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Mr. Thayer

Room 286

Adm File

Flick Case

M I L I T A R Y   T R I B U N A L   N O.   IV

CASE NO. 5

THE UNITED STATES OF AMERICA

-against-

FRIEDRICH FLICK et al

Answer and Memorandum in Opposition to Defendants' Motions to Dismiss Nos. II and III and Motion for Finding of Not Guilty No. V

For the reasons hereinafter set forth, the Prosecution respectfully opposes the Motions to Dismiss Nos. II and III and Motion For Finding of Not Guilty No. V heretofore filed by each of the defendants in the above entitled action.

A. Motion to Dismiss No. II

In their Motion to Dismiss No. II, the defendants contend, firstly, that the acts alleged in the indictment fail to constitute an offense against the laws of war and the laws of the United States of America. In Section C of the Answer and Memorandum in Opposition to Defendants' Motion to Dismiss No. IV and Motion to Strike No. I, the Prosecution has demonstrated that this Tribunal has jurisdiction over the offenses for which defendants were indicted. It was there pointed out that Military Tribunal IV is not a military commission and its jurisdiction is not limited to violations of the laws of war. Military Tribunal IV is not required to apply the law of the United States in the trial of these defendants, nor even the law of nations as heretofore recognized by the courts of the United States. As an international court and a court of occupied Germany, it is required to apply Control Council Law No. 10, a law promulgated by the quadripartite governing body for occupied Germany. The crimes specified in Control Council Law No. 10 have their basis in international conventions, and particularly in the Charter annexed to the London Agreement of 8 August 1945, as interpreted and applied by the International Military Tribunal. Military Tribunal IV was created for the purpose of bringing to trial persons indicted for these crimes. The indictment under which these defendants were tried describes in five counts offenses which fall precisely within the definition of the crimes declared indictable under Article II of Control Council Law No. 10.

The defendants assert as a second ground for their Motion to Dismiss No. II that they have been denied full opportunity to present evidence before this Tribunal to establish that the acts alleged in the indictment did not constitute an offense against the laws, usages and customs of war as recognized and established by international law, and that many of the acts so alleged do not constitute an offense under international law. It has already been pointed out that the jurisdiction of this Tribunal is not limited to offenses against the laws, usages and customs of war, as asserted by the defendants. To the extent that the defendants in their motion state that they "have been denied full opportunity to present evidence" to show the alleged acts did not constitute such offenses, the motion is too indefinite to permit of an answer. Not one single fact is averred to support their conclusion. It may be observed, moreover, that the question of whether the acts alleged in the indictment constitute an offense within the jurisdiction of this Tribunal is a question of law, not of fact. This requires no production of evidence on the part of the defendants, but is a question of law to be determined by the Tribunal after such argument as the defendants care to make.

B. Motion to Dismiss No. III

In their Motion to dismiss No. III, the defendants contend in Paragraph 1 that they were held in continuous confinement for some months and were denied opportunity to contact Defense Counsel or to make other proper arrangements for their defense prior to the date the indictment was served upon them, and that all the defendants were not brought before the Tribunal prior to 15 March 1947, the day of arraignment, all of which is said to be in violation of due process of law.

The facts are that all of the defendants, except Burkart, were served with the original indictment on 10 February 1947 and arraigned on 15 March 1947; all of the defendants, including Burkart, were served with the amended indictment on 18 March 1947 and arraigned on 19 April 1947, the trial actually beginning on the latter date. The duration of continuous confinement of the defendants prior to indictment has not, with the exception of Flick, been prolonged -- 54 days for Kaletsch, 19 days for Steinbrinck, 9 days for Terberger, 7 days for Weiss, and 1 day for Burkart. Curiously enough, Burkart also joins in the Motion on this ground, although it is difficult to imagine how any person could be served with an indictment sooner after arrest than he was. Since this Tribunal has no jurisdiction over the confinement as such prior to indictment, the only possible issue here is whether defendants were prejudiced in their defense. But none of the defendants allege that the lack of opportunity to contact Defense Counsel or to make other arrangements for their defense, as a result of their confinement, has in any way prejudiced their defense. Moreover, the defendants have raised no such complaint during the course of the trial nor asked for any remedial action by the Tribunal to remove any alleged prejudice.

It has already been pointed out in Section D of the Prosecution's Answer and Memorandum in Opposition to Defendants' Motions I and IV that the constitutional provisions of the United States have no applicability to this proceeding. Article IV of Ordinance No. 7 provides _inter alia_ that "a defendant shall have the right to be represented by Counsel of his own selection ... " This right, by definition, only arises after the defendant has been indicted. Ordinance No. 7 has no applicability to the detention of a security or a war criminal suspect prior to the time an indictment is served upon him, and this Tribunal has no jurisdiction in the premises prior to that time. The motion of the defendants shows on its face that each of them exercised their right to be represented by Defense Counsel as of the time the indictment was served upon them.

Defense Counsel here apparently rely upon the famous case of McNabb v. U.S. The Supreme Court there held, according to respondent's recollection, that a confession obtained from McNabb by federal agents was improperly admitted in evidence by the trial court on the ground that McNabb had not been taken before a committing magistrate within a reasonable time as required by a statute of the United States. It also appeared that McNabb had been subjected to more or less uninterrupted questioning for approximately 48 hours. However, the holding was not based on the use of fraud, duress or coercion, or upon any provision of the Constitution, but rather on the statutory requirements. This case has been much criticized and rarely, if at all, followed in the State courts, although many have statutes similar to that involved in the McNabb case.

Nothing could be clearer than that the principle of the McNabb case, not to speak of the federal statute, has no applicability to these proceedings. Military law governs occupied Germany. Hundreds of thousands of persons were arrested as security suspects during hostilities and thereafter. A relatively small number of these have been subsequently tried for the commission of war crimes. A requirement that all persons arrested by the military authorities be immediately brought before a committing magistrate, provided with Counsel and the like, is a reductio ad absurdum. War criminal suspects are screened as fast as humanly possible and brought to trial as soon as facilities permit. No suspect is put on trial before he has been charged and provided with Defense Counsel.

At best, the defendants raise only an evidentiary question, i.e. were the statements taken from defendants before arraignment admissible in evidence, which in no event can form the basis of a Motion to Dismiss. An objection to their admissibility should have been raised at the time of offer. To the extent that this was done, the Tribunal has already made its ruling. To the extent that this was not done, Defense Counsel have waived the objection.

In Paragraph 2 of their Motion to Dismiss, the defendants complain that their property has been impounded and that they have been denied and deprived of any use thereof in making any adequate and proper provision for their defense, all of which is said to be in violation of the laws of war, the Constitution and the laws of the United States, and the principles of penal law of all civilized nations. The only possible issue here is whether the acts complained of by the defendants have prejudiced their defense. This they do not claim. The defendants do not allege that they have been unable to obtain whatever funds were necessary to conduct their defense from sources other than their own property. The defendants are not required to pay Defense Counsel or to provide them with funds necessary for their defense. Defense Counsel are paid for their services from funds made available by the German economy. They are furnished office space and supplies in the Palace of Justice. Official transportation is furnished by the United States Government. The defendants have not heretofore complained to this Tribunal that lack of funds were handicapping their defense. The record of this proceeding proves that their defense has been ably handled, and the motion papers to which this Answer is directed were themselves prepared by American Counsel retained by the defendants. Under such circumstances, there is no showing whatever that defendants have been denied full opportunity to make a defense.

In Paragraphs 3 and 4 of their Motion to Dismiss, the defendants assert that they have heretofore requested that certain witnesses and documents essential to their defense be made available, which witnesses and documents were denied to them by this Tribunal, in violation of the laws of war, the Constitution and laws of the United States, and the principles of penal law of all civilized nations. Here again, the contention made by defendants is completely indefinite. No particular instance of the denial of witnesses or documentary evidence by the Tribunal is cited. Moreover, there is no showing whatever of prejudice as a result of the alleged, but unspecified, denials by the Tribunal of witnesses and documents for the Defense.

The Prosecution answers that the Tribunal has not in fact denied to the defendants the benefit of the testimony of any witnesses or documentary proof which was available, and material and relevant to the issues in the case. Under Article VIII of Ordinance No. 7 "The Tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof". If the Tribunal has heretofore denied any requests by defendants for the production of witnesses or documentary evidence, it has been done pursuant to the lawful authority granted to the Tribunal by Article VIII of Ordinance No. 7 and because the witnesses and documents requested were not relevant.

In Paragraph 5, the defendants aver that certain documentary evidence used in this proceeding against them was secured by officers of the United States as a result of force and unlawful search and seizure, in violation of the laws of war, the Constitution and laws of the United States, and principles of penal law of all civilized nations. The defendants do not specify which documents admitted in evidence were so secured, but it is clear in any event that the doctrine of unlawful search and seizure has no applicability to these proceedings.

As the United States' Armies overran German-occupied territory, and then Germany itself, certain specialized Army personnel seized documents, books, and records for such information of strategic and tactical value which they might contain. This was done as a result of obvious military necessity. Thereafter, such documents were collected in various document centers established by Army Headquarters in the United States Zone of Occupation. The Office of Chief of Counsel for War Crimes secured copies of many documents admitted in evidence by the use of screening teams operating in the document centers. Additional documents admitted in evidence in this proceeding were initially discovered and obtained by duly authorized agents of the Office of Chief of Counsel for War Crimes. Pursuant to Executive Order 9547, 2 May 1945, Executive Order 9679, 16 January 1946, Memorandum No. 15 of Office of Chief of Counsel, 29 March 1946, General Order No. 301 of the Military Governor, 24 October 1946, and letter, USFET, 24 October 1946, (Subject: Appointment of Chief of Counsel for War Crimes), General Telford Taylor has been, since 29 March 1946, authorized to prepare and prosecute charges of atrocities and war crimes against leaders of the European Axis powers and their accessories. The powers thus conferred on the Chief of Counsel for War Crimes necessarily included the right to discover and secure evidence for use in war crimes trials. It is clear, therefore, that the securing of evidence admitted in this proceeding on behalf of the Prosecution was accomplished pursuant to lawful authority.

For reasons already set forth in the Prosecution's Answer and Memorandum in Opposition to Defendants' Motion to Dismiss No. IV and Motion to Strike No. I, the provisions of the 4th Amendment stating that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ..." does not apply to this proceeding nor, in any event, has it been violated. What was done clearly did not constitute an "unreasonable" search and seizure. To assert that the military authorities may not, during time of war, enter into houses and buildings in search of enemy documents containing information of military value, and evidence of the commission of war crimes, without first a search warrant having been issued, is ridiculous. Defendants cite no law of war, or of the United States, or any principle of penal law of any civilized nation prohibiting such searches and seizures on the part of lawful military authority.

In Paragraph 6, the defendants contend that testimony and affidavits of certain witnesses were secured and admitted in evidence against them as a result of force and coercion by confinement and excessive term therof, in violation of the laws of war, the Constitution and the laws of the United States, and the principles of penal law of all civilized nations. Here again, the contention of defendants is indefinite and no instance of the exercise of such force and coercion are cited. This objection in any event cannot form the basis of a motion to dismiss before this Tribunal, since at best it constitutes an objection to certain unspecified evidence. This objection should have been raised at the time such evidence was offered. To the extent that such objections were raised at the time of offer, the Tribunal has already ruled thereon. To the extent that this was not done, the objection comes too late. In any event, the Prosecution contends that the objection has no merit whatever. There is no principle of law, so far as respondent is advised, that any period of confinement, no matter how long, constitutes coercion as a matter of law.

In Paragraph 7 of their Motion, the defendants complain that as a result of the confinement of witnesses by the Prosecution, the defendants were deprived of the benefit of the testimony of such witnesses, which was essential to their defense, and that Defense Counsel were denied free communication with such witnesses, all of which is said to be in violation of the laws of war, the Constitution and laws of the United States, and the principles of penal law of all civilized nations. This objection is likewise indefinite, as the defendants do not state what witnesses essential to their defense were confined by the Prosecution, or precisely how they were deprived of the benefit of the testimony of such witnesses or denied free communication with them. Nor have they heretofore requested the Tribunal to make such witnesses available to them or to take any remedial action to insure free communication with such witnesses. The Prosecution asserts that the defendants have not been deprived of the benefit of the testimony of any witnesses, nor have they been denied free communication with such witnesses. Rule 23 of the Uniform Rules of Procedure of the Military Tribunals, as amended on 3 June 1947, and the practice thereunder, permits any Defense Counsel to interview any person brought to the Nürnberg jail by the Prosecution, subject to 48 hours' notice by Defense Counsel and the right of the Prosecution to be represented at such interview if desired. The latter right infringes in no way on the right of free communication by Defense Counsel with respect to any issues involved in a case in which he is acting. Contrariwise, the Prosecution has the right to interview any person brought to the Nürnberg jail by the Defense, subject to the same conditions.

In Paragraph 8 of their Motion, the defendants contend that the Tribunal arbitrarily denied them the right to present proof that the acts and conduct of certain foreign statesmen and states corresponded to certain acts termed "criminal" by the Prosecution with respect to German statesmen, and in which the defendants in this case are alleged to have taken a consenting part. The defendants do not specify what acts and conduct are involved. The question of whether acts alleged to have been committed by German statesmen and with which the defendants were connected constitute crimes within the jurisdiction of this Tribunal, is one of law, not of fact. Consequently, there is no necessity for proof by the Defense of what other statesmen or states did. Such acts are not in issue in this case, are clearly co-lateral, and any proof with respect thereto would be irrelevant and immaterial. Proof that another person committed a crime similar to that charged against the defendants is certainly not relevant.

In Paragraph 9 of their Motion, the defendants contend that they have been subjected to an unequal application of the law, and had been made the object of discriminatory orders, regulations and decrees, in violation of the laws of war, the Constitution and laws of the United States, and the principles of penal law of all civilized nations. This objection is too indefinite to permit of an answer, as the defendants nowhere specify what orders, regulations and decrees are said to be discriminatory, the manner of such alleged discrimination, or any unequal application of the law.

C. Motion of Finding of Not Guilty No. V

In their Motion of Finding of Not Guilty No. V, the defendants move this Tribunal for a finding of not guilty on each count of the indictment on the ground that the evidence is insufficient in law to sustain the charges thereunder. Since this case is being tried before a court without a jury, the motion is completely meaningless and no answer thereto is required.

The members of this Tribunal are the triers of both law and fact. The taking of evidence in this proceeding has been completed and it is now the task of the Tribunal to reach its judgment as to the law and facts, on the basis of the record and the closing arguments and briefs of the Prosecution and the Defense.

Conclusion

WHEREFORE, the Prosecution respectfully requests that Motions to Dismiss Nos. II and III, and the Motion of Finding of Not Guilty No. V, heretofore filed by the defendants, be denied.

For: TELFORD TAYLOR,
Brigadier General, USA,
Chief of Counsel for War Crimes

By: James M. McHaney
JAMES M. McHANEY,
Deputy Chief Counsel

Nürnberg: 26 November 1947