

## On the Difference Between Omission Criminal Made and Accomplice

### LA DISTINCTION ENTRE UN OFFENSEUR PRINCIPAL ET UN COMPLICE D'INACTION

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**Abstract:** There has been formed many viewpoints in criminal law world regarding the issue of how to distinguish omission criminal made and accomplice; in general, however, they can be classified into three categories of principle criminal made theory, principle accomplice theory, and compromise theory. Although these three types of viewpoints have both advantages and drawbacks as well; on the whole, they are unable to propose satisfactory answers on how to differentiate omission criminal made and accomplice. In view of this, author, with the hope to settle this issue, present his unique opinion from Pflichtdelikt and dominated committed perspective.

**Keywords:** omission; criminal made; accomplice; dominated committed; Pflichtdelikt

**Résumé:** Afin de faire la question de différenciation avec le complice d'inaction, des cercles de loi de châtements ont formé un grand nombre de vues à ce sujet. Mais on peut diviser ces vues en trois catégories: le principe qui fait, le principe qui permet de faire et le principe qui compromet. Ces trois types de vue ont leurs avantages et leurs défauts. Pourtant, ces trois types de vue ne peuvent pas donner une réponse satisfaisante pour distinguer le complice d'inaction. Pour cette raison, dans l'espoir de résoudre ce problème, je voudrais faire l'introduction, l'évaluation et l'analyse de ces trois types de vues, et proposer mon propre point de vue de faire et de contrôler l'angle qui est fait volontairement.

**Mots-clés:** omission, criminel, complice, devoir délit commis dominé

It is a major issue of how to differentiate omission criminal made and accomplice in joint crime. The difference between omission criminal made and accomplice had turned into a new subject in the theory at that time ever since Professor Armin Kaufmann published the monograph on omission criminal. There have been plenty of established viewpoints regarding the issue of distinguishing omission criminal made and accomplice in criminal law world that can be generally classified into three types: principle criminal made theory, principle accomplice theory, and compromise theory. This article aims at proposing my unique opinions to settle this issue based on introducing and reviewing these three types of viewpoints.

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## 1. PRINCIPLE CRIMINAL MADE THEORY

This theory believes that although in physical sense omission means “non”; omission is based on the fact that nonactor could prevent harmful consequence from occurring but failed to do it, and the particularity of this act determines that omission in principle can only be criminal made. Armin Kaufmann and Welzel typically represented those who hold this view.

Based on purposive act theory, Armin Kaufmann believed that omission doesn't have causal force, can't change outside world, and can't become the reason to cause the consequence either; it is therefore totally impossible to simulate the act of actor, the crime of either assisting or instigating omission or through assisting or instigating omission doesn't exist.<sup>2</sup> Otherwise it is inappropriate to define nonactor as accomplice when there is crime of act from others get involved between nonactor and consequence while as criminal made when there are natural forces and animals get involved.<sup>3</sup> Welzel shared same view with Armin Kaufmann. He believed that “the reason that guarantor didn't prevent the infringement against the legal interests under his/her protection is not because of the already- imposed punishment against assistance of omission to killing, but because of omission criminal made (killing of omission)”; since he owns both capability to stop killer's act and ultimate crime domination.”<sup>4</sup> And this opinion has been criticized by many scholars, just as Utida Humiaki pointed out, now that it has been considered that omission is not act; then, based on the legal proverb of “No act, no crime”, why it considers “Omission” that is not act as crime? Now that omission doesn't have the causal dominant that owned by act only, why nonactor must impose causal force to prevent consequence from happening? Now that nonactor doesn't have intention, why the nonactor is concerned as criminal made? <sup>5</sup> Author truly agrees the criticism mentioned above. In addition, author believes the fundamental mistake of above opinions is that they over stress, from natural and physical dimension, the theoretical structural differences between act and omission; however ignore discovering the unity between two parties. As for distinguishing omission criminal made and accomplice, “Admit in point of view of so-called causal force, whether there is such structural difference or not itself is not decisive to the tenable basis for omission criminal made and accomplice”, what is decisive is the normative criminal made theory beyond the structural difference between act and omission.

## 2. PRINCIPLE ACCOMPLICE THEORY

The fundamental stance of theory is demonstrated as: “Except the criminal made with intentional act and dominating act, the act of guarantor who didn't stop crime has, in principle, only accomplice meaning.”<sup>6</sup> Gallas pointed out that it is different to introduce force of nature or others' act crime intervention between nonactor and legal interest infringement. There is no crime dominant in the force of nature; others' intention act, however, dominates crime. The real crime dominant of actor is superior to potential crime dominant of nonactor. Act is therefore the more important act than the that of the guarantor who didn't take any action, it is only necessary for nonactor to take the responsibility of criminal made that the nonactor still didn't intervene after actor had implanted his/her act.<sup>7</sup> This theory is also the popular one in Japanese law world. As Kamiyama Toshio believed, it affects to command priority standardization that only guarantor showed up or guarantor and other persons of act showed up together in legal interest infringements. What the guarantor in the former case accepts is prohibited and primary norm

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<sup>2</sup> Vgl. Armin Kaufmann, *Die Dogmatik der Unterlassungsdelikte*, 1959, S. 190 ff.

<sup>3</sup> Vgl. Armin Kaufmann, *Die Dogmatik der Unterlassungsdelikte*, 1959, S. 296 ff.

<sup>4</sup> Welzel, *Das Deutsche Strafrecht*, 11. Aufl., 1969, S. 222.

<sup>5</sup> Refer [Japan] Utida Humiaki: “不真正不作為犯における正犯と共犯”, from “Kanagawa Law”, Volume 34, number 3, (2001), page 655.

<sup>6</sup> [Germany] Giesecke and Weigend “Germany Criminal Law Textbook”, translated by Xu Jiusheng, China Legal Publishing House, 2001, page 845.

<sup>7</sup> Vgl. Gallas, *Studien zum Unterlassungsdelikt*, 1989, S. 92 ff.

commands; the latter, however, regardless of in view of standardization or reality, plays a leading role that needs to be imposed primary responsibility. The guarantor, on the other hand, takes primary standardization infringement from the actor as the pre-condition and the responsibility the guarantor takes is just the secondary norm command to prevent legal interest infringement. The violation of the command, regardless of in view of standardization or reality, only plays the role to impede act progress of actor, which is therefore should be punished as accomplice.<sup>8</sup>

There are many issues existing in principle accomplice theory: first, now that criminal law world believes there is equivalence between act and omission, even principle accomplice theory's advocates share this point, then why they also believe act and realistic crime dominant is superior to omission and potential crime dominant? "They believe there is obligation equivalence between omission criminal made and omission accomplice on one hand; and they still want to distinguish the omission importance of these two parties on the other. It is totally impossible in my opinion."<sup>9</sup> Second, now that they admit there is equivalence between act and omission, why crime dominant of actor can block that of nonactor? There is not possibility that actor and nonactor joint dominate crime? Third, there is no effect to verify principle accomplice theory by using norm theory since "Norm command's priority varies with the specific status of the situation at any minute. For instance, after actor had left the spot, the norm commands nonactor received are no longer the secondary any more, they turned to the primary norm commands to establish the foundation for single criminal made instead."<sup>10</sup> Finally, scholars only focus on using causal contribution to consequence from act and omission to judge if omission can turn to criminal made which is doomed to failure. Since this method will lead to ignoring understanding criminal made theory from normative point of view, deviating from the fundamental theory of criminal made and attempting to distinguish criminal made and accomplice from causal force, which is incorrect.

### 3. COMPROMISE THEORY

Since both these two views above have deficiencies, scholars then started looking for compromise solutions. And there are generally two types of compromise views: guarantor obligation theory and distinction theory.

#### 3.1 Guarantor obligation theory

This theory advocates to classify guarantors into two types, i.e. "Protector Guarantor" (protect legal interest) and "Supervisor Guarantor" (control hazard source). It can determine nonactor is criminal made or accomplice according to distinctions. As for the former, the omission that doesn't impede others to infringe legal interests with violating obligation is always criminal made; for the latter, it is always participation only.<sup>11</sup> There are also many existing defects in this theory: first, just as Japanese scholar Hirayama Mikiko pointed out, it is impossible to proceed to use the protection from guarantor's obligation distinction to ensure and supervise hazard source's guarantee. Just as mentioned, the protection of someone refers to supervising various hazards approaching the person being protected; as for supervising on hazards on the other hand, refers to protecting someone that is being approached by various kinds of hazards.<sup>12</sup> Second, protector guarantor and supervisor guarantor are just a type of guarantor classification from the form that doesn't substantially explain the basis to generate guarantor's obligation, these two types of guarantor classification therefore can not be used as the base to determine

<sup>8</sup> Refer [Japan] Kamiyama Toshio: "不作為をめぐる共犯論", Chengwen Hall, Page 182, 1994 Edition.

<sup>9</sup> [Japan] Noriyuki Nishida: "Omission Accomplice". Translated by Wang Shaowu, from "Jianghai Journal", Page 33, Article 3, 2006.

<sup>10</sup> Refer [Japan] Michihiko Sone Takeshi: "不作為犯と共同正犯", from "神山敏雄先生古稀祝賀論文集", Chengwen Hall, Page 415, 2006 edition.

<sup>11</sup> Gropp, *Strafrecht Allgemeiner Teil*, 3., 2005, 10/151.

<sup>12</sup> Refer [Japan] Hirayama Mikiko: "不真正不作為犯について—'保障人说'の展開と界限", from "立命館法学", Page 75, Number 1, 1999.

criminal made and accomplice. Finally, it is incorrect to entirely identify supervisor guarantors as accomplices. For instance, a father didn't impede when he saw his own child (under the age of 14) killing other with a knife. As a supervisor guarantor, the father is just the accomplice of intentional killing? If the father is just identified as an accomplice, then where criminal made comes from?

### 3.2 Distinction Theory

There are also two opinions in this theory: one of them is the distinction theory based on effect from nonactor; the other is the distinction theory based on legal interest protection relation. The former uses omission effect from guarantor to distinguish criminal made and accomplice of non-typical negative crime, believing crime of omission with greater power is criminal made and weaker power is accomplice; omission participant who could prevent crime consequence from happening more easily is criminal made otherwise is accomplice.<sup>13</sup> The latter believes that the standard to distinguish criminal made and accomplice is the direct control on the infringement against legal interest. When guarantor's obligation is restricted by specific conditions, for instance, guarantor's obligation is only generated based on first act, etc. if there is a liable active offender lies across the guarantor and the consequence, then guarantor's legal interest infringement is indirect, it is therefore accomplice. When the active offender is person without capacity and thereby can not directly control legal interest infringement, the guarantor then turns to the direct controller of legal interest infringement, and is hence criminal made. When the guarantor and the active offender of legal interest jointly control legal interest infringement directly, the guarantor is then the joint criminal made of active actor. And when the guarantor must protect legal interest without any restriction, he will then always directly control legal interest infringement and is therefore coincident criminal made.<sup>14</sup> There are defects existing in these two viewpoints. Like the former, now that it distinguishes criminal made and accomplice by using omission force, how it distinguishes criminal made and accomplice when the force to impede crime equals that of legal interest infringement? For the latter, there is also something unreasonable existing in this theory: first, what "Depend on specific conditions" means? It is difficult to make the connotation and extension clear; second, why can the guarantor without being restricted by specific conditions always become the person directly controlling legal interest infringement, but the guarantor restricted by specific conditions can only become criminal made at the time the guarantor and the active offender of legal interest must jointly control legal interest infringement directly? Scholars holding this opinion didn't explain it clear.

## 4. AUTHOR'S VIEW

Through analyzing the three points of view above, it finds that all of them are unable to resolve this type of crime issues in practice. Author believes the key reason that criminal law world could not uncover mystery of criminal made of omission and accomplice is that we have ignored for a long time two types of crime with totally different natures, i.e. dominated committed, and Pflichtdelikt. The difference of crime nature, imputation principle, and standards to identify criminal made and accomplice between these two types of crimes determines the difference of measures and standards taken in criminal law.

In criminal law theory sector, it defines the crime that violates "No hurting others obligation" as dominated committed. According to Jakobs's opinion, as for dominated committed, jurisdictional and organizational scope connects to owner's organizational act; and as for the issue to access organizational act as criminal made act or participation act, it should be decided on the basis that if act dominates crime event.<sup>15</sup> As for dominated committed, the violation of negative obligations conducted by dominated committed is legally demonstrated as infringing others field. The reason that lets dominated committed undertake legal responsibility is caused by the act dominated committed conducted, or person with

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<sup>13</sup> Refer [Japan] Utida Humiaki: "不真正不作為犯における正犯と共犯", from "神奈川法学", Page 672, 720, Number 3, Volume 34 (2001).

<sup>14</sup> Vgl. Hoffmann—Holland, Die Beteiligung des Garanten am Rechtsgutsangriff, ZSTW118(2006), S.630 ff.

<sup>15</sup> Vgl. Jakobs, Strafrecht Allgemeiner Teil, 2. Aufl., 1993, 21/1 ff.

negative obligation must be liable for consequences caused by his/her act when exercising freedom to act, and also consider the possible caused danger in his/her scope of freedom. And the corresponding relation between freedom to act and responsibility to consequence is attribution theory (organizational jurisdiction); act is the media for actor to undertake responsibility. Therefore, as for violating negative obligation, both the extent of legal interest infringement conducted by act and the extent act controls causal process of legal interest infringement are closely related to the act of the actor. Act division and intention liaison are the basis to identify dominated committed joint crime. Act, for dominated committed, plays a determining role; therefore, for dominated committed, the standard to identify him/her as criminal made can only be if act dominates causal process of legal interest infringement. If yes, the dominated committed will be criminal made; otherwise will be accomplice.

In criminal law field, crime that violates “The obligation to build common world with others” is defined as *Pflichtdelikt*. The concept of *Pflichtdelikt* was firstly introduced by Professor Roxin. Jakobs believed that for *Pflichtdelikt*, the jurisdiction to identify it as criminal made is established through violating an obligation (or active obligation – author) that is ensured by the system, and it is always established. Jakobs believed that the criminal obligation of *Pflichtdelikt* generated from the active obligation that was additionally appended by the system, or request norm acceptor to “Build a common world” with others to make others better instead of making up the loss caused by *Pflichtdelikt*.<sup>16</sup> The *Pflichtdelikt* supported by a certain system, obligation violation conducted by the *Pflichtdelikt* determines in principle that the *Pflichtdelikt* is of criminal made quality. For *Pflichtdelikt*, development extent of act and legal interest infringement extent of act do not own important significance; and what plays a decisive role is if actor violates active obligation, the standard to identify *Pflichtdelikt* as criminal made can only be the violation against active obligation.

If criminal of omission includes two types of crime forms of dominated committed and *Pflichtdelikt*? Author believes the key is that if it can prove act obligation can include negative obligation and active obligation. If yes, it then shows that criminal of omission includes these two types of crimes; otherwise criminal of omission doesn't. Professor Jakobs believed that isolated obligations, just like those fulfilled by debtor in property law, are not generated from an active system, and they don't request obligors to build a common world and proactively seek interests for others, either. And they are just the obligations in organizational filed of individual personality. Even if isolated obligation violation constitutes crime of omission, it still doesn't constitute *Pflichtdelikt*.<sup>17</sup> For example, a father takes a neighbor's child to swim and the father has the obligation to save the child when he or she is drowning, and the obligation is the one of organizational filed of personality and it belongs to negative obligation. If what the father didn't save the child leads to the death of the child, the father constitutes the crime of omission intentional homicide of dominated committed. If the father takes his own child to swim and the father didn't save the child when the child is drowning, the father has the obligation to save the child and the obligation is systematic one (or the one of parental right system) of personality and it belongs to active obligation. If what the father didn't save the child leads to the death of the child, the father constitutes the crime of omission intentional homicide of *Pflichtdelikt*. Act obligation therefore can include negative obligation and active one and omission crime should include dominated committed and *Pflichtdelikt* accordingly. Based on this point of view, author believes that the study of omission criminal made and accomplice should also from two types of situations of both omission criminal made and accomplice of dominated committed and omission criminal made and accomplice of *Pflichtdelikt*.

#### 4.1 Omission criminal made and accomplice of dominated committed

As mentioned previously, for dominated committed, act development extent and actor's intention liaison have important meaning; the control on causal process of legal interest infringement conducted by act of actor is the standard to identify dominated committed as criminal made. How to distinguish omission criminal made and accomplice of dominated committed is case by case:

<sup>16</sup> Refer ギュンター・ヤコブス: “刑法における作為と不作為”, jointly translated by Matsumiya Takaaki and Hirayama Mikiko, from “立命館法学”, Page 267, Issue 6, 1999.

<sup>17</sup> Jakobs, *Strafrecht Allgemeiner Teil*, 2. Aufl., 1993, 21/116.

#### **4.1.1 Typical negative**

In typical negative situation, as long as actor has act obligation to fulfill act obligation and the actor fails to fulfill act obligation, it then constitutes criminal made. If actor and others with act obligation jointly fail to fulfill act obligation and there are intention liaison between them, it then constitutes joint criminal made of omission; otherwise, it then constitutes coincident criminal made without intention liaison.

#### **4.1.2 Non-typical negative**

In non-typical negative situation, it first needs to establish a primary principle: it is totally different to intervene liable third party, natural forces, animals, or the third party without responsibility respectively between nonactor and legal interest infringement. If there is liable party's act behavior, then the act behavior is of crime dominant. If there are natural forces, animals, or the third party without responsibility cause risk of damage, then there is no crime dominant in natural forces, animals, or the third party without responsibility. Based on this, it can be discussed in following situations:

(i) The risk of damage is natural forces, animals, the third party without responsibility, the situation caused by victims on their own. In this case, since there is no crime dominant in natural forces, animals, the third party without responsibility, or victims themselves, actor with act obligation fails to save the victims when the actor has the capability to do so, causing damaging consequence, the actor in fact directly controls legal interest process, and the actor should be identified as criminal made. If actor and others with act obligation jointly decided not to save legal interest infringement, it then constitutes joint criminal made of omission. If others without obligation persuade actor not to fulfill salvage obligations, which leads to consequence, actor then constitutes criminal made and others accomplice.

(ii) Infringement danger is the situation caused by the third person with liability. When liable active violator lies across guarantor and consequence, if the active violator and the guarantor reach agreement to cause the occurrence of legal interest infringement prior to or at the time the violator implemented the active act led victim into dangerous status, it then should identify the active violator and the guarantor jointly controlled legal interest infringement directly, and both of two should be identified as criminal made, and also joint criminal made. Since in this case guarantor's omission is just a kind of crime division under the joint agreement between the active violator and the guarantor, and guarantor's omission should be equivalent to active infringement act. It should be understood that active infringement act and omission jointly caused the consequence and both omission and active infringement act belong to functional act dominant and should be regarded as coincident criminal made. When liable active violator lies across guarantor and consequence, if guarantor was about to save the victim after the violator implemented the active act led victim into dangerous status and the violator impeded or persuaded the guarantor not to save the victim, and the guarantor agreed not to save; or the violator left crime scene after implementing the active act led victim into dangerous status and the guarantor witnessed violator's crime committing (if the guarantor didn't witness violator's crime committing and didn't save the victim, which caused occurred consequence; then it should be processed by following the situations that harmful danger is natural force, animal, the third person without responsibility, or caused by the victim himself/herself respectively, the guarantor should constitute criminal made) without saving the victim and therefore caused occurred consequence, guarantor's omission can only constitute accomplice. Since in this case violator's act had already directly controlled causal process of legal interest infringement, for the occurrence of consequence, guarantor's omission can only play a part to promote or accelerate the implementation of causal process and just plays a supporting role comparing with the act of violator, in this case the guarantor therefore only constitutes accomplice, not criminal made.

#### **4.2 Omission criminal made and accomplice of Pflichtdelikt**

As mentioned earlier, the crime nature of accomplice is against active obligation. Act and actor's intention liaison, for accomplice, don't have fundamental significance; the standard to identify the criminal made of Pflichtdelikt is against active obligation as well. Therefore, the quantity that act contributes to consequence doesn't have any meaning for determining the criminal made standard of

Pflichtdelikt. ° In addition, it is worth noticing that the obligation in Pflichtdelikt has nothing to do with antecedent organized act, and it is the request directly imposed to actor from outside, during which there is no need for any person, matter, object as pre-conditions, that is active obligation is a kind of obligation without media. The non-media nature of active obligation causes another extremely important property of it or active obligation can only be directly entrusted to specific person (role) from outside since it has no media; among plural persons, each of them individually fulfills his/her own obligation instead of jointly fulfilling his/her own obligation even if they look like in the same obligation status. ° For example, a wife found the husband didn't feed the child, her obligation is not fulfilled by forcing the husband to feed the child, she must feed the child herself instead; however what the husband fed the child doesn't mean the wife fulfilled her obligation. If the wife plans to starve the child to death while the husband is away from the home but failed because the husband returned home ahead of time and fed the child, the wife will be identified as attempted because of violating obligation. This is the unique specificity of active obligation.<sup>18</sup> Based on the natures of Pflichtdelikt, we then specifically discuss the typical negative criminal in Pflichtdelikt and how to distinguish criminal made and accomplice of non-typical negative criminal in Pflichtdelikt.

#### 4.2.1 Typical negative

In typical negative, the obligation of multiple persons is "build common world with others", and there is no generality in the obligation. Because of its unique specificity active obligation can only point to specific each role, what it requests is each of being requested must unite with others instead of uniting with others as a whole by a number of individuals, and each role fulfills its own obligation individually and has nothing to do with others. There must be existing joint obligation serving as the precondition of jointly violating joint obligation among multiple persons. If there is no joint obligation at all, then no so call joint obligation.<sup>19</sup> Therefore, in the situation of typical negative criminal in Pflichtdelikt, if multiple actors all have act obligation, then there is subjectively intention liaison and subjectively joint act; however, since there is no joint obligation among them, there certainly exists no joint criminal made, they can be identified as coincident criminal made only. Thereby, in the situation of typical negative in Pflichtdelikt, as long as guarantor has act obligation and violates the obligation, then it constitutes criminal made; if multiple guarantors all have obligation, even if there are mutual intention liaison among them, the joint agreement not to fulfill act obligation can only constitute coincident criminal made instead of joint criminal made.

#### 4.2.2 Non-typical negative

In non-typical criminal of omission situation, as long as actor has act obligation and the actor violates his/her act obligation, it then constitutes criminal made. Specifically, it can be classified into following situations to discuss:

(i) In the situation that harmful danger is natural force, animal, the third person without responsibility, or caused by the victim himself/herself respectively, since the act obligation that actor has is active obligation, as long as actor violates active obligation and doesn't save legal interest, it then constitutes criminal made. If multiple actors all have act obligation of active obligation, even if there mutual intention liaison among them and they don't save victim based on joint resolution, it can only constitute coincident criminal made instead of joint criminal made. If the person with no act obligation persuades the person with act obligation not to fulfill his/her act obligation, then the person with act obligation constitutes criminal made and the person with no act obligation accomplice.

(ii) In the situation that harmful danger is caused by the third person with liability, when there is a liable active violator lies across the guarantor with active obligation and consequence, no matter if the violator has act obligation of active obligation or act obligation of active obligation, and no matter the violator

<sup>18</sup> Refer ギュンター・ヤコブス:“支配犯および義務犯における関与”, jointly translated by Junji Abe, and Kunio Midorikawa, from "Legal Study", Issue 3, 1993, Page 44-45.

<sup>19</sup> Vgl. Sánchez-Vera, Pflichtdelikt und Beteiligung, 1999, S. 160

reaches agreement with the guarantor before, after, or at the time he/she implemented/was implementing active violate act, either; as long as the guarantor violates his/her obligation and doesn't save the victim, the guarantor then constitutes criminal made in all cases. If the violator has no act obligation and reaches agreement with the guarantor, the violator constitutes criminal made and so does the guarantor, but these two persons can only constitute coincident criminal made. If the violator has the act obligation of negative obligation and reaches agreement with the guarantor, the violator constitutes criminal made and so does the guarantor, but these two persons can only constitute coincident criminal made also. Why? The reason is: the establishment of joint criminal made must have the precondition of common attribution theory and punishable basis; the attribution theory of dominated committed is that one must be responsible for violating negative obligation (organizational jurisdiction), and its standard to identify criminal made is if the person dominates the causal process of legal interest infringement; and the attribution theory of Pflichtdelikt is that one must be responsible for violating active obligation (systematic jurisdiction), its standard to identify criminal made is if the person violates active obligation. The difference of attribution theory and punishable basis between these two types of crimes determines that it is impossible for these two types of crimes to establish joint criminal made and they can only be identified as coincident criminal made. If the violator has the act obligation of active obligation and reaches agreement with the guarantor, the violator constitutes criminal made and so does the guarantor, but these two persons can only constitute coincident criminal made also. For instance, a couple takes their own child to swim. The husband and wife reach agreement while swimming to throw the child into deep water pool to drown and agree both of them won't save the child and consequently the child was thrown into the deep pool by the husband and drowned to death. The husband then constitutes the criminal made of intentional homicide while the wife constitutes the omission criminal made of intentional homicide. These two persons are not joint criminal made but coincident criminal made instead; since both the wife and husband are Pflichtdelikt, the unique specificity of active obligation of Pflichtdelikt, determines two person can only establish coincident criminal made.