

UNITED STATES MILITARY TRIBUNALS
SITTING IN THE PALACE OF JUSTICE, NURNBERG, GERMANY
AT A SESSION OF MILITARY TRIBUNAL III
HELD 21 JANUARY 1948

THE UNITED STATES OF AMERICA

- vs. -

ALFRIED KRUPP VON BOHLEN UND HALBACH,
et al.,

Defendants.

CASE NO. 10

Ruling of Tribunal III on matters relating to Contempt
of Court committed on January 16, 1948

For the past several days we have been dealing with a very serious question. We have now come to dispose of the last phase of it. As we heretofore pointed out, the question concerns not only this Tribunal but all other tribunals now sitting in Nurnberg. These Tribunals were established pursuant to an agreement between the United States of America and three other nations now occupying Germany under circumstances too well known to mention, and are engaged in the trial of defendants alleged to be guilty of serious charges including war crimes. The question essentially involves the ability of these Tribunals to function except at the whim and will of counsel for the defense; whether they shall abdicate their authority to control the proceedings and surrender it to counsel for the defense; or whether, to state it somewhat differently, counsel for the defense can stop or invalidate the proceedings of this or any other Tribunal by the simple expedient of walking out of the courtroom in a body without any notice whatever to the Tribunal, without advising it of the purpose for which the walkout occurs, without permission of the Tribunal, and in open defiance of its authority and power to function, leaving the defendants on trial with no counsel to represent them.

When the circumstances which prevail are considered, the gravity of this matter must be obvious to any thinking person who has the least concern for the authority of the Tribunals and of the nations that are undertaking to function in this country.

On Friday, January 16, 1948 a series of incidents occurred in connection with the sessions held on that day, which, in the considered opinion of the Tribunal, constituted contumacious conduct on the part of several of the counsel for defense in this case and it was accordingly so adjudged. Those whom the Tribunal found necessary to discipline were Dr. Wecker, Dr. Reitzenstein, Dr. Schilf, Dr. Gollnick, Dr. Geisseler and Dr. Pohle.

Upon this finding being made, the Marshal was directed to take said parties into custody and hold them pending further orders of the Tribunal.

On Monday, January 19, 1948 at 0930 AM they were, at the order of the Tribunal, produced in open session. A hearing was held consuming two full days; wherein every person concerned was accorded a full opportunity to be heard in person or by counsel, or both. The purpose of this hearing was to determine what further action, if any, was required in order to insure insofar as possible an orderly and lawful trial of this case.

Before announcing our findings, we deem it appropriate to recapitulate some of the events of January 16, insofar as they are pertinent here and refer to the authority by virtue of which we acted. In the morning session of that day the Tribunal announced that the commissioner theretofore appointed under the authority conferred by Military Ordinance 7, Article 5, would sit that afternoon to hear the cross-examination by defense counsel of two affiants whose affidavits had been introduced in evidence by the prosecution. Counsel for the defense objected to the commission sitting concurrently with a session of the Tribunal. After a full discussion participated in by counsel for the defense, this objection was overruled.

It should be noted just here that each of the twelve defendants is represented by two lawyers, a chief counsel and an assistant counsel. In addition there is a general assistant to all the chief counsel in the case. As was customary, a number of these defense lawyers were, for legitimate reasons, absent from the courtroom on Friday morning when the incidents presently to be narrated took place.

Thus, the procedural matter relating to the sitting of the commissioner has been definitely decided by the Tribunal and another matter was to be taken

up, namely the presentation of documents by counsel for the Prosecution. At or about this time, defense counsel, Dr. Schilf began to address the Tribunal. Upon inquiry by the Tribunal, Dr. Schilf stated that he rose for the purpose of further discussing the question of the commissioner, which, as said, had been fully discussed and finally ruled upon.

When this occurred the presiding judge announced that there would be no further discussion on that and directed the attorney for the prosecution to proceed with the document book. In fact, at that time, counsel for the prosecution was standing at the podium preparing to begin his presentation; but Dr. Schilf persisted in an attempt to address the Tribunal. The presiding judge again directed the Prosecutor to proceed with the document book.

Dr. Schilf did not even consider it necessary to wait until the presiding judge had finished his sentence, but in a defiant manner and cutting off the presiding judge and completely disregarding the ruling of the presiding judge to the effect that not Dr. Schilf but the Prosecutor had the floor; protested against the fact that he was not permitted to go on. The presiding judge again admonished Dr. Schilf that there would be no further discussion on the question of the commissioner's hearing. Again disregarding the ruling of the presiding judge, Dr. Schilf continued to talk and again protested against the ruling.

The behavior of Dr. Schilf made it impossible for counsel for the Prosecution, who was still standing at the podium, to proceed as he had been ordered by the Tribunal. The presiding judge warned Dr. Schilf to take his seat, otherwise he would order him removed from the courtroom. Dr. Schilf answered defiantly, "I request that that be done." In the German original this appears: "Ich bitte darum."

The presiding judge replied, "All right, you may remove yourself then.", and speaking to counsel for the prosecution, he added: "Proceed." Counsel for the Prosecution had hardly been able to say a few words when Dr. Schilf again interrupted him trying to speak and had again to be reminded by the presiding judge that he would have nothing more to say now. Even after having left the podium and having started to walk toward his seat, he neither took his seat nor did he move to the door; but started back to the podium and reached for the earphones. He was stopped by a gesture of the Marshal.

Dr. Schilf then left the courtroom. Immediately, all other defense lawyers who at that moment were present in the courtroom, and without any of them even asking the Tribunal for permission to leave, and without any of them making any statement to the Tribunal, demonstratively and in one group, marched out of the courtroom. This was about 11:45 a.m.

Being taken entirely by surprise and not appreciating at the moment the significance of this move or what it was intended to be, the Tribunal allowed the proceedings to continue, momentarily expecting the return of counsel to the courtroom. Considerably more than a reasonable time elapsed before it was decided that some action must be taken to preserve the integrity of the proceedings. Accordingly, at a recess, we ordered the Marshal to institute a search for the defense counsel and notify them to forthwith appear in the courtroom. This notice was duly served and after a delay of some 20 to 30 minutes, they put in their appearance; whereupon, the members of the Tribunal resumed the bench and took the action already referred to.

About two and one half trial hours exclusive of the luncheon period elapsed between the time defense counsel deserted the courtroom and their return following the action by the marshal. During all this time the Tribunal received no word from them or any of them. We did not know why they left the trial, where they were, what they were doing or whether they or any of them intended to return to their duties ever.

The walk-out of the defense counsel made it impossible for the trial to proceed orderly and validly according to the normal course of procedure. What little was done during their absence must be done over again unless some way can be found to remedy the defect in the proceedings. Moreover because of the disciplinary steps made necessary by this contumacious conduct, the Tribunal was unable to proceed further with the trial on that day and has not been able to proceed since.

As can be readily seen, all three members of this Tribunal necessarily had immediate, direct, and personal cognizance of all of the determinative acts, namely the defiant behavior of Dr. Schilf, the walk-out demonstration, and the subsequent abstention from the trial by all of the counsel for the defense, which was ended through the action of the Tribunal in notifying its

Marshal to direct the counsel to put in their appearance forthwith.

Just here distinction must be noticed between contumacy under the very eyes of a court or tribunal, and contumacious acts committed out of the presence of a court or tribunal. Only the latter require that a formal hearing be conducted in order to take disciplinary action. As to the former, that is contumacious conduct in the presence and under the very eyes of a court, this can be summarily dealt with on the strength of the immediate, direct, and personal knowledge of the court or tribunal.

From what has been said it is clear that the whole series of incidents revolved around the procedural question as to whether the cross-examination of the two witnesses was to be heard Friday afternoon before a commissioner. It was evident, indeed it was not denied, that the conduct of Dr. Schilf in this connection created a state of confusion in the courtroom which was wholly incompatible with the orderly conduct of the trial. His attitude as reflected, not only by what he said and did, but by his tone of voice and manner and demeanor, had every appearance of being defiant, and his anger, or excitement if such it was, as he afterwards claimed it to have been, was apparent, not only to the Tribunal, but to everyone present in the courtroom.

The defense lawyers who, without asking permission or making any statement of their intention or attempting to do so, provocatively marched out of the courtroom also directly challenged the very authority and ability of the Tribunal to function. By such conduct they served notice upon the Tribunal that they considered it within their power to sabotage and paralyze the conduct of the trial if and when they felt misgivings about a particular ruling, and moreover that they reserved to themselves the right to determine when a particular ruling justifies a walk-out. By such conduct the counsel not only violated their duty to the Tribunal, but they violated their duty to the defendants in leaving them without the benefit of counsel while the prosecution was proceeding with the presentation of evidence against them.

It should be pointed out just here that the counsel for the defense in this case occupy a somewhat unique status. They appear only by the express approval of the Tribunal under the regulations enacted by the Military Govern-

ment of the United States of America for Germany; and moreover their compensation and expenses are not paid by their clients, but out of the public funds of this community.

Those of defense counsel who were not present in the courtroom when the walk-out occurred, but who later joined them and by common agreement remained away from the courtroom, knowing that no defense counsel were present in the courtroom, likewise violated their duty to the Tribunal and to the defendants.

Considered from any angle, the action of all counsel who participated can be regarded as nothing less than a strike against the authority of the Tribunal to function in this trial upon its own motion.

It should be noted that it was afterwards claimed that counsels' delay in returning to the courtroom was due to the fact that they were preparing a statement explaining the walk-out. They themselves introduced this statement in evidence upon the hearing held on Monday and Tuesday. It consists of slightly more than two typewritten pages. It points out the alleged reasons for the walkout, which, reading from the English translation, are as follows:

"The defense counsel saw themselves forced to take this step for the following reasons: The Presiding Judge had denied a defense counsellor the right to make a regular motion and to justify it, a motion which the Tribunal had not yet ruled upon. The motion which Dr. Schilf intended to make had nothing to do with the ruling previously made by the Court regarding the employment of the Commission. In addition to this, the defense counsel as a whole feel offended that Dr. Schilf was not permitted to go on and was denied the possibility to make this motion."

As to the first of these alleged reasons, we have already stated the material and determinative facts precisely as they appeared to the Tribunal at the time; which is also precisely as they now appear from the official record of the proceedings prepared by the official court reporters. As against the contention of defense counsel afterwards made, they speak for themselves.

In the statement prepared by counsel there was no intimation of regret for the disrespect shown the Tribunal and no explanation as to why no notice was given the Tribunal of the whereabouts and intentions of counsel follow-

ing their departure from the courtroom.

From what has been said, it is apparent that the circumstances narrated, singly and together, propose a grave question as to who is to conduct this trial, whether the members of the Tribunal or counsel for the defense. To this question there can be but one answer.

We come now to a discussion of the authority by virtue of which the Tribunal acted in taking disciplinary measures against those named.

Article 18 of the Charter of the International Military Tribunal, annexed to the Four Power Agreement made in London on August 8, 1945 provides:

"The Tribunal shall deal summarily with any contumacy, imposing appropriate punishment including exclusion of any defendant or his counsel from some or all further proceedings, and without prejudice to the determination of the charges."

The London Agreement and the annexed London Charter have been adhered to after they were signed by the four major powers and by nineteen other nations. They have been formally upheld by the United Nations, which represents fifty odd different countries.

The principles laid down in the London Charter, including the one just quoted, represent therefore, the most authoritative expression of international law as pertaining to the trials of this character.

Control Council Law No. 10, which was duly enacted by the representatives of the four occupying powers, including the United States of America, makes the London Agreement and Charter an integral part of this law.

Ordinance 7 of the Office of the Military Government for Germany of the United States of America, which has laid down binding rules for the procedure in these trials, literally repeats in its Article 6-A the provision contained in Article 18-C of the London Charter.

All these provisions are well known to the defense lawyers active here. Certainly, when confronted with a situation tantamount to surrendering its authority to counsel, the Tribunal therefore has the full power to take appropriate action to meet the challenge.

The authority of the Military Tribunals sitting here in Nurnberg to punish for contempt has been exercised in at least two other instances. These precedents were: first, the punishment of a witness in the so-called Medical Case. There the act had been committed in open court and the witness was punished by

imprisonment in a summary proceeding. The other precedent, in the so-called Justice Case, involved the commission of grave irregularities by defense counsel and an assistant of his outside the presence of the Tribunal. The lawyer was sentenced to 30 days imprisonment and disqualified to act as defense counsel in the trials being held here.

As already said, the aforementioned defense lawyers were produced Monday morning before the Tribunal. The Tribunal considered it essential to ascertain whether they persisted in their contempt, that is , continued in their contumacious attitude. After two full days of hearing in open court, the Tribunal finds as follows:

Dr. Wecker, Dr. Reitzenstein, Dr. Schilf, Dr. Gollnick, and Dr. Pohle have made declarations to the Tribunal in which they express that they realize that their behavior on January 16 was wrong and disrespectful to the Tribunal.

Dr. Bellas occupies a special position. He participated in the walk-out but left the courthouse before the Marshal notified counsel to put in their appearance. He was, therefore, not present on Friday afternoon when the disciplinary measures against the others were taken. On Monday, with commendable frankness, he voluntarily informed the Tribunal of the facts. He also has conceded his error and made suitable declarations to the Tribunal with respect thereto.

The case of Dr. Geisseler is different. Dr. Geisseler is an assistant to defense counselor, Dr. Kranzbuehler. On the day in question Dr. Kranzbuehler was absent from the courthouse and not involved in the events above narrated. He had authorized Dr. Geisseler to act in his stead as counsel for the defendant, Krupp during his absence. Dr. Geisseler was one of the defense counsel who participated in the exodus from the courtroom and in the protracted absence afterwards. Therefore, it only remains to be decided whether his present attitude is such that he can be allowed to continue in this case. This must be denied for the following reasons:

Dr. Geisseler still insists that he can see nothing wrong in the behavior he showed on January 16. He still feels strongly that his honor was injured by the way the Tribunal dealt with the disorderly conduct of his co-defense

lawyer, Dr. Schilf. He would only admit that the failure to inform the Tribunal before 3:50 p.m. of January 16th of the reasons for the absence of the defense lawyers was not quite in order, but this he considers a mere fault of form, which he regards as very insignificant. His concept of honor, upon which he does put much emphasis, is a wrong one, and, in its ulterior implications, a dangerous one for any orderly, democratic society; for his concept of honor requires him, in emergency cases, as he says, to disregard the generally accepted rules of conduct and to proceed on rules which he, himself makes as final arbiter. This time, because he considers that an emergency existed, he maintains that he was right in pursuing a course of conduct calculated to paralyze the Tribunal in the due performance of its functions.

It is to be noted that he not only claims the right to decide himself as to how far he may deviate from the generally accepted rules in an emergency, but also to rely entirely on his own discretion as to when an emergency exists. The Tribunal feels that the continued participation of a lawyer, who is animated by such views, would be potentially harmful to the fair continuation of this trial. The Tribunal therefore, disqualifies Dr. Geisseler as a co-defense lawyer or a defense lawyer for any of the defendants in this case and excludes him from all further proceedings in this case, but without prejudice to the determination of any of the charges against the defendants, as provided and authorized by Article 6 of Ordinance 7 of the Military Government of the United States of America for Germany. The Tribunal also directs Dr. Geisseler to hand over, forthwith, to defense counsel Dr. Kranzbuehler, or to any other lawyer representing the defendant Krupp in this case, all and any files, papers, documents, pieces of evidence, etc., relating to the defendant, Krupp.

It may be noted that one of Dr. Geisseler's principal grievances is that he was not heard before being ordered into custody on January 16. Since his contumacious conduct occurred under the eyes of the Tribunal and the Tribunal knows that it was wholly without justification, there was no need for any hearing. However, while it is not a determinative factor, it is interesting to note that upon the very full and extended hearing accorded him on the 20th of January by this Tribunal he himself demonstrated how useless any hear-

ing would have been on the preceding Friday. Upon that occasion, the only reasons he put forth demonstrated that he reserved to himself the right to determine whether a strike by defense counsel against the authority of the Tribunal was proper in a given instance and that he considered the walkout in which he participated as having been fully justified.

There remain to be dealt with those members of defense counsel who were not, for legitimate reasons, present in Court when the walkout occurred but who, willfully, knowingly, and pursuant to a common plan, absented themselves from the proceedings, knowing that no defense counsel were present at the trial, and continued to so absent them selves until ordered to appear. The Tribunal finds that they were fully advised as to all the facts and circumstances connected with the walkout and by common agreement with those who participated therein, and without excuse or justification, refused to return to the Courtroom when the situation there demanded their presence or the presence of some defense counsel. We hold that this was a violation by those lawyers of their duty to the Tribunal and to their respective clients, but we think this contumacy was of a lesser degree than that of those who participated in the walkout and that of Dr. Schilf, who created the turmoil in the first place. This for the reason that had the exodus not taken place, those defense counsel would not have absented them selves in the manner they did. The Tribunal therefore, is satisfied to reprimand these members of the counsel for the defense for their conduct and to admonish them against a repetition of the violation of their professional duties.

It is well enough to say in reaching its conclusion that the Tribunal has not been unmindful of the fact that, for obvious reasons, the defendants have had a high stake in the outcome of this proceeding.

Now, the Tribunal herewith considers these unfortunate events as closed. It reiterates that it considers them as being fundamental and of the utmost gravity. The Tribunal hopes and expects that the trial will proceed in an orderly fashion in that all of the orders and rulings made by it will be respected by counsel on both sides of this case.

Finally, we think it proper to note for the record that this contempt proceeding has not been a criminal proceeding but that the measures taken

were solely of a disciplinary nature.

Presiding Judge

Judge

Judge