (München:

12 Wolf Graf von Baudissin, ‘Redeangläubisch der Verleihung des Freiherr-vom-Stein-

General von Baudissin’s concept for military reform was first of all marked by the idea that the armed forces should be made fit for democracy and compatible with a pluralistic society by overcoming the traditional narrow-mindedness of military thinking. This was to prevent the self-isolation of the armed forces as well as their isolation from society, and to promote both their integration into the democratically structured state and their conformity with an open, pluralistic society.

Thirdly and finally, Graf von Baudissin’s rationale for the structure and organization of the new German army sought from the start to avoid any reduction to a solely national dimension. He was determined to set up the Bundeswehr within the framework of a European security architecture – that is, tied to an international perspective. Innere Führung is based on the fundamental assumption that in the nuclear age the soldier must first and foremost work towards the preservation of peace; no longer is the battlefield the place of proving him or herself, and ‘during peacetime the question of combat motivation is not under consideration.’ War can no longer be seen as a normal means of politics. Ultimately, what matters is the preservation of existence. Thinking in categories of war fighting capabilities is obsolete, what is essential is the military’s suitability for peace. Given the new scope of risks since the end of the Cold War, there is no getting around that insight. Striving for military victory over international terrorism and stemming the proliferation of weapons of mass destruction with strategies of preventive warfare is a deadly illusion. This is all the more true in view of the exceedingly controversial nature of recent wars in which the US and its allies have been engaged.

**Old Values – New Missions**

In times of the *Global War on Terror*, preventive warfare, crimes against international law, torture, and threats to fundamental human and civil rights, the frequently inhumane reality of the use of military force may create the suspicion that a soldier is just a kind of battle robot who follows orders without thinking. This perception is enhanced when even NATO allies, all Western democracies, seem to abuse their

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armed forces in missions whose legality under international law is disputed.\textsuperscript{18} Not least because of this, civil society has become aware of the problem of legitimacy of such wars under international and constitutional law. The number of cases of disobedience in many intervention and occupation forces reveals that even amongst military professionals, who are expected to execute the combat missions agreed on by the political leadership, sensitivity has grown regarding the implications of the legal constraints on the initiation and conduct of war, including the Rome Statute of the International Criminal Court and the implications this has for both for the legal and the moral dimensions of military service.

The fundamental question service members who operate within the area of tension between their duty to obey, loyalty to the law, and freedom of conscience must answer is: How may or shall or must I act as a soldier who is strictly subject to the primacy of politics, if my political leaders or military superiors urge me into a war that will inevitably bring death and injury to human beings, if this war is potentially or even clearly a war of aggression, which clearly constitutes a crime against international law?

The service member involved has no choice but to confront the problematic nature of that vitally important issue. Since the Nuremberg Tribunals, service members can no longer appeal to a superior political or military authority in order to avoid responsibility for obeying illegal orders. In accordance with Kant’s philosophy of law and morality,\textsuperscript{19} the reason for this is the recognition that the conscience of each person sets the standard for any human action. For the service member this means that superior orders alone are insufficient to legitimize any military action. By obeying an order soldiers voluntarily transform the extrinsic will of another person into their own intrinsic determination, and before actualizing their own intention through their action soldiers have to scrutinize its legitimacy in relation to their conscience.\textsuperscript{20}

Modern philosophy of law founded upon the traditions of the Enlightenment is reflected in the so-called Nuremberg Principles.\textsuperscript{21} On the one hand the latter

\textsuperscript{18} On this point in detail, see Jürgen Rose, \textit{Ernstfall Angriffskrieg. Frieden schaffen mit aller Gewalt?} (Hannover: Ossietzky, 2009).

\textsuperscript{19} Immanuel Kant, \textit{Grundlegung zur Metaphysik der Sitten} (Hamburg: Felix Meiner, 1965).

\textsuperscript{20} This implies that ultimately every soldier decides with which means and up to which point he would be prepared to fight. The functional imperatives of the military subsystem, at least in its current constitution, are incompatible with this moral imperative, which suggests, to paraphrase Hegel – this is so much the worse for the military.

impinged on various national bodies of military law. On the other hand they were affirmed at the level of international law, for instance by the Code of Conduct on Political and Military Aspects of Security, which states in paragraphs 30 and 31 that:

30. Each participating State will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that they are individually accountable under national and international law for their actions.

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

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

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

22 The relevant regulations of the German military law are discussed above. In the United Kingdom soldiers are obliged to refuse any illegal order. In Denmark and France soldiers must refuse all obviously illegal orders. In addition, they are authorized to refuse all other illegal orders. In Belgium, Luxembourg, the Netherlands, Poland, and Spain, soldiers must refuse to obey illegal orders. But while a soldier in the Netherlands may refuse to obey any illegal order, soldiers in Germany, Luxembourg, and Spain are only authorized to refuse to obey a limited range of illegal orders. These embrace primarily orders that hamper human dignity; on this point, see Georg Nolte and Heike Krieger, Europäische Wehrrechtsysteme (Göttingen: Nomos, 2002), and Jürgen Groß, Demokratische Streitkräfte (Baden-Baden: Nomos, 2005), pp. 93f.


Two years later former Chief of Staff of the German Armed Forces, four-star General Klaus Naumann, even posited a soldier’s obligation to insubordination in his official report to the General Inspection Committee, when he stated:

According to our conception of the rule of law and ethics, the commander’s claim to obedience is faced by both the right and the obligation to insubordination, where this rule of law and morality is no longer in accordance with the military mission. The soldier therefore would be positioned outside the free and democratic legal order.\(^\text{25}\)

Also, former US Secretary of Justice Ramsey Clark once said about the limits of the soldier’s duty to obey orders: ‘The greatest cowardice consists in obeying an order which requires a morally unjustifiable action.’\(^\text{26}\)

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

Those considerations, regularly invoked by the Bundeswehr, were on the one hand posed with regard to the classic mission of defence of both the nation and the Alliance, and on the other hand referred back directly to the tradition of the military resistance fighters who attempted to assassinate Hitler on 20 July 1944. In their original historical context they would have appeared merely theoretical and abstract. But if the exercise of command and the execution of orders is strictly bound by both domestic and international law, this could not a priori exclude soldiers from occasionally refusing to take part in military missions which were either obviously illegal, doubtful or controversial under international law. And indeed, after the end of the Cold War, this matter became unexpectedly explosive, especially since the Bundeswehr has claimed to be defending Germany in the Balkans or even the Hindu Kush. Several members of the German armed forces preferred to follow their conscience as well as their oath of duty instead of obeying the orders of their superiors which they considered to be irreconcilable with constitutional norms and international law.\(^\text{27}\) All those conscientious objectors were acting under severe personal risk – after all insubordination and

\(^{25}\) Klaus Naumann, *Generalinspekteursbrief 1* (Bonn 1994).


disobedience are criminal offenses under penalty of imprisonment under the German military penal code.\textsuperscript{28}

So as early as 1999, in the course of NATO’s air war against the Federal Republic of Yugoslavia, around a dozen German Air Force fighter pilots refused to board their ECR-TORNADO aircraft and fly the assigned SEAD [Suppression of Enemy Air Defences] missions.\textsuperscript{29} At the time this event attracted hardly any media coverage, presumably mainly because the government shied away from a trial which might be fought all the way up to the Federal Constitutional Court or the European Court of Justice and would have attracted considerable media coverage. However, subsequently the German armed forces’ leadership was to show far less caution in dealing with the insubordinate behaviour of soldiers, as some significant cases illustrate. They are particularly relevant for both their juridical assessment and the sanctions they entailed. They will be considered in greater detail below. The first case concerns that of Major Florian Pfaff, the second the author himself, and the third medical orderly Sergeant Christiane Ernst-Zettl. In addition, there are several confirmed cases of conscientious objection by active or retired soldiers including officers, some of them accepted and others not, in which the protesters explicitly refer to the missions of the Bundeswehr as justification for their decisions of conscience.

Major Florian Pfaff

As far as is known, Major Florian Pfaff\textsuperscript{30} was the only soldier among the entire German armed forces who refused to obey orders which, had he carried them out, would have led him to knowingly participate in what he considered a war of aggression launched by the US and Britain and which the well-known German law philosopher Reinhard Merkel had previously denounced as an ‘outrage against

\textsuperscript{28} This does not imply any value judgement about the empirically very manifold manners of conscientious objection that range from AWOL, permanent desertion, or situative refusal to obey orders, to conscientious objection for principled reasons. Referring to the typology of objectors: Anonymous, 
\textit{War Heroes of the Iraq War – War Resisters from within the Military} http://www.tomjoad.org/WarHeroes.htm and; UnitedforPeace.org (ed.), 


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

Immediately, disciplinary action was taken against the Major in April 2003, in the course of which he was demoted to the rank of captain with a court martial in February 2004. Both the prosecutor and Pfaff himself lodged an appeal to the Federal Administrative Court against this original judgment. Almost one and a half years later the Second Senate for military jurisdiction of the Federal Administrative Court rescinded the decision of the initial court martial, rejected the appeal of the prosecutor as ill-founded and – in a judgement described as spectacular – granted Major Pfaff a full discharge from one of the most serious charges that could be raised against a service member: insubordination and disobedience.

With their judgment the judges considerably enlarged the scope of discretion regarding that issue for each soldier, to cover even cases of uncertainty concerning the legitimacy of a military intervention. A German soldier who is confronted with a moral conflict and is able to explain it in a serious and credible manner need not obey orders if, by executing them, he or she would be involved in legally ‘grey area’ activities. With its decision the Federal Administrative Court de facto reassigned the burden of proof. It is no longer the soldier who has to prove that his or her refusal to follow orders was required by law, but the government that must explain to the ‘citizens in uniform’ sent into battle that their mission complies with both international and constitutional law. For the Bundeswehr, an army under

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32 Florian Pfaff quoted from Bundesverwaltungsgericht: loc. cit., p. 103.

33 Truppendienstgericht Nord, Urteil im gerichtlichen Disziplinarverfahren – N 1 VL VL 24/03 – vom 9. Februar 2004 (unpublished). Although the First Chamber took for granted that the attack on Iraq had been a war of aggression (!), the judges denied the soldier’s right to refuse his orders because they did not accept the soldier’s personal involvement as cogently proven. Therefore they found him guilty of breaches of article 7 (obligation to devote service), article 10 (duties as superior), article 11 (obligation to obey orders) and article 17 (obligation to preserve respect and trust) of the German Military Code.

34 Bundesverwaltungsgericht, loc. cit.

35 Bundesverwaltungsgericht, loc. cit. p. 72.

the rule of parliament, the implications of the Federal Administrative Court's judgement are of vital relevance. This is, because the primacy of politics applies only within the limits of law and statutes; beyond these the primacy of conscience rules. Otherwise why did the Federal Administrative Court state: 'In case of a conflict between conscience and legal obligation the freedom of conscience is "inviolable".'

Lieutenant Colonel Jürgen Rose

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

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

The above request above was preceded by an 'official statement' made one year previously which declared inter alia:

Whilst appreciating the primacy of politics and committed to my oath of duty, which is to devotedly serve the Federal Republic of Germany as well as to bravely

37 Bundesverwaltungsgericht, loc. cit. p. 106.
defend the right and freedom of the German people, I hereby declare that it goes
against my conscience to follow any orders which violate international or German
law. While doing so I refer to article 4, paragraph 1 of the German constitution as
well as to the decision of the Federal Administrative Court regarding freedom of
conscience given on June 21, 2005 (BVerwG 2 WD 12.04).\(^{40}\)

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

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

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

I hereby declare that it goes against my conscience to support the operation of
TORNADO weapon systems in Afghanistan in any way, because I cannot exclude
the possibility that by virtue of my own action I will contribute to a mission of the
German Armed Forces against which there are grave reservations with respect to
constitutional, international, criminal and international criminal law. Within that
context, the following deliberations must be stressed in particular: \(^{41}\)

- The operation of TORNADO weapon systems of the Bundeswehr in
  Afghanistan inevitably implies that Germany is taking part in military
  actions that are both illegal in terms of international law and not covered by
  the NATO treaty, for the reason that
- the results of reconnaissance sorties accomplished by Bundeswehr
  TORNADOs are submitted to the high command of the U.S. forces; at the
  same time despite the restrictions in the ISAF operations plan indicated in

\(^{40}\) Jürgen Rose, Dienstliche Erklärung vom 1. Mai 2006, documented in Jürgen
Rose, ‘Soldaten-Verweigerung gegen völkerrechts- oder grundgesetzwidrige Befehle’,

\(^{41}\) For details see Dietrich Murswiek, Organstreit Gauweiler/Wimmer – Antragsschrift
the resolution submitted, it is not ensured that the results of reconnaissance sorties will not be utilized for other purposes under Operation Enduring Freedom (OEF);

- the war of the USA under OEF is illegal in terms of international law in several respects, that is:
  - it both cannot be justified as self-defence and is not based on a UNSC mandate;
  - concerning its line of approach, especially with regard to the consequences for the civilian population, it exceeds even the authorization granted by the Karzai government;
  - it is incompatible with the rules for the protection of the civilian population stipulated by international law with regard to the so-called collateral damage which it accepts;
  - it violates fundamental principles of humanitarian law concerning the treatment of POWs.

- By resolving to deploy TORNADO weapon systems in Afghanistan, the Federal Government is contributing to warlike operations by virtue of its own actions which are accomplished while resting on a military strategy that is incompatible with the basic principles of the United Nations Charter as well as article 1 of the NATO treaty, and furthermore it entangles the German Armed Forces herein.

Concurrently, I hereby request to be explicitly released from all tasks that could put me at risk to become guilty in the sense exposed above: since my conscience instructs me that it cannot be morally justified under any circumstances at all to break the law – in the present case that is international as well as constitutional law – by virtue of my own action. Such action that is to say would be diametrically opposed to the 'Categorical Imperative' postulated by the philosopher Immanuel Kant, which reads: 'Act only on that maxim whereby thou canst at the same time will that it should become a universal law', or phrased similarly: 'Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation'. Accordingly, each action which is in compliance with the principles defined by that 'Categorical Imperative' is a priori morally right, while any action that goes against those principles is a priori morally wrong. It is evident and requires no further explanation that one cannot want that breach of law becomes a universal rule under the 'basic law of pure practical reason' – because such volition would be self-contradictory and hence annihilate itself. Not to take part in breach of law by virtue of one's own action hence constitutes an inevitable obligation of moral law, and that is exactly why I shall, as a matter of principle, not take part in actions or support those by virtue of my own action

44 Ibid.
that imply breach of (international and constitutional) law. In particular this applies to all measures linked with the decision to deploy TORNADO weapon systems in Afghanistan, because these obviously infringe the charter of the United Nations as well as the German Basic Law.

In addition, if I support the operation of TORNADO weapon systems in Afghanistan by virtue of my own action that give rise to grave reservations with respect to constitutional, international, criminal and international criminal law, I shall run the risk of breaking my oath of duty once sworn which urges me inter alia “bravely to defend the law … of the German people”, but definitely not to break and trample it. Beyond all question, international law as well as Basic Law are among the central legal norms of the German people.45

The refusal to contribute to the logistic support of the TORNADO mission in Afghanistan became the subject of TV coverage, was broadly reported by many radio stations, and could be read in nearly all German newspapers. Not least because of the unforeseen publicity and a constitutional complaint filed with the Federal Constitutional Court,46 the relevant military authorities promptly decided to move the objector to another division of his department, just as it was settled in the Federal Administration Court’s decision regarding the soldier’s freedom of conscience. Apart from this, higher commands, including the Ministry of Defence, took no further action on this issue.

Sergeant Major Christiane Ernst-Zettl

The case of the medical orderly Christiane Ernst-Zettl,47 unlike the cases depicted above, does not refer to the so-called ius ad bellum, but to the ius in bello or Humanitarian Law.48 Specialists of international law subsume the latter under the so-called ius cogens, that is, law that has to be followed at all times and anywhere.


48 That law is primarily codified by the four Geneva Conventions from 1949 and the two Additional Protocols from 1977.
The conflict was caused by assigning guard and security duties, that is, protection of military installations, to members of the German Army Medical Corps during the war in Afghanistan. This not only included the custody and defence of army medical service facilities, such as a combat support hospital, which is in full compliance with international humanitarian law, but also implied the comprehensive military protection of the multi-national armed forces’ bases in Afghanistan. For that purpose medical orderlies were even employed as machine-gunners, after having been ordered to take off their Red Cross armbands.

Sergeant Major Christiane Ernst-Zettl had been deployed to the surgical company of the medical detachment of the 7th contingent of the NATO International Security Assistance Force (ISAF). During that appointment the Bundeswehr medical orderly was ordered to perform armed service, contrary to international law, when as part of the military protection of Camp Warehouse, the multi-national ISAF garrison based in Kabul, she was requested to undertake personal checks on Afghan women employed by ISAF as local staff. When she informed her superior that she was a non-combatant under humanitarian international law and therefore could not be employed for security tasks, she received a disciplinary fine of EUR 800 and was ‘repatriated’, that is, ordered back to Germany as a punishment. The soldier’s complaint against this treatment was rejected by the responsible ‘Military Service Court South’ with absurd arguments. Although the complex position of the case under international law resulting from the four Geneva Agreements of 1949 and the two additional protocols of 1977 cannot be described in detail here, the core concern arising from it may be summarized as follows: the questionable nature of the procedure described is that it is likely to deter soldiers from facing up to the legal or moral implications of their actions.

Conclusions

The cases depicted above demonstrate that, if both military superiors and their subordinates are insistently urged to act in accordance with national and international law, it can no longer be ruled out *eo ipso* that those in uniform, whatever their rank, will occasionally refuse to take part in military activities when these are recognizably in breach of national and/or international law or at least are dubious and controversial in terms of national and/or international law. Such cases of selective conscientious objection, which were mainly based on the argument of illegal participation in a war of aggression prohibited under international law, have occurred not only in the Bundeswehr, but also in the armed forces of Germany’s allies.49 These incidents take different forms, ranging from being

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temporarily absent without official leave (AWOL) through permanent desertion or the rejection of individual orders to a complete rejection of war service on grounds of conscience.

Despite all of the differences between the cases of selective conscientious objection described above with regard to the motives of the protagonists and the subsequent reactions of the various military and judicial figures involved, they have one significant aspect in common. This relates to the specific self-perception of the military in modern industrial societies.\(^{50}\) There it is no longer the unreserved readiness to go to war which characterizes the attitude of the military leadership, but rather caution and reluctance. And there is another factor:

> Whether we like it or not: The military oath…has gradually lost its timeless and indissoluble effect as part of the general change of values. The oath now is no longer sworn to a general or an ideology, but to the nation and its Basic Law.\(^{51}\)

It is precisely these cases of selective conscientious objection, that is, disobedience to orders in the context of breaches of both *ius ad bellum* and *ius in bello*, that confirm this thesis. Therefore soldiers can no longer be regarded as mere artisans of war ‘with high-flying ideals and a blindfold in the national colours before their eyes’, as the prominent German pacifist journalist Kurt Tucholsky once wrote, but must be seen as constitutional patriots. In the Bundeswehr this latter type of soldier corresponds precisely with the model advocated above all by the General Baudissin after the Second World War, the ‘citizen in uniform’ who does not abandon ethical convictions and political ideas even while on military service. But this latter point is not limited exclusively to the military in Germany, because elsewhere too ‘…the individual soldier, a company, a regiment or even a larger formation have quite often taken to themselves the freedom to decide which orders should be obeyed, and which not.’\(^{52}\) In addition, as argued above, soldiers are even obliged to refuse to obey orders which are criminal and contrary to international law.\(^{53}\)

Today the crucial problem is the attitude and the motivation of troops and their identification with the mission.

If they trust their leaders and accept the ‘war aims’, then they will be ready for almost anything. But if their attitude differs radically from the view of their (military or political) leaders, this may lead to protests or at least to passivity.\(^{54}\)

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52 Ibid.


54 Däniker, *Wende Golfkrieg*, p. 204.
The 'refuseniks against wars of aggression', whatever their origin, illustrate strikingly that orders for dubious purposes are no longer being obeyed without question: 'When the legitimacy of the order is not entirely clear and the just cause is not obvious to everyone, the formerly feared instrument ... becomes a recalcitrant rabble'.\textsuperscript{55} This means that to an ever-increasing extent, troops can no longer be used for whatever political purpose is desired, and that they can no longer be assumed to willingly participate in military interventions. Admittedly, at the moment the political and military decision-makers have no real reason to fear 'mass disobedience' or even a 'rampant over-use' of conscience. In reality the number of those who refuse orders for reasons of conscience is tiny. Moreover, not in a single instance was the operational readiness or functioning of the armed forces impaired or even touched.

Nevertheless, in the eyes of the authorities the existence of a new type of soldier who is not prepared to obey like a robot, against his or her own conscience and idea of what is right, and is not intimidated by the serious punishments possible under military jurisdiction, must present a serious threat. But as the cases of selective conscientious objection demonstrate, a good deal of pressure is applied to those who refuse to obey orders on grounds of conscience. This starts with the criticism of forbidden political activity, which allegedly calls into question the primacy of the political decision-makers, and culminates in the accusation that it amounts to a challenge to democracy itself. It also allegedly undermines military morale and discipline. The prosecution regularly insinuates that the conscientious objectors only used their conscience as a pretext to hide political motives. And just as regularly, the judicial authorities involved, whether military or civil, refuse to take any account of the reasons put forward to justify disobedience – that is, illegal and immoral wars of aggression and serious breaches of the laws of war, as codified in humanitarian international law. However, the political and military leaders cannot avoid recognizing 'that not only the individual soldier, but even the toughest troop has a soul of his/her own, and a conscience which tells him/her what you can do and what you cannot'.\textsuperscript{56} Remarkably, it was a U.S. Army officer, First Lieutenant Ehren K. Watada,\textsuperscript{57} who demonstrated clearly that the modern soldier is sometimes very much aware of this, when he declared: 'To stop an illegal and unjust war, the soldiers can choose to stop fighting it ... If soldiers realised this war is contrary to what the Constitution extols – if they stood up and threw their weapons down – no President could ever initiate a war of choice again.'\textsuperscript{58}

\textsuperscript{55} Ibid.

\textsuperscript{56} Däniker, \textit{Wende Golfkrieg}, p. 205.

\textsuperscript{57} On this point, see in detail Rose, \textit{Ernstfall Angriffskrieg}, pp. 187-9, and Ladiges, \textit{Irakkonflikt}.

\textsuperscript{58} First Lieutenant Ehren K. Watada quoted from Jeremy Brecher and Brendan Smith, 'Will the Watada Mismatch Spark an End to the War?', \textit{The Nation}, 10 February (2007), http://www.commondreams.org/views07/0209-23.htm
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A decade of conflict not clearly aligned to vital national interests combined with recent acts of selective conscientious objection by members of the military have led some to reappraise the distinction between absolute and selective conscientious objection, and argue that selective conscientious objection ought to be legally recognised and permitted. Political, social and philosophical factors lie behind this new interest which together mean that the time is ripe for a fresh and thorough evaluation of the topic. This book brings together arguments for and against selective conscientious objection, as well as case studies examining how different countries deal with those who claim the status of selective conscientious objectors.

Contents: Foreword, Jeff McMahan; Introduction, Andrea Ellner, Paul Robinson and David Whetham; Part I Arguments For and Against Accepting Selective Conscientious Objection: The duty of diligence: knowledge, responsibility, and selective conscientious objection, Brian Imiola; There is no real moral obligation to obey orders: escaping from 'low cost deontology', Emmanuel R. Goffi; Selective conscientious objection: a violation of the social contract, Melissa Bergeron; Who guards the guards? The importance of civilian control of the military, David Fisher; An empirical defense of combat moral equality, Michael Sherker; Selective conscientious objection and the just society, Dan Zupan. Part II Case Studies in Selective Conscientious Objection: Selective conscientious objection in Australia, Stephen Coleman and Nikki Coleman (with Richard Adams); Conscientious objection to military service in Britain, Stephen Deakin; Selective conscientious objection: philosophical and conceptual doubts in light of Israeli case law, Yossi Nehushtan; Claims for refugee protection in Canada by selective objectors: an evolving jurisprudence, Yves Le Bouthillier; Conscience in lieu of obedience: cases of selective conscientious objection in the German Bundeswehr, Jurgen Rose. Part III Conclusions: Selective conscientious objection: some guidelines for implementation, J. Carl Ficarrotta; War resisters in the US and Britain – supporting the case for a right to selective conscientious objection, Andrea Ellner; The practice and philosophy of selective conscientious objection, Andrea Ellner, Paul Robinson and David Whetham; Bibliography;