

# **Public Annex H**

# THE TOKYO JUDGMENT

THE  
INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST  
(I.M.T.F.E.)  
29 APRIL 1946 - 12 NOVEMBER 1948



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DISSENTING JUDGMENT  
OF  
THE MEMBER FROM FRANCE

## OPINION JUDGE BERNARD/FRANCE

elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any illtreatment in the future."

(7) Army and Navy commanders, Ministers of War or of the Navy are responsible, if crimes are committed against prisoners under their control, of the likely occurrence of which they had or should have had knowledge in advance;

(8) Department officials whose functions included the administration of the system of protection of prisoners and which had or should have had knowledge of crimes and did nothing effective to the extent of their powers to prevent their occurrence in the future, are responsible for such future crimes.

I cannot agree with these various propositions.

1. Of the four categories of persons, to whom the first of these propositions, inadvertently no doubt, imposes the duty of establishing and securing the continuous and efficacious working of a system appropriate to secure proper treatment to prevent illtreatment, there are three upon which an obligation of this nature could not reasonably be imposed, and two of which are distinctly exempted from it by Article IV of the Hague Convention No. IV, dated 18 October 1907.

2. The wording of this part of the judgment leads one to believe that the majority sees, in each of the eight cases considered, a crime of equal seriousness with all those qualified as Conventional War Crimes. In each of these cases, where the crimes in question have some distinct immediate author and thus directly responsible for the act, the culprit in question before us is declared responsible for the crime without any kind of reservation, in the same terms no doubt as would be affirmed in the case of the responsibility of the immediate author. The responsibility seems to be judged equally as serious in either case. No doubt this appraisal can be attributed to the fact that whereas the immediate author is generally accused of only a limited number of crimes, in the eight hypotheses they choose to see the case of individuals responsible for a much greater number of crimes. The truth, however, is that the responsibility involved is of an entirely different nature from that of the immediate author and that the seriousness of the anticipated sentence cannot be determined, unless the nature of this responsibility is specified.

In order to do this, it is necessary to recall that no-one can be held responsible for other than the necessary consequences of his own acts or omissions. The application of this principle to the case of active participation in an offense either as author, co-author, or accomplice, implies no difficulty. There cannot be much more in the case of passive participation, that is, participation by omission. Responsibility by omission supposes, of course, an ultimate commission following the omission, and emanating either from the individual to whom the omission is imputed, or from one or several others. The responsibility for the results of this commission is only imputable to the author of the omission if the commission is the certain result of the latter. The relation of cause and effect may be easily ascertainable when the author of the omission and that of the commission are the same individual; it is no longer the case when they are different. The only possible manner of establishing this causal connection would consist in proving that the author of the omission could by an action of some kind prevent the commission and its direct harmful consequences.

The application of these principles leads to the conclusion that the consequences of the responsibility for the atrocities committed upon the prisoners of war cannot be imputed to any individuals outside of those who actively participated in them, other than those who could have prevented them and did not do so. Proof that the defendant could have prevented the wounds, sickness, death, etc., inflicted upon the prisoners cannot result from a legal presumption (with the exception of the case in which the defendant would be accused of being the author of an act which resulted in these wounds, sickness, death, etc. as direct conse-