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Exploring justice in extreme cases: Criminal law theory and international criminal law

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Cover Page



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Annex

Omissions: Can Failures Have Consequences?

In Chapter 6, I did not delve into relatively philosophical questions about causal contribution; my topic was the Tribunal's failure to address the formal contradiction with the culpability principle as recognized by the Tribunal itself. However, an understandable question about my proposed solution is whether omissions can ever have causal contributions; if not then the solution is untenable. For any readers concerned about that question, I touch upon it here.

Some scholars argue that an omission merely *fails to avert* an outcome, and cannot 'cause' or 'contribute' to an outcome.³⁶ Such arguments rely on a 'naturalistic' conception of causation, which looks only at sufficient physical causes.

In contrast, legal practice and normative argumentation overwhelmingly support the 'normative' conception, which considers that humans have duties, and failures to meet those duties can have consequences. On the normative conception, we compare what happened to the situation that would have pertained if the person had met her duty.³⁷ If I am obliged to guard prisoners, and I do not, the normative conception has no difficulty recognizing that my failure to guard may facilitate their escape.

On the normative conception, the counterfactual analysis of an omission mirrors the counterfactual analysis of an act. Where there was a positive act by the accused, we imagine the world where she did not do the prohibited act, to assess the difference that her act likely made. In the case of an omission, we imagine a counterfactual world where she did what was legally required, and assess the likely difference.³⁸

For example, if a pilot aboard an aircraft has a duty to operate and land the aircraft, and yet chooses instead to do nothing and allows the plane to crash, most jurists (and lay persons) would conclude that the pilot's omission contributed to the crash. A purely

³⁶ Moore, *Causation and Responsibility*, above, at 446, argues that that an omission is a nothingness, or an absence, and an absence cannot produce effects; "nothing comes from nothing." While Moore concludes that counterfactual dependency does not warrant the label 'causation', he holds that counterfactual dependency can give rise to liability. In this respect he reaches a similar endpoint to other scholars, albeit with different labels. See *ibid* at 139-142 & 351-354.

³⁷ See g. K Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP, 2012) at 215-17.

³⁸ See similarly K Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta, JRWD Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary* (2002) 825 at 860.

‘naturalistic’ conception of causation, looking only at active physical forces, would insist that the plane crashed on its own because of gravity and inertia, and that the pilot merely ‘did nothing’. Legal practice and ordinary language reject this as a contrived and myopic way of describing events.³⁹ On a ‘normative’ conception of causation, we compare the result against what would have resulted if the pilot had met the baseline expectation of carrying out her legal duty. Under common notions of causation and responsibility, we would not hesitate to find that the pilot’s omission to fulfil her duty was indeed a contributing factor, and that the crash was a result of her culpable inaction.

To give other examples, most people have no difficulty recognizing that a failure to feed prisoners, despite a duty to do so, contributes to their starvation. Or, as Miles Jackson notes, a cleaner who deliberately omits to lock a door in order to assist robbers thereby facilitates the robbery.⁴⁰ The naturalistic conception neglects morally salient features of causation, because it focuses incorrectly on only one aspect of causation (‘causal energy’) and neglects other aspects (‘counterfactual dependence’).⁴¹ As Victor Tadros argues, any theory that ignores the fact that a lack of rain causes crops to fail is not a viable theory of causation.⁴² Tribunal jurisprudence reflects the mainstream understanding; for example, the ‘substantial effect’ test, when applied to omissions, means that ‘had the accused acted, the commission of the crime would have been

³⁹ See eg. Hart & Honoré, *Causation*, above at 139 and other works cited in the previous two footnotes.

⁴⁰ M Jackson, *Complicity in International Law* (OUP, 2015) at 103.

⁴¹ I believe that the debate arises because there are at least two major conceptions underlying causation. One conception looks at counterfactual dependence (the ‘but for’ test), examining what would have happened in an alternative universe without the variable in question. Another looks at the chain of events as they actually occurred, looking at the ‘causal energy’ or ‘causal efficacy’ of the forces sufficient to bring about the result. But causation is more subtle than either of these conceptions on its own.

For example, it is well-recognized that exclusive reliance on the counterfactual (‘but for’) test can at times generate absurd results. In ‘over-determined’ events, where there are multiple concurring sufficient causes, the ‘but for’ test would absurdly absolve all contributors, as each can accurately say that the event would have happened anyway. Thus, the ‘but for’ test cannot be the entirety of the test and we must resort to other tools. See eg. Dressler, ‘Reassessing’, above, at 99-102; Hart and Honoré, *Causation in the Law*, above, at 122-125.

Similarly, the difficulties with omissions arise only when one relies *exclusively* on concepts such as ‘causal energy’ or ‘causal efficacy’ and sets aside counterfactual analysis. That limited analysis can also generate counterintuitive results, such as not conceding that failures by humans to fulfil their duties can have consequences. Causation (and contribution) are more subtle than either ‘counter-factual dependence’ or looking for ‘sufficient’ causes. Both types of analysis are needed to capture the nuances of causation.

⁴² V Tadros, *Criminal Responsibility* (OUP, 2010) at chapter 6.

substantially less likely'.⁴³ Similarly, ICC jurisprudence has generally supported the normative conception.⁴⁴

On the normative conception, it is easy to see that a commander's omission to take appropriate steps to inculcate respect for humanitarian law, to establish a system of discipline, and to repudiate and punish crimes, thereby encourages or facilitates subsequent crimes, in comparison with the situation that would have pertained had she met her duty. Whether one prefers to use labels such as hypothetical causation, counterfactual causation, quasi-causation or negative causation is not of interest at this point. What matters is that there is ample ground to conclude that omissions can satisfy the causal contribution requirement. To deny this is to deny that failures by humans to fulfil their duties can ever have consequences.

It is sometimes thought that the assessment of the impact of omissions is more difficult or more speculative than the assessment of the impact of acts.⁴⁵ This view overestimates the clarity of the impact of acts. Assessing the impact of an act also entails a 'hypothetical' assessment. Whether for acts or omissions, the counterfactual analysis equally involves imagining a hypothetical alternative world. Furthermore, the daily practice of criminal law shows that the impact of acts can often be equally difficult to assess. For example, did one blow among many other blows hasten the death? Conversely, the impact of omissions can be quite clear, as in the case of the pilot choosing to slump passively during a routine landing and thus crashing the plane. The real difficulty is not the difference between acts and omissions, but rather the inherent challenges of assessing impacts on behaviour of other human beings. This is why accessory liability only requires 'contribution' as opposed to full 'causation'.

This thesis does not aim to delve into or add to the already extensive discussion on that philosophical debate; my aim is to explore other specific issues in command responsibility and culpability. The position that I adopt (the normative conception of causation) already accords with ICL doctrine, with the jurisprudence of national systems,

⁴³ *Prosecutor v Popović*, Judgement, ICTY A.Ch, IT-05-88-A, 30 January 2015 at para 1741.

⁴⁴ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(8)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC PTC, ICC-01/05-01/0815 June 2009 ('Bemba Confirmation Decision') para 423-25; *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74, ICC T.Ch, ICC-01/05-01/08, 21 March 2016 ('Bemba Trial Judgment') *Bemba Trial Judgment*, para 212 ('hypothetical' causation); the Steiner Opinion at para 18 explicitly discusses the 'naturalistic' versus the 'normative' conception; the Ozaki Opinion at para 19-23 engages with the normative considerations and juridical practice.

⁴⁵ See eg Bemba Confirmation Decision, at para 425; 'Bemba Trial Judgment' at para 212.

and with the preponderance of arguments on normative theory. Thus, my arguments rely on the excellent responses already provided in the ample discourse on the issue.⁴⁶ My arguments build on the well-established normative conception of causation, to unpack the implications for command responsibility. This accords with the coherentist method: even if there might be philosophical doubts and we cannot achieve absolute certainty, we can still build on the best available understandings.

⁴⁶ See eg. G Fletcher, *Basic Concepts of Criminal Law* (1998) at 67-69; G Fletcher, *Rethinking Criminal Law* (1978, reprinted 2000) 585-625; A Ashworth, *Principles of Criminal Law* (5th ed, 2006) at 418-420; Husak, 'Omissions', above at 160-165; Hart & Honoré, *Causation in the Law* at 30-31, 40 and 447-449; C Sartoria, 'Causation and Responsibility by Michael Moore', 119 *Mind* (2010) 475; J Schaffer, 'Contrastive Causation in the Law', 16 *Legal Theory* (2010) 259; RW Wright, 'Moore on Causation and Responsibility: Metaphysics or Intuition?' in K Ferzan & S Morse, eds, *Legal, Moral and Metaphysical Truths: The Philosophy of Michael Moore* (OUP, 2015).