

80 years after the birth of the international criminal law criterion for individual criminal accountability. Murray Bernays, the Statute of the International Military Tribunal at Nuremberg, and the Joint Criminal Enterprise

80 años después del nacimiento del criterio de la responsabilidad penal individual en el Derecho penal internacional. Murray Bernays, el Estatuto del Tribunal Militar Internacional de Núremberg y la Empresa Criminal Conjunta

MARIO MARTIN PEREIRA GARMENDIA*

Universidad de Navarra, Pamplona, España
mpereirag@unav.es | <https://orcid.org/0000-0002-7997-4697>

DIEGO ALBERTO ZAPATA GONZALES**

Universidad San Ignacio de Loyola, Lima, Perú
dzapata@usil.edu.pe | <https://orcid.org/0000-0003-4010-3488>



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Abstract. As the German National Socialist regime declined and Allied victory became likely, a policy was set to prosecute those responsible for its major atrocities. The same approach was applied to the Empire of Japan. It was only the genius of Murray Bernays (the true architect of International Criminal Law) that laid the dogmatic foundations on which this branch of criminal law is based, the purpose of which is the prosecution

* Graduado en Abogacía (Universitario de Punta del Este, Uruguay). Magister en Derecho Penal (Universitat de Barcelona - Universitat Pompeu Fabra). Magister en Criminología i Sociología Jurídico-Penal (Universitat de Barcelona). Doctor en Derecho (Universitat Pompeu Fabra). Profesor contratado doctor, profesor ayudante doctor en la Facultad de Derecho y Relaciones Internacionales de la Universidad de Navarra.

** Licenciado en Relaciones Internacionales (Universidad San Ignacio de Loyola, USIL). Candidato a Doctor en Derecho (Universidad de Navarra, España). Máster en Derechos Humanos (UNAV). Docente Ordinario Auxiliar de la Carrera de Relaciones Internacionales en la USIL

and punishment of international crimes (today: genocide, crimes against Humanity, and international aggression). As will be shown in this essay, these bases are, in essence, objective and subjective imputation of criminal liability, constituted following the parameters of specific legal institutes (of Anglo-Saxon roots): conspiracy, membership, and standard design Theory. On this basis, he established a model of imputation in two stages, the first associated with the civilian and military hierarchs of the regime and the legal entities created for the achievement of the criminal plan, and a second stage associated with the middle commanders and direct executors. All this gave rise to what we recognize today (mainly due to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia) as Joint Criminal Enterprise. Diving into the origins of this criterion of imputation will help to glimpse its intimate connection with the central typical figures of international criminal law, as well as the underlying preventive and repressive logic, consubstantial to its primary criminal norms.

Keywords. joint criminal enterprise; conspiracy; common design theory; membership; criminal liability; criminal responsibility; intention, atrocity crimes; nuremberg jurisdiction.

Resumen. A medida que el régimen nacionalsocialista alemán declinaba, y la victoria de los Aliados resultaba inevitable, se empezó a pergeñar los lineamientos político-criminales para enjuiciar a los responsables de las principales atrocidades nazis. Mismo enfoque que también se aplicaría a los responsables del Imperio de Japón. Gracias al ingenio de Murray Bernays –el verdadero artífice del Derecho Penal Internacional–, se sentaron las bases dogmáticas sobre las que se sustenta dicha rama del Derecho Penal, cuyo objetivo es el enjuiciamiento y castigo de los crímenes internacionales (hoy en día: genocidio, crímenes contra la humanidad y agresión internacional). Como se demostrará en este ensayo, estas bases son, en esencia, la imputación objetiva y subjetiva de la responsabilidad penal, constituidas conforme a los parámetros de específicos institutos jurídicos (de raíces anglosajonas): la Conspiracy, la Membership y la Common Design. Sobre estas bases, estableció un modelo de imputación en dos velocidades: una primera, asociada a los jerarcas civiles y militares del régimen y a las personas jurídicas creadas para la realización del plan criminal; y una segunda, asociada a los mandos intermedios y a los ejecutores directos. Todo ello dio lugar a lo que hoy reconocemos (principalmente gracias a la jurisprudencia del Tribunal Penal Internacional para la ex Yugoslavia) como empresa criminal conjunta. Profundizar en los orígenes de este criterio de imputación ayudará a vislumbrar su íntima conexión con las figuras típicas centrales del Derecho Penal Internacional, así como con la lógica preventiva y represiva subyacente, consustancial a sus normas penales primarias.

Palabras clave. empresa criminal conjunta; conspiración, teoría del diseño estándar; membresía o pertenencia; imputación penal; culpabilidad; dolo; delitos atroces; jurisdicción de Núremberg.

1. Introduction: The London Conference and the creation of the Statute of the International Military Tribunal at Nuremberg

It is often repeated by a large part of the European and Latin American continental doctrine, as a sort of mantra about the Joint Criminal Enterprise (hereinafter: JCE): (i) that it is an institute that the central national legal systems have not received, both belonging to the Statute and the Common Law. Given this, they conclude that the effects of the JCE cannot be considered as international custom and, therefore, are not part of international criminal law. (ii) That, being a creation of the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), it is not relevant (much less binding) when it comes to the literal and historical interpretation of international treaties and conventions (this is what the Pre-Trial Chambers of the International Criminal Court have held in their latest decisions).¹ (iii) That it implies the imputation of individual criminal responsibility for typical results based on mere membership in a criminal organization or group, also assuming a single concept of perpetrator.

Contrary to these assertions, and as we will demonstrate, the fact is that (i) the JCE is the only system of imputation of criminal legal responsibility recognized by international custom, through the unanimous approval of the “Principles emerging from the statute of the International Military Tribunal [of Nuremberg] and its respective trials” by the General Assembly of the United Nations. On the other hand (ii), the JCE is not an “invention” of the ICTY, on the contrary, it is a minimal recalibration of the criterion of imputation emerging from the Nuremberg Trials (both before the International Military Tribunal—hereinafter: IMT—and before the American, British and French jurisdictions given the competence granted by the Allied Council Control Act No. 10). These judgments (in their respective indictments, instructions and rulings) are the legal-philosophical and dogmatic bases on

¹ The decision dated January 29, 2007, issued by the Pre-Trial Chamber of the International Criminal Court (on the confirmation of charges in the Lubanga Case), rejected the conclusions set forth in the appeal judgment issued by the II Chamber of the International Tribunal for the former Yugoslavia (ICTY) in the Tadic Case regarding the fact that Art. 25 (3) of the Statute of the International Criminal Court adopted a subjective position for the purposes of differentiating between perpetration and participation, and this as a consequence of seeing in the concept of JCE a modality of co-perpetration. This Chamber took into consideration the theory of domination of the act for the purpose of making the distinction between principal and accessory responsibility. Likewise, and as Olásolo refers: “the ICC SCP I itself in its decisions of confirmation of charges in the Katanga and Ngudjolo, Abu Garda and Banda and Jerbo cases and in its arrest warrants against Muammar and Saif Gaddafi and Abdullah Al-Senussi, of June 27, 2011 and June 27, 2011 respectively, the SCP II in its decision of June 15, 2009 regarding art. 61 (7) in the Bemba case and its orders to appear and confirm charges in the Muthaura, Kenyatta and Ali, and Ruto, Kosgey and Sang cases of 8 March 2011 and 23 November 2011, and the majority of SCP I in its first instance judgment in the Lubanga case of 14 March 2012, have reaffirmed that, pursuant to art. 25 (3) of the E[statute of] R[ome], the distinction between primary and accessory liability is based on the concept of the dominion of the act. (Olásolo Alonso, 2013, pp. 108-109).

which this Theory of imputation is based. As a result, (iii) we will demonstrate how, for this Theory, heir to conspiracy and membership in a criminal organization, mere membership in a criminal group or structure was never sufficient to impute individual criminal liability (for an international crime).

Likewise, the creator of this Theory, Murray Bernays—lawyer of the U.S. War Department and true architect of International Criminal Law—, far from emphasizing the design of the criminal figures (of the criminal types) and the problem that (apparently) would arise with the rule of non-retroactivity of criminal norms, saw that the problem (and the essence) of this branch of criminal law lies in the imputation. That is to say: how to hold each member of a group legally and criminally responsible for the crimes committed by the collective (as a whole). Added to this is an empirical finding that, as we shall see, extends to the present day: the impossibility of determining *ex ante* (and even *ex post*) the true scope of the contribution made by each one, through his commission or omission, concerning the creation of the typical risk (and its subsequent realization in the result). However, it is not even possible to delimit the actual relevance of such contributions based on a merely causal or empirical criterion. That, since, as has been evidenced by the best doctrine, the contribution made by the individual, once he is “processed” by a structure, organization, or criminal group, acquires a much greater harmful relevance than the own (intrinsic of the) referred contribution (Silva, 2008).

The value deficit of the Theory of the dominion of the act (and its derivative Theory of the dominion of the act through organized apparatuses of power) falls on this last aspect; which, in the end, ends up attributing in an essentially subjective way (not to say, whimsical) the magnitude of the intervention of each individual on the typically relevant risk (Pereira Garmendia, 2016, p. 245). Moreover, this problem finds a better solution (normative-valuative) through the imputation structure proposed by Bernays and determined, to a greater extent, by the Nuremberg Jurisdiction. That is because imputation is not based on the intrinsic value of the contribution made by each subject, but on the power of action which, when integrated into the (typical) interaction, is oriented towards the specific commission of the criminal result. Hence, the underlying logic of such an imputation institute cannot be other than the reciprocal imputation of the typically relevant risk and of the emerging typical results.

However, let us proceed in parts and begin this analysis concerning the indicated quality of the only institute recognized by international custom. Verifying the legal framework in which it emerges: the principles derived from the jurisdiction developed under the Statute of the International Military Tribunal (of Nuremberg) and the Allied Council Control Law No. 10. (Heller, 2011, p. 275; Jescheck, 2008, p. 408; Morris, 2017; Michalczyk, 2017, p. 11; Bassiouni, 2008, p. 577; Röling, 2008, p. 455).

2. The (real) relevance of the JCE as a criterion of imputation of the wrongful act

Given these origins or genesis of the institute, it is logical that the criterion of imputation of the JCE is not found (in its entirety) in any national legal system, since it is a criterion to establish personal criminal liability that was born in the context of an international criminal proceeding (the first one held by a criminal court of multinational composition, by the way). It would therefore be a sterile exercise to look for a counterpart within national laws; at most, one will obtain institutes on which it is inspired, which, as such, are never identical and have a scope—at least partially—different (for example: conspiracy, common purpose doctrine, membership, partnership in crime, by Australian, Canadian, American or British law).

The JCE is a *sui generis* imputation system, created for the London Conference of 1944 and reflected in the Statute of the IMT and its convictions. Far from accepting the statement that the JCE “is not consistent with the general principles of criminal responsibility that inform international law”, the fact is that it emerged as the only institute of imputation of individual criminal responsibility for international crimes in Nuremberg; acquiring the quality of international legal-penal custom because such trials constituted a true “Grotian Moment”.²

Thus, at certain moments in Universal History, drastic modifications of the rules of conduct and values, as well as the procedures and institutions corresponding to public international law, are observed. Situations that we can exemplify in the Europe of the Cinquecento, when the modern and secular state emerged, or those that were verified as an effect of the Peace of Westphalia, which configured the bases of the system of international relations that govern us, in not a few extremes, until today. Within these very exceptional cases, publicists tend to place, without much hesitation, the constitution of the UN (specifically, the approval of its founding Charter), the Universal Declaration of Human Rights of 1948, and the constitution and subsequent trial of the International Military Tribunal at Nuremberg. Because of these parameters, we note that on December 11, 1946, the General Assembly of the United Nations unanimously confirmed the “Principles emerging from the statute of the IMT and its respective trials” (International Military Tribunal of Nuremberg, 1946). Thus, both the substantive law and the Theory of imputation of individual (criminal) responsibility, codified in the Statute of the Tribunal and applied in its judgments, were confirmed as international custom.³ Indeed, the resolutions of the General Assembly are not binding concerning the decisions and judgments of the national and international Tribunals. Still,

² “Grotian moment” (in clear reference to Hugo Grotius) is an expression coined by Princeton University Professor Richard Falk in 1985. It refers to those situations in which a profound and drastic transformation takes place within international law, in which new doctrines and international usages emerge and consolidate with unusual rapidity and wide acceptance (Falk, 1985; Scharf, 2010, p. 147).

³ “As a consequence, a compelling case can be made that common plan (now known as JCE) liability was rendered just as much a part of Customary International Law as the other fundamental concepts of International Criminal Liability reflected in the Nuremberg Principles” (Scharf, 2010, p. 151).

the latter have consistently recognised the value of state practice and *opinio iuris* (the two components of international custom as a source of law) because they are the manifestation of the governments and states concerned. Thus, the paradigm shift represented by the precedent of the Nuremberg trial, and the universal and unequivocal endorsement of the Nuremberg Principles by most of the world's nations in 1946, crystallized as international custom in such a way as to determine the individual criminal responsibility, regardless of the number of cases in which it was applied.

The Theory of collective criminality proposed in the very constitution of the International Military Tribunal at Nuremberg was not only the true genesis of the JCE doctrine but also delineated its foundation and scope. Moreover, the main criticisms, as well as the primary conceptual errors often made in this regard (both in case law and doctrine), can be traced back to their origins. Nevertheless, this doctrine was also consolidated in the conviction of the prominent leaders of German National Socialism; hence, unlike the Theory of the Mastery of the Act—best known as the Theory of Control of the Act—it is part of international criminal custom (Scharf, 2010, p. 145). Indeed, it is the only Theory of imputation that is part of it today.

3. Bernays' Theory of collective criminality: the beginning of the JCE doctrine

The main concerns of the Allies when drafting the Statute or Charter of the IMT can be summarized as follows: (i) to expressly define the criminal offenses that would be imputable to the defendants; (ii) to prove to the world the criminal nature of the National Socialist regime; (iii) to avoid making martyrs of the defendants, thus ruling out summary executions; (iv) to conduct the trial in such a way that the defendants would be representative of the various strata of National Socialist power, so that it would symbolize a trial of the entire Nazi power; (v) to bring to the attention of world public opinion the criminal events caused and/or perpetrated by the Third Reich, leaving a whole archive of documents and information for posterity; and, what matters to us here, (v) to establish guidelines for the imputation of criminal responsibility in all those trials that took place concomitantly or subsequently to the one held before the IMT (Guildfoyle, 2016, p. 61; Marrus, 2017, p. 20; Weinberg, 2009, p. 35).

However, the primary concern and the most complicated question to answer was the following: how could a trial be brought against an entire political regime, how to determine and establish the criminal liability of those who acted as a group, organized in a political system through various institutions, and whose direct or indirect participation in the typical result (based on causal grounds) was almost impossible to delimit? Extremes that, fifty years later, would again be pointed out by the ICTY in the appeal judgment in the Tadic case: "Most of the time, these crimes are not the result of the criminal propensity of individuals, but constitute manifestations of a collective criminality: the crimes are usually

committed by groups of individuals acting in pursuit of a common criminal design. Even though only some of the members of such a group will physically perpetrate the criminal act (murder, extermination, destruction of cities, towns, or villages, etc.), the participation and contribution of the other members are often vital in facilitating the commission of the crime in question. It follows that the moral gravity of such participation is usually no less—indeed, no different—than that of those who physically carry out the acts in question (Prosecutor v. Tadic, 1995).

The Belgian judge for the International Military Tribunal for the Far East (hereinafter: IMTFE), B.V. Röling, spoke of “systemic criminality” even back then. He associated it with situations in which governments order, instigate, encourage, permit, or tolerate the commission of crimes.⁴ As Nollkaemper points out, “systemic” means any set or group of objects, natural or artificial, that form an (inter)connected and complex whole. The former underlines that the systemic nature of international criminal law crimes is more than the sum of isolated individuals and their corresponding acts or omissions; on the contrary, connection and organization are key factors (Nollkaemper, 2009, p. 15). The involvement of States or other collective entities (since this phenomenon should not be limited only to States but to any organization that, *de facto* or *de jure*, takes their place) will be systemic to the extent that it is framed or directed by a specific common plan or policy. Thus, and in line with Röling’s theoretical developments, we will be facing a systemic criminality to the extent that the commission of such crimes serves the system or has been caused by the system, where the relevant aspect will be to verify that the collective has acted in response to the standard plan or policy. This concept, on the other hand, is recognized in Article 8 (1) of the Statute of the International Criminal Court when it states: “War crimes. The Court shall have jurisdiction over crimes when committed as part of a plan or policy or as part of the large-scale commission of such crimes”.⁵

Returning to the initial question, the main peculiarity of this type of criminality is its blurred causality in the organic work of the institution or system. In other words, the causality between the specific conduct of the intervening subjects and their respective results is never straightforward and easily reconstructed in the process. Hence the need to resort to essentially normative criteria that—without completely disregarding the causality and other data of the reality underlying the crime—base the creation of a typically relevant risk

⁴ Thus, “the war crimes (of the Empire of Japan) served the system, and were caused by such a system” (International Military Tribunal for the Far East, 1948, para. 138).

⁵ This proves, also for violations of International Humanitarian Law, that the so-called atrocity crimes do not observe a nature of “macro criminality” as some maintain, that it is not a real mega competition of crimes against life, liberty, physical integrity, etc.; but that they offend Humanity (as *grand être*) through the non-compliance by pre-state organizations or political institutions of human rights that constitute the core of the international system or world order. “World order” being understood as nothing more than the set of norms (conventional or customary) that make up the world public order. Hence the need (as a typical presupposition of all these crimes) for an iniquitous plan or policy (i.e., a *pactum scaeleris*) deployed by governmental institutions or whoever (*de facto* or *de jure*) takes their place (i.e., warlords, insurgent or terrorist groups, mercenary groups, in certain territories).

on the design of a systematic plan, the respective distribution of roles among its members, and all this substantially oriented to the achievement of a criminal end, capable of affecting Humanity as *grand être* (according to Comte) (Pereira Garmendia, 2023, p. 289). Specifically (according to the American delegation at the London Conference), murder, terrorism, and destruction of peaceful populations in violation of the laws of war.

All this was the basis for the strategy deployed by the United States when negotiating with the rest of the Allies the Charter of the future IMT, based on the plan devised by Bernays (then a War Department official). This lawyer proposed the (as he called it) “Theory of collective criminality”, which was nothing more than the fusion of two barely known institutes by Anglo-American doctrine and jurisprudence: (a) the conspiracy doctrine, a true exceptional institute used in the fight against organized crime and stock market frauds generated during the 1929 crisis. Moreover, (b) the membership of criminal organizations doctrine, an institute of imputation of criminal liability, using which liability for all the unlawful acts perpetrated by a criminal organization is transferred to each of its members.

The first (a) was aimed at the persecution and condemnation of the main civilian and military leaders of the Nazi regime, while the second (b) was aimed at the persecution and condemnation of the “little fishes”, officials or military men of medium or small relevance within the institutional echelon of the regime. Thus, from Bernays’ words contained in a memorandum dated September 15, 1944, and addressed to Secretary of War General G. Stimson, certain postulates emerge that he foresaw as necessary to deploy a successful judicial strategy against Nazi war criminals. First, there is a need to appeal to a new normative system, one that is more detached from causal data and the underlying empirical reality. Extremes that are visualized from the following manifestations of the referenced document: “There will be many thousands of war criminals who should be tried for crimes committed throughout Europe (...) there will be, in many cases, enormous difficulties to establish the identities of the interveners and to connect them with a concrete criminal event (...) the accused would be subjected to a trial for the crimes committed in the course of the war (...) the accused would be subjected to a trial for the crimes committed in the course of the war (...) the defendants would be tried under many different codes and procedures thus increasing the difficulties of punishing them (...) the work and paperwork would be enormous, the coordination and liaison particularly difficult (...) So it must be concluded that it will never be possible to catch and convict every single Axis criminal under the old concepts [of indictment] and criminal procedures”(Smith, 1982, p. 86). Secondly, such new normative system should: (i) attack the feeling or “reasons of right” that those perpetrators believed or felt they had at the time of committing their criminal acts; (ii) attend to the criminal instigation underlying every war criminal, therein lying the proper moral and legal meaning that should be contradicted and attacked through punishment; (iii) take from the referenced (two) theories on which it is based, only those extremes that would be functional to its retributionist (rather than a deterrence) *ratio* (Jackson, 2008, p. 354; Deguzman, 2020, p. 41; Werle & Jessberger, 2020, p. 6; Taylor, 2022, p. 63).

Therefore, it was not a sequential application (as will be explained below) of two Anglo-American law theories, but their recalibration, because of the peculiarities of the quaestio to be judged. Thus, what is relevant is not (only) what the subject did or did not do for a specific criminal event, but his membership: voluntary membership in organizations/institutions created for the sole purpose of perpetrating or facilitating the perpetration of such crimes. The latter extremes emerge from the following statements: “The greatest gravity of cases such as the massacre of the village of Lidice lies not so much in its destruction, but in the affirmation of the right (which the Nazis thought they had) to commit such acts (...) Behind every Axis war criminal, however, lies the basic criminal instigation which must be distinguished, established, since only in that way will the trial and punishment of the intervening subjects attain their true moral and legal significance” (Smith, 1982, p. 45; Taylor, 2022, pp. 81-84).

The plan put forward by Bernays took the form of a road map with two clearly defined periods. The first stage, in turn, consisted of two phases. In the first phase, the prominent Nazi civilian and military leaders (who could be captured alive) would be put on trial, and they would be charged with all the crimes perpetrated by the agents of National Socialism throughout the world (whether these leaders had a direct participation in the execution of such acts). This imputation would be based on conspiracy: a crime whose structure would obey an inchoate crime (i.e., a punishable preparatory act) and which, in this case, was elevated to a mode or criterion of imputation (mode of liability) as had been used in the prosecution of the Mafia and stock market crime during the economic crisis of 1929. The reason for this was the difficulty (if not impossibility) of delimiting the scope or degree of intervention of each conduct (considered individually) concerning the typical risk involved in the result. In other words, it is not that the barrier of protection of legal property is being advanced (i.e., a punishable preparatory act); instead, it was a question of imputation.

Thus, each of the “conspirators” was held liable like the reciprocal imputation of co-perpetration: for the criminal acts perpetrated by himself and for those perpetrated by the others. Those who participated in the preparation (and eventual execution) of the criminal plan containing several crimes (the conspiracy itself) would be reciprocally imputed for each of the typical results derived from the execution of the plan. In other words, all of them would be held responsible for each of the unlawful conduct perpetrated by them and by the other members. Moreover, this, even if such conduct—and their respective typical results—exceeded or departed from the criminal plan or agreement itself to the extent that their consummation was foreseeable as a possible and natural consequence of the criminal framework or context generated by it (i.e., what today we consider a JCE III). Note that it is a conspiracy taken as the basis of this structure of imputation of individual criminal responsibility within a collective act, and, in no case, of participation as necessary cooperation or complicity, as some authors consider (Fletcher, 2000, p. 635; Gillies, 1990, p. 155).

What can be observed is the functioning of the logic of conspiracy, as an attempt at co-perpetration, as a configurator of the *typically relevant risk*⁶ in these atrocious crimes (i.e., as a criterion for the objective imputation of the normally relevant risk deployed through the interaction).⁷ Furthermore, this is relevant for understanding two things: a) why it is that the jurisprudence of the ad-hoc and hybrid international tribunals usually condemns these persons with the penalty of an accessory subject to the crime (i.e., accomplice). Not because it is (from the dogmatic point of view), but for strict reasons of justice and penological proportionality. (b) That, more than a criminal type (which defines a typically relevant risk), the crime against peace or war of aggression (which is usually manifested through State terrorism, homicides, looting, etc.) was a criterion of imputation of those typical results to anyone who had participated in the creation of a structured framework for criminal interaction. Such structured frameworks of interaction, created to achieve the criminal intent, determined by the criminal agreement (*pactum scaeleris*), are the institutions created (in this case) by National Socialism: Gestapo, SS, SA, Reich Cabinet, Nazi Party, etc. Frameworks of interaction where the different statutes and roles to be played are perfectly delineated in pursuit of the achievement of the typical result, so that, in most cases, for the correct performance of such roles, the subjects who become members of the same (institution or organization) must know the iniquitous end (the criminally relevant result) to perform their corresponding task (within the framework) correctly. Hence, membership in the second phase of Bernays' plan) does not imply a mere integration or acceptance of voluntarily being part of such institutions (or being a sympathizer of them), but much more: their involvement, their willingness to contribute their energies to the whole interaction, to achieve the criminal result: through the actualization of the typically relevant risk (already, at least, to a degree typical of the typical risk corresponding to an attempt in a crime of result).

However, the fact is that this application of conspiracy, as a criterion of imputation, posed a problem that lay at the essential core of such a criminal figure: the plan, common agreement, or *pactum scaeleris*. The former, was because it was necessary to prove the existence of such a common plan among the foremost Nazi leaders since 1933, when Hitler became Chancellor of Germany, as well as that such a plan had the specific purpose of committing crimes against peace (war of aggression) and crimes against Humanity, following the typical configuration given to such crimes after the design of Bernays' plan

⁶ Under this terminology (typically relevant risk or relevant risk) we refer to the risk that the subject's conduct (in accordance with the *actus reus*) produces, and which is directed toward the consummation of the typical result (i.e., in accordance with the *actus reus*). Only an *ex ante* assessment of the result, which considers that the conduct has posed a criminally relevant risk (i.e., beyond what is tolerated or accepted by civil or administrative law), may be considered as causing the criminal result.

⁷ It should be recalled that we consider by conspiracy, the planning of a crime between two or more persons; and by co-perpetration, the joint commission of a criminal offense, through: (i) the conclusion of a criminal agreement prior or tacit to the beginning of the deployment of the typical risk; (ii) a functional distribution of roles (functionality oriented to the typical risk); and, observing as a consequence (iii) the reciprocal imputation of the risk and of the result.

(specifically at the London conference when the IMT statute was drafted). Such a gap between Bernays' plan and the final drafting of the criminal offences for which the Nazis would be prosecuted (cf. the London Conference) meant that factual data were judicially upheld that did not exist. That is, Hitler and his associates had been plotting the outbreak of World War II since the middle of 1933. On the contrary, historical evidence proves that Hitler and his henchmen seized various opportunities without adhering to a perfectly delineated plan from the outset. In short, unlike Bernays' original construction, where the criminal agreement was aimed at the persecution of part of the German population (as well as Czech, Austrian and Alsations) for racial, religious, political or sexual reasons, all of which is typical of a model of State terrorism, the actions of the prosecution and the judges of the IMT were based on a fiction: the existence of a plan or *pactum scaeleris* to wage a war of aggression and/or universal conquest since 1933. Such a fiction constitutes the main criticism of the Nuremberg Trial, as it runs counter to the purpose of revealing the historical and material truth of the facts prosecuted.⁸ In any case, these shortcomings were not due to the imputation system (we mean it was not a substantial and inescapable effect of the model of Collective Criminality or JCE), but to how the different *actus reus* were drafted. That would not have happened if the criminal definition of crimes against peace had been drafted to include not only "war of aggression" but also the creation of an iniquitous structure that would have caused profound instability for the peace of the region or the continent. These extremes could be perfectly verified in the concepts of "murder, terrorism, and destruction of peaceful populations" that Bernays originally used when designing his legislative-procedural strategy and that today could be easily accommodated in the concept of instigation to genocide and genocide itself.

We pointed out above that in a second phase (within this "first phase"), the IMT had to proceed to declare criminal the organizations that the accused commanded, directed, or in which they participated or were members of. The purpose of this was to replace the criminal plan or *pactum scaeleris* as the normative basis for the imputation of the responsibility of the little fishes, that is, of the subordinates or agents on foot (who are usually, in most crimes, the material executors), and whose causal link was (with all the more reason) complicated to elucidate and also to prove (as is usually the case in all mass crimes). Thus, after the IMT had prosecuted the prominent leaders of National Socialism and declared its leading organizations (SS, SA, Gestapo, SD, Military High Command, Hitler's Cabinet, Nazi Party) to be criminals, it was necessary to proceed to the prosecution and punishment of all those middle commanders and direct executors who were charged (i.e., who were "selected" by the respective Allied or national prosecutors of the countries in whose territories such crimes had been perpetrated). These extremes constituted "the second half" of Bernays'

⁸ Something that, we think, shows how unreliable these trials are for the purpose of accrediting "the historical truth" of an entire regime or historical period, beyond the specific facts on which the prosecutor's request is based. Following the same sort of critic against the Statute Law's accountability theories (specially the one developed by Claus Roxin) (Ohlin, 2011, p. 693).

plan, which would be achieved through the application of the doctrine of membership of criminal organizations, which was coupled to that of conspiracy, normatively replacing—as we have already noted—the *pactum scaeleris*, which was unfounded (*in limine litis*) concerning those subjects. That is to say: how could an accusation be because middle commanders or, even worse, privates or partisans, could have sealed an agreement or criminal plan with Hitler and his immediate collaborators in 1933?

Hence, what is relevant—always from a normative conception—is membership (voluntary and conscious) in one of the organizations belonging to the leaders, previously condemned by the IMT and directed towards the achievement of the various criminal aims corresponding to the conspiracy. It follows that membership, knowledge of the criminal purpose of the organization, and voluntary adhesion would be sufficient elements to hold the subject responsible for the crimes perpetrated by the various members of the organization. Without even being relevant, the intervention, on the part of each defendant, in the creation or increase of the *relevant risk*.⁹

However, Bernays' postulates, once presented to the Roosevelt Administration by Secretary Stimson, were harshly criticized, especially by the U.S. Attorney General's Office. It was argued that the concept of conspiracy, although specific to the U.S. system, was not, however, a concept recognized and accepted either by European continental doctrine or jurisprudence (Taylor, 2022, pp. 71-73). On the contrary, such a concept would be seen as an abusive artificial construction; a fiction incompatible with the legal-criminal theoretical constructions recognized as valid in most of the continent's legal systems. However, when Secretary of War Stimson's proposal was being criticised in this way, the events of the Villa de Malmèdy occurred. In that Belgian town, on December 17, 1944, seventy American prisoners of war were tortured and then shot by a German army unit. Such facts generated such a degree of indignation among the members of the armed forces, as well as the population in general, that the White House could not ignore them. Thus, it was decided to give a new and more decisive backing to the Bernays plan presented by Stimson (Remy, 2017; Taylor, 2022, pp. 85-87). Although Roosevelt did not make a final decision on the matter (since he died in early April 1945), his successor, Harry S. Truman, issued an executive order on May 1, 1945, appointing Federal Supreme Court Justice Robert H. Jackson as "Chief Counsel for the Prosecution of Axis Criminals. He was entrusted with the defence (before the rest of the Allies) of the premises of the Bernays plan: that conjunction of the doctrines of conspiracy and membership in a criminal organization.

⁹ Likewise, the investigations and trials would no longer fall under the jurisdiction of the ITM (whose work would be exhausted in the "first stage"), but of the civil or military courts of the nations in whose territory the crimes had been perpetrated. The IMT would be competent in cases involving crimes perpetrated in several countries: the defendants would then be tried by military courts belonging to the four occupying forces of Germany (USA, United Kingdom, France, and the USSR), which would be called "the subsequent Nuremberg trials".

4. The reception of the Bernays plan in the IMT Statute

The IMT statute, which was drafted at the London Conference (1944), did not include a definition of “conspiracy”. However, it did make two express mentions of the institution, albeit with very different scopes: art. 6 (Tribunal Militar Internacional de Núremberg, 1945, art. 6) lit. A) states, “Crimes against Peace: includes the planning, preparation, initiation or execution of a war of aggression in violation of international treaties, agreements or covenants; or participation in a common plan or conspiracy to execute any of the foregoing actions”.¹⁰ And subparagraph C) *in fine*: “The leaders, organizers, instigators and accomplices involved in the elaboration or execution of a common plan or conspiracy to commit any of the foregoing crimes shall be responsible for all acts carried out by any of the (other) persons in the execution of such plans”.

Jurisprudence and doctrine interpreted subparagraphs A) and C) as referring to the “common plan”, and therefore it was recognized as a *per se* crime (inchoate crime) of danger, although limited to the war of aggression, and for which all participants would respond as co-perpetrators (but with the penalty of an accomplice). However, some jurisprudence and doctrine have mistakenly interpreted the term “common plan or conspiracy” in paragraph C), as a form or modality of intervention in the crime, as a mode of criminal participation related (better: confused) with our complicity (non-necessary cooperation); this being expressly sustained by the French Judge who was a member of the IMT. This mistaken conception persists to this day, leading to repeated errors in the analysis by the Imputation Institute (JCE). Thus, it was already noticed in the analysis made by the Judge Donnedieu de Vabres, who pointed out (concerning paragraphs A and C) of Art. 6) that “conspiracy” should be understood as the determination of the persons who would be responsible as principal or accessory participants in the crimes listed in the Statute itself. Hence, de Vabres interpreted “leaders, organizers, provocateurs or accomplices” to mean any person intervening in the crime and understood “accomplice” (following French law at the time) to mean the person who provides the means to the perpetrator or the one who instigates or provokes the crime. Therefore, the only peculiarity in the regulation of the Statute was the link that the Statute expressly made (in Article 6) concerning participation in the conspiracy, rather than having linked it directly to each of the criminal offences included in the conventional text (Sliedregt, 2012, p. 24).

Far from such a peculiar interpretation, and as a tool used by the U.S. criminal system in its fight against organized crime and stock fraud, conspiracy was extremely flexible to prove and substantiate the charges and legal-criminal responsibilities of the Nazi hierarchs. This was because it facilitated the indictment of those who had not participated directly or personally in the crimes charged. These extremes are repeated in paragraph C *in fine*:

¹⁰ Similar wording to that observed in Art. 8 bis of the Statute of the International Criminal Court in the formulation agreed upon at the Kampala Conference (2010). Only that, in this case, it is configured as a special crime of its own, being *intransiens* the political and military leaders, *de iure* or *de facto*; and no criminal sanction against the *extraneus* (i.e., those not specially bound by the Law).

it is nothing more than the reciprocal imputation that characterizes all co-perpetration. Thus, all the members of the conspiracy (i.e., of the JCE) are liable for the typically relevant risks generated by themselves, as well as for those generated by the other members of the criminal enterprise (even if, for the assessments of the legal systems of the signatory states, they are considered as secondary participants or interveners in the crime).

On the other hand, conspiracy facilitates the imputation to the superior (political leader or military hierarch) of all those criminally relevant acts or omissions (for integrating the common criminal plan) that his subordinates may have committed without a direct order.¹¹ It also makes it possible to extend the criminal responsibility of all the accused, not only through the reciprocal imputation to all the participants,¹² but also by making each one responsible for those crimes that are not part of the original plan, but that were perpetrated in the context of the (alleged) war of aggression (even before the war, during the National Socialist government).¹³ The latter conception—the true genesis of the JCE III—was the basis on which the American team of the IMT Prosecutor’s Office tried to extend the conspiracy crime to all the offenses listed in Art. 6 of the Statute, and not (only) circumscribed to the crime against peace (i.e., war of aggression), as agreed in the London Convention.

Given the latter, the leaders selected by the Prosecution were (mainly) members of Hitler’s cabinet and in whose respect, it was easier to prove the existence of the *pactum sceleris*, which was part of the general assumptions of the conspiracy. This, by way of evidence or through documents (supposedly) categorical in their evidentiary efficacy, such as the so-called Hossbach memorandum. This document, which had been discovered in the summer of 1945, consisted of the personal notes taken by Hitler’s adjutant, Colonel Friedrich Hossbach, on the occasion of a meeting held at the Reich Chancellery in Berlin (November 5, 1937) and attended by several of the defendants in the Nuremberg Trial: Goering, Bormann, Frank, Hess, Jodl, Keitel, Ribbentrop. In these notes, Hitler’s plan is expressed (“as the Führer’s living will”) to obtain a *Lebensraum* or living space for the Germans in the territories of Eastern Europe; as well as his desire to unleash (for this purpose) a war of aggression on the neighbouring countries. Likewise, careful note is taken of the contingencies that Hitler feared—a conquest of Austria, the Sudetenland (in

¹¹ Thus, avoiding the eternal problems of proof posed by Roxin’s model of perpetration-by-means through organized apparatuses of power (both in its positive and negative fungibility). According to this model, the verification of the order emanating from the superior (located at the top of the structure of the power apparatus) to the rank and file (the direct executors) is essential.

¹² This being the consubstantial effect of the reciprocal imputation of all co-perpetration: what each of the co-perpetrators does is communicated to all the others.

¹³ This exceeds the framework of co-perpetration, where, as a principle, the one who exceeds is liable for the excess. And I say as a principle, since the most widely accepted doctrine recognizes that it is possible to impute their intervention as intentional or recklessness (Mir Puig, 2008, p. 230).

the former Czechoslovakia) and the western Rhineland could cause (i.e., a war against the United Kingdom and France).¹⁴

The second part of Bernays' plan was embodied in articles 9 to 11 of the IMT statute (International Military Tribunal in Nuremberg, 1945, arts. 9-11). Thus, there was a division of tasks between, on the one hand, the international jurisdiction in charge of condemning the Nazi hierarchs and declaring the different National Socialist organizations criminal, and on the other hand, the national jurisdiction in charge of prosecuting and condemning the members of the Nazi organizations declared criminal.

Thus, and by Bernays' "Theory of collective criminality" (in its pure formulation), after the declaration of "criminal" concerning a specific Nazi organization, in order to be able to impute the responsibility of any little fish (i.e., those who did not hold any political or military power) it was sufficient to prove (using sufficient evidence) two extremes: (i) that the subject had freely and voluntarily joined said organization, and (ii) that he had had sufficient knowledge of the "criminality" of the ends or means employed by said organization. It was a question—again—of the need to hold criminally responsible those members of the Nazi regime who had participated in the crimes contained in the Statute and who did not belong to the highest echelons of power, making it difficult (if not impossible) to attribute to them a participation in the conclusion of a *pactum scaeleris* consubstantial to the *conspiracy*.¹⁵ As van Sliedregt points out, it was only through the notion of criminal organization (derived from the concept of conspiracy) that the incrimination of hundreds of "second-level" Nazis involved in the commission of crimes during World War II became possible.¹⁶ In particular, it was made possible to the extent that they had knowledge of the

¹⁴ These points contained in the memorandum, however, also served to demonstrate how unprepared the American prosecution was when it came to making its case on conspiracy. This, since the emphasis placed on the referenced document came up against Goering's clever (and no less malicious) defense, who put Jackson on the spot by questioning him on how he justified his argumentation about a planned war of aggression against the rest of the European countries, if, as it emerged in the referenced document, Hitler's government had spent enormous sums of the national budget on the construction of a defensive system both in the Rhineland and in the Sudetenland. Such acts were not consistent with an *a priori* offensive attitude. The difficult obstacle to solve, which Jackson faced, lay in proving the Nazis' purpose of attacking the whole of Europe from the beginning of their government; when, in fact, what Hitler and his associates were doing was to take advantage of each concrete situation, there not being a perfectly devised plan (down to the last detail) from the very beginning.

¹⁵ As noted, "*Punishment of war criminals necessarily involved more than the trial of a handful of Nazi leaders. The few men at the head of the regime were not alone responsible for such crimes as the mass extermination of Jews and the deportation of some 5,000,000 persons for forced labor. Not did guilt rest only upon the concentration camp guards, operators of gas vans, and lynchers of Allied aviators who committed murders with their own hands. A multitude of enthusiastic collaborators, at all levels of the Nazi hierarchy, had cooperated in organizing and executing the systematic criminal program*" (Leventhal et al., 1947, p. 884).

¹⁶ This criterion does not differ, in substance, from that indicated by the Palermo Convention of 2000, with respect to organized crime (where, from a criterion of imputation, it is elevated to an autonomous crime against public peace); and the same happens with the R.I.C.O. Act (Racketeer Influenced and Corrupt Organizations Act), a system that today is taken as a model for the criminal prosecution of organized and transnational crime.

criminal acts of their fellow (co-members) and party leaders and had explicitly or implicitly expressed their acquiescence (Van Sliedregt, 2012, p. 26).

It is true that, concomitant with the trial conducted before the IMT, in those trials conducted before military tribunals in the United Kingdom or the United States under Allied Control Council Law No. 10, the common design criterion of liability emerged, which was essentially no different from conspiracy (in fact, both institutes were framed within the logic of the Bernays plan) (United States of America vs. Altstötter et al., Vol. III, 1949-1953, pp. 954-1201; United States of America vs. Brandt et al., Vol. II, 1949-1953, p. 171; United States of America vs. Pohl et al., Vol. V, 1949-1953, p. 958.; United States of America vs. Gottfried Weiss et al., Vol. IX, 1949-1953, p. 5).

What characterized these trials (such as the Hadamar Asylum and the extermination camps of Bergen-Belsen, Dachau and Treblinka) was the context in which these crimes were perpetrated, which obeyed systems of ill-treatment that gave rise to JCE II (Bazyle & Terkheimer, 2014, p. 75; Hilton, 2004; Jardim, 2012, p. 40; De Mildt, 1996, p. 190). Thus, according to U.S. prosecutor Lt. William Denson, three points had to be proven to determine the criminal liability of each defendant: first, the Prosecution had to prove the existence of a system of ill-treatment of prisoners consisting in the commission of crimes under international criminal law (as defined by Allied Control Council Law No. 10). In other words, it was a description of what happened in the forced labour and extermination camps. Secondly, the Prosecution had to prove that the defendant knew (i.e., was aware) of the existence and (true) nature of such a system. Finally, it had to be proven that each of the prosecuted individuals participated, collaborated, or cooperated, thereby reinforcing the system. In other words, the conduct was evaluated not according to its direct or indirect harmfulness concerning the typical manifestations of war crimes or crimes against humanity: homicide, torture, ill-treatment, abuse and sexual aggression, etc., but in terms of its impact on the proper functioning of the criminal system (since this is what, in the final analysis, offends or harms the legally protected legal good: Humanity as *grand être*). Thus, the Prosecution argued that even the guards who remained in the control towers located outside the perimeter had collaborated and helped with the common design, as they had prevented the prisoners from fleeing. Moreover, it was added, concerning the subjective imputation, that—in principle—it was impossible for anyone to have worked in the camp and remain ignorant of the regime of torture and death that reigned daily there, “where emancipated inmates were an everyday part of the landscape of the camp”. The existence of sufficient, simultaneous, and up-to-date knowledge of the typical risk and the typical results that occurred within that environment for the victims was inferred from this (Van Sliedregt, 2012, p. 48).

Given the foregoing, there is no doubt that both membership liability and common design Theory are irremediably based on conspiracy. However, there are apparent differences between them; differences whose extremes are evidenced in confusion on the part of doctrine and jurisprudence to this day. Thus, under conspiracy, it is necessary

to prove the existence of an express or tacit agreement between the original creators of the common plan, which is not the case in the first two. This generates an apparent dogmatic distortion for the former. Moreover, we say apparent, since both membership and common design Theory observe a typical tacit presupposition: the existence of a criminal organization generating a common framework of interaction oriented to the achievement of the iniquitous result and to which the offender couples his conduct (active or omissive) and always oriented to the achievement of the crime (Pereira Garmendia, 2016). The visualization of the *pactum scaeleris* is more diffuse in the case of conspiracy, since—it must not be forgotten—its foundation is built based on an anticipation of the punishability to a moment prior to the execution of the conduct: that of the adoption of the criminal agreement or *pactum scaeleris* (Werle, 2013, p. 53). Hence, the individual relationship of each participant in the pact, concerning the typical results, loses relevance. The analysis of the imputation focuses on the moment of the agreement and the effective incorporation of the defendant into the common framework, common enterprise, or joint plan, etc. Thus, both the one and the other are teleologically directed to the same point: to overcome the difficulties of proof and empirical determination of individual liability.

In addition to the above, and contrary to what is maintained by critics of the JCE (Olásolo Alonso, 2013, p. 122), even before Nuremberg, the national legislation and jurisprudence of several countries of both Common and Statute Law traditions already recognized imputation criteria based on the participation of the defendant in the framework of a common plan. And this with a scope very similar to that of conspiracy (like that of the current JCE). Thus, in addition to the aforementioned conspiracy,¹⁷ we find the felony murder doctrine¹⁸ and, especially—given its impact on the United Nations War Crimes Commission (UNWCC)—the *association de malfaiteurs*.¹⁹ This modality of imputation became particularly relevant given the massacre carried out by the Waffen-SS in the villages of Lidice and Oradour (a few

¹⁷ The *conspiracy* arises from the “*Pinkerton v. US*” decision of 1946. The Pinkerton precedent was established whereby a conspirator can be convicted for all reasonably foreseeable consequences of an unlawful agreement. Today, such an institute is the inspiration for the RICO Act.

¹⁸ Enunciated by Lord Coke in 1797, it has been used in jurisdictions belonging to the United Kingdom, USA, New Zealand, and Australia. By it, it is admitted that a convict may be charged with a criminal result that is a natural and probable consequence of the crime that the person intended to aid/assist or encourage/instigate. In the same vein, the Indian Penal Code of 1860 imposed individual criminal liability for unlawful acts committed by several persons in pursuance of a common plan; similarly the Canadian Criminal Code of 1893 punished those who formed a common intention for the pursuit of an unlawful purpose “making each of them” a party responsible for each of the offences committed by any one of them in the pursuit of such common (criminal) purpose”.

¹⁹ Thus, the now repealed art. 265 of the French Penal Code regulated the *association de malfaiteurs* as follows: “Any association formed, whatever its duration or the name of its members, established for the purpose of preparing or committing crimes against persons, or property, constitutes a crime against the public peace”. Article 266, on the other hand, read: “The members of an association formed, or who have participated in an agreement established for the purposes specified in the preceding article, shall be punished with hard labor”. While art. 267 dictated: “Shall be punished with imprisonment those who, consciously and voluntarily have favored the perpetrators of the crime provided for in art. 265, through the provision of instruments for the crime, of the means of connection, lodging or meeting place”.

hours after the Normandy landings). There were almost no witnesses to such massacres, and it was (to say the least) impossible to prove sufficiently the concrete participation of each of the members of such SS units in such criminal acts. Given this, the French delegation stated that, if the general principles and criteria of imputation of ordinary (French) criminal law were applied to the facts, the collective criminality in question could not be punishable. Hence, to facilitate such imputations, the need to consider two fundamental points: first, the establishment of a presumption of guilt (reversing the *onus probandi*) by placing the burden of proof of innocence on the accused himself. Second (and this being the fundamental characteristic of the institute of the *association de malfaiteurs*), making criminally liable the individuals who were members of the organization, to the extent that their incorporation or membership had been voluntary and that the said organization had, as an unequivocal purpose, the commission of crimes (UNWCC, History of the UN War Crimes Commission and the Development of the Law of War, London, 1948, p. 294). As can be seen, the bases of these doctrines (especially the French one) differ from those of membership and common design, in two extremes (at least): they do not foresee a common plan (even tacit) with division of tasks or roles during the executive stage of the crime; nor do they require the performance of conduct (either active or omissive) by each of the defendants (individually considered). The mere conscious act of becoming part of the iniquitous organization or structure (i.e., mere membership) is sufficient.

Returning to the wording of the IMT statute, it should be noted that individual liability for mere membership in a criminal organization was never envisaged; instead, it always required the verification, in its regard, of a typical result (about the target offense) and an intervention on the relevant typical risk (however minor it might be). Therefore, mere membership was never enough. There was only one exception glimpsed in Bernays' plan as a link between the "big fishes" and the "little fishes": the mere membership of any of those convicted by the IMT (i.e., of the high civilian and military commanders of National Socialism) to specific organizations denounced, would be sufficient to consider such legal entities as criminal organizations—always to the extent that a conviction of the Court ratified it—. However, such extremes were never replicated to determine criminal responsibility to middle and lower commanders, foot soldiers, simple officials, etc. (i.e., "little fishes"); since the construction of their individual responsibilities was never foreseen based on a mere membership or belonging to the referred organizations declared criminal by the IMT.

To summarize, it can be argued that the declaration of criminal organization reached, from the point of view of its legal effects, the collective or group criminality and not, at first, the individuals (physical persons, individually considered). However, it left the door open for national criminal jurisdictions to prosecute, at a later stage, the members (natural persons) of such organizations declared to be criminal. In no case could the declaration of criminality made by the IMT concerning the legal persons charged be reconsidered or revised. The declaratory judgment issued by the ITM had the force of *res judicata*

(formal) binding (in all its ends and effects) for the national jurisdictions and always (and only) concerning the legal person.

Thus, what had to be investigated and resolved by the national jurisdiction was whether or not the subject had been a conscious—and acquiescent—member of an organization declared criminal by the IMT (i.e., Gestapo, SS, SD, Reich Cabinet); for this it was necessary to prove: his personal involvement in—at least—one of the criminal acts committed by the organization; that it was voluntary; and; that he had knowledge of the criminal nature of the organization.

Personal involvement (in at least one of the criminal acts committed by the organization) was expressly indicated by Jackson himself, when he stated that, according to the Statute, criminal organizations must have perpetrated crimes against peace, war crimes, or crimes against humanity. Hence, we are dealing with intervention in a crime of result, and not in a preparatory dependent type; as already indicated, the problem lay (and continues to lie in this type of criminality) in the determination (proof) of the specific acts performed by each member of the group and in their causal influence on the result. It is not a question of advancing the protection barrier for legal assets. Since, in any case, it is a matter of intervention in a crime with a result, it is not only required that the subject has belonged to the criminal organization, but that he has observed a functional relationship for it; that he has fulfilled a role. Assuming a status within the logistics deployed by the referred iniquitous institution (i.e., in the structured field of interaction). It is because of this that, for example, the defendant Buetefisch was acquitted in the (subsequent) trial against those responsible for the firm I.G. Farben. This was because, although he had obtained an honorary rank within the SS, he had not taken an oath of allegiance, nor had he played any role within the iniquitous organization—beyond participation in a sociable or festive event (Nuremberg Military Tribunals, 1952a, p. 1201; 1952b, pp. 859-860).

Regarding voluntariness, it refers to the fact that the individual's entry into the declared criminal organization was voluntary, not forced. The Nuremberg jurisprudence addressed this issue in a stringent and restrictive manner. Firstly, because the IMT, in its judgment, declared the access and permanence in these criminal organizations to be “entirely free”, thus conditioning the assessments made in subsequent trials. Secondly, because following the instructions of the Office of the Chief of the War Crimes Council (OCC), any threat of political or economic reprisal that the defendant might have suffered for refusing to join such organizations was considered—at best—as a mitigating factor. The situation of those inmates who tried, in vain, to resign from their posts within such organizations (e.g., because their resignation was not accepted, or even because they were forced to continue occupying their posts) was also considered as a mitigating factor. The reason for the latter was that if they had voluntarily joined the organization, it was understood that there was no merit in supporting a lack of voluntariness following the membership requirements. Of course, there were exceptions: for example, in the case of the “Ministries”, the Court acquitted the defendant Darre of membership in the SS, since both Himmler

and Hitler had refused to accept his resignation from his position within the organization (Heller, 2011, p. 321).

Now, when was it understood that the subject lacked voluntariness? Well, when he was in a situation of a state of exculpatory necessity (duress), having been “submerged” into the sphere of the criminal organization. Moreover, even so, an exception was foreseen that, acting as a member of the organization, he had been personally involved in the execution of one of the crimes contemplated in Art. 6 of the IMT Statute (i.e., he had personally executed one of the criminal modalities of war crimes or crimes against humanity). Since this aspect of voluntariness is closely related to the following: knowledge. It was a matter of subjective imputation, requiring nothing more than malice; knowledge of the criminal purpose of the organization and simultaneous to the moment of carrying out its specific conduct.

Notwithstanding the foregoing, it is true that when interpreting the provisions, the American Chief Prosecutor—Jackson—, argued that the declaration of criminal organization would generate a modification of the *onus probandi* regime in the subsequent trials of its members; all this, in perfect alignment with the parameters of the *association de malfaiteurs* of French law. Thus, once the existence of the organization and its criminal purpose had been judicially established, all members were automatically held responsible for the acts of the other members (Van Sliedregt, 2012, p. 280). In any case, it should be reaffirmed that such *ad hoc* premises were never successful neither before the IMT, nor before any military or civilian Court acting after it (in exercise of the jurisdiction regulated by Allied Council Law No. 10).

5. The reception of the Bernays plan in the Nuremberg IMT judgment

At the London Conference, the British, French, and Soviet delegations accepted, albeit with reservations, the broad outlines of Bernays’ plan for collective criminality. However, it was agreed that it should be limited to the crime of war of aggression. Thus, and concerning the British delegation, it was stated: “The British expressed their reticence in this respect because they considered Hitler to be an opportunist, and not a political leader whose program was mapped out in advance. Yes, they admitted, there was an overall strategy, but the Nazi government was not united, but rather the government of one man. The French also did not entertain the idea of conspiracy and did not conceive that anyone could be charged with a crime who had not actively participated in it”. (Paz, 2016, p. 76; Taylor, 2022, pp. 126-132). In short, conspiracy was considered, except by the Americans, as an autonomous crime, albeit connected to the crime against Peace or war of aggression: as a punishable preparatory act, a type of dependent on the crime of war of aggression. However, in practice it was used—as the Americans understood it—as an imputation structure with effects similar to co-perpetration (since, in Nuremberg, the sentences handed down were not those corresponding—in their *quantum debeatur*—to

the accomplices, but to the perpetrators or co-perpetrators: 20 years to life imprisonment, when the death penalty).

We note above that, despite going against what was agreed at the London conference, the American team based the charge of common plan or conspiracy not only on the crime against Peace (i.e., the war of aggression), but also concerning all the crimes listed in Article 6 of the Statute. Moreover, this, since Jackson, in complete harmony with Bernays (and with what today we identify as the doctrine of the ECCB), understood that it was not the typification of a criminal modality, but something more generic and broader: a structure that served as a criterion for the imputation of individual criminal responsibility for macro-crimes. In this regard, Prosecutor Jackson noted before the IMT: “All of the defendants, together with other persons during a period prior to May 8, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy for the commission (or participation in the commission) of: crimes against Peace, war crimes and crimes against humanity, as defined in the Charter of the Tribunal. Moreover, by the provisions of the said Charter, they are individually responsible for their acts and for those other [acts] committed by any person in the execution of such plan or conspiracy (...)”. See how the individual criminal liability is already apparent, not only for the criminal acts corresponding to the criminal purpose pursued by the organization, but also for those crimes committed by any of the members in (better: during) the execution of the plan. Such extremes constituted the basis of the charging structure JCE III. It is curious that, to this day, it is maintained (or rather, attempted to be maintained) that the JCE III is an invention of the ICTY that, in no way, can its origin be traced back to the IMT and its sentence (International Military Tribunal, 1947, pp. 27, 35-67; Drumbl, 2005, p. 539; Ohlin, 2007, p. 68; Werle & Jessberger, 2020, p. 244).

Thus, in detailing these charges (and in complete harmony with the outlines of the Bernays plan), Jackson held that the Nazi Party “constituted the central nucleus of the common plan or conspiracy”. Thus, together with its subsidiary organizations, the Party “became the instrument of cohesion between the defendants and their (co-)conspirators in carrying out the aims and purposes of such conspiracy” (Marrus, 2017, p. 57). All defendants were members of the Party and—jointly—of the conspiracy; with full knowledge of its aims and purposes or, through such knowledge, became interveners at a particular stage in the development of the conspiracy. The Jackson-led team proceeded to construct all charges in such a manner, albeit with an emphasis on war crimes and crimes against humanity perpetrated during the execution of the charged conspiracy. This reflected the breadth of criteria upheld by the Americans as opposed to what had been agreed with the rest of the Allies.²⁰ Although the wording was not very polished and rambling, it can be

²⁰ Specifically, they stated: “1) Beginning with the initiation of a war of aggression on September 1, 1939, and throughout its extension by successive battles involving almost the entire globe, the Nazi conspirators carried out their common plan or *conspiracy* in a ruthless manner and in complete violation of the laws and customs of war. In the course of the execution of such common plan or conspiracy, war crimes were committed (...) 2) Beginning with the initiation of their plan to gain and retain total control over the German

deduced from the grounds and the charges presented by Jackson that the results of crimes against humanity, war crimes and crimes against the non-belligerent civilian population were typical results of what today we would call a JCE III derived (as a foreseeable and natural consequence) from a JCE I consisting of the war of aggression.

The guidelines of the US Prosecutor's Office to prove the first charge were limited to the accreditation that the conspiracy had existed and, through it, it was possible to delimit who could be charged: those involved, who had observed a free will to conspire to produce the criminal results (war of aggression, in violation of International Law). On the contrary, the defenders tried to the best of their ability (given the statutory limitations) to prove the non-existence of such a conspiracy; that the Third Reich had functioned in a chaotic and disorganized manner, with only one will at the helm, which was none other than Hitler's own (Tusa & Tusa, 2022, p. 615; Taylor, 2022, p. 615).

Thus, the indictment brought by Jackson's team based these charges (i.e., involvement in the conspiracy) primarily on two documents found by the Allies a few months before the requisition was filed: the Hossbach memorandum of November 1937 and the Schmundt Minutes of May 1939. The first of these, discovered in the summer of 1945, consisted of the personal notes taken by Hitler's adjutant, Colonel Friedrich Hossbach, on the occasion of a meeting held at the Reich Chancellery in Berlin on November 5, 1937, which was attended by several of the defendants in the Nuremberg Trial: Göring, Bormann, Frank, Hess, Jodl, Keitel, Ribbentrop. In these notes, Hitler's plan ("as the Führer's living will") to obtain a Lebensraum or living space for the Germans in the territories of Eastern Europe is expressed, as well as his desire to unleash (for such purposes) a war of aggression on the neighbouring countries. Likewise, careful note was taken of the contingencies that could cause, according to Hitler's fears, a conquest of Austria, the Sudetenland (in the former Czechoslovakia), and the western Rhineland: a war confrontation with the United Kingdom and France. Although it also emerged (from the same document) that it was not thought that the British would embark on such a conflict, so that, without London's support, the French would never declare war on the Reich. However, on this last point, nothing was said by the Prosecution (nor were the defences allowed to argue). With specific reference to the Schmundt Minutes, they were no more than a draft of a military plan for the invasion of Poland, based, among other reasons, on the low power of warlike resistance of that country to an eventual aggression on the part of the Bolshevik forces. The effects of an invasion of Poland on the German economy were also analyzed, as the Reich needed

State, and then through its use as a means of perpetrating aggression abroad, the Nazi conspirators carried out their common plan or conspiracy in a ruthless manner and in complete disregard and violation of the humanitarian laws. In the course of carrying out such common plan or conspiracy, crimes against humanity were perpetrated (...) (3) By reason of the foregoing, the defendants, among other persons, are guilty of a planning or conspiracy for the perpetration of crimes against peace, of a conspiracy to consummate crimes against humanity in the course of or in preparation for war and in the course of war; and of conspiring to perpetrate war crimes not only against the armed forces of their enemies, but also against non-belligerent civilian populations" (Marrus, 2017, p. 64).

to obtain resources and means of production from neighbouring countries to sustain its economic growth. The economic necessity was thus considered as a ratio of the war of aggression, under the understanding that the Nazi control in economic, financial, and political matters was a necessary phase to be able to attack other states: Austria and Czechoslovakia at first, and after that, Poland (triggering from there the Second World War). As has been stated in this regard, such extremes gave the Prosecution some breathing space, which at least had a basis on which to support the assumption that there had been a Nazi conspiracy, from the beginning of its government in 1933, to launch such an armed conflict (Paz, 2016, p. 84; Taylor, 2022, pp. 181-182, 279-278).

The charge brought by the Prosecution was taken up almost in its entirety by the IMT judges at the time of sentencing. Moreover, although they were unable to reach a unanimous decision on the conspiracy charge, it was nevertheless considered by most of the judges (three out of four). Only the French representative, Donnedieu de Vabres, consistently voted against indicting any defendant on this charge. Specifically, he stated that he would systematically vote against it because he considered it an unnecessary and difficult-to-determine institution, since its typical assumptions and scope were not even minimally defined in the Statute. He also wrongly argued that during the negotiation and drafting of the IMT charter at the London Conference, crimes against Peace, crimes against humanity and war crimes were discussed, and that at no time was there any talk of conspiracy, which is why the Germans could not have had prior knowledge, until Nuremberg, that they could be indicted on this charge.

Contrary to the judge's argument, in the logic of the IMT statute regarding the scope of the rule of legality (i.e., the non-retroactivity of the most severe criminal law), what the Germans knew or could have known about what was agreed upon at the London Conference is irrelevant. It should be recalled that, in the context of the ITM trial, all the crimes contained in the Statute were considered to be recognized as such by all civilized peoples of the world and, more specifically (although today it is preferred to be ignored by the doctrine) as an integral part of the natural law referring to every human being and binding on every political and social organization. Although, as de Vabres argued, such extremes were—and still are—more than debatable concerning conspiracy, the fact is that it was not—properly speaking—a criminal type, nor a dependent criminal type, but a criterion of imputation of individual criminal responsibility on a collective act. Hence, de Vabres' entire argument was irrelevant.

Notwithstanding the above, de Vabres maintained that the rules of non-retroactivity of the criminal norm and maximum taxation were essential, becoming a real “stone in the shoe” during the deliberations of his colleagues on the Tribunal. However, the Soviets were the central defenders of the position defended by the American team of prosecutors. The reason for this was that their representative at the Tribunal, Gen. Nikitchenko, had understood that without such a charge, several of the defendants could not be convicted of any other crime (and for the Soviets, that none of the defendants should be acquitted

was a political mandate emanating from Stalin himself). Of a similar opinion was the British judge, Sir Norman Birkett, who supported Nikitchenko's position, although for legal rather than political-utilitarian reasons (or reasons of personal survival in the face of the dictator Stalin): because he understood that, after all, the accusation was based on the conspiracy for the simple reason that it was all based on the plan outlined initially by Bernays and taken up (to a large extent) at the London Conference.

Despite the position of the French judge, and the confusing wording of the Statute, the IMT crystallized a uniform criterion on conspiracy, specifying it as a means of imputation, although limiting it to the framework of crimes against Peace. Its relationship to the planning of a war of aggression was emphasized. At the same time, any interpretation of conspiracy as an autonomous crime, detached from any of the crimes included in the Statute, was prevented (Van Sliedregt, 2012, p. 25). Thus, the IMT—in its majority—interpreted the final paragraph of Article 6 of the Statute (“The leaders, organizers, instigators and accomplices participating in the elaboration or execution of a common plan or conspiracy to commit any of the aforementioned crimes are responsible for all acts carried out by any of the persons in the execution of such plans”) not as referring to all the crimes contained in Article 6, but only concerning the one contained in subparagraph A: crimes against Peace. This is because it was only this criminal type that included in its definition the possibility of being perfected through a conspiracy (“Crimes against peace: includes the planning, preparation or initiation or execution of a war of aggression or in violation of international treaties, agreements or pacts; or participation in a common plan or conspiracy to execute any of the foregoing actions”). Indeed, the text of the final subparagraph should have been included immediately after the definition of the crime against Peace (as a second subparagraph of subparagraph A), thus avoiding any confusion about its scope. However, the Jackson team's attempt to extend conspiracy to all crimes (against Peace, against humanity, and war crimes) implied an interpretation contrary to the literal meaning of subparagraphs B and C of the article. Nor was it following the historical criterion—a criterion for the interpretation of treaties, after that corresponding to their literal meaning—emerging from the agreement of the parties at the time of drafting the Statute (derived from the preparatory work of the treaty and the circumstances of its conclusion) (Vienna Convention on the Law of Treaties, 1969). The judges were thus complying with what had been the framework agreement reached at the London Conference: conspiracy, as a criterion for imputing identical effects to co-perpetration, which had been reluctantly approved by the USSR, the United Kingdom, and France, was to be confined to the framework of crimes against Peace only.

In addition to the foregoing, the judges understood that, given the evidence submitted, in order to be able to charge a conspiracy, the following points had to be proven, in addition to the existence of an orchestrated plan *ab initio*: (i) the existence of a specific criminal purpose (referring to the war of aggression) on the part of each defendant. Thus, one of the requirements of membership is observed: personal involvement. Thus, in most

cases, it was understood that such a criminal purpose was established by the defendant's involvement in some of the events considered, which in turn served as evidence of the conspiracy's existence. For example, having participated in the meeting documented by Hossbach, or having been a member of the Reich Cabinet, or having signed the decree of the Anschluss or that of the annexation of the Sudetenland, etc.

On the other hand, the judges also required ii) voluntariness: having freely assumed (each of the convicted persons) their participation in the pact or criminal plan and its execution. However, and closely related to the above, they required the verification of a certain temporal proximity between the individual decision to join the organization and the performance of the actions or services to the common effort. Hence, they indicated that the plan, to be criminal, should not be based (only) on the declarations of the party program ("the twenty-five points of the Nazi party") announced in 1920, or on the manifestations expressed in the text of Hitler's "Mein Kampf". The above is derived from the hybrid foundation that characterizes Bernays' Theory and that the IMT—if I may use the expression—"deepened"; since it proceeded to demand within the "first time" of the mentioned plan (i.e., of the conspiracy), extremes that were consubstantial to the foundation of the individual responsibility of the "second time" (i.e., of the membership). Thus, he considered it relevant both to examine the existence of a concrete plan to wage a war of aggression and to determine as precisely as possible the different roles of the participants within their respective organizations and their (normative) influence on the execution of the plan. It is on these two bases that a reciprocal imputation to all the participants is based, just as happens within the institute of co-perpetration. This hybrid conception or foundation was crystallized as international custom in the "Nuremberg Principles" approved by the UN General Assembly. This is the true essence of the JCE as a criterion for (individual) criminal accountability for atrocity crimes.

Regarding (iii) subjective liability, and as mentioned above, the IMT required, in any case, the verification of malice on the part of the defendant. That is, actual knowledge and simultaneous knowledge of his personal involvement in a criminal organization, the purpose of which, following an express or tacit agreement previously entered, was the commission of a crime against Peace (i.e., a war of aggression). Such a requirement of malice on the part of each participant in the collective criminality could be called into question in some instances where personal opposition to certain aspects of the common plan had been proven. There, the ITM sustained the thesis that they had done so for "reasons of convenience" and "not for moral reasons" and therefore lacked the value to nullify the intent (i.e., malice). An example of this is the reasoning given by the IMT when convicting Göring on the first charge; when it dismissed the defence put forward by Göring, consisting of his (documented) opposition to the Barbarossa plan (invasion of the USSR), which constituted the sixth phase of the conspiracy plan (according to the Prosecution's argumentation). Thus, the IMT held that Göring's opposition to the war against the USSR was due "(...) to reasons of a personal nature, of his political and economic convenience,

rather than to oppose a war which—he knew—contravened the international legal order” (George, 2014, p. 200).

An unsuspecting interpreter would indeed understand that these extremes would refer to subjective criminality.²¹ Thus, for the judgment of *mens rea* or subjective imputation, the Court would replace malice by the existence of an alleged “immoral” or “amoral” motive, rooted in utilitarianism, which would have driven the defendant’s conduct. However, this was the first substantiation of a JCE III at the higher command level. This was because, up to that point, such an imputation structure had only been applied by military jurisdictions acting in conjunction with the IMT, to substantiate the convictions of junior military personnel. Thus, Göring had participated in the JCE I, consisting of the generalized war of aggression, which included, as a natural and foreseeable consequence, and therefore imputable to malice aforethought, the attack on the territory of the Soviet Union. Therefore, no evidence would have been adduced to prove (concerning the *mens rea*) a lack of foresight on the part of Göring in this respect: on the contrary, only one who is minimally informed (i.e., one who knows the cause) can substantiate his opposition.

6. Conclusion

When the Allies decided to put the major Axis war criminals on trial, many doubts arose as to how individuals could be held accountable for their involvement in macro-crimes such as genocide, war crimes or crimes against humanity (crimes against humanity). Within this framework, Colonel Murray Bernays developed a plan that, in his opinion, would overcome the main pitfalls involved in charging such acts: i) the difficulty of finding sufficient evidence to support a causal relationship between each individual conduct and the typical results; ii) derived from the above, the difficulty to impute as intervention in a typically relevant risk what was done by each of those who acted within the context of the collective activity; iii) and hence the difficulty of determining the true degree (relevance) of responsibility of those involved in the macro-criminal phenomenon, if the traditional criteria for determining criminal-legal responsibility were applied. The proposed solution consisted in creating a structure of imputation based on *conspiracy*, according to which, among the main leaders of National Socialism, the verification of an express or—at least—tacit agreement on a common plan (conspiracy) was required and whose execution was carried out through certain institutions or criminal organizations whose only *ratio essendi* was the achievement of such criminal purpose. Organizations that, in turn, would be (also) declared criminal by the ITM. Then, in a second stage, the liability of the individuals who had been members of such organizations would be determined by various national courts, in application of the Theory of *membership in a*

²¹ And that, moreover, it considers malice, not as updated and simultaneous knowledge with respect to the risk that deploys its conduct, but as intention or will to perfect the typical result.

criminal organization or *common design*. As has been seen, the *ratio* of this imputation is not due to an advance in the protection of criminally protected legal assets, but to the evidentiary difficulties in determining the specific causal contribution of each participant with respect to the typical risk. Hence, causality is set aside, and criminal liability for the typical risk and for the result is built on strictly evaluative bases. Incidentally, this is no different from what happens with many categories of crimes in national systems, where the objective imputation of the risk in the typical result is built on a purely normative/valuative basis, without causality having any relevance whatsoever.

Thus, temporarily located after the trial held before the IMT, the so-called “other Nuremberg trials”, corresponding to the jurisdiction regulated by the Allied Council Control Law No. 10 (and in strict compliance with the second half of the Bernays plan), it was decided to leave aside the accreditation of a *pactum scaeleris* and it was based, as analogous to the disvalue of *conspiracy*, on the effective incorporation (belonging or membership) to the criminal organization. As in *conspiracy*, the relationship of each member with the typical result or results was considered irrelevant (due to the difficulty or impossibility of proof), and liability was based, in part, on the incorporation of the subject to the organization or common plan. These extremes having been pristinely accredited in the previous judgment of the IMT, insofar as the alleged existence of a criminal plan *ab initio* was considered proven by the fact of having been (the defendant) a member of Hitler’s cabinet, or by his position in the military High Command; i.e., what was relevant, more than the prior agreement in itself, was the membership in the common framework or joint plan. However, it should be emphasized once again that these extremes were never reduced to mere membership, but that, in addition to this, verification was always required of those extremes constituting liability under *membership*, which we have analyzed *above*.

Four decades later, with the establishment of the ICTY, ICTR, and other international tribunals created by the Security Council²² (under Chapter VII of the UN Charter), the survival of the main lines of Bernays’ plan—now known as *Joint Criminal Enterprise*—was verified. The same *Ariadne’s thread* that was found in the original plan was observed in these: a structure of imputation of individual criminal liability based on a moment prior to the production of the typical results, with the determination (and proof) of a causal relationship between the defendant and the typical result(s) not being relevant, but between the defendant and the typical risk(s). Such a relevant moment for the imputation became the *personal implication*: performing a role within the common criminal action. Inferring from there the existence of an updated knowledge of the criminal purpose and of his intervention in it, i.e., subjective imputation by way of malice aforethought.

²² In addition to the International Criminal Tribunal for the former Yugoslavia (ICTY), the UN Security Council authorized the constitution of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court for the Prosecution of Crimes in Darfur (Sudan), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Panels for East Timor.

There is, therefore, a common basis for all JCEs that finds its logic in the Bernays plan referred to above: objectively (*actus reus*) it is required that: i) a (minimally) organized plurality of persons; ii) that they share a common plan or purpose that involves the commission of one of the typical figures contemplated in the statute or founding charter of the competent international tribunal; iii) the intervention of the subject in the achievement of said common criminal plan (which, in no case, requires that it be in the consummative stage, but that it is externalized in a conduct—at least—locatable in the stage of execution). All these extremes entail the reciprocal imputation of everything acted by themselves and by the other subjects. Subjectively (*mens rea*) it is required the updated and simultaneous knowledge that they intervene (through their conduct) in an interaction constituting a typically relevant risk. Furthermore, the variants of JCE II and III (also emerging in the context of the Nuremberg trials), include in their respective nuclei the same solution of reciprocal imputation.

As can be seen, the bases on which this form of imputation is based, both in its original construction (“Theory of collective criminality”) and its more modern version (JCE in its forms I, II and III), are essentially like those of co-perpetration. Thus, we find the requirement of the *pactum scaeleris*, or an express or tacit agreement of wills (prior to execution), and that of the joint execution of said agreement. With the peculiarity, with respect to the first requirement, rather than an express agreement, it was gradually accepted that it was a voluntary entry into the criminal structure or organization. This, in turn, requires the performance of a certain role within the organization in question. Likewise, with respect to the last requirement indicated (joint execution of the pact or plan), there is also a peculiarity derived from the context created by the organization or criminal enterprise itself; thus, a contribution that could well be considered (*per se stante*) more typical of complicity, when channelled through a joint organization or criminal enterprise, will be clearly enhanced. It is this potential that makes it possible to be considered as the conduct of a co-perpetrator (Silva Sánchez, 2013, p. 213).

Moreover, as I have explained elsewhere, each participant in a criminal structure of this nature is the owner of both the typical risk and the result of the interaction (*i.e.*, they belong to them).²³ The result, fruit of the collective effort of all the intervening parties, in turn, belongs to each of them—individually considered—. And it is not that it belongs to them in their share, according to their personal contribution to the typically relevant risk, because, both *ex ante* and *ex post*, it is unknown what their influence has been on such risk emerging from the interaction. Therefore, only knows (both *ex ante* and *ex post*) his

²³ Collective action, the result of interaction, is not something alien to the individual subject. It is not, therefore, a matter of attributing to him something that does not belong directly to him: rather, it is a matter of imputing to him a collective conduct (and its respective results) that is proper to him (both to him and to all the other intervening parties), in view of the collective or plural dimension that is consubstantial to every human being. Because of this condition of plurality, man cannot be conceived of alone (*i.e.*, in himself) but always inscribed in a relationship with another or other men. Such a nature is not secondary, added to an already complete human nature, nor is it extraneous to human nature itself, but constitutes an essential part of it (Pereira Garmendia, 2016, p. 404).

personal involvement in it. Hence, the ownership (to each participant) of the result (as well as the joint action or interaction) is valued in its totality; such valuation being based on the voluntary assumption both of its provocation and of its execution and consummation. Assumption that is verified in the *pacta scaeleris*, but fundamentally (essentially) in the personal, voluntary and conscious involvement of each of the participants in the typical risk (i.e., for having lent their power of action for the achievement of the common project). This, although the penalty is individualized differently, pays more attention to the different needs of each participant (according to their degree of personal imputation, alternative circumstances, etc.).

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