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OVERDETERMINED ATROCITIES

James G. Stewart[*]

An event is over-determined if there are multiple sufficient causes for its occurrence. A firing squad is a classic illustration. If eight soldiers are convened to execute a prisoner, they can all walk away afterwards in the moral comfort that "I didn't really make a difference; it would have happened without me." The difficulty is, if we are only responsible for making a difference to harm occurring in the world, none of the soldiers are responsible for the death—none made, either directly or through others, an essential contribution to the death. In many respects, this dilemma is the leitmotif for individual responsibility in a globalized world, where criminal harm is so frequently occasioned by collectives. In order to assess the various solutions offered for the overdetermination problem in criminal theory, this paper reconsiders arguments for and against requiring causation in criminal responsibility, competing theoretical accounts of causation and the various unsatisfactory explanations for overdetermination presently on offer. While the paper uses examples from international criminal justice as illustrations, it concludes that overdetermination is a central moral problem of our time. A range of significant consequences follow for the theory and practice of international criminal law.

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For Antonio Cassese. An essential contribution. Directly, and through others.

I. INTRODUCTION

An event is overdetermined if there are multiple sufficient causes for its occurrence. A firing squad offers a classic illustration. If eight soldiers are lined up to execute a blindfolded prisoner and all shoot at the same time, none of the soldiers makes a difference to the plight of the slain victim; she would have died regardless of whether any one of the soldiers participated or not. So even if one of the shooters had refused to fire, seven other bullets would still have found their mark and ended the prisoner's life in a more or less indistinguishable manner. Indeed, the firing squad was designed and constituted so as to allow each of the soldiers who participated to walk away in the moral comfort that, "I didn't really make a difference; it would have happened without me." The difficulty is, if we are only responsible for making a difference to harm occurring in the world, none of the soldiers are responsible for the death—none made, either directly or through others, an *essential* contribution.

This moral quandary is, by and large, the leitmotif for international criminal justice. Very few atrocities are so dependent on the acts of any one individual that we can say with confidence that they would certainly *not* have transpired absent any one accused's individual agency. In fact, if there were one overarching tension in the ongoing struggle for defensible standards of blame attribution in this discipline, it might be between our exclusive focus on individual accountability and the pervasive influence of collectivities that furnish a long line of willing substitute perpetrators, thereby diluting the significance of individual agency upon which criminal liability is predicated. Thus, overdetermination presents a moral problem whose impact is profound for international trials, even if overdetermined atrocities arguably come in a variety of different forms.

In fact, there are four potential variants that help illustrate the problematic. The first is epitomized by the fire bombing of Dresden by Allied pilots during World War II. Over three inglorious days in February 1945, the Allies flew three bombing raids over Dresden, deliberately generating a firestorm that brutally

killed civilians in the tens of thousands.[1] The analogy with the firing squad motif is very direct. As Christopher Kutz ably argues, the estimated 8,000 crewmen who flew over 1,000 sorties over Dresden made little real difference individually: 'Each crewman's causal contribution to the conflagration, indeed each plane's, was marginal to the point of insignificance.'[2] As a result, each of the pilots could later safely claim that they did not personally make a difference to the way the atrocity transpired—meaning perversely, that no one was responsible for it.

The Dresden pilots form the classic illustration of overdetermination, which approximates to the firing squad most closely. First, they are perpetrators not accomplices. In discussing the differentiated model of attribution presently in place internationally, George Fletcher states that "[p]erpetrators or principals are those who are directly liable for the violation of a norm; accessories are those who are derivatively liable."[3] In this instance, the pilots are perpetrators because they dropped the bombs, that precipitated the firestorm, that destroyed so many civilians. Their culpability is not contingent on that of others, meaning that they are best described as *perpetrating* the death by smoke inhalation, fire and asphyxiation that ensued. Second, they form part of a single highly ordered organizational structure that shared a definite and dark common goal.

Western businesspeople operating in apartheid South Africa offer a related but distinct variant. At the end of its arduous work, the South African Truth and Reconciliation Commission concluded that '[c]ertain businesses were involved in helping to design and implement apartheid policies. Other businesses benefited from cooperating with the security structures of the former state.'[4] Many of these actions constituted complicity in or direct perpetration of crimes. Of course, the difficulty here too is that the actions of any one business were fungible for the conduct

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[1] For a concise history, see C. Kutz, *Complicity: ethics and law for a collective age* (Cambridge: Cambridge University Press, 2000), at 116–123.

[2] *Id.* at 118.

[3] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 636 (1978); In a separate work, I argue again the differentiated model this definition assumes, but I accept that model international criminal justice does not adopt a model like that I advocate for. James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 165–219 (2012).

[4] The Truth and Reconciliation Commission of South Africa, Volume 4, Chapter 2, "Institutional Hearing: Business and Labor, Principles Arising out of Business Sector Hearings," 161. N. Clark, *Manufacturing Apartheid: State Corporations in South Africa* (Yale: Yale University Press, 1994).

of corporations as a class; if specific companies had not participated it would merely have left an economic vacuum others would certainly have filled. Drawing on this reality, a number of US companies sued under the *Alien Tort Statute* complained that without their input, it was only the case that "apartheid would not have occurred in the same way."[5] The implication is plain; these particular companies did not *cause* anything.

On one level, this replicates the Dresden bombing campaign. If a company's board passed a motion to assist apartheid crimes by a bare minimum (e.g. 8 votes to 7 in a corporate board with 15 members), then each board member who cast an affirmative vote *did* make a difference to the downstream consequences, but in any other voting configuration, the company would have acted as it did regardless of any individual vote. And structurally speaking, corporations are organizations too, so the example differs little at the level of board deliberations. Focusing on the corporation itself, however, yields different results. To borrow from Tracy Isaacs, companies like those operating in apartheid South Africa are just a mereological sum; a notional composite of a random collection of things.[6] Thus, overdetermination not only arises within organizations, it also has relevance for groups that are only very loosely constituted.

Perhaps unwittingly, the International Criminal Court's first judgment stumbles upon a third possible type of overdetermination. In convicting Thomas Lubanga for recruiting and using child solders, the majority seized upon his *essential* contribution to the crimes as a basis for describing the warlord's responsibility as that of co-perpetration rather than mere complicity,[7] whereas at least one dissenting judge disputed whether an essential contribution was required.[8] Both sides of the debate miss the wider point that these crimes would probably have happened anyway. As Lubanga's counsel put it, Lubanga's role was in no way determinative of the crime of recruiting child soldiers, "for the simple reason that the soldiers who appointed

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[5] Complaint, *Am. Isuzu Motors, Inc. v. Ntsebeza*, (No. 07-919) 128 S. Ct. 2424 - Supreme Court 2008, at 4.

[6] TRACY ISAACS, MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS 27 (2011).

[7] Judgement, *Prosecutor v. Lubanga* (ICC-01/04-01/06) Judgment Pursuant to Article 74 of the Statute. 14 March 2012, § 925 ("*Lubanga*"); "only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime".)

[8] Separate and Partly Dissenting Opinion of Judge Fulford, *Lubanga*, *supra* note 7, § 15.

him as leader did not need him."[9] How do we hold Lubanga responsible at all, if his conduct made no difference?

The example raises distinct issues again. First, many would describe this scenario as pre-emptive (not overdetemined) causation. Maybe some other military commander would have stepped into Lubanga's shoes had he declined the leadership position, but that is quite different from the firing squad. Lubanga did commit these crimes, and whether or not someone else would have in the future is entirely speculative. As we will soon see, this argument and the normative distinction it depends upon is one of the key issues with which we must wrestle, but to foreshadow what is to come, the distinction is more difficult to justify than first meets the eye. Second, and equally importantly, Lubanga's example demonstrates that the conceptual problems with which we will soon toil are not limited to crimes committed by "small fish." Lubanga was a leader at the head of a military unit responsible for atrocities.

The arms vendor Viktor Bout, aptly nicknamed the Merchant of Death, presents a fourth and final variant.[10] After the end of the Cold War, Bout trafficked guns to the most brutal conflicts with reckless abandon. For example, at one point during the Angolan war, UN Panels of Experts cited Bout as selling weapons to both sides of a brutal conflict that had spanned four decades, killing at least 500,000 civilians.[11] Many years later, he would stand trial in the United States for attempting to sell weapons to the FARC in Colombia (which paralleled the Lubanga trial insofar as Bout's true criminal responsibility went seriously under-represented).[12]

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[9] Defence Closing Statements (Open Session), *Lubanga* (ICC-01/04-01/06-T-357), Trial Chamber I, August 26, 2011, 30, lines 2-5. I in no way vouch for the factual veracity of this argument.

[10] For an overview, see D. Farah and S. Braun, *Merchant of Death: money, guns, planes, and the man who makes war possible,* (New York: Wiley, 2007); discussing Bout's various misadventures in the context of the arms trade generally, A. Feinstein, *The Shadow World: Inside the Global Arms Trade* (London: MacMillan, 2011), 154–164.

[11] For engaging histories of the conflict, including the role of arms vendors and extractive industries, see T. Hodges, *Angola: the anatomy of an oil state.* (2nd ed. London: James Currey, 2004); K. Maier, *Angola Promises And Lies* (London: Interlink, 2002). Estimates of deaths from the conflict range from 500,000 to 1.2 million people, with millions more displaced internally: International Crisis Group (ICG), 'Angola's Choice: Reform or Regress' 61 *Africa Report* (Luanda/Brussels: ICG, 2003).

[12] N. Rosenberg, 'Viktor Bout Guilty in Arms-Trafficking Case', *The New York Times*, (2 November 2011), accessible at http://www.nytimes.com/2011/11/03/nyregion/viktor-bout-guilty-in-arms-trafficking-case.html (last visited Jul 23, 2012).

Subsequent to his conviction, Bout offered new reflections on his earlier role in Angola. Predictably, he too explained away all responsibility by appealing to the firing squad motif: "If I didn't do it, someone else would."[13] And it is difficult to contradict him, knowing the global market in weaponry as we do.

Contrary to the other three examples, Bout is clearly an accomplice. I am of the view that the accomplice liability of arms vendors is philosophically defensible on an appropriate account of complicity, although I accept that some would contest this.[14] Indeed, after WWII, corporate officers were prosecuted as accomplices for selling the means used to asphyxiate civilians at Auschwitz,[15] and modern courts have also begun to use complicity to call businesspeople to account for knowingly transferring weapons to recipients who use them to carry out atrocities.[16] Unlike the surprisingly large mereological group of companies that were prepared to do business with an apartheid regime that was sanctioned, denounced and opposed throughout the West, only a much smaller set of arms vendors could have sold weapons to armed groups in Angola at the time. Bout was a pre-emptive accomplice within a small mereological group.

How then does international criminal justice deal with the various moral problems these examples engender? The answer is, inadequately. At the level of doctrine, for accomplices such as Bout, the position is that "[a]lthough the accused's conduct need not have been a condition *sine qua non* of the commission of the

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[13] N. Schmidle, 'Disarming Viktor Bout', *The New Yorker* (5 March 2012), available at http://www.newyorker.com/reporting/2012/03/05/120305fa_fact_schmidle (last visited 4 June, 2012).

[14] I concede that this point is not beyond dispute as a matter of criminal theory. See R A Duff, *"Can I help you?" accessorial liability and the intention to assist*, 10 LEGAL STUDIES 165–181 (1990) (arguing that using complicity in the ordinary course of business is structurally akin to omission liability since it requires the businessperson to break with their usual course of conduct). For different views that use arms vendors as examples of accessorial liability, see John Gardner, *Complicity and Causality*, 1 CRIM. LAW AND PHILOS. 127–141 (2007); CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE (2000).

[15] Trial of Bruno Tesch and Two Others (The Zyklon B Case), British Military Court, Hamburg, 1 *Law Report of Trials of War Criminals*, 93 (March 8, 1946).

[16] Prosecutor v. Van Anraat, Netherlands, LJN: BA6734, Gerechtshof 's-Gravenhage , 2200050906-2, (May 9, 2007) (charging Frans Van Anraat with complicity in genocide and war crimes for selling chemical weapons to Saddam Hussein, that were ultimately used to gas civilians); Prosecutor v. Kouwenhoven, Netherlands, LJN: AY5160, Rechtbank 's-Gravenhage , 09/750001-05 (July 28, 2006) (charging Guus Kouwenhoven with complicity in international crimes perpetrated by Charles Taylor's regime in Liberia).

crime, it must have made a difference."[17] And yet, as we will see, this language means precious little. Moreover, for co-perpetrators such as the Dresden pilots or the businesspeople operating in apartheid South Africa, existing international criminal law requires that each individual must make an 'essential contribution… resulting in the realization of the objective elements of the crime.'[18] And yet, perversely, neither an Allied pilot over Dresden nor the businessperson in apartheid would satisfy these standards. In any event, the core issue across all these examples is really causal overdetermination, which presently goes unnoticed as courts enthusiastically borrow 'modes of liability' from domestic legal systems that do not deal with the problem squarely.

In fact, there is something quite peculiar about international criminal justice as a discipline: causation has escaped direct treatment by almost all courts and scholars.[19] While we academics have expended a considerable effort debating 'modes of liability',[20] very little debate has centered on more fundamental concepts that apply regardless of how 'modes of liability' are configured. This is undoubtedly true of causation. The problem is that as soon as one begins the process of unveiling the concept and its implications for international trials, one is immediately confronted with the problem of overdetermination that has troubled philosophers for centuries. Nonetheless, if international criminal law is to be rational not intuitive, principled not arbitrary, all variations of the problem require defensible solutions.

Causal overdetermination also strikes at the heart of international criminal justice as a project. In recent years, many scholars have come to the view that international criminal law's liberal commitment to locating responsibility in the individual is

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[17] Judgment, *Prosecutor v. Kordić & Čerkez* ("*Kordić* ") (IT-95-14/2-T), Trial Chamber, 26 February 2001, § 391; Judgment, *Prosecutor v. Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000, § 270: "Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*.".

[18] Lubanga Trial Judgment, para. 925 "only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime".

[19] For a helpful exception, see Darryl Robinson, *How command responsibility got so complicated: A culpability contradiction, its obfuscation, and a simple solution*, 13 MELBOURNE JOURNAL OF INTERNATIONAL LAW 1 (2012).

[20] International criminal courts and tribunals use the term "modes of liability" to designate participants in a crime. As I have argued elsewhere, the label is conceptually misleading and of uncertain historical pedigree. Domestic systems use the labels 'participation', 'parties to a crime' and more rarely, 'modes of attribution.' Stewart, *supra note* 3, fn 2.

unavoidably at odds with the collective character of atrocity.[21] As one of the very best of these scholars argues, "the collective nature of atrocity sits uncomfortably with international criminal law's predicate of individual agency, action and authorship."[22] In turn, this misgiving has led to serious skepticism about the value of international criminal justice as a tool for promoting post-conflict justice. Nevertheless, whether individual agency can adequately cope with group offending largely depends on the strength of our solutions to the problem of causal overdetermination, which goes unexplored in the literature that too quickly declares individual accountability inadequate.

In this essay, I introduce causal overdetermination and theories proffered as solutions. Instead of advocating for one or another, I hope to start a missing conversation by plotting the extent and significance of these issues. To do this, Part I begins by highlighting the structural origins of the problem and their genesis in the idea that harm and therefore causation matter for international criminal responsibility. In Part II, I then plot various theories of causation, showing how 'but for' causation coupled with a restraining auxiliary concept represents the dominant understanding of causation in both theory and practice. With this background behind us, Part III criticizes the positions adopted for dealing with overdetermined causes in international and domestic criminal courts alike, highlighting an alternative explanation that shows greater promise while raising new concerns. What emerges is a keen sense that this problematic cannot be easily resolved or ignored.

II. THE STRUCTURAL ORIGINS OF THE CAUSATION IN INTERNATIONAL CRIMINAL LAW

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[21] George P. Fletcher, *Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt, The*, 111 YALE L.J. 1499, 1514 (2001) ("the liberal bias toward individual criminal responsibility obscures basic truths about the crimes that now constitute the core of international criminal law. [They] are deeds that by their very nature are committed by groups and typically against individuals as members of groups.").

[22] Mark A. Drumbl, *Collective Responsibility and Postconflict Justice*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 23–60, 1 (Tracy Isaacs & Richard Vernon eds., 2011). In fairness to Drumbl, he also raises a range of other bases for his criticisms of individual criminal responsibility, including the deeply conformist nature of most atrocities and the selectivity of trials that are seriously under-inclusive of offenders.

In the firing squad example with which we began, our core concern was to isolate who was responsible for bringing about the prisoner's death given multiple sufficient causes. This raises a preliminary structural question: why should making a difference to harm matter in international criminal law at all? I begin then, by situating the problem of overdetermination in the long debates about whether causation should matter in determining criminal responsibility. As will become apparent, doing so will later help in elucidating why overdetermination is such a significant moral problem, in pointing out the ways in which international criminal justice has inadequately grappled with the challenge, and in developing a new explanation of why these types of contribution remain culpable despite the premise that the underlying criminal harm would have transpired regardless of the conduct of any specific accused.

Traditionally, criminal offenses are understood as dividing into three distinct categories: inchoate crimes, such as attempt, where the subjective disposition is the primary ground for responsibility; conduct-type crimes, such as rape and fraud, where wrongdoing is constituted by the conduct itself;[23] and harm-type offences, such as murder, where a potentially wide range of actions are prohibited if they lead to proscribed harm.[24] Under this latter category, lighting a cigarette, driving a car, or watching television can serve as the ground of responsibility,[25] provided there is a causal relationship between this conduct and a harm that is criminally prohibited. Thus, for these harm-type crimes, the almost universal position in extant criminal systems is that "a causal connexion between some action of the accused and the specified harm must be shown in order to establish the *existence* of liability."[26]

Of course, there are those who deny this three-way division, arguing that causation is a quintessential element of responsibility

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[23] I do not wish to be understood as implying that rape does not cause devastating physiological and psychological harm. I have worked with victims of mass rape. The conceptual point is merely that the occurrence of this harm is not formally constitutive of rape as an offense, which I believe is appropriate. What a horror it would be to have to prove that an act of sexual violence *caused* a particular degree of physical or psychological harm for rape to be established.

[24] Fletcher, *supra* note 21, at 388-390 (referring to patterns of manifest criminality, harmful consequences and subjective criminality). I am grateful to Thomas Weigend for pointing out how malleable these categories are.

[25] M. Dan-Cohen, 'Responsibility and the Boundaries of the Self', 105 *Harvard Law Review* (1991) 959–1003, at 962. (using the term "ground of responsibility" to distinguish object-responsibility and subject-responsibility).

[26] H. L. A Hart and T. Honore *Causation in the Law* (2nd edn., Oxford: Oxford University Press, 1985), at 92 (emphasis in original).

across all criminal offences. This argument is best made by Michael Moore, who implores that "all complex descriptions of actions share with 'killing' a built-in, second causal element: the bodily movement (that is caused by a volition) must itself cause some further, independent event to occur, like a death in the case of 'killing'.[27] On this account, rape is not restricted to the conduct of inserting one's penis into a woman's vagina without consent; it is brought about by 'causing sexual penetration of the female.'[28] If this reading of the philosophy of action is correct, one can never escape causal analyses, even for what are commonly known as conduct-type crimes. Thus, overdetermination affects all crimes, not just harm type offences where causation is indisputably a necessary ingredient of criminal responsibility.

Others reach the diametrically opposite view. If we are committed to punishing people for what they deserve, surely they should not benefit from their luck.[29] Why, after all, should a would-be murderer who shoots at her enemy be punished less, merely because the victim by chance dies of a heart attack seconds before the bullet hits?[30] If we are serious about culpability as the metric upon which to judge responsibility, we must eliminate these types of fortuitous scenarios from our evaluations of guilt. We therefore abolish harm as a morally relevant component of criminal responsibility, and as a result, eliminate causation from our criminal vocabulary. In its place, criminal offenses would always be inchoate in structure (based on the inherit risk of morally blameworthy actions), making each member of the firing

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[27] The criticism of the traditionalist division between conduct and harm type offenses is best made in MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 101 (2009); But see John Gardner, *Moore on Complicity and Causation*, 156 U. PA L. REV. PENNUMBRA 432 (2008) (disagreeing that rape requires causation, because the offence demands "no result... other than the action in question having been performed").

[28] MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS (2009).

[29] For the classic discussion of this in English-speaking literature, see T. Nagel, 'Moral Luck', 50 *Proceedings of the Aristotelian Society Supplementary Volume* (1976), 137-155; For more recent discussion, see A. Ashworth, 'Taking the Consequences', in S. Shute, J. Gardner, & J. Horder (eds.), *Action and Value in Criminal Law* (New York: Oxford University Press US, 1995), at 107; also see L.Alexander, K.K. Ferzan and S. Morse. *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), at 171-175.

[30] For an excellent overview of these arguments, see L. Alexander and K. K. Ferzan, *supra* note 29, at 171-196 (arguing that only culpability, not resulting harm, affects desert"). For a response to these claims, which asserts the orthodox position that harm matters, see M.S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009), at 30.

squad guilty of murder for firing the gun at the point they pull the trigger. On this account, we solve the problem of overdetermination by transcending the structure upon which it depends.

And yet, international criminal law sides with neither extreme. Like it or not, this particular criminal system unquestionably makes causing harm a primary element of responsibility for many crimes, from deportation as a crime against humanity to genocide.[31] Moreover, international courts often explicitly reinforce the normative significance of harm by stating that many international crimes are *not* inchoate and that liability is contingent upon proof that the intended harm materialized.[32] At the same time, these courts are also unequivocal that for a conduct-type crime such as public incitement to genocide, "a causal relationship is not requisite to a finding of incitement."[33] For both these reasons, our appreciation of the problem of overdetermination in international criminal justice must defer to the manner in which this set of crimes is constructed.

Moreover, there are compelling arguments in favor of this partial reliance on causation, despite what exponents of the moral luck school suggest. First, our basic intuitions about responsibility,

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[31] For the former, civilians must be expelled across a border; for the latter, members of a civilian population must perish. For deportation, the ICC Elements of Crimes stipulate that "[t]he perpetrator deported or transferred one or more persons to another State or to another location." *Id.,* at 17. For the latter, they indicate that *one way of perpetrating the crime* requires that "[t]he perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population." ICC Elements of Crimes, at 6.

[32] Judgment, *Prosecutor v. Milutinoviæ et al.*, (IT-05-87-T), Trial Chamber, 26 February. 2009) at 92 ("liability for aiding and abetting under the Statute cannot be inchoate: the accused cannot be held responsible under Article 7(1) for aiding and abetting if a crime or underlying offence is never actually carried out with his assistance, encouragement, or moral support."); Judgment *Prosecutor v. Semanza*, (ICTR-97-20-T), 15 May 2003, § 398 ("Article 6(1) does not criminalize inchoate offences".).

[33] Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment, ¶ 1015 (Dec. 3, 2003); this aspect of the Trial Chamber's reasoning was affirmed on appeal. See Prosecutor v. Nahimana et al., *supra* note 76, at 678; for a concise articulation of the difference between instigation as mode of liability and incitement as inchoate offence, see Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, Judgment, ¶ 512 (June 20, 2009) ("Instigation under Article 6 (1) is a mode of liability; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement is itself a crime, requiring no demonstration that it in fact contributed in any way to the commission of acts of genocide.").

naturally make causing harm a central component of the remorse we feel for our actions. We would be appalled by someone who treated negligent driving that killed an infant as merely a question of poor driving, in the same way that we would view someone who blamed themselves for killing an infant when they merely drove negligently as psychically imbalanced.[34] The reality is that "[f]eelings of remorse and guilt are closely connected with causing harm, for these feelings are part of a broader pattern of human interaction."[35] Consequently, in order to maintain a close intersection between morality and criminal responsibility, we have to live with the unfortunate downside that is overdetermination.

Second, causation also preserves freedom, providing another rationale for tolerating the problem. One of the primary concerns in the literature on over-criminalization[36] is the extent to which conduct-type offenses that criminalize inherently risky behaviors inhibit freedom of action. Take the criminalization of weapons possession. Here, we prohibit possession because of its statistical correlation with use for criminal ends, not because it is intrinsically harmful. But many argue that a blanket crime of possession is over-inclusive, given that it restricts the freedoms of those who carry and use arms for non-criminal purposes.[37] So by insisting on a causal link between proscribed harm and actions of an accused, international criminal justice offers only a minimalist intrusion into the liberty of risky but otherwise socially desirable practices—causation ensures that Bout is *free* to sell weapons to Angolans, except where they *cause* atrocities.[38]

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[34] S. Wolf, 'The Moral of Moral Luck', in C. Calhoun ed. *Setting The Moral Compass Essays By Women Philosophers* (New York: Oxford University Press, 2004), at 6..

[35] G. Fletcher. *Rethinking the Criminal Law,* (London: Little, Brown, 1978) at 482 (note also Fletcher's helpful criticisms of this position, questioning the validity of using popular feelings of remorse as foundational for criminal responsibility insofar as they may be the product of "neurotic guilt."). This is similar to John Gardner's argument that using emotions as a basis for criminal responsibility depends on how decent the emotions are. J. Gardner, *Wrongdoing by Results: Moore's Experiential Argument* (2012) 18 Legal Theory (forthcoming) (citing irrational emotional prejudices against homosexuality as an example of indecent emotions of this type).

[36] S.H. Kadish. *Blame and Punishment: Essays in the Criminal Law*. (New York; London: Macmillan, 1987), at 21-61; D.N. Husak. *Overcrimininalization: The Limits of the Criminal Law* (New York: Macmillan, 2008).

[37] For an excellent set of arguments to this effect, see D. N. Husak, 'Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction,' 23 *Law and Philosophy* (2004), 437–493.

[38] I acknowledge that many would view selling weapons as categorically socially *un*desirable, especially in the context of the Angolan War. I am not prepared to follow the first of these arguments, because it denies the importance

Third, causation may also be a practical necessity of proof. A system of international criminal responsibility that abolishes causation in favor of a structure that makes attempt the paradigmatic basis for accountability would face severe difficulties accessing relevant mental states. While it is often possible to identify the person who has *caused* a harm, it is markedly more difficult to isolate the class of people who entertained criminal intentions towards others. Mental states, after all, 'leave no trace.'[39] Consequently, demanding proof of causation ensures a necessary degree of functional efficiency in the investigation and proof of international crimes, while simultaneously preserving the private internal life of potential defendants from undue encroachment.[40] If we aspire to liberal notions of punishment, these are salutary characteristics.

Fourth, it is unclear to what extent those in the moral-luck camp can really wash their hands of causation entirely. Invariably, partisans of this theory still demand some action on the part of defendants, usually defining it as an act that risks a criminalized legal interest.[41] Shooting a gun at another person is murder if this action coincides with an intention to kill, regardless of whether someone actually dies or not. On first blush, this is an astute argument, which claims to dispense with causation while still guarding against pure thought crimes. And yet, how do we know that firing a gun qualifies as an act that increases the risk of murder, except by drawing on our experience of the consequences of speeding bullets puncturing the human body? We only know that firing the gun is a plausible last-act for murder because

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of weaponry in legitimate self-defense. Accordingly, I am tempted to think that circumstances matter a great deal for the second argument too.

[39] J. M. Fischer & R. H. Ennis, 'Causation and Liability,' 15 *Philosophy and Public Affairs* (1986), 33–40; See also, V. Tadros. *Criminal Responsibility* (Oxford: Oxford University Press: 2007), at 155; ("Given that what the defendant has done cannot be established without considering what the defendant has caused, it will be obvious that causation will be relevant to determining the criminal responsibility of the defendant.").

[40] I extrapolate this position from Antony Duff's argument that privacy and autonomy are the primary rationale for why thought crimes are objectionable. The addition of a causal element is my own. See A. Duff. *Answering for Crime: Responsibility and Liability in the Criminal Law* (New York: Hart Publishing, 2007), at 102–104. I accept, of course, that the requirement of intention still requires courts to intrude on the internal lives of defendants. The argument here is that causation reduces (but does not eliminate) the dangerousness of this artificial but necessary exercise.

[41] For instance, Alexander, Ferzan and Morse reject causation and require a last-act that unleashes a risk over which the defendant no longer has control. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 197–199 (1 ed. 2009).

intuitions derived from causation tell us as much, meaning that causation is still doing important normative work no matter if we formally repress this reality.[42]

How extensive is the problem of overdetermination then in existing international criminal law? Superficially, we might anticipate that the difficulty is localized in harm-type crimes, since only these make causation a constitutive element of responsibility. Lamentably, this is far from true. For accomplices, the harm/conduct distinction disappears because the derivative nature of the secondary party's liability creates a cause-like relationship,[43] through which overdetermination again rears its ugly head. According to traditional accounts, rape is a conduct-type crime (insofar as conduct and not consequence is the quintessence of the offence), but assessing whether a supplier of weapons can be convicted of rape for providing the weapons used to coerce the sexual intrusion demands causation too. How else can we justify convicting Bout of this particular war crime, other than by showing that his actions made a difference to this conduct of a rapist? Thus, we are again vulnerable to the rejoinder that these rapes would have happened anyway.

Arguably, even the direct *perpetration* of *conduct-type* offences can be overdetermined if they take place in a context where one perpetrator is immediately substitutable for another. If, for example, a particular soldier is ordered to rape a male inmate within a prisoner of war camp, and duly does so in accordance with these orders, is the claim that "it would have happened whether I did it or not" not equally available to him where another soldier would certainly have taken his place had he refused? This, I concede, is controversial because it merges what Anglo-Americans describe as overdetermination (the firing squad) with additional or pre-emptive causation (someone else would have shot the prisoner later had the firing squad not done so). The received wisdom is that pre-emptive causation is very different because we never really know how events would have transpired otherwise, but this position fails to address squarely the moral appeal individuals like Bout make to expiate themselves.

Similarly, even if these sorts of pre-emptive cases give rise to what German theorists frequently discredit as 'hypothetical

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[42] Viewed in this fashion, the act requirement offered by those who advocate abandoning causation looks very similar to what German theorists call adequate causation (*Adaequanztheorie*). This theory emphasizes the generic propensities of particular actions. For further details, see below in Part II.

[43] S.H. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,' 73 *California Law Review* (1985), 323-410, at 323, 327.

causation,'[44] I doubt whether this criticism is terribly well founded. For one reason, causation is always hypothetical. In order to determine the responsibility of the serial murderer who allegedly kills an old lady with a gun, we must construct an imaginary world that is identical to that in which the serial murdered acted as he did, minus the squeezing of the trigger. Only this journey into a fictitious world allows us to determine whether the serial murderer *caused* the death of victims. So, when ICC Judge Fulford objects that determining whether Lubanga made an *essential* contribution to the enlistment of child solders requires 'a hypothetical investigation as to how events might have unfolded without the accused's involvement',[45] the obvious retort is that causation always involves this retreat into the imaginary. We are operating in hypothetical worlds either way.

Instead of belaboring the unavoidably speculative nature of this exercise, the better explanation for why pre-emptive causation (e.g. Bout) should be distinguished from overdetermination (e.g. Dresden pilots) probably flows from assessing causation in a *minimally different world*. In the words of David Lewis, in determining whether a particular act or event is a cause of another, the fictive world we construct "should be closest to actuality, resembling itself more than any other world resembles it."[46] Consequently, our task should involve *subtraction* (of the defendant's actions) but not *addition* (of alternative possible actions or events):[47] otherwise we are left without any principled normative restraint capable of preventing our imaginations from running wild. So, the problem of overdetermination is formally limited to situations such as Allied pilots bombing Dresden; not Bout in Angola. In the former, the alternative Allied pilots were also in the air dropping incendiaries over Dresden whereas substitutes for Bout would probably have sold weapons through other channels, at some later time.

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[44] C. Roxin *Strafrecht: Allgemeiner Teil. Band I: Grundlagen. Der Aufbau der Verbrechenslehre* (4th edn., Munich: Verlag C. H. Beck, 2006) at 354; K. Kühl, Strafrecht Allgemeiner Teil (6th edn., Vahlen Franz GmbH, 2008), at 23.

[45] Separate and Partly Dissenting Opinion of Judge Fulford Judgement, *Lubanga*, *supra* note 8, at § 17.

[46] David Lewis, *Causation*, 70 THE JOURNAL OF PHILOSOPHY 556–567, 560 (1973). Of course, Lewis later retracted portions of his thinking on overdetermined causes, and ultimately reached the position that all pre-emptive causes are in fact overdetermined because of minimal relations between pre-empted and pre-empting causes. See David Lewis, *Causation as Influence*, 97 THE JOURNAL OF PHILOSOPHY 182–197, 189 (2000).

[47] My thanks to Thomas Weigend for this point.

Already, these illustrations should leave you feeling slightly incredulous. What about pilots who are only over the English Channel en route to Dresden, or arms vendors who are pressing Angolan warlords to abandon Bout in an attempt to sell them their cheaper more damaging weapons systems? The point is that even if we can agree that those who merely pre-empt other people from committing inevitable crimes do *cause* international crimes in the relevant sense, we are still at pains to ascertain whether a particular set of facts is pre-emptive or overdetermined. In fact, these sorts of epistemic constraints lead two imminent theorists to perfectly contradictory positions about the problem of overdetermination. These competing accounts warrant our attention momentarily, since they alert us to the epistemic difficulties that await even if we are able to resolve first principles.

On the one hand, Martin Bunzl famously argues that every supposed instance of overdetermination is really an example of pre-emptive causation if one looks hard enough.[48] In the case of the firing squad, one of the soldiers who shoots at the prisoner actually kills her first. Sure, the difference between the first and subsequent bullets penetrating the heart may only be a nanosecond, but this difference is still significant if we are truly committed to constructing *minimally different worlds.* To extrapolate, even in the firestorm that raged over Dresden over those three horrendous days, the fire that killed a given child was attributable to a particular bomb, dropped by a single pilot with assistance from a specific crew, on orders from an individual commander. While it might be nigh on impossible to trace these individuals, the evidential problem should not corrupt the deeper moral principle.

At the end of a distinguished career, David Lewis reached the opposite conclusion—for Lewis, pre-emptive causes do not exist and causation is always overdetermined.[49] To illustrate his thesis, Lewis used the example of a two people throwing stones at a glass, although the firing squad would have served his purposes perfectly too.[50] In the stone-throwing example, the first stone hits the glass ahead of the second, shattering the object completely. Thus, when the second stone arrives at its intended destination, there is simply no glass left to break. While many would claim that the first stone caused the shattering, Lewis argues that the second stone's flight

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[48] See M. Bunzl, 'Causal Overdetermination', 76 *Journal of Philosophy* (1979), at 147 ("the illusion of causal overdetermination arises from nothing more than the same epistemic constraints that make for difficulties in distinguishing causes that preempt other causes.").

[49] Lewis, *supra* note 46.

[50] *Id.* at 188–189.

affects that of the first, by minimally influencing the gravitational forces operative on it.[51] To summarize a more sophisticated argument, the event would have been different without the second stone. Thus, both throwers caused the harm, even though it would have materialized *almost* identically without either of them.

The implications are great. Our four variants of the problem suggest that overdetermination arises even as we modulate between harm-type or conduct-type crimes these individuals are said to have assisted, between the different means of committing international crimes across the full panoply of 'modes of liability,' and within structured organizations as well as mereological groups. As such, overdetermination emerges as an acute problem for international criminal justice because: causation is a quintessential element of responsibility for international crimes in a great many contexts; the epistemological difficulties in distinguishing pre-emptive causes from overdetermined causes are likely to be more acute given the factual complexity of international cases, and individual perpetrators of international crimes very frequently play fungible roles within collective entities that guarantee the crime's commission.

III. AN OVERVIEW OF THEORIES OF CAUSATION

In order to assess the relative strengths and weaknesses of the various attempts at solving the problem of overdetermination, we must first understand causation *tout court*. In setting out to acquire this understanding, we are immediately struck by a stark peculiarity about international criminal law: while "modes of liability" may well lay claim to being the most discussed topic within the discipline, more fundamental principles such as causation attract little to no scholarly attention. Similarly, the only real judicial reference to the concept usually reaffirms that '[a]lthough the accused's conduct need not have been a condition sine qua non of the commission of the crime, it must have made a difference.'[52] As we will explore later, this language is opaque to the point of meaninglessness, but in order to understand why, we must first explore the competing explanations of cause and effect that could underpin this explanation. What is *sine qua non* causation and what are we left with if we discard it?

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[51] *Id.* at 189.

[52] *Kordić*, *supra* note 17 at § 391; *Prosecutor v. Blaškić* , *supra* note 17 at § 270 ("Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*.").

Most often, causation is understood as a counterfactual relationship between two connected events. "But for" event A, event B would never have occurred. This understanding springs from widely held moral intuitions—the imperative *do no harm* lies at the heart of many visions of moral obligation. We have free rein to craft whatever constitutes our own vision of the good life, but we remain constrained by the minimalist obligation to ensure that we do not bring harm into the world. As Michael Moore explains, '[w]hat gets recorded in our moral ledgers are the bad states of affairs that would not have existed but for our actions.'[53] And an understanding of the natural effects of 'impacts, blows, and gross mechanical movements' that is instilled in us from a very young age normally leaves us with a clear picture that making a difference to events matters in determining blame.[54] Accordingly, whether actions are a *sine qua non* for criminal harms is the dominant yardstick for determining causation.

This immediately poses problems. While our primary interest lies in situations where the *sine qua non* assessment leaves too much out, the major influence on causal theory stems from the test's failings in the opposite extreme. Counterfactual causation is over-inclusive in two dimensions. First, it makes even distant conditions of a particular event relevant to responsibility. To cite a neat and often-used example, consider the responsibility of a serial murderer's grandmother—but for her decision to procreate the better part of a century earlier, the murder of numerous innocents would never have transpired at the hands of her progeny.[55] But by including the grandmother in our account of these gruesome crimes, we extend causation beyond the point of plausibility, establishing a kind of *reductio ad absurdum* for the 'but for' standard that dominates causal theory.

Second, coincidences also undermine the merit of 'but for' causation. In a range of cases, an entirely unforeseeable occurrence can derail an actor's causal influence from its pre-established path. If I shoot my estranged lover intending to kill her, but my bullet only grazes her leg, am I really responsible for murder when she is later killed by a bolt of lightning on the way to the hospital?[56] My actions are certainly a 'but for' condition of her death, and yet the

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[53] Moore, *supra* note 28, at 317.
[54] H.L.A. Hart and T. Honoré, *supra* note 26, at 15-16.
[55] J. Stapleton, 'Perspectives on Causation,' in Jeremy Horder ed., *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 2002), at 67.
[56] For three other interesting variants of this problematic, see J. Feinberg, *Harm to Others: the Moral Limits of the Criminal Law*, 2nd edn., (Oxford: Oxford University Press, 1987), at 122.

result I contributed to bringing about is so attenuated from the direct consequences of my own conduct, that blaming me for murder seems to miscommunicate events as they really transpired. For most, I did not really *cause* my ex-lover's death in the operative sense, and calling me to answer for these entirely anomalous results runs counter to the rationales for causation in criminal law that we considered earlier.

In response, the most prominent causal theories simply append additional limiting criteria to compensate for the overly promiscuous 'but for' standard. In Anglo-American systems, this approach has led to the bifurcation of causation into two conjoint elements, namely, *cause in fact* and *legal causation*. The first allows for a "purely scientific" inquiry on factual grounds based on the "but for" standard, thus including the serial murderer's grandmother and my actions leading to my ex-lover's death by lightning. The second evaluative limb excludes these scenarios, frequently by somewhat misleadingly describing them as either "inadequately proximate" or "too remote."[57] To be sure, a range of alternative concepts, from substantial factor to harm-within-the-risk, claim to achieve this limiting function more fairly,[58] but each of these exists in the shadows of the more popular notion of proximate cause.

This duality also exists in orthodox German theory. According to the prevalent 'theory of conditions' (*Bedingungstheorie*), all conditions are formally equal, making 'but for' causation the most favored basic test. Instead of a notion of proximate cause or remoteness, however, the German tradition constrains the overreach of the *sine qua non* standard by relying on a concept called 'normative attribution' (*objektive Zurechnung*).[59] Normative

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[57] For a more historical analysis of proximate cause in the Anglo-American tradtion, see J.A. McLaughlin 'Proximate Cause,' 39 *Harvard Law Review*, 149–199; for a précis of the abundant criticism of both concepts, see Hart and Honoré *supra* note 15 at 4 (refering to "insufficient proximity" and "too remote" as illusions, and citing dicta from the 19th century arguing that both concepts merely camouflage the real question of whether it is fair to convict the accused in the circumstances). H. Morris, *Freedom and Responsibility: Readings in Philosophy and Law* (Stanford, CA: Stanford University Press, 1961), at 284. (discussing the widely held view that proximate cause "is simply a 'policy decision' disguised as a factual discovery".).

[58] For an excellent overview and criticism of these various options, see Moore, *supra* note 28 at III (discussing foreseeability, harm-within-the-risk, substantial factor and remoteness); See also, R. Wright 'Causation in Tort Law,' 73 *California Law Review* (1985), 1759–1773 (also discussing several theories for limiting the scope of *sine qua non* causation).

[59] C. Roxin *Strafrecht: Allgemeiner Teil. Band I: Grundlagen. Der Aufbau der Verbrechenslehre* (4th edn., Munich: Verlag C. H. Beck, 2006) at 372; H.

attribution filters out causal contributions that were minor, remote, unusual or involved third party interventions of a particular intensity based on notions of fairness. As one international criminal tribunal put it, normative attribution 'is a means of limiting "naturalistic causality."'[60] If one might again protest that, like the equivalent concept of legal causation in English-speaking systems, these standards are hopelessly vague, the essential point for present purposes is that neither legal tradition allows "but for" causation free rein—both employ supplementary doctrine out of fear that an unbridled concept of "but for" causation will overstep what is fair.

There is, however, an array of theories that contest these cumbersome and ill-defined twin standards. One set of alternatives overcomes the imperfections of the "but for" test and its restraining partner by disputing the validity of the cause in fact/legal causation dichotomy outright. In the English-speaking tradition, H.L.A Hart and Tony Honoré authored the most famous attempt of this sort. For Hart and Honoré, common sense was the shining light that illuminated a defensible understanding of causation and its limits; not abstract philosophical, scientific or open-textured principles that struggled for concrete articulation. This appeal to common sense (to be established through the hypothetical ordinary citizen) leads inexorably to the conclusion that *the* cause of a criminal harm is the condition that makes a difference, in that it either constitutes a voluntary human act intended to bring about the harm, or is an abnormal action, event or condition that is itself the real cause of a harm.

There is undoubtedly much that commends this explanation. In a democratic system where criminal norms purport to put would-be defendants on notice of potentially important intrusions on individual liberty, the everyday perceptions of citizens matter as metrics for defining causation. The great merit of the common sense approach, quite apart from simplifying an oftentimes spectacularly complex philosophical literature, is that it champions the standard a potential criminal would employ.[61] And yet, for a number of reasons, the common-sense approach has not garnered widespread adherence since its academic inception. For one

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Koriath, *Kausalität und Objektive Zurechnung* (1st edn., Baden-Baden: Nomos, 2007), at 15 (discussing the implications of normative attribution); M. Maiwald *Kausalität und Strafrecht. Studien zum Verhältnis von Naturwissenschaft und Jurisprudenz* (Munich: Grundlegend, 1980), at 4-5, 9.

[60] Judgment, *Prosecutor v. Orić*, (IT-03-68-T), Trial Chamber, 30 June 2006, at 305.

[61] P.K. Ryu, 'Causation in Criminal Law,' (1958) 106 *University of Pennsylvania Law Review* 773-805, at 786.

reason, if criminal justice uses causation to achieve corrective justice (i.e. you account for the harm you caused), justice demands "a robustly metaphysical interpretation of cause,"[62] not some definition that accords with popular perceptions as a matter of convenience.

Moreover, the common-sense standard of causation does not appreciably alter the fluid state of *legal causation* it was crafted to transcend. As Paul Ryu colorfully retorted soon after Hart and Honoré's groundbreaking first edition emerged, 'common sense (or the test applied by the common man) compares with scientific thinking as sight estimates size compared with scientific measure.'[63] So conferring *cause* a meaning that best suits the clear-cut resolution of disputes, the need for simplicity or popular expectations may have some beneficial sociological consequences, but it misspeaks responsibility by trading off the meaning of a concept that arguably has a unique metaphysical significance this account does not attempt to honor, and ultimately, is no less equivocal than the vague notion of legal causation it was invented to replace. Others will refute this, of course, but these perceptions do explain the very limited purchase of common sense in this field.

Other theories of causation attempt different solutions to these problems, but they are no more successful in dethroning the dominant 'but for' test. The theory of *adequate causation* (*Adaequanztheorie*) is arguably the strongest among these contending accounts. Here, contrary to the individualized assessment of causation involved in the "but for" analysis, adequate causation is only established where the action in question was of a *type* adequate to produce the harm generated.[64] My shooting at my ex-lover was not the *type* of action that was capable of producing death by lightning, meaning that my responsibility should be limited to that of attempting her murder.[65] Whereas 'but for' causation undertakes causal inquiries one by one in perfect hermetic isolation, adequate causation limits this over-reach,

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[62] M. Moore, *supra* note 27, at 95. But for an excellent criticism of the notion that causation has any inherent metaphysical character, see Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CAL. L. REV. 879 (2000).

[63] Ryu, *supra* note 61 at 786.

[64] Hart and Honoré, *supra* note 26 at 411 (introducing adequate causation, including the focus on kinds of connections); Ryu, *supra* note 61 at 791–792 (also introducing adequate theory of causation).

[65] Note how this circles us back into our earlier debate about whether harm is a conceptually meaningful ingredient of responsibility. If it is not, it is hard to understand why attempts should be treated as involving lesser responsibility. Thus, on my lightning example, some would argue that I am equally responsible whether my ex-lover dies by my bullet or an entirely unforeseen electrocution.

assessing these issues by deferring to an action's generic propensities.[66] I am not responsible for murdering my estranged lover because shooting is generally inadequate as a cause of death by lightning.

But this theory has major shortcomings too. Surely a defendant would have to know of typical propensities in order to be fairly held responsible for them? As a result, the most popular iteration of adequacy theory demands that the accused knew the particular factors (ontological knowledge) and the pertinent general laws of nature (nomological knowledge).[67] Any yet, for many, these requirements are unpalatable. By introducing a mental element into a test devised to ascertain purely physical phenomena, they arguably force distinct concepts into an unhappy union. Thus, with certain exceptions, most courts flatly reject the concept because of this tendency to pollute the division between physical action and guilt.[68] This factor alone tends to confirm adequate causation's long-endured place as the underappreciated sibling of the more popular 'but for' alternative.

What then of the concept of efficient causation? Various versions of this theory posit that quantitative assessments of causation are capable of singling out the one true cause from the sea of necessary conditions. For some partisans, the one true cause is the last condition in a temporal sequence prior to the prohibited result's manifestation in the world; the preponderant factor that 'disrupts the equilibrium between positive and negative conditions.'[69] Others contend that whatever has the greatest or most *efficient* influence on the result constitutes *the cause*, denying that order in sequence need necessarily constitute the decisive factor. To illustrate, if ten blows of precisely the same force are necessary to kill a particular prisoner of war, and soldier A delivers eight of them before soldier B independently delivers the final two,

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[66] Hart and Honoré, *supra* note 26 (describing generalized theories of causation in the following terms: "They seek rather a general connexion between a condition and a subsequent event in the sense of a relation which will hold good although the condition is combined with a varying set of other conditions.").

[67] Ryu, *supra* note 61 at 791–792.

[68] See in particular, the decision of the German *Bundesgerichtshof*, (Federal Court of Justice) judgment of Sept. 28 1951 in *S. v. H.* (II. Strafsenat), , 1 B.G.H.S. at 332. (rejecting adequate causation within German criminal law). For other examples of courts adopting the adequacy theory, albeit some time ago, see *Id.* at 792–793; Hart and Honoré, *supra* note 26 at 417 (setting out various continental systems that accepted adequate causation in their criminal or civil systems).

[69] K. Binding. *Die Normen und ihre übertretung: Eine untersuchung über die rechtmässige handlung und die Arten des Delikts* (1st edn., Leipzig: Verlag Von Wilhelm Engelmann, 1877), at 470.

the efficient theory holds soldier A responsible, the preponderant theory declares soldier B the cause for making the final difference.

And yet, singularizing quantitative theories of causation such as these, that attempt to distil the *one* true cause of an event, seem inappropriately narrow for international criminal law. Aside from the persistent concern that these theories too are badly indeterminate,[70] efficient and last-cause understandings of causation struggle to make any real sense of the cases that concern us here. With respect to the Dresden bombers who are principal perpetrators, the many Viktor Bouts of this world who are accomplices, and the corporate officers who willingly sustain morally bankrupt political regimes who may be either perpetrators or accomplices, responsibility cannot be reduced to the act of a single agent. In other words, we are committed to the idea that responsibility for atrocity is diffused across numerous actors—masterminds, accomplices and executioners. For international crimes then, the quest for a single cause is at odds with our deepest intuitions about justice after events as complex as atrocity. Thus, we are drawn away from ideas about efficient causes back towards the more inclusive concept of 'but for' causation that captures all these actors.

This said, efficient causation is helpful in introducing a slightly controversial proposition that has (somewhat mysteriously) infiltrated modern international criminal law. The idea is that causal contributions must be 'substantial.'[71] At first blush, this quantitative vision of causation sits uncomfortably with the theory of conditions that underpins the popular "but for" standard. If all causes are equal, how are some more potent than others? An action is either a cause of an event or it is not, so how do you make a substantial contribution when causation is an on or off switch? The answer again lies in the notion that not all causes count for responsibility—some are too distant, weak or bizarre. So, in accordance with metaphysics that view causal relations as scalar,

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[70] Even one of the most ardent advocates of the efficiency theory of causation has conceded that precise criteria are not available to filter out efficient from non-efficient causes. M. von Buri *Die Kausalitat und ihre strafrechtlichen Beziehungen* (Stuttgart: 1885), at 7-9.

[71] Judgment, *Prosecutor v. Kordić & Čerkez*, (IT-95-14/2-A), Trial Chamber, 17 December 2004, § 27 ("it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another..."); Judgment, *Prosecutor v. Nahimana et al.* (ICTR-99-52-A), 28 November 2007 § 410 (specifying that genocide and crimes against humanity "require evidence of a substantial contrbution."); Judgment, *Prosecutor v. Brima*, (SCSL 04-16-T), 20 June 2007, § 1648 (2007) (requiring a substantial contribution for the purposes of planning international crimes).

causal force is a variable property of events that can 'peter out gradually by transmission through events.'[72]

Where does modern international criminal law stand on these various competing visions of causation? It is still too early to say. Frequently, difficult causal problems are simply abandoned under the guise of prosecutorial burdens of proof,[73] and little is known about how courts will address these contradictory explanations in trials involving international crimes. Assuming that international courts will follow domestic systems' lead, however, the 'but for' test would seem likely to infiltrate international criminal proceedings, in tandem with an auxiliary concept of normative attribution or its equivalent. This likelihood arises from international criminal law's sometimes unconditional deference to the position adopted in leading Western municipal systems,[74] but it will also flow from a desire to assess more than a single strain of causal influences on atrocity. Consequently, everything suggests that overdetermination, the under-inclusive flipside of 'but for' causation, is likely to enjoy a long and troublesome life in international criminal justice.

IV. THE PROBLEM OF OVERDETERMINATION AND ITS SOLUTIONS

Let us begin our exploration of possible solutions for the overdetermination problem by recapitulating the various examples with which we began. In the first, the fire bombing of Dresden by close to 8,000 Allied pilots provided a paradigmatic illustration closest to the firing-squad motif. As part of this aerial campaign, no individual pilot made a difference to the firestorm that would have resulted without their token contribution. Put differently, we can subtract the contribution of each and every pilot in a trial for say crimes against humanity as counterfactual causation would demand, but this leaves us with the implausible result that these

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[72] Moore, *supra* note 27 at 224. Another nice description Moore employs is that causation "tires" through its links. See *Id,* at 102.

[73] In one instance, for example, an individual named Gotovac died in a Bosnian concentration camp as the result of two separate beatings. The accused participated in the first, but not the second. Conceivably, the accused produced wounds that accelerated death once the second spate of violence commenced. The second beating could also have been so vicious that Gotovac would have died irrespective of whether the first too place or not. These sorts of scenario would give rise to neat problems in causation, but they were circumvented by pointing to the failure to prove causation.

[74] For a series of instances where international criminal law uncritically absorbs doctrine from prominent Western systems, see Stewart, *supra* note 3.

crimes are the fault of no one. This, as we have seen, highlights how the actions of even those personally perpetrating crimes can be overdetermined in the relevant sense—the problem is not limited to accomplices on any plausible rendering.

Thomas Lubanga offered a second potential variation on this truth, even if some would contest his inclusion here. If Lubanga's defence is true, then his involvement in the recruitment of Congolese child soldiers was arguably overdetermined too, even though he is also probably best described as a perpetrator not an accomplice. To recall, Lubanga argues that the members of the rebel group he represented did not 'need him to carry out these crimes.'[75] I accept that some would describe this as pre-emptive causation i.e. Lubanga completed the crime before someone else, so you cannot assimilate this to the firing-squad metaphor. But even if we take seriously the idea that we are only to construct a *minimally different world* to test what would have happened without a defendant's conduct, "one should not erroneously infer that [various tests for causation] will blind us to the causal role of dispositions or inclinations."[76] If others had inclinations to fill Lubanga's shoes, might his conduct not be overdetermined?

The actions of businesspeople in apartheid South Africa were doubly overdetermined. On one level, a robust global market makes the acts of any one company in the apartheid regime fungible for other companies would willingly play this role if any one corporation defects. On a second level, a single vote on a corporate board of, say, fifteen members seldom makes a difference to the actions of the company. If a company's board passed a motion to assist apartheid crimes by a bare minimum (i.e. 8 votes to 7 in this hypothetical), then each board member who cast an affirmative vote *did* make a difference to the downstream consequences, but in any other voting configuration, the company would have acted as it did regardless of any individual vote. How then do we hold these businesspeople responsible, when almost no consequence can be pinned on any individual using the prevalent understanding of causation?

Viktor Bout offers a slight variation on this theme. In the case of businesses operating in apartheid South Africa, the willing substitutes are numerous and barriers to entry marginal. In Viktor Bout's case, he forms part of a much smaller group of individuals who would or could run weapons to Angola in the midst of this bloodshed (for reasons that become apparent further below).

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[75] Defence Closing Statements (Open Session), *Lubanga* (ICC-01/04-01/06-T-357), Trial Chamber I, August 26, 2011, § 30, lines 2-5.

[76] MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 278 (2008).

Moreover, ascertaining whether someone else would have filled this role is more speculative in Bout's case, given the extent of these impediments. For these reasons, Bout's argument that 'If I didn't do it, someone else would,'"[77] falls within the rubric of pre-emptive causation, and contravenes our *minimally different world* test. Nonetheless, if his contribution is neutral in consequentialist terms in that others would have done more or less identically, we are still left with the vexing task of justifying his responsibility for international crimes that require causation. Moreover, these issues not only arise in formal organizations; Bout shows how they are salient for mereological groups such as arms vendors that have no joint agenda.

Jonathan Glover makes the task of justifying accountability in these contexts even harder still. In a beautiful articulation of the scale of the ethical dilemma (that coincidentally uses arms manufacturers and businesses in apartheid as illustrations), he questions whether it is really safe to claim that overdetermined contributions are neutral in consequentialist terms.[78] The problem is much worse. The side effects of declining to participate in evil may bring an added set of negative consequences, without impacting upon the advent of the atrocity. To return to Dresden, the Allied pilots whose troubled consciences led them to drop their ordinance over vacant fields outside the city rather than participate in the horror could have faced court martial, loss of earnings for their family, or major impediments to their careers over the longer term. If the massacre at Dresden was going to unfold anyway, would these side effects not favor participation absent an ability to actually make a difference to the atrocity?

This is surely sobering. The reasoning implies that if we cannot point to a meaningful difference our conduct would make relative to massive harm, and a set of countervailing side effects favor implicating oneself to at least avoid these peripheral negativities, the only reason to refuse participating in evil might derive from a strange sort of narcissistic pride.[79] So to place this set of reflections back into the context of modern international criminal law, the

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[77] Schmidle, *supra* note 13.

[78] J. Glover & M. J. Scott-Taggart, 'It Makes no Difference Whether or Not I Do It,' 49 *Proceedings of the Aristotelian Society*, *Supplementary Volumes*, (1975), 171–209.

[79] I accept, however, that someone who chose to participate would have to live the rest of his days with the psychological impact of knowing that she personally did these things, which would likely be a massive psychic cost. For evidence of this, see the testimony of various Dresden pilots cited in Kutz, who reflected many years later that "I expect no mercy in the life to come." Kutz, *supra* note 1, p 120-122.

major conceptual problem in the famed Erdemović case (where other executioners threatened the life of a fellow soldier who did not wish to participate in the execution of thousands of men and boys at Srebrenica) is less whether international law afforded Erdemović a defense of duress,[80] and more whether criminal law could justifiably hold him responsible for causing crimes that would have certainly transpired regardless. In Glover's terms, even minor negative side effects could favor participation in these inevitable crimes, even though they create pressures that are well short of duress.

To date, international criminal justice has offered only a shallow treatment of these disquieting problems. Most frequently, the only real engagement is tacit, when international courts repeat the refrain that '[a]lthough the accused's conduct need not have been a condition sine qua non of the commission of the crime, it must have made a difference.'[81] As I suggested earlier, this language lacks any appreciable meaning. If the phrase implies that a theory of causation other than 'but for' causation better explains the relationship between action and result in international criminal justice, courts should announce which less popular theory of causation is doing the hidden causal work. As I argued in Part II, there are compelling reasons why *sine qua non* is the dominant test for causation in theory and practice almost everywhere, not to mention strong grounds for its retention in international criminal justice in particular. If international courts are going to stray from this path, they should at least announce as much and elect one of the competing theories we have considered.

Alternatively, if this language implies that there is some way of making a difference to something without causing it, the test fails for other reasons. First, it unjustifiably dispenses with causation, when this concept is made necessary by the definition of international crimes. In Part I, we saw that causation is a pre-requisite for responsibility in international criminal justice because international criminal law creates harm-type offenses, and because secondary parties often bear causal relations to the physical perpetrators of conduct-type offenses they assist. One cannot

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[80] For the very best exemplars of an extensive literature dealing with Erdemović under the rubric of duress, see Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741 (2008); Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*, 43 VA. J. INT'L L. 861 (2002); Alexander K. A. Greenawalt, *Pluralism of International Criminal Law, The*, 86 IND. L.J. 1063 (2011).

[81] *Kordić*, *supra* note 17 at § 391; *Prosecutor v. Blaškić* , *supra* note 17 at § 270 ("Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*.").

discard causation in these contexts without miscommunicating what it means to be responsible for an international crime, so if the standard test means that causation is not required, it creates an expressive contradiction.

Second, making a difference without causing something is logically nonsensical since "there is no way of contributing to any result, directly or indirectly, except causally."[82] So even if we overlooked this test's first infidelity to the international crimes with which it partners, this second flaw confirms that the approach is more a smokescreen to prevent detection than a good-faith philosophical attempt at accounting for the moral problem. On either reading of this language, then, the test fails to offer a position that is commensurate with the challenge that overdetermined causes pose for international criminal justice as a discipline. This realization should spark better solutions for a problem of this importance, if we are to apply principles of blame attribution that are justified not intuitive, arbitrary and illiberal.

Perhaps domestic criminal systems offer better solutions? Unfortunately, I fear not. In both Anglo-American and German systems, the preferred strategy for dealing with overdetermined causes modifies counterfactual causation by assessing events *as they actually transpired*.[83] The supposition is that the harms in Angola or before the metaphorical firing squad can be defined in a sufficiently precise way that the sorts of difficulties overdetermination engenders simply dissolve. In the words of John Mackie, '[w]hat we accept as causing each result, though not necessary in the circumstances for that result described in some broad way, was necessary in the circumstances for the result *as it came about.*'[84] So, we should *not* evaluate whether our prisoner up against a brick wall would have died but for the actions of any one soldier in the firing squad; the question is, would she have died as she did?

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[82] Gardner, *supra* note 27, at 443.

[83] Hart and Honoré, *supra* note 26, at 117-119 (discussing what they describe as additional causes, and the need for assessing *sine qua non* based on events that occurred "in this particular way"); K. J. M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (New York: Oxford University Press, 1991), at 84 ("the *sine qua non* condition is concerned with an event's exact occurrence, including time, place, extent and type of harm, and so on."); For the German equivalent, which assesses the *result in its concrete figure* ("Erfolg in seiner konkreten Gestalt"), see H. Koriath, *Kausalität und objektive Zurechnung*. (1st edn., Baden-Baden: Nomos, 2007), at 145; Roxin, *supra* note 59, at 359.

[84] J.L Mackie, *The Cement of the Universe: A Study of Causation* (New York: Oxford University Press, 1980), at 46, (emphasis in original).

Alas, this solution does not work either. First, by adopting an understanding of causation based on events as they actually took place, we would have to describe a woman who paints a vase blue before someone else smashes it as a cause of the vase's destruction.[85] After all, if the painter had not done as she did, the event would not have occurred *as it took place*, since the shattered pieces of porcelain left on the floor would be an entirely different color.[86] The implications of this objection are broad—the manufacturer of the t-shirt our prisoner is wearing when executed by the firing squad becomes a cause of the death,[87] since the event would have materialized quite differently after subtracting the clothing through which the bullet passed in the death that really took place.

Second, if *as it took place* includes a temporal component, everything is causally relevant to everything else. For example, it we offer a fine-grained account of Viktor Bout's complicity in atrocities that took place in Angola, a key property of the event was that they transpired in 1992. But time is a relational property of events, making Bout's criminally indifferent actions in Angola and every prior event causally linked. Consequently, Boris Becker was a causal contribution for Bout's crimes in Angola too, since his inaugural win at Wimbledon in 1985 had a precise temporal relationship with the fine-grained explanation of how Bout's crimes took place seven years later.[88] So in resorting to the fine-grained explanation of causation to overcome the shortcomings in the *sine qua non* theory of causation, we collapse into a standard whose breadth is without limit.

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[85] L. Traeger, *Der Kausalbegriff im Straf- und Zivilrecht* (Marburg, 1929). Claus Roxin later attempts to explain away this example, by arguing that the painting was not relevant for the time, place and way of the execution of the legal element of the crime. I find this unconvincing, since it introduces a different notion of relevant causation; Roxin, *supra* note 59, at 359, marginal no. 21. For more on the theory of relevant causation (*Relevanztheorie*) and its shortcomings, see Ryu, supra note 61, p. 793-796.

[86] L. Traeger, *supra* note 85.

[87] I borrow this example from I. Puppe, 'Naturalismus un Normativismus in der modernen Strafrechtsdogmatik,' 141 *Goltdammer's Archiv für Strafrecht* (1994), 297-301. Puppe offers an attractive solution, which goes unconsidered in the English-speaking literature, by arguing that causation should be seen as "a detrimental modification of the legally protected interest." But for criticism of this position too, see E. Hilgendorf, 'Zur Lehre vom Erfolg in seiner konkreten Gestalt,' 142 *Goltdammer's Archiv für Strafrecht* (1995) 527

[88] Michael Moore uses Princess Diana's death to illustrate this argument, but I draw on a historical figure with whom I am more enamored. Moore, *supra* note 27, at 414.

Third, a range of authors from different traditions object that the *harm as it took place* standard already posits the solution that causal inquiry exists to provide. In the German tradition, Friedrich Dencker concludes that using the concrete result adopts a condition for the description of the event that one already is certain about, which he rightly rejects as a circularity.[89] Similarly, in addressing the firing-squad example explicitly, Christopher Kutz argues that '[t]he trouble with this approach is that by identifying effects by their causes, it solves questions of overdetermination by tautology.'[90] Each of these criticisms plays off the fact that we do not include the manufacturer of the t-shirt the prisoner was wearing at the moment of execution because we believe it causally irrelevant, but this impermissibly assumes the answer that we look to causation to provide.

Ultimately, the various criticisms of *harm as it took place* alert us to a remarkable three-way convergence among purportedly conflicting accounts of criminal responsibility. In the first instance, the fine-grained solution to overdetermination that assesses harm as it actually took place is so broad as to make causation an irrelevance in assigning responsibility. If Boris Becker's first win at Wimbledon is a causal factor in Viktor Bout's responsibility for international crimes in Angola, causation loses all meaning as an ingredient in responsibility. This, ironically, coincides with the conclusion Christopher Kutz reaches after admonishing causation's inability to cope with overdetermined causes—in both instances, causation plays no part.[91] To complete the curious merger, these approaches also coincide with arguments that moral luck interdicts causation in the criminal law as a blanket rule. Although each of these approaches differ, their implication is identical—causation does no work in assigning responsibility for overdetermined harms.

This exposes a deep schizophrenia in international criminal justice. As things stand, the dominant theory for establishing responsibility for overdetermined causes in international justice is at odds with core commitments. Each of the arguments for

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[89] F. Dencker, *Kausalität und Gesamttat* (1st edn., Munich: Duncker & Humblot, 1996), at 106-107. In this spirit, see also Eric Hilgendorf, Zur Lehre von "Erfolg in seiner konkreten Gestalt,' 142 *Goltdammer's Archiv für Strafrecht* (1995), 515-524 (arguing that the "concrete result" is without fixed outline and indeterminate.).

[90] Kutz, *supra* note 1 at 285, footnote 33. Wright, *supra* note 58 at 1777–1778 (also describing the attempt to describe the effort to detail the manner of occurrence for purposes of calculating causation as tautology).

[91] Christopher Kutz, *Causeless complicity*, 1 CRIMINAL LAW AND PHILOSOPHY 289–305 (2007).

maintaining harm as a ground of liability finds a counterpoint in the intricacies of overdetermination. First, the evidential point about mental states 'leaving no trace' is clearly inapposite for overdetermined cases, since *ex hypothesi* there is no necessary correlation between result and any one individual's actions in these circumstances. And second, to some extent, feelings of remorse can be assuaged by Lubanga's countervailing sense that 'I wasn't needed for the crime,' or even more problematically, the knowledge that the world is better off that this inevitable evil came into being through me.

This said, someone is surely responsible for the Dresden firebombing! Participation in atrocity is surely sufficient, and the cases of Bout, Lubanga, Dresden pilots, and businesspeople in apartheid corroborate this moral intuition with spectacular intensity. Perhaps, then, instead of throwing up our hands in surrender to the incoherence of standards domestic courts tolerate or prematurely amputating the infected concept entirely, international criminal courts should seek out new explanations for what it means to cause an atrocity. In the context of their work, this would mean discarding the hopelessly hollow statement '[a]lthough the accused's conduct need not have been a condition *sine qua non* of the commission of the crime, it must have made a difference,'[92] in favor of a more robust holistic theory of causation that better accounts for individual agency within collective structures.

For some, this theory is already on offer. In recent years, a theory called *necessary element of a sufficient set* (NESS) has gained ascendancy in modern English-speaking systems, precisely because of its perceived success in resolving the overdetermination riddle. This particular theory was originally introduced by Hart and Honoré on the backs of Hume and John Stuart Mill, but later expanded and popularized by Richard Wright.[93] The formal definition of NESS that "a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedents actual conditions that was sufficient for the occurrence of the consequence."[94] The key word in all this is "actual". In the case of the Dresden bombers, each pilot made a necessary contribution to a sufficient

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[92] *Prosecutor v. Kordić & Čerkez*, *supra* note 17 at 391; *Prosecutor v. Blaškić* , *supra* note 17 at 270 ("Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*.").

[93] Wright, *supra* note 58.

[94] Wright, *supra* note 58 at 1782.

set of antecedent conditions that produced the actual firestorm. In essence, they all caused these murders by acting in unison.

What about the board members of companies in apartheid South Africa? To recall, according to the "but for" evaluation, any vote within a board other than a bare majority (i.e. 8 out of 15 votes) creates serious problems of causal overdetermination—each board member could rightly argue that her contribution in voting to do business with an apartheid government made no difference to that outcome. Under the NESS analysis, however, a vote of say 14 affirmative votes involves 14 distinct contributions to the *actual* set of conditions sufficient to propel the company into a role in sustaining a system of institutionalized racism.[95] So, claim adherents, NESS causation ably accounts for the Dresden-type harm where joint action produces an exact quantum of harm as well as overdetermined participation in voting structures where harm presupposes the attainment of a particular threshold. NESS factors thus appear to outperform their more established predecessor.

And yet NESS would treat Bout and Lubanga differently. In both these instances, the NESS analysis purportedly excludes these types of argument on the familiar distinction between pre-emptive and truly overdetermined causes, without explaining why this distinction is operative or how we go about distinguishing between them. In the case of Thomas Lubanga, it may well have been true that the militia that recruited child soldiers into their ranks did not need him for that purpose and that his contribution to the enterprise was less than essential, but the supposition is that this requires more than a *minimal imaginary world*. As Richard Wright would argue, "[t]he potential actions of others that did not in fact occur could not be a part of any set of actual antecedent conditions that was sufficient for the injury."[96] The evil did come through Lubanga, and yet NESS theorists still leave us guessing why this should be normatively important if the disposition of others confirm that someone else would certainly have taken his place.

How would a NESS factor function in international criminal law? For all its possible advantages, I also fear a collapse into a familiar indeterminacy. The real work NESS does involves drawing boundaries around sufficient sets of conditions, then holding anyone accountable (subject to other elements of blame attribution) who participated in this set. In cases involving massive

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[95] Wright, like many others, uses pollution cases to illustrate this phenomenon but the principles are easily transposable to corporate boards. See *Id.* at 1792–1794.

[96] *Id.* at 1795.

social upheaval, the prospects for massive sufficient sets for crimes that are dependent on broad collective participation are very real. In fact, this has proved one of the central points of contention around joint criminal enterprise in international criminal justice: sure, one can say an entire army of soldiers, government representatives and political supporters were engaged in a joint criminal enterprise,[97] but at some point people begin to fear this means 'just convict everyone.'[98] Two examples demonstrate comparable difficulties for NESS causation.

First, the war ICC indictee Thomas Lubanga was fighting in the Democratic Republic of Congo was motivated and fuelled by the illegal exploitation of natural resources by Western companies.[99] At a particular point, the closure of an industrial plant in Australia made the Eastern DRC the only place in the world where the mineral coltan could be extracted. This mineral, which is essential in laptop computers, game consoles and cellphones, is readily harvested by artisanal minerals, making it an ideal means of financing atrocity in the post-Cold War world. Immediately prior to Christmas in 2001, the demand for next generation electronics in Western markets saw prices in the region Thomas Lubanga operated rise 1000%, sparking a massive increase in atrocities as warring factions vied for dominance over extractive sites.[100] Does this market in pillaged commodities, which is dependent on a very large sufficient set of willing Western consumers, make these consumers responsible for the resulting crimes?[101]

Second, the reason Viktor Bout was so unrepentantly selling weapons to every brutal regime on the earth for more than a decade, was because Western governments supported him in the

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[97] For a synopsis of very broad joint criminal enterprises, see Alison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, CALIFORNIA LAW REVIEW 75–169 (2005).

[98] Mohamed Elewa Badar, *"Just Convict Everyone!" Joint Perpetration: From Tadić to Stakić and Back Again*, 6 INT. CRIM. L. R. 293–302 (2006).

[99] Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2001/357 (2001), 12 April 2001.

[100] J. Cuvelier and T. Raeymaekers, *Supporting the War Economy in the DRC: European Companies and the Coltan Trade*, International Peace Information Service, January 2002, available at http://www.ipisresearch.be/publications_detail.php?id=197&lang=en (visited 20 June 2012).

[101] For an overview of the law governing pillage of natural resources, see JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES (2010).

endeavor. The motivation for their collaboration was obvious; when they had to transfer weapons covertly on the grey market, they depended on established black-market dealers such as Bout to give their covert transfers the clandestine veneer necessary.[102] In a democratic system like the United States (to name only one of Bout's trusted supporters), the decision of political leaders to support someone such as Bout despite his actions in Angola might implicate a massive sufficient set of all American citizens who voted for these political representatives.[103] Without this sufficient set's vote, the leaders could not have acted thus, and Bout would have enabled the murder of fewer Africans.[104] Is this, after all, so far from the example of corporate board members in Apartheid South Africa, just with membership of the board expanded exponentially?

To bring this back into our earlier analysis of causation, the NESS factor became popular because it dispensed with the need to show that anyone involved in a crime made a necessary contribution to that offense, and it proudly brushed aside the need for a 'substantial contribution' on the assured ground that the 'necessary element of a sufficient set formula is the essence of the concept of causation.'[105] Indeed, in an essay I would highly recommend to all and sundry, Derek Parfit invites us to accept that those who make imperceptibly small contributions to joint harm are still responsible for that harm when operating in collective constructs.[106] In essence, he incites international criminal lawyers to do away with the need for a 'substantial contribution.' And yet, if international criminal law has anything to contribute to these theories, it is that the extrapolation of garden-variety principles onto the international stage in an increasing interdependent global

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[102] R. Stohl, D. Smith, and M. Schroeder, *The Small Arms Trade: A Beginner's Guide*, (London: One World, 2007), at 15-17 (using Bout as an illustration of the ways in which governments use black-market dealers within the covert grey market).

[103] For a wonderful exploration of citizen responsibility for war crime in Iraq, albeit one that is founded on citizenship not causation, see Amy Sepinwall, *Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq*, *in* ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 231–260 (Tracy Isaacs & Richard Vernon eds., 2011).

[104] I use the verb murder advisedly even though Bout was an accomplice, to reiterate that accomplices are held responsible for the crime their actions assist.

[105] Wright, *supra* note 58 at 1805; for an important criticism of this view, and all other theories of causation, in that they overlook the perspectival character of causal analyses, see Stapleton, *supra* note 34 at 66; For a response to Stapleton, see Tadros, *supra* note 39 at 159–164.

[106] D. Parfit, Chapter 3: Five Problems of Moral Mathematics, *Reasons and Persons* (New York: Oxford University Press, 2003), pp 67 – 87.

society casts a very wide net. Thus, our solution for overdetermination risks serious over-inclusion, drawing us back into the opposite set of problems that inhere in causation.

V. CONCLUSION

Overdetermination poses serious problems for international criminal justice, where the individual agency upon which criminal responsibility depends tends to diminish in direct proportion to the scale of mass violence. Accordingly, a coherent explanation of the relationship between responsibility and overdetermined causes is a pressing issue for international criminal justice, if responsibility is to be based on principle not discretion. Despite this, causation in general and overdetermination in particular have escaped sustained discussion within the discipline, as we theorists expend an undue amount of energy on 'modes of liability' that are less fundamental next to basic understandings of cause and effect. Although this essay has sought to begin a new discussion about overdetermined causation rather than offer any definite solution, several practical and conceptual implications are immediately apparent at this early stage.

First, the standard test that is used as a refrain in international judgments, that '[a]lthough the accused's conduct need not have been a condition sine qua non of the commission of the crime, it must have made a difference,'[107] is at best unhelpful and at worst fundamentally incoherent. In either case, the phrase obscures the real moral and legal principles at issue here, which go to the heart of any attempt to hold individuals to account for moral wrongdoing within systemic campaigns of violence. Consequently, more must be said about causation, better defenses of the dominant fine-grained account of 'but for' causation offered, and greater investigation of NESS theories explored, in order to arrive at a more principled position than that presently on offer in international criminal trials. Without these, modern trials depend upon faith rather than justifiable principle.

Second, I do not believe that making 'an essential contribution' is a normatively principled means of assigning blame to any type of participant in international crimes. As we have seen, the ICC has recently followed German criminal theory in concluding that

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[107] *Prosecutor v. Kordić & Čerkez*, *supra* note 17 at 391; *Prosecutor v. Blaškić*, *supra* note 17 at 270. ("Although it must be proved that the instigation was a clear contributing factor to the commission of the crime, it need not be a *conditio sine qua non*.").

co-perpetration requires an agreement with others coupled with an essential contribution in the sense of being able to frustrate the commission of the crime. And yet few international crimes involve "essential" contributions of this sort, as even the firing-squad example shows. None of the Dresden pilots or board members of Western companies in apartheid made essential contributions, but they jointly perpetrated crimes for which they should be called to account. This is true of crimes perpetrated within organizations that have shared goals within well-defined structures, as well as in mereological groups that are only a chance assembly of disparate agents who are acting similarly.

Third, collective responsibility is not an adequate solution to the problem. True, if one does not share the widespread misgivings with corporate criminal liability,[108] we could hold companies operating in apartheid accountable by deploying corporate criminal liability. Instead of worrying about individual contributions by boardmembers, the corporation itself becomes our target. But notice how this does not immediately extend to the other organizations we have considered; holding Thomas Lubanga's rebel group responsible, criminally or otherwise, is not an obvious option. More acutely, our appeal to collective responsibility struggles to account for the mereological group of independent arms vendors such as Bout, who share no joint characteristics, structure or identity. And in any event, collective responsibility cannot excuse individuals.

Fourth, it is too early to concede that individual criminal responsibility is structurally incapable of accounting for the collective nature of most international crimes. Before arriving at that conclusion, we must wrestle with the unwieldy problem that is overdetermination with much greater zeal. To be sure, the foregoing suggests that the challenge is significant, but the problem of overdetermination resonates with our deepest sense of

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[108] For criticisms, See V. S Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARVARD LAW REVIEW 1477–1534 (1996); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009); Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* A.S. and R.E. Barkow (eds), PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38–61 (2011). For arguments pointing out the retributive justification for and practical utility of corporate criminal liability, see Samuel W Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY LAW REVIEW 468–513 (1988); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, (Keith Hylton & Alon Harel eds.).

what it means to participate in atrocity and therefore requires a robust conceptual solution. I suspect, for instance, that at least part of what Hannah Arendt famously calls "the banality of evil" is that terrible violence often involves playing a consequentially benign part in a wider horror that would take place regardless of one's participation;[109] what makes radical evil so banal is that the most terrible individual actions frequently make no discernable difference.

Moreover, overdetermination should leave us asking uncomfortable questions of ourselves; it is the central moral problem of our time. In a globalized society where markets enable atrocities, we all make utterly banal contributions to international crimes: by buying diamond jewelry that provides an important means of financing unspeakable bloodshed; purchasing all range of electronics that almost certainly contain other conflict resources; flying airplanes whose manufacturers use our fares to subsidize their production of weapons systems that ultimately find their way into the hands of brutal warlords; and by buying low-cost clothing we know was produced in subhuman conditions. We rightly tell ourselves that we do not personally make a difference to these atrocities; but that is hardly the point. In the end, we are left with the unsettling sense that participating in atrocity is terrifyingly normal.

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[109] H. Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* (New York: Penguin Books, 1992).