Criminal Liability for Omissions in Latin America

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Abstract 1

Criminal liability for omissions is a highly developed issue in Latin America. Unlike in many common law legal systems, these countries tend to have 'good Samaritan' rules and in some cases equate criminal liability for omissions with the usual legal regulation of positive action. This paper analyses these fundamental features of Latin-American legal systems and provides an overview of recent academic discussions. By way of example only, this paper uses translations of different legal rules from Argentina, Paraguay and Colombia.

I. Introduction

To analyse the main features of criminal liability for omissions in Latin American legal systems, it is necessary to begin with some brief conceptual clarifications regarding omissions in general. It is well known that these issues are extraordinarily controversial at the philosophical level with even basic assumptions, such as the possibility of causing harm through omissions, being intensely debated.[1] To expect these fundamental problems to be conclusively resolved at the legal level would probably be placing too high a demand on legal systems. However, there should at least be a sufficiently neutral starting point to be able to understand what is meant by criminal liability for an omission without hindering the required ongoing discussion, i.e., without stipulating solutions for various contentious issues right from the start. 2

For this purpose, Latin American criminal law theory frequently starts from a conceptualisation of omissions as the absence of certain bodily 3

1 For a recent overview, see Randolph Clarke, *Omissions* (OUP 2014).

movements,[2] which coincides to a greater or lesser extent with some common views in modern philosophy.[3] It is true that this basic idea is not free from criticism[4] and, even at this elementary level, there is probably much to discuss, irrespective of whether or not one accepts the plausibility of this initial approach. Pushing through any controversy for the sake of practicality, let us accept this initial notion, at least as a necessary compromise, to be able to embark on the journey ahead. The subject of criminal liability by omission is understood, from this initial notion, as the non-performance of certain bodily movements which the perpetrator had a legal duty to perform.

4 It is important to understand that the ongoing legal research in countries such as Argentina, Brazil, Chile, Colombia, Paraguay and Perú on criminal liability for omissions must be understood in a broader context. Specifically, the discussion is taking place using the concepts (or 'system') regarding crime developed by German criminal law theory,[5] so that something of an algorithm of liability has been created that now operates relatively independent of particular legal systems.[6] The jurisprudential reception of German criminal law in Latin America[7] was, to a large extent, facilitated by various events, including the translation of various seminal works at the beginning of the 20th century, academic exchanges and the use of the German criminal code (StGB) as a source for the reforms of various

2 Cf. Sebastián Soler, *Derecho Penal Argentino. Tomo I* (5th edn, TEA 1987) 381; Enrique Cury, *Derecho Penal. Parte General* (7th edn, Ediciones Universidad Católica de Chile 2005) 676; Marcelo Lerman, *La Omisión por Comisión* (AbeledoPerrot 2013) 111 ff.

3 See e.g. Michael Moore, *Act and Crime* (OUP 1993) 28 ff.; id., *Causation and Responsibility* (OUP 2009) 53.

4 For a critical overview, from a moral and legal perspective, see Marcelo Ferrante, 'Causation in Criminal Responsibility' (2008) 11 NCLR 470, 476 ff.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 17 ff.

5 See Kai Ambos, 'Toward a Universal System of Crime' (2007) 28 Cardozo L. Rev. 2647; Eric Hilgendorf, 'System- und Begriffsbildung im Strafrecht' in Eric Hilgendorf et al. (eds), *Handbuch des Strafrechts. Band 2* (C.F. Müller 2020) 24 ff.

6 On the impact of philosophy on the development of a system based on the concept of crime, see Michael Pawlik, 'The Role of Philosophy within the General Theory of Crime', in Shin Matsuzawa and Kimmo Nuotio (eds), *Methodology of Criminal Law Theory: Art, Politics or Science?* (Nomos 2021) 218 ff.

7 Cf. Enrique Bacigalupo, 'La recepción de la dogmática penal alemana en España y Latinoamérica' (2019) 2 InDret 1.

national criminal codes.[8] This does not mean that Latin American criminal law in general, and the regulation of liability for omissions in particular, has not been nourished by other sources. Generally speaking, however, the concept of crime characteristic of German criminal law theory has largely prevailed, at least in its general outline, and is today the starting point for any discussion on the subject throughout the region.[9]

II. 'Direct' and 'indirect' omission offences

Regarding the specific issue of omissions, some works of the mid-twentieth century, such as Enrique Bacigalupo's seminal book on the subject,[10] have consolidated this trend. As such, it is appropriate to start from the basic distinction made in civil law jurisdictions between 'direct' (or 'proper') and 'indirect' (or 'improper') omission offences.[11] Although there has been discussion about what the essential criterion is when distinguishing between these two categories, it can be said that from the formal point of view,[12]

8 See, as an example, the actual process of jurisprudential reception in Eugenio R. Zaffaroni and Guido Croxatto, 'El pensamiento alemán en el derecho penal argentino' (2014) 22 Rechtsgeschichte – Legal History 192; Enrique Bacigalupo, 'La recepción de la dogmática penal alemana en la ciencia penal argentina', in Eric Hilgendorf et al. (eds), *Brücken bauen* (Duncker & Humblot 2020) 65 ff.

9 The debate goes on mostly through academic papers with interpretations of the rules of the different criminal codes. Court rulings, although important, still play a secondary role in Latin American criminal law. For this reason, we will not cite case-law in this paper.

10 Enrique Bacigalupo, *Delitos impropios de omisión* (Pannedille 1970).

11 Cf. Markus Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 218 ff.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 20 ff.

12 For the Latin American discussion, see Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 292 ff. (Argentina); Wolfgang Schöne, '*Nullum crimen sine lege* y dogmática penal', in Sergio García Ramírez and Olga Islas de González Mariscal (eds), *Panorama internacional sobre justicia penal* (Universidad Nacional Autónoma de México 2007), 381 ff. (Paraguay); Gabriel Adriasola, *La imputación de la negligencia, la omisión de asistencia y el abandono del paciente en la empresa médica* (Carlos Álvarez 2011) (Uruguay); Olga Islas de González Mariscal, 'Responsabilidad penal por omisión. Bases doctrinarias, en Sergio García Ramírez and Olga Islas de González Mariscal (eds), *La situación actual del sistema penal en México* (Universidad Nacional Autónoma de México 2011), 169 ff. (México); Fernando Velásquez Vázquez, *Manual de Derecho Penal. Parte General* (5th edn, Ediciones Jurídicas Andrés Morales 2013) 419–20. (Colombia); Juan Pablo Mañalich, 'Omisión del garante e intervención delictiva' (2014) 21 Revista de Derecho

'direct' omission offences are those for which the non-performance of a specific conduct is expressly punished by the relevant legal statute. There are many examples of this in Latin America, such as in Argentine's Criminal Code (ACC), Art. 108 that states:

> "A fine of between seven hundred and fifty pesos to twelve thousand five hundred pesos shall be imposed on the one who, finding a minor under ten years of age lost or helpless, or a person injured, disabled or threatened by any danger, fails to render the necessary aid when he could do so without personal risk or does not immediately notify the authorities."[13]

6 This criminalisation of duties of solidarity (so-called 'Good Samaritan' rules[14]) is a typical example of a 'direct' omission offence since it seems relatively clear what the situation is that gives rise to a duty to perform a particular action, the breach of which gives rise to criminal liability: failure to render the necessary assistance or to immediately notify the authorities in such a situation is the *actus reus* of the offence. In contrast, 'indirect' omission offences, also known as crimes of 'commission by omission', are not explicitly regulated as specific statutory offences. Nevertheless, they arise from the interpretation[15] of offences described using verbs that, according to their everyday language use, would seem to refer to positive actions (bodily movements) rather than to omissions. Again, by way of example, Art. 79 ACC states that:

225 (Chile); Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 49 ff. (Brazil); Percy García Cavero, *Derecho Penal. Parte General* (3rd edn, Ideas 2019) 571 ff. (Perú).

13 The translation is ours. Original: "ARTICULO 108. – Será reprimido con multa de pesos setecientos cincuenta a pesos doce mil quinientos el que encontrando perdido o desamparado a un menor de diez años o a una persona herida o inválida o amenazada de un peligro cualquiera; omitiere prestarle el auxilio necesario, cuando pudiere hacerlo sin riesgo personal o no diere aviso inmediatamente a la autoridad."

14 See Marcelo Ferrante, 'Necesitados, intolerantes, homicidas y malos samaritanos' (2007) 7 Discusiones 57; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 39 ff.

15 Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 293.

> "A reclusion or imprisonment of eight to twenty-five years shall be applied to anyone who kills another person, provided that no other penalty is established in this Code."[16]

Here the offence of intentional homicide is specified by the verb 'kill', however, agents whose special duties entail rescue activities (the so-called 'guarantor position'),[17] can also commit this offence through inaction. In this regard, think of a father who has a newborn baby and decides not to feed her for several days resulting in the baby's death. Since the father had a special legal duty to protect his baby, the father's failure to feed the infant is considered to be equivalent to an act of (active) killing.[18] 7

This distinction is important not least because both 'direct' and 'indirect' omission offences have three common objective elements (*actus reus*), while 'indirect' omission offences have two additional autonomous requirements. Regarding the three elements common to both types of offences, it is always necessary to prove:[19] 1) a situation that generates a duty to act, such as finding a person involved in an accident or threatened by some danger; 2) there was non-performance of the required positive conduct and; 3) the physical capacity to perform such conduct was reasonably possible, which would not be the case if, for example, it was necessary to save someone from drowning but the actor did not know how to swim. In the absence of other special objective elements of the respective offence, it would be possible to affirm that a 'direct' omission offence has been committed if these three necessary conditions are present.[20] The two additional autonomous 8

16 The translation is ours. Original: "ARTICULO 79. – Se aplicará reclusión o prisión de ocho a veinticinco años, al que matare a otro siempre que en este código no se estableciere otra pena."

17 Cf. Markus Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 220 ff.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 27 ff. See also Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 40 ff.

18 Cf. Carlos Nino, '¿Da lo mismo actuar que omitir?' (1979) C La Ley 801.

19 Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 301 ff.; Eugenio Sarrabayrouse, 'Los delitos de omisión impropia en la Argentina. Estado de la discusión' (2020) LXXXVII Criminalia 505, 508.

20 Having said that, the presence of intent as a subjective element is also needed as a general rule, since most offences require a mental state of purpose, knowledge or conditional intent (*dolus eventualis*). Punishment for negligence is exceptional in Latin America. See e.g. Marcelo Lerman and Leandro Dias, 'Delitos impropios de omisión imprudentes en la jurisprudencia de la CSJN' in Leonardo Pitlevnik (ed.), *Jurisprudencia Penal de la CSJN 16* (Hammurabi 2016), 40 ff.

requirements to prove there was an 'indirect' omission offence mean an agent must also; 4) have a special duty to save the protected object (in the case of homicide by omission, the aforementioned 'guarantor position'), and 5) cause[21] the result in the sense of the (modified) 'but for' formula or *conditio sine qua non* rule, namely if the agent had performed the required conduct, the result would not have occurred[22].

9 On these fundamental issues, there seems to be relative agreement, at least at the theoretical level. The differences between the Latin-American legal systems become clear when legislating these two basic categories of offences, which we will analyse in section III below. Moreover, the details of omission liability, mainly the specific content of 'direct' and 'indirect' omission offences in difficult cases, are extraordinarily controversial and still highly disputed. Therefore, we will provide an overview of the most important discussion over the last decades on this subject in section IV.

21 In Latin America, a separate category, developed in Germany, which in principle complements the causal analysis, has also been received (see e.g. Manuel Cancio Meliá, Marcelo Ferrante and Marcelo Sancinetti, *Estudios sobre la Teoría de la Imputación Objetiva* (Ad-Hoc 1997); José Caro John, *La imputación objetiva en la participación delictiva* [Grijley 2003]): the so-called 'objective attribution' (or 'imputation'). According to the proponents of this construction, the criminal conduct (action or omission) in addition to being causal of a result (in result crimes) must have created a legally prohibited risk which, in turn, materialises in the unlawful result. The purpose of this additional analysis, *simpliciter*, is to exclude certain cases in which it is counterintuitive to consider that the objective elements of a crime have been fulfilled despite the fact that a causal relationship has been proven. For example, suppose that a father did not feed a newborn baby for several days and this is discovered by a relative, who takes the baby to the hospital to save her. However, when the baby is treated at the hospital, an unexpected fire breaks out and kills everyone there, including the baby. This theory is still under discussion today and some authors consider that it is simply a part of the analysis of causality, similar to how questions of 'proximate cause' are dealt with in Anglo-American systems. See only Luis Chiesa, 'Comparative Criminal Law' in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 1096–7; Carl-Friedrich Stuckenberg, 'Causation' in Markus Dubber und Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 487 f. See also Luís Greco, *Problemas de causalidade e imputação objetiva nos crimes omissivos impróprios* (Marcial Pons 2018) 33 ff.

22 One may argue that there is a sixth condition: the actual crime result. But this is not really a necessary condition of omission liability in general but of criminal liability for accomplished or completed omissions: if the result does not materialise, the perpetrator would usually incur liability for the attempt (assuming intent).

III. On the legal regulation of omission offences

The distinction between 'direct' and 'indirect' omission offences offers only a general approach to the legal regulation of omission liability in Latin America. Beyond that, additional clarification related to the specific configuration of 'indirect' omission offences in the region's various legal systems is needed. On the one hand, there are Latin American criminal codes in which liability for 'indirect' omission offences is not explicitly recognised in a statute, neither as a rule of the general part of the code nor through specific provisions in the special part, that is, in the enumeration and description of the elements of actual offences. This kind of liability has been created by the courts (and by legal theorists) through an extensive interpretation of various specific crimes, such as the aforementioned case of intentional homicide in Art. 79 ACC:[23] it is understood that it is also possible to kill another person through an omission if one has a special duty to prevent the victim's death and fails to comply with that duty. 10

This kind of implicit regulation has the advantage that a controversial issue, such as whether and under what conditions criminal liability arises for ('indirect') omissions, is left open to scientific discussion and case-by-case analysis by courts.[24] However, this results in partly reduced legal certainty and, for that reason, some commentators have put forward various criticisms of criminal liability for 'indirect' omission offences in legal systems without statutory rules on the subject, as is the case in Argentina. Such criticism usually focuses on two different aspects of the so-called 'principle of legality' (*nullum crimen, nulla poena, sine lege*), i.e. the prohibition of analogy (*nullum crimen sine lege stricta*) and the principle of certainty (*nullum crimen sine lege certa*). 11

Regarding the prohibition of analogy, it is often pointed out that holding someone criminally liable for the offence of homicide for failing to save a person because the failure to assist is as blameworthy as an act of killing, is a paradigmatic example of forbidden analogy.[25] This, of course, is debatable, since the prohibition of analogy, as understood in general in Latin 12

23 See Marcelo Ferrante, 'Argentina', in Markus Dubber and Kevin Jon Heller (eds) *The Handbook of Comparative Criminal Law* (Stanford University Press 2010), 22 ff.

24 On this general advantage of succinct regulations on the general part of the criminal law, see Marcelo Sancinetti, *Dogmática del hecho punible y ley penal* (Ad-Hoc 2003) 19.

25 See e.g. Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 581 f.; Hernán Gullco, *Principios de la parte*

American legal systems,[26] does not actually block the possibility of using any kind of reasoning by analogy. Analogical reasoning is something common to all applications of law, so that this prohibition only implies a ban on exceeding the wording of a given criminal statute while interpreting it. Furthermore, the natural language's open texture used in criminal statutes seems to be sufficient to cover cases of omission: it is absolutely intelligible and in accordance with everyday Spanish (and also English) usage to consider that a father who does not feed his baby is killing her so that the wording of the respective legal rule is not exceeded.[27] With regard to the principle of certainty, the requirements for criminal liability for 'indirect' omission offences are supposedly too indeterminate as they lack specific statutory regulation and, therefore, are insufficient for citizens to know *ex ante* the risks of incurring criminal liability for wrongful conduct.[28] However, this criticism should not be overestimated as many requirements giving rise to criminal liability (especially those contained in the general part of most Latin American criminal codes) are similarly indeterminate.[29] As an example, the rules on intent in most Latin American legal systems are no more specific than those on omissions and judges, lawyers and academics deal with them on a daily basis. Moreover, the citizenry usually identifies these requirements adequately, probably because they also correlate with existing moral rules so that only in rare cases could one speak of a lack of knowledge of such requirements.[30]

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general del derecho penal (2nd edn, Ediar 2009) 244 ff.; Javier De Luca, 'La omisión impropia y sus trampas' (2012), Anuario de Derecho Penal 335.

26 Cf. Luis Chiesa, 'Comparative Criminal Law' in Markus Dubber und Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 1099 f.

27 Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 295 f.; José Milton Peralta, 'Legalidad y justificación en los delitos impropios de omisión' (2015) 2 Revista de Derecho Penal y Criminología 41, 50 ff.; Lucila Chiminelli, 'Comentario al fallo "K., S. N., y otro": el delito de abandono de personas vs. el homicidio en comisión por omisión' (2017) 11 Pensar en Derecho 205, 225 f.

28 Cf. Gonzalo Molina, *Delitos de omisión impropia* (Rubinzal-Culzoni 2014) 181 ff. Against this objection, see Carla Salvatori, '"Delitos de omisión impropia"' (2015) 1 En Letra: Derecho Penal 193.

29 Similarly Percy García Cavero, *Derecho Penal. Parte General* (3rd edn, Ideas 2019) 576. See also Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 296.

30 On the need to privilege 'moral clarity' over 'textual clarity', based on Rule of Law considerations, see John Gardner, *Offences and Defences* (OUP 2007) 33 ff.

Conversely, and partly as a consequence of the criticism of legal systems without specific statutory regulation of 'indirect' omission offences, some States explicitly regulate this kind of crime through general clauses in their criminal codes by establishing an equivalence between actions and omissions.[31] This is the case, for example, in the current Colombian Criminal Code (CCC), which states in Article 25: 13

> "Action and omission. The punishable conduct may be carried out by action or omission.
> Whoever has the legal duty to prevent a result belonging to a statutory description and does not carry it out, while being in a position to do so, will be subject to the penalty stipulated in the respective criminal statute. For this purpose, it is required that the agent is charged with the specific protection of the legally protected right, or that he has been entrusted as guarantor with the surveillance of a certain source of risk, in accordance with the Constitution or the statutes.

The following situations constitute guarantor positions: 14

1. When the actual protection of a person or a source of risk is voluntarily assumed, within the scope of one's own domain.
2. When there is a close living community.
3. When the performance of a risky activity is undertaken by several people.
4. When an unlawful situation of proximate risk to the corresponding legal right has been previously created.
   Paragraph numbers 1, 2, 3 and 4 shall only be taken into account in relation to punishable criminal conduct that threatens life and personal integrity, individual freedom, sexual freedom and sexual education."[32]

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31 See Jesús-María Silva Sánchez, 'El delito de omisión' (1994) 1 Revista de Derecho (Coquimbo) 41, 45; Gustavo Trovato, 'Incorporación legislativa de la comisión por omisión' (2005) 15 Revista de Derecho Penal y Procesal Penal 1699.

32 The translation is ours. Original:
"Artículo 25. Acción y omisión. La conducta punible puede ser realizada por acción o por omisión.
Quien tuviere el deber jurídico de impedir un resultado perteneciente a una descripción típica y no lo llevare a cabo, estando en posibilidad de hacerlo, quedará sujeto a la pena contemplada en la respectiva norma penal. A tal efecto, se requiere que el agente tenga a su cargo la protección en concreto del bien jurídico protegido, o que se le haya encomendado como garante la vigilancia de una determinada fuente de riesgo, conforme a la Constitución o a la ley.

15 It is possible to see that according to this statute, crimes can be committed both by action and omission and that the sources of the guarantor positions or special duties are also explicitly listed, namely voluntary assumption, close living community, the performance of risky activities and creation of an unlawful risky situation. It is also clear that the main virtue of systems without specific rules on the subject is the main flaw of those that do have statutory regulation: flexibility in the former and a lack thereof in the latter. In particular, the listing of only four sources of guarantor positions poses an obstacle to criminal liability for omissions in cases in which none of the four sources mentioned in the statute is a relevant factor, even though there are compelling reasons to affirm such liability. Consider the case of a previously lawful act that creates a risk, a circumstance that is characteristic of so-called 'product liability':[33] Company A launches an autonomous (self-driving) vehicle onto the market in compliance with all statutory requirements. However, after a month the company's senior management realizes that the algorithms have a programming error that will result in the loss of human life. Since withdrawing the product from the market would be very costly, the management of company A deliberately decides to do nothing. Subsequently, several people die as a result of this omission. A Colombian judge would then be unable to establish criminal liability by omission in this case for intentional homicide by omission because according to the CCC only prior *unlawful* conduct is a source of special duties to act. For that reason, a more general clause, such as that contained within the Paraguayan Criminal Code (PCC), which is itself similar to the German § 13 StGB, may be more appropriate as a regulatory standard. Regarding omissions to avoid a result, Article 15 PPC stipulates:

Son constitutivas de posiciones de garantía las siguientes situaciones:
1. Cuando se asuma voluntariamente la protección real de una persona o de una fuente de riesgo, dentro del propio ámbito de dominio.
2. Cuando exista una estrecha comunidad de vida entre personas.
3. Cuando se emprenda la realización de una actividad riesgosa por varias personas.
4. Cuando se haya creado precedentemente una situación antijurídica de riesgo próximo para el bien jurídico correspondiente.
Parágrafo. Los numerales 1, 2, 3 y 4 sólo se tendrán en cuenta en relación con las conductas punibles delictuales que atenten contra la vida e integridad personal, la libertad individual, y la libertad y formación sexuales".

33 For the Latin American discussion on this issue, see Eugenio Sarrabayrouse, *Responsabilidad penal por el producto* (Ad-Hoc 2007) 583 ff.; Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 255 ff.

"Whoever omits to prevent a result described in the legal description of an active offence, the sanction foreseen for this shall be applied only when:

1. there is a legal duty that obliges the omitting party to prevent such a result; and
2. the purpose of this duty is to protect the threatened legal right in such a specific and direct manner that the omission is generally as serious as the active causation of the result."[34]

Those who raise legality objections against legal systems that do not have a general clause on the subject will probably also raise them against systems with such clauses.[35] These objections would arise because, in legal systems where the sources of the guarantor positions are not legally defined (PCC) and those where they are (CCC), the provisions would be still too abstract. Using the above-cited Colombian code as an example, when could one speak of a "close living community"? It can be asserted that this would give judges too much discretion. It seems that behind these concerns there is a tendency to think that the principle of legality forces a parliament to be as detailed as possible in drafting criminal statutes. However, such arguments not only require a utopian response since one could probably always be more specific when regulating human conduct.[36] Moreover, the resultant criminal codes would be extremely long, full of descriptions of each particular way of committing an offence (killing by stabbing with a knife, by drowning the victim, by poisoning, and so on). That would go against the criteria of pragmatism in law-making and possibly conceal a mistaken understanding of the rationale for the principle of legality.[37] 16

34 The translation is ours. Original:
"Artículo 15.- Omisión de evitar un resultado
Al que omita impedir un resultado descrito en el tipo legal de un hecho punible de acción, se aplicará la sanción prevista para éste sólo cuando:
1. exista un mandato jurídico que obligue al omitente a impedir tal resultado; y
2. este mandato tenga la finalidad de proteger el bien jurídico amenazado de manera tan específica y directa que la omisión resulte, generalmente, tan grave como la producción activa del resultado".

35 See Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 581–2.

36 See Luís Greco, 'Das Bestimmtheitsgebot als Verbot gesetzgeberisch in Kauf genommener teleologischer Reduktionen' (2018) 11 ZIS 475, 476–7.

37 Cf. José Milton Peralta, 'Legalidad y justificación en los delitos impropios de omisión' (2015) 2 Revista de Derecho Penal y Criminología 41, 48 ff.

17 It is also possible that behind these criticisms of 'indirect' omission offences lies some general distrust of the legitimacy of punishing omissions or the idea that criminal law should not advance this way in the face of the simple absence of active behaviour. This belief may also be reflected in criticisms of any kind of liability for crimes of omission, including for 'direct' omission offences. However, this kind of offence is generally accepted in Latin American systems, in clear contrast to Common Law jurisdictions, and only specific issues are discussed.[38] In fact, a proposal by some critics is to establish more crimes of omission in the special parts of criminal codes, such as the so-called crime of 'abandonment' elucidated in Art. 106 ACC that states:[39]

> "Whoever endangers the life or health of another, either by placing him in a situation of helplessness or by abandoning to his fate a person incapable of providing for himself and whom he must support or take care of or whom the same perpetrator has incapacitated, shall be punished with imprisonment of 2 to 6 years."[40]

18 At first glance one may think that this solution seems sensible. However, it is highly doubtful that a crime of this kind can meet the very high requirements of certainty that are affirmed in order to criticise the legitimacy of 'indirect' omission offences. This is evident when stopping to consider what 'abandoning to his fate' means and at what point should someone support or take care of a person incapable of providing for himself. This is a strong indication that these legal objections are not conclusive. Moreover, in systems such as the German one, offences such as 'abandonment' (§ 211 StGB) coexist with liability for 'indirect' omission offences (§ 13 StGB), which shows that the relevant provisions regulate different kinds of con-

38 See Luis Chiesa, 'Comparative Criminal Law' in Markus Dubber und Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 1092 f.

39 See e.g. Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 582.

40 The translation is ours. Original:
"ARTICULO 106.- El que pusiere en peligro la vida o la salud de otro, sea colocándolo en situación de desamparo, sea abandonando a su suerte a una persona incapaz de valerse y a la que deba mantener o cuidar o a la que el mismo autor haya incapacitado, será reprimido con prisión de 2 a 6 años.
La pena será de reclusión o prisión de 3 a 10 años, si a consecuencia del abandono resultare grave daño en el cuerpo o en la salud de la víctima.
Si ocurriere la muerte, la pena será de 5 a 15 años de reclusión o prisión."

duct.[41] Finally, the verbs abandon and place seem to refer to active conduct (involving physical movement), so that their interpretation as a template for offences of omission would also create a legality problem if the latter is understood in such a strict way.

IV. Relevant discussion

In this section, we will summarise some of the most relevant discussions on crimes of omission that have taken place in Latin America in recent years. The interesting aspect of the Latin American approach to omissions is that discussion has focused on substantive problems rather than on regulatory details. Furthermore, because of the common background of legal scholars, it is quite normal for dialogue in this area to take place between academics from different countries without any further comparative law framework being necessary. 19

1. 'Direct' omissions, 'indirect' omissions and a third kind of omission?

One of the fundamental discussions in Latin America looks at the possibility of establishing an intermediate category between 'direct' and 'indirect' omission offences. This position, proposed by the Spanish scholar Jesús-María Silva Sánchez,[42] has had a major impact on Latin American scholarship.[43] He points out that to speak of a true normative equivalence between actions and omissions, so that an absence of bodily movement can 20

41 For a similar conclusion Marcelo Sancinetti, 'La relación entre el delito de abandono de persona y el homicidio por omisión', in Patricia Ziffer (ed.) *Jurisprudencia de Casación Penal* (Hammurabi 2009), 318 ff.

42 Jesús-María Silva Sánchez, 'El delito de omisión' (1994) 1 Revista de Derecho (Coquimbo) 41; id., *El delito de omisión. Concepto y sistema* (2nd edn, B de F 2003).

43 See e.g. Sergio Delgado, 'Comentario al capítulo de los estudios sobre los delitos de omisión de Jesús M. Silva Sánchez relativo a la muerte violenta del recluso en un centro penitenciario' (2006) 1 Ícaro 279; Julieta Makintach, 'Comisión por omisión. Presupuestos de imputación', in Leonardo Pitlevnik (ed.) *Jurisprudencia penal de la Corte Suprema de Justicia de la Nación, Tomo XVIII* (Hammurabi 2015), 36 ff.; Iván Navas, 'Acción y omisión en la infracción de deberes negativos en derecho penal' (2015) 10 Polít. crim. 678, 687 f.; Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 104 ff.; Percy García Cavero, *Derecho Penal. Parte General* (3rd edn, Ideas 2019) 573.

be likened to causing an unlawful result, something more than a special legal duty is necessary. In particular, an additional act of autonomy (a 'commitment') would be necessary on the part of the guarantor:[44] For example, a promise to protect the victim or to control a source of danger, which would confer on an actor a kind of special control over the situation, comparable to the setting in motion of a necessary condition leading to a harmful event.

21 According to Silva Sánchez,[45] in addition to these 'true indirect' omission offences, civil law systems usually include and, indeed, should include, two other categories. One of them would be 'direct' omission offences based on 'Good Samaritan' rules. In addition, a new category of simple guarantor offences may emerge, which would consist of failure to comply with certain special duties imposed by the legal system, without the need for an additional exercise of autonomy. This would be an autonomous category since this breach of duty would not be sufficient to legitimise criminal liability for a 'true indirect' omission offence but would be more blameworthy than a 'direct' omission offence that could be committed by anyone. Examples of these possible offences would be certain violations of official duties, such as the omissions of police officers in general to prevent crimes[46] without a previous specific commitment to prevent a particular crime or to protect an identifiable (would-be) victim. According to proponents of this new approach, such crimes should be included in the criminal code, as is the case with the usual 'direct' omission offences.

22 Both the question of whether this proposal is suitable for resolving the prevailing controversy regarding criminal liability for 'indirect' omissions, as well as its general plausibility, remains open to debate. It is sufficient here to simply highlight that this is only an attempt to show that the range of omissions in criminal law may be broader than is usually considered. In fact, in recent years, the possibility of contemplating other intermediate categories has also begun to be discussed, such as the loss of access to healthcare procedures resulting from manipulation of transplant waiting

44 Jesús-María Silva Sánchez, 'El delito de omisión' (1994) 1 Revista de Derecho (Coquimbo) 41, 49 f.; id., *El delito de omisión. Concepto y sistema* (2nd edn, B de F 2003) 471 ff.

45 See also Jesús-María Silva Sánchez, 'Criminal Omissions: Some Relevant Distinctions' (2008) 11 NCLR 442, 462 ff.

46 See Jesús-María Silva Sánchez, 'Muerte violenta del recluso en un centro penitenciario' (1991) 44 ADPCP 561, 563 ff.

lists,[47] or the so-called 'actmissions':[48] cases of conduct that have both action and omission elements where, for example, an actor serves poisoned food to a customer in a restaurant without the actor having put the poison in (because someone else did it) but, knowing the food was poisoned, made no attempt to take it out.

2. Special duties and positions of guarantors

The reception of German criminal law theory in Latin America, and its distinction between 'direct' and 'indirect' omission offences, gave rise to the region's academics having an early interest in the study of positions of guarantor and special duties. The first thing that can be said about this is that the Latin American discussion followed the classic German framework, in the sense that at first, the so-called 'theory of the formal sources' of guarantor positions was adopted.[49] This theory considered that the special duties that could give rise to liability for an 'indirect' omission offence should come from legal sources, such as statutes, contracts and prior unlawful conduct. Within this framework, the first discussion appeared early on regarding the latter formal source, as shown in a 1970 article by Enrique Bacigalupo,[50] in which he discussed the case of someone who ran over a bystander and failed to help her afterwards. In more recent discussions, the assumption of criminal liability for omissions by virtue of prior conduct appears as an accepted starting point and the focus has begun to shift toward the concrete requirements of the previous act.[51] 23

47 Cf. Juan Manuel Molina Carmona, *Interrupción de cursos causales salvadores* (Universidad Pontificia Bolivariana [trabajo de grado] 2021) 14, quoting Jesús-María Silva Sánchez, 'Frustración de oportunidades terapéuticas ' (2019) 1 InDret 1.

48 See Luis Chiesa, 'El caso del camarero malvado' (2016) 2 En Letra: Derecho Penal 154.

49 See e.g. Sebastián Soler, *Derecho Penal Argentino. Tomo I* (5th edn, TEA 1987) 385–6. Also Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 69 ff.

50 Enrique Bacigalupo, 'Conducta precedente y posición de garante en el Derecho penal' (1991) 23 ADPCP 35, 41–2.

51 See e.g. Francisco Bernate Ochoa, 'La injerencia en el nuevo Código Penal para el Distrito Federal de México y el nuevo Código Penal colombiano' (2004) 8 Derecho Penal Contemporáneo 67; Cristóbal Izquierdo Sánchez, 'Comisión por omisión' (2006) 33 Revista Chilena de Derecho 329; Guillermo Orce, 'Conducta previa del riesgo especial e injerencia' (2014) 10 Revista de Derecho Penal y Procesal Penal 2086; Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 143 ff.; Daniel Domínguez Henaín, 'El tratamiento jurídico penal de la injerencia en el

24 Nowadays, the modern German trend to no longer consider the formal sources as decisive in determining whether a special duty arises has also been followed by Latin American scholars. Thus, the focus has now shifted to the so-called 'functional taxonomy'[52] of the guarantor positions, meaning there would be both guarantors of protection of certain objects (such as a child) and guarantors of supervision of certain risks (such as an animal or other source of danger).[53] Within this framework, it has been hotly debated whether cases of 'special trust' are sufficient to establish a position of a guarantor.[54] These are cases in which the link between the alleged perpetrator and the victim is not in principle formalised by law but the victim has an expectation of receiving assistance. We can think, for example, of a couple who from time-to-time sleep in the same apartment and have the expectation that the other person will assist in case an emergency arises. If one of the couple has a heart attack while sleeping and the other does not call the emergency services, is it possible to say that a homicide by omission has been perpetrated or is it merely a breach of 'Good Samaritan' duties?

25 Another aspect that is being fiercely debated is that of the position of guarantor held by certain public officials, such as doctors on duty in public hospitals[55] and police officers.[56] In the latter case, the question arises as to whether, for example, a policeman who does not prevent a crime, while being able to do so, can be held liable as a perpetrator or accomplice

código penal paraguayo', in Eric Hilgendorf et al. (eds), *Brücken bauen* (Duncker & Humblot 2020) 271 f.

52 Cf. Markus Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 220 f.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 28.

53 See e.g. Enrique Bacigalupo, *Manual de Derecho Penal* (Temis 1996) 230 f.; Mario Garrido Montt, *Manual de Derecho Penal. Parte General. Tomo II* (3rd edn. Editorial Jurídica de Chile 2003) 189 ff.

54 See Jorge Fernando Perdomo Torres, *Posición de garante en virtud de confianza legítima especial* (Universidad del Externado 2008); Izabele Kasecker, 'A responsabilidade penal do médico por omissão diante da recusa de tratamento pelo paciente menor de idade ou por seu representante legal' in Flávia Siqueira and Heloisa Estellita (Marcial Pons 2020) 79 ff.

55 See e.g. Laura Mayer Lux, 'Autonomía del paciente y responsabilidad penal médica' (2011) XXXVII Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 371, 388; Heloisa Estellita, 'Contornos da responsabilidade omissiva imprópria dos médicos plantonistas' in Flávia Siqueira and Heloisa Estellita (Marcial Pons 2020) 195 ff.

56 See e.g. Leandro Dias, 'El deber positivo del funcionario policial de impedir delitos y el problema de la división de tareas' (2016) 10 Revista de Derecho Penal y Procesal Penal 1841.

in the crime not prevented. For the solution to this question, it seems to be relevant to resolve the previous discussion on whether an effective commitment is necessary to be a guarantor[57] or whether the imposition of legal duties, without an additional exercise of autonomy, is sufficient. In a nutshell, there has been an intensive of discussion about the rationale and limits of various specific guarantor positions.

3. Impeding rescues and omission by commission

Just as criminal liability has been discussed in cases of 'commission by omission', the problem of 'omission by commission' also appears in the current discussion. Under this latter category, two different problems emerge in Latin American literature which are not always adequately differentiated. The first is that of impeding rescues already initiated by third parties or by natural forces (think of a piece of wood being carried by the current of the river to the position of a drowning person).[58] These are double-prevention cases in which the actor does not directly cause the harmful result, but by means of a positive action prevents the rescue of a legally protected object.[59] For example, Frances is drowning in a river and Judy, an expert swimmer, is swimming toward her to perform a rescue. Philippa, who hates Frances and is also an expert swimmer, decides to swim out and grabs Judy tightly, preventing her from rescuing Frances. Frances ends up drowning. According to the distinction between action and omission, the issue is quite clear in the sense that an action has been performed, since Philippa is in fact moving her body while holding Judy. Of course, it is not easy to speak of causation in a 'physical' sense in these cases,[60] but this does affect the fact that Philippa has acted and considering these actions as omissions may be somewhat misleading. 26

57 Cf. Ivó Coca Vila, 'Tirar a matar en cumplimiento de un deber' (2017) 19–24 Revista Electrónica de Ciencia Penal y Criminología 1, 23–4. See also José Milton Peralta, 'Posición de garante como competencia excluyente y la responsabilidad en comisión por omisión de los funcionarios públicos', in Omar Palermo et al. (eds), *El Derecho Penal del Siglo XXI* (Editores de Sur 2021) 417–8.

58 See Marcelo Lerman, 'Sobre el criterio de distinción entre la interrupción de cursos causales salvadores iniciados por terceros o provenientes de la naturaleza y la causación directa' (2014) 93 Lecciones y Ensayos 131.

59 On double-preventions, see Michael Moore, *Causation and Responsibility* (OUP 2009), 62 ff.

60 For a similar discussion Marcelo Ferrante, 'Causation in Criminal Responsibility' (2008) 11 NCLR 470, 481.

27 The second problem is the true case of 'omission by commission'.[61] This is the opposite problem of 'indirect' omission offences or 'commission by omission', in that a non-guarantor carries out a 'direct' omission offence by means of bodily movements. Several groups of cases can fall within the scope of this category, such as non-compliance by means of active conduct with a general duty of solidarity in a situation of necessity. Consider the following case: Helen is being chased by wild dogs in a mountainous area. If the dogs catch her, they will kill her.[62] Luckily, she finds a cabin with an open door, which she can enter, close the door and, as a result, save herself. Cécile, the owner of the cabin, observes Helen running towards the cabin and, since she does not want to have strangers in her cabin, decides to quickly lock the door. Helen is unable to enter the cabin and ends up being eaten by the dogs. The relevant question in cases of this kind is whether Cécile, by her active conduct of locking the door of her cabin, actively killed Helen, which would make her liable for homicide or, alternately, Cécile can only be held liable (despite her positive action) for a 'direct' omission offence as if she had found an injured person in the street and did not help her. If the second position is adopted, there is a strong indication that what is normatively decisive is not so much the simple distinction between action and omission, but that the focus should be on the kind of duty that is infringed or violated: iin the wild dog example, it would be a general duty of solidarity with someone in need.[63]

4. Justifications and omissions

28 The relationship between omissions and justifications has also been discussed recently from at least two points of view. The first is linked to the role played by omissions in the analysis of general justificatory defences.

61 See Marcelo Lerman, *La Omisión por Comisión* (Abeledo Perrot 2013).

62 Cf. Marcelo Lerman, 'Unterlassen durch Tun', in Eric Hilgendorf et al. (eds), *Brücken bauen* (Duncker & Humblot 2020) 557–8.

63 See Gustavo Trovato and Guillermo Orce, *Delitos Tributarios. Estudio analítico del régimen penal de la ley 24.769* (Abeledo Perrot 2008); Fernando Córdoba, 'Delitos de infracción de deber' (2015), 1 En Letra: Derecho Penal 93, 102 ff.; Juan Ignacio Piña Rochefort, 'La solidaridad como fuente de deberes. Elementos para su incardinación en el sistema jurídico-penal' (2019) 14 Polít. crim. 242. This focus on duties has developed from the ideas of the German legal scholar Günther Jakobs (e. g. 'Imputation and Norm Validity' [2004] 7 Buffalo Criminal Law Review 491, 503).

With respect to lesser evil justifications, the distinction between action and omission may be relevant when a person should tolerate some harm on his property[64] so that an essentially superior right can be saved but decides not to tolerate it (recall cases of 'omission by commission'). However, this can also be observed in self-defence cases and the Latin American discussion has begun to debate whether it is possible to defend oneself justifiably against aggression by omission.[65] For example, suppose that someone finds a seriously injured person on the street but refuses to make a simple phone to call an ambulance while a bystander observes the scene and wants to make the call but does not have a cell phone. Can the bystander punch the person who refuses to make the call, take the cell phone and make the call to get help? Although the answer seems to be obvious, in the sense that the bystander is permitted to do that, the question has only recently begun to be examined in detail.[66]

The second point of view is that of justificatory defences applicable only 29
to omissions. This is where a so-called 'conflict of duties' appears, namely in situations in which a person has several duties to act and cannot fulfill all of them.[67] The classic example is the one of a father who sees his two children drowning in a pool and only has time to save one of them. In these cases, which involve concurrent duties of roughly the same weight that cannot all be acted on, it is usually said that the agent must save one of the children and can choose which one. Problems arise only then when the duties in question are of different weight and the agent makes the wrong choice. Recently, however, the issue has gained renewed interest not only because of

64 Cf. Jesús María Silva-Sánchez, 'Derechos de necesidad agresiva y deberes de tolerancia' (2007) 7 Discusiones 25, 35 ff.; Marcelo Ferrante, 'Necesitados, intolerantes, homicidas y malos samaritanos' (2007) 7 Discusiones 57; Andrés Bouzat, Pablo Navarro and Alejandro Cantaro, 'El fundamento jurídico de un derecho de necesidad' (2007) 7 Discusiones 113.

65 Javier Wilenmann von Bernath, 'La legítima defensa sin contención material. Sobre la defensa frente a agresiones incorporales y omisivas' (2017) 23 Revista Ius et Praxis 419.

66 For other related problems, see Bernarda Muñoz, '¿Están las madres y los padres obligados a defender a su hijo/a de la agresión ilegítima de parte de un tercero? Sobre la diferencia entre la defensa debida de terceros y la legítima defensa de terceros', in Nadia Espina (ed), *Derecho penal y pandemia* (Ediar 2021) 183 ff.

67 Alejandra Verde, 'Fundamento y límites de la impunidad por colisión de deberes en derecho penal' (2009) 9 Discusiones 111; id., '"La colisión de deberes en Derecho penal" de Ivó Coca Vila. ¿Disolución de colisiones de deberes jurídicos?' (2018) 6 En Letra: Derecho Penal 254; Ivó Coca Vila, 'La colisión "deficitaria" de deberes' (2018) 6 En Letra: Derecho Penal 52.

the publication of various papers but also, and perhaps especially because of, the application of this problem to medical triage cases that arose as a result of the Coronavirus pandemic.[68] Here the relevant question is what a physician should do when she has several patients waiting for a life-saving resource, such as a ventilator, with only a limited number of ventilators available.

30 As noted, the usual view is that assuming the duty to save each patient is roughly equally weighted, the physician can choose whom to save, as long as he or she fulfils as many of those duties as possible. However, the scarcity of medical resources coupled with the intuition that one needs to save the highest number of lives has raised the question of whether it is possible to establish certain criteria for allocating resources, such as urgency, the chances of successful treatment or even the ages of the patients. Additionally, there have even been proposals to apply this justificatory defence to cases of active conduct, that is to say, when duties to omit or do no harm are involved. This would make it permissible, for example, to disconnect a patient with little prospect of surviving from a ventilator to save another patient with better chances, something that seemed unthinkable a few years ago.[69] This extremely important discussion is currently underway and at this point, it is difficult to predict what the outcome will be.

5. Attempts and complicity

31 Before closing this brief paper, it is necessary to point out two final areas in which the Latin American discussion on crimes of omission has made advances. On the one hand, in the relationship between responsibility for attempts and for omissions. Although it is almost indisputable that just as crimes of omission can be completed, they can also be attempted, the details of liability for attempted omission offences are still not clear. This is why various scholars have pointed out the difficulty, for example, of determining the moment at which the omitting party leaves the stage of

68 See e.g. María Lucila Tuñón Corti, 'Alter, fair innings, und „ex ante" Triage', in Eric Hilgendorf et al. (eds), *Triage in der (Strafrechts-) Wissenschaft* (Nomos 2021), 323 ff.

69 Cf. Eduardo Rivera López et al., 'Propuesta para la elaboración de un protocolo de triaje en el contexto de la pandemia de COVID-19' (2020) 50 Rev Bio y Der. 37, 56 ff.; Carsten Kusche, 'La pandemia del Coronavirus y el derecho penal de la medicina' (2021), 11 En Letra: Derecho Penal 7.

the preparatory acts and has made an attempt for which she may incur criminal liability.[70] Take the aforementioned case of the father who does not feed his newborn child with the intention that the latter will starve to death. When can we say that his 'homicide by omission' begins so as to determine the point at which the father can be punished for his attempt to commit the crime? A dilemma arises here, since affirming that every little delay in the performance of a legally mandated action is a criminal attempt seems to be too strict. Is it just that the father, who did not feed his hungry newborn for only a few minutes, albeit with the intention of eventually killing her, could be charged with an attempt? Conversely, waiting for a risk to take on such proportions that there is an imminent danger of death significantly reduces protection for (would-be) victims and it is not clear what the middle ground is.

Another issue to bear in mind is how challenging it is to make a clear distinction between perpetration and complicity in omission offences. Some academics have proposed that in 'indirect' omission offences the omitting party always be liable as the perpetrator of her own breach of duty, even if she is not the main character of the criminal event.[71] Thus, a father who does not prevent a murderer from killing his child should be convicted the same as the physical perpetrator of the murder, even though the father is not the one who actively kills the child. Because this position seems somewhat drastic, different alternatives are now being discussed to allow differentiation between perpetration and complicity in connection with omissions.[72]

32

70 See e.g. Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 848 ff.; Juan Pablo Mañalich, 'Omisión del garante e intervención delictiva. Una reconstrucción desde la teoría de las normas' (2014) 21 Revista de Derecho Universidad Católica del Norte 225, 251 ff.; Antonella Donnes, 'La tentativa en los delitos de omisión y la posibilidad de diferenciar etapas al igual que en el delito comisivo' (2015) 1 En Letra: Derecho Penal 152.

71 Cf. José Antonio Caro John, 'Sobre la autoría en el delito de infracción de deber' (2006) 27 Derecho Penal y Criminología 91, 104; Pablo Andrés León González, 'Autoría y participación en la infracción del deber: una especial referencia al delito de cohecho' (2021) 28 Iuris Dictio 27, 31 f.

72 See Juan Pablo Mañalich, 'Omisión del garante e intervención delictiva. Una reconstrucción desde la teoría de las normas' (2014) 21 Revista de Derecho Universidad Católica del Norte 225, 250 ff.; Santiago López Warriner, 'La calidad de intervención por omisión del garante por responsabilidad institucional' (2016) 10 Revista de Derecho Penal y Procesal Penal 1864; José Milton Peralta, 'Posición de garante como competencia excluyente y la responsabilidad en comisión por omisión de los

V. Conclusion

33 From the above, it can be concluded that the history of legal discussion on omission offences in Latin America is a part of the general flow of legal history stemming from the region's reception of German criminal law theory. However, both the legal regulation and the substantive discussion on the subject have some special features worth mentioning: *nullum crimen sine lege* constraints to legal interpretation, different regulations of indirect crimes of omission and a general criminalization of indirect crimes of omission (good Samaritan rules). At the same time, in recent decades there have been various developments that have opened up previously unexplored areas of research. If this trend continues, it is possible to predict that neither the academic discussion nor the progress already made regarding crimes of omission in Latin American legal systems have run their course or reached their peak.

Further Reading

Chiesa L, 'The Rise of Spanish and Latin American Criminal Theory' (2008) 11 NCLR 190–194.

Dopico Gómez-Aller, J 'Criminal Omissions: A European Perspective' (2008) 11 NCLR 419–451.

Estellita H, Responsabilidade penal de dirigentes de empresas por omissão (Marcial Pons 2017).

Rivera López E, 'Carolina Sartorio on Causation and Free Will. A Critical Comment' (2018) 19 RATJ 190–194.

Sartorio C, 'Responsibility and the Metaphysics of Omissions' in Sara Bernstein and Goldschmidt T. (eds), Non-Being: New Essays on the Metaphysics of Nonexistence (OUP 2021) 294–309.

funcionarios públicos', in Omar Palermo et al. (eds), *El Derecho Penal del Siglo XXI* (Editores de Sur 2021) 422 f.