AMICUS BRIEF

PRESENTED BY

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PRESENTED BEFORE THE SUPREME COURT OF JUSTICE OF COLOMBIA , PENAL CASSATION CHAMBER
PALACE OF JUSTICE
BOLIVAR SQUARE, BOGOTA

CONCERNING APPEAL FROM THE ANTIOQUIA SUPERIOR COURT, CRIMINAL APPEAL CHAMBERS, REGARDING THE ACCUSED: ORLANDO ESPINOSA BELTRAN, JORGE HUMBERTO MILANES Y ORTROS
CASE NO. 2009 00015 01

AND CONCERNING JUDGEMENT DELIVERED AT MEDELLIN, 05 JUNE (2012)

JANUARY 2013

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I INTRODUCTION

1. This Amicus brief is respectfully lodged with the Supreme Court of Justice of Colombia regarding judgement delivered by Criminal Appeal Chambers of the Antioquia Superior Tribunal on 5th June 2012 concerning the massacre of members of the Peace Community of San Jose de Apartado.

2. That judgement is the subject of a cassation appeal by the Popular Forum with respect to the acquittals of the remainder of the accused, namely, Colonel Orlando Espinosa Beltran, Major Jose Fernando Castano Lopez, Henry Agudelo Cuasmayan Ortego, Ricardo Bastidas Candia, Angel Maria Padilla Petro and Sabarain Cruz Reina notwithstanding the subsequent convictions of Alejandro Jaramillo Giraldo, Jorge Humberto Milanes Vega, Dario Jose Brango Agamez and Edgar Garcia Estupinan.

3. In order to assist the court in its deliberations will seek to consider the following:

   a) What is the wider context within which the massacre of 8 civilians took place at the Peace Community of San Jose de Apartado; and

   b) Whether considerations of Joint Criminal Enterprise, Torture and Cruel and Inhuman Acts other relevant provisions enable the Court to find criminal liability upon the remainder of the accused. It is in light of this that it is the view of the amici that criminal liability can extend to all the accused.

4. It does so by considering the wider framework with which to view the history of the Peace Community and the massacre, then International Criminal Law, Colombia's obligations under international law concerning Torture and Cruel, Inhuman and Degrading Treatment and lastly comparative English criminal law.

5. The amici are conscious that the matter before the court is subject to disagreement between the parties to the appeal of a factual nature, this amicus will shy away from inviting the court to draw factual conclusions.

II WHO THE AMICI ARE[1]

6. This amicus brief has been prepared by a team of lawyers led by Smita Shah. It is composed of Shahida Begum, and Wafa Shah (members of Garden Court International Law and Advisory Team, a part of Garden Court Chambers based in London, United Kingdom); Fatima Kola (PhD in international human rights law from University College London); and Dr Silvia

[1] With special thanks to Richard Bennett, Head of Immigration at ITN Solicitors

Borelli, Director of Research, School of Law, University of Bedfordshire. Lawyers at Garden Court Chambers individual web profiles can be found at www.gardencourtchambers.co.uk/barristers/index

7. Garden Court Chambers based in London is a leading multi-disciplinary set of Barrister Chambers. It comprises of approximately 140 Barristers, many leaders in their fields. It has the following legal practice areas: crime, family, housing, immigration, general civil and international law. Garden Court Chambers is well known for its work and commitment to legal aid, human rights and social justice both within the United Kingdom and internationally. Members of the International Law and Advisory team have worked in the International Criminal Tribunals of the Former Yugoslav Republics and Sierra Leone as legal counsel, for United Nations organisations such as UNICEF and UNHCR and they have appeared regularly in regional human rights fora such as the European Court of Human Rights.

8. Dr Silvia Borrelli, completed her PhD in International Law at the University of Milan. She is the Director of Research and Principal Lecturer in International Law in the School of Law, University of Bedfordshire. She has published extensively on the topic of protection of human rights in the context of counter-terrorism operations and military operations. Dr Borelli is also a visiting Lecturer in International Human Rights at King's College London and a research associate of the Faculty of Law of the University of Parma, Italy. She has participated in the submission of amicus curiae briefs and third parties interventions in several high profile domestic and international cases, including before the European Court of Human Rights and the Inter-American Court of Human Rights.

III THE WIDER FRAMEWORK: LINKS BETWEEN THE 17TH BRIGADE, THE PARAMILITARIES AND VICTIMISATION OF THE PEACE COMMUNITY

9. The basic facts of the massacre perpetrated upon the members of the Peace Community of San Jose de Apartado, namely, Mr Luis Eduardo Guerra Guerra, his 11 year old son, Denyer Andre Guerra Tuberquia and partner, Benyanira Areiza, aged 17 years old; the family of Mr Alfonso Bolivar Tuberqueria Graciano, his wife, Sandra Milena Munoz Poso and their children Natalia, aged 5 years old and Santigao Tuberquia Munoz, aged 2 years as well as Mr Alejandro Perez Castano are well known to the court and the amicus will not rehearse them.

10. The Antioquia Superior Court, Criminal Appeal chamber from where the current appeal comes, considered the wider context of the crimes committed in two respects; firstly with specific reference to the fact that the community in 2004 has been subject to precautionary measures from the Inter-American Court of Human Rights, given effect by the Colombian Constitutional Court had in sentence T 327 of the 15th April 2004. Secondly in general terms the terror inflicted and widely known to be inflicted upon the civilian population of Colombia

by the activities of paramilitary groups and the wider responsibility upon members of the armed forces in light of this.

11. It is the amici's respectful opinion that the framework with which to view the context in which these crimes occurred can and should be considered in more depth; the situation of extreme danger faced by civilians in the Peace Community of San José de Apartadó ("the Peace Community") has been the subject of a number of decisions and reports by international human rights monitoring bodies, both at the regional and global level. Those bodies have repeatedly and clearly documented the violations which have occurred in the past, including at the hands or with the support, acquiescence or connivance of members of the Colombian armed forces, in particular the 17th Brigade and National Police. They have also drawn the attention of the Colombian authorities to their positive obligations to protect members of the community against attacks on their life, physical integrity, personal liberty and property, regardless of the perpetrators of those attacks.

Inter-American Regional Human Rights Mechanism

12. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights has issued repeatedly decisions since 1997 in relation to the situation in the Peace Community. The seriousness of the risks faced by the population of the Peace Community is evidenced by the large number of orders for provisional measures which have been adopted by the Court in the intervening years, as well as by the extension of the individuals covered by the provisional measures.[2] In its orders, the Court notes with increased emphasis the continued failure of the Colombian authorities to comply and to take any steps to protect the lives and physical integrity of members of the Community, as well as a pattern of increasing harassment of persons associated with the community, i.e. service providers, who became beneficiaries of provisional measures of protection in 2002,[3] and lawyers assisting and representing the members of the Peace Community.[4]

13. In December 1997, the Inter-American Commission requested the Colombian authorities to adopt precautionary measures in favour of the residents of the Peace Community of San José

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2 See Order of the Inter-American Court of Human Rights of 18 June 2002, available at http://www.corteidh.or.cr/docs/medidas/apartado_se_03_ing.doc; Order of the Inter-American Court of 17 November 2004, available at http://www.corteidh.or.cr/docs/medidas/apartado_se_041.doc; Order of the Inter-American Court of 15 March 2005, available at http://www.corteidh.or.cr/docs/medidas/apartado_se_051.doc; Order of the Inter-American Court of 2 February 2006, at http://www.corteidh.or.cr/docs/medidas/apartado_se_06_ing.doc; Order of the Inter-American Court of 17 December 2007; Order of the Inter-American Court of 6 February 2008; Order of the Inter-American Court of 30 August 2010.

3 Order of 18 June 2002, *supra*, considering para. 11 and operative paragraph 2.

4 See Order of 2 February 2006, *supra*, considering para. 19.

de Apartadó.[5] In requesting the adoption of measures of protection, the Commission noted that 43 members of the Community had been murdered since the inhabitants of the Community had declared their neutrality in March 1997.[6] *It further referred to incidents resulting in the disappearance of civilians in an area "at some short distance" from the military base where the 17th Brigade of the National Army was stationed at the time.*[7] Subsequently, in October 2000, noting that the Colombian authorities had failed to adopt the requisite steps to stop the violence unleashed "against the members of the community and the harassment acts [that] seriously and continuously threaten the right to life and the personal integrity of the protected people",[8] the Inter-American Commission, on behalf of the inhabitants of the Peace Community, requested the Inter-American Court to issue provisional measures to protect their lives and personal integrity pending consideration of their application by the Commission.[9] In its Communication to the Court, the Commission stated that members of the Peace Community had "'*been the object of serious acts of violence and harassment by paramilitary groups in the area', of which the members of the Colombian Army would also be liable*".[10] *A number of the incidents detailed in the Commission's brief to the Court allegedly involved members of the 17th Brigade of the National Army, which had been responsible, at times in collaboration with the paramilitaries, for acts of harassment, beatings, intimidation and threats against members of the Peace Community from December 1997 to April 1998*.[11] The Commission also outlined a number of allegations against AUC paramilitaries.[12]

14. In its order of 24 November 2000, the Inter-American Court of Human Rights, noting the assertion of the Commission that many members of the Peace Community were afraid of stigmatization and did not wish to be identified for fear of reprisals,[13] expanded the scope of

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5 The request for adoption of provisional measures was issued on 17 December 1997; see Report of the Inter-American Commission of Human Rights 1997, "Precautionary Measures Granted or Extended by the Commission in 1997", available at http://www.cidh.org/medidas/1997.eng.htm. On the same date, the Commission also issued precautionary measures specifically in relation to Mrs Gloria Isabel Cuartas Montoya, the former mayor of Apartadó, and her family, noting that she "had been the target of threats and harassment in reprisal for charges that she, as mayor, had made during her term of office against the activities of the guerrilla force and the paramilitary groups that supported the army. Since her term of office has come to an end, the danger to her life and personal integrity has grown worse" (ibid.).

6 See *ibid*.

7 *Ibid.*

8 *Peace Community of San José de Apartadó Case*, Decision of the President of the Inter-American Court of Human Rights of October 9, 2000, available at http://www.corteidh.or.cr/docs/medidas/apartado_se_01_ing.doc ("Decision of the President, 9 October 2000").

9 Case No. 12.325.

10 See Decision of the President, 9 October 2000, *supra*, *having seen* para. 2.

11 See *ibid.*

12 See i*bid.*

13 At the oral hearing before the Court, the Commission noted that "[its] effort […] to identify a number of members of the Community in order to present the request of provisional measures led it to present a list of 189 people, but this is not complete, since "the great majority of the members of the Community fear stigmatization and violence

the measures of protection, to cover all members of the Community. In this regard, the Court recognized that the Peace Community "constitutes an organised community, located in a determined geographic place, whose members can be identified and individualized and who, due to the fact of belonging to said community, all its members are in a situation of similar risk of suffering acts of aggressions against their personal integrity and lives".[14] In this key passage of the Order, the Court unequivocally accepted the argument put forward by the Commission that there is a geographic dimension to the Peace Community as well as a personal one; given that the Peace Community can be identified by its members as well as location, the whole community is potentially at risk.[15] Accordingly, the Court, whilst confirming the protective measures in favour of the individuals named in the Decision of the President of 9 October, ordered Colombia "to extend, forthwith, any measures as may be necessary to protect the lives and personal integrity of all of the other members of the Community of Paz de San José de Apartadó."[16]

15. In addition, the Orders of the Court disclose the full extent of the armed and hostile activity around the Peace Community and the fact that members of the community are not protected from the violence which derives from those activities, *but rather are targets of abuses committed by the members of the armed groups operating in the area, including members of the Colombian armed forces.*[17] For instance in the order adopted in 2004, only a few months before the events at issue in this appeal, the Court noted that, on the basis, *inter alia*, of the information provided by the Inter-American Commission, "durante la vigencia de estas medidas provisionales [...], los miembros de la Comunidad de Paz continúan siendo objeto de amenazas, hostigamiento, intimidaciones, estigmatización, robos, detenciones arbitrarias, tortura, tratos crueles, inhumanos o degradantes, asesinatos y desapariciones forzadas en

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resulting from such stigmatization, and this is the only reason for which they did not authorize to make their names known"; Order of 24 November 2000, *having seen* para. 9(i).

14 *Ibid.*, considering para. 7.

15 *Ibid.*, considering para. 7.

16 *Ibid.*, operative para. 3.

17 As noted above, already the decision of the President of 9 October 2000 and the first Order by the Court, issued on 24 November 2000, list a number of incidents in which the 17th Brigade of the National Army were implicated and alleged collusion of the National Army with the paramilitaries in the period between December 1997 and September 2000. Further allegations of connivance and involvement of members of the Army in abuses against the residents of the Community emerge from the orders adopted by the Court in the following years. See, for instance, the Order of 2006, at para 13(d), where the Court noted that in the period between 19 February and 24 June 2005, "a series of incidents took place, related to the arrival of army units in some hamlets of San José de Apartadó and with the action reportedly taken by army and police officers"; the Order of 17 November 2004, *supra*, reports the findings of the Commission that "continúa el estricto control del ejército en el casco urbano de San José de Apartadó, la detención y tortura de campesinos de la zona acusados de guerrilleros, los actos de intimidación y el chantaje a testigos por parte de la Fuerza Pública y los grupos paramilitares, las amenazas a los miembros del Consejo Interno de la Comunidad de Paz, el desplazamiento forzado de familias, los retenes y el control paramilitar en la carretera y en la terminal de Apartadó y el robo de los bienes de los miembros de la Comunidad. […]" (*having seen* para. 10(a)). See also the Order of 15 March 2005, *supra*, detailing arbitrary arrests and abuses against members of the Community perpetrated by soldiers of the National Army (see in particular *having seen* para. 9(a)-(e)).

manos de la Fuerza Pública y de grupos paramilitares, que a su vez han ocasionado el desplazamiento de numerosas familias [...], todo eso a pesar de que el propósito fundamental de la adopción de estas medidas es la protección y preservación eficaces por parte del Estado de la vida e integridad personal de los integrantes de la Comunidad de Paz, así como de las personas que tengan un vínculo de servicio con dicha Comunidad".[18]

16. A few points emerge; firstly there exists a history as far back as 1997 of allegations and incidences which indicate collusion, acquiescence or outright acts of violence by members of the armed forces, in particular 17th Brigade. Secondly the Commission in its recommendations to the Court accepts these allegations as credible and sufficient to suggest a prima facie case being made of a serious risk of irreparable harm by paramilitaries and even the armed forces, in particular the 17th Brigade. Finally the Peace Community of San Jose de Apartado was very well known, vocal, visible and could be identified clearly by geographic location as well as members. Therefore pertinent conclusions for the court to consider drawing would be the following:

    a) It is not surprising that while patrolling both the army and paramilitaries came across unarmed civilians, given the geographic location of their patrol. The Court may wish to consider whether this was adequately addressed when planning the operation by those in command.

    b) Given the history of alleged links and close association that have followed the 17th Brigade and paramilitaries in the area, it is not surprising that the army came across paramilitaries while patrolling and then acquiesced to patrolling with them, and

    c) It is not a stretch to infer that expression of fear, inability to act and unhappiness at patrolling with the paramilitaries were disingenuous or perhaps even more muted than suggested[19].

17. Further the failure on the part of the Colombian authorities, including the military authorities, to take meaningful steps to protect the life and personal integrity of the civilians of the Peace Community emerges clearly from the various decisions of the Court and the underlying briefs by the Commission. Months before the acts which led the massacre in February 2005 the Commission noted, in is communication to the Court again the "*constantes señalamientos por parte de la Fuerza Pública y por las reiteradas denuncias sobre acciones y omisiones que posibilitan el accionar de grupos paramilitares en la zona, [así como*

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18 Order of 17 November 2004, *supra*, considering para. 12. See also, in almost identical terms, Order of 15 March 2005, considering para. 17.

19 It is noted that the Antioquia Superior Court makes note of the fact that soldiers subordinate to the platoon commanders were disempowered to do anything other than look unhappy, obey and away further order. It is worth recalling that notwithstanding the chain of command, individual soldiers have an obligation not to obey manifestly unlawful orders or orders that will lead them to anticipate a situation where they may be committing criminal acts, under international criminal law. The defence of obeying orders has not been a legitimate defence since the Nuremburg Tribunals.

por] la falta de avance en las investigaciones".[20]

18. As a consequence, there could have been no doubt that, in the view of the Court, given the circumstances, Colombia's obligations under the American Convention required that joint patrols should not be undertaken, and that subsequently, after the event, adequate investigation and prosecution of all those responsible was required so as to avoid impunity.

19. In that latter regard, the obligation to avoid impunity requires that those responsible at all levels should be held accountable. The words of the Inter-American Court in a case concerning a similar factual situation are particularly relevant; in *Mapiripán Massacre*, a case concerning a similar massacre of civilians by a paramilitary group, the Court observed that

    […] such an operation could not be overlooked by the high military commanders in the area from which the paramilitary left and through which they moved. Some of the facts with regard to planning and execution of the massacre are included in the State's acknowledgment of responsibility, and even though some of those responsible for the massacre have been convicted, there is still widespread impunity in the instant case, insofar as the truth of all the facts has not been established and not all the masterminds and direct perpetrators of those facts have been identified.[21]

United Nations

20. For a number of years the United Nations Human Rights mechanisms and indeed the Office of the High Commissioner represented by her office in Colombia have been concerned about the gravity of the violations in Colombia. The court will no doubt be aware of the phenomenon of 'Falsos positivo's' which has attracted the attention of the Special Rapportuer on Extra-Judicial Executions who has reported on this in 2009[22] and the Office of the Prosecutor of the International Criminal Court maintains a watchful eye on proceedings in Colombia[23].

21. However the concern of the human rights mechanisms of the United Nations has existed for some time with respect to the links between the armed forces of Colombia and the paramilitaries. As echoing the timeframe of the 1st precautionary measures adopted by the regional mechanism, the Committee with oversight for the International Covenant on Civil

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20 Order of 17 November 2004, *supra*, para. 2.

21 *Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005; *I/ACtHR, Series C, No. 134*, para. 236.

22 Report of Special Rapportuer on Extra-Judicial, Summary and Arbitrary Executions mission to Colombia, dated 31/03/10, A/HRC/14/24/Add.2

23 Her report OPT Situation in Colombia: Interim Report November 2012 notes at paragraph 121 of page 38 that the army tried to interfere with the investigation by seeking to pass the blame on paramilitaries, bribe witnesses and does so in the context of the 'falsos positivo's' phenomenon which she notes may constitute a crime against humanity and indeed the Superior Appeal Court notes attempts by officers to bribe witnesses in to blaming the massacre upon the guerillas.

and Political Rights urged in its recommendations in its concluding observations in 1997, that Colombia investigate and punish support given by members of the armed forces to paramilitaries[24]. In 2004, those concerns were heightened to move the committee to deliver the following: 'The Committee also expresses its concern about links involving extensive violations of articles 6, 7 and 9 of the Covenant between elements of the armed forces and State security forces, on the one hand, and illegal paramilitary groups on the other.' That 'The State party should take effective measures to terminate the links between elements of the security services and illegal paramilitary groups.'[25]

22. Added to these concerns were those of the Office of the High Commissioner for Human Rights representative office in Bogota Colombia, which in it report in 2006, highlighted the massacre against the Peace Community in February 2005. They noted that judicial investigations into the massacre were subject to two attacks in the course of their work[26].

23. On a separate but telling note, they note at paragraph 66, ' Allegations continued to be made with respect to members of the security forces, particularly the army, for failing to observe the humanitarian principle of distinction, which affected civilian persons and property. *Such situations reflect the failure of military leaders to take due account of humanitarian principles when planning and ordering military operations.* On several occasions, the principle of distinction was infringed through the stigmatization of the civilian population by the authorities. Examples of this were seen, inter alia, in Caquetá, San José de Apartadó (Antioquia) and in Arauca.'.[27]

24. In light of the sheer number of precautionary measures issued by an increasingly agitated Inter-American Court of Human Rights and the jurisprudence of the Constitutional Court of Colombia, it is sad to note that the massacre of the Peace Community was preventable and that the conclusions in 2006 of the Office of the High Commissioner for Human Rights representatives in Colombia were tragically correct. The Supreme Court cannot be confident that those responsible for planning and ordering the military operation, nor those responsible for its execution discharged to a sufficient degree their duty to distinguish civilians, and the amici submit, a heightened duty with respect the Peace Community.

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24 CCPR Concluding Observations, 03/05/97, CCPR/C/70/Add.76. At paragraph 17. The Committee is deeply concerned at the evidence that paramilitary groups receive support from members of the military. And at paragraph 31. The Committee strongly recommends that support given by military personnel or security forces to paramilitary groups and operations be investigated and punished, that immediate steps be taken to disband paramilitary groups . . .

25 At paragraph 12 in CCPR Concluding Observations, 26/05/04, CCPR/CO/80/COL

26 At paragraph 38 of Office of the High Commissioner on Human Rights Colombia Office, Report 16/05/06, E/CN.4/2006/9 and at paragraph 33 of Annexe III at page 50.

27 Ibid at paragraph 66, page 18

IV INTERNATIONAL CRIMINAL LAW

25. The amici take this opportunity to bring relevant international and comparative law to the attention of the Supreme Court. Clearly the amici would not seek to comment on the content or interpretation of the courts jurisprudence or disputed facts. It notes the brief submitted by the Appellants which address these matters.

26. Due to the nature of this massacre and the global attention it received; concurrent developments in international criminal law can in the submission of the amici provide a useful tool with which to examine how far criminal liability can be imputed upon members of the armed forces in circumstances such as these.

27. It is the respectful opinion of the amici that criminal liability can extend and should extend to all the accused.

A. Joint Criminal Enterprise

28. The amici note that the Antioquia Superior Court imputes liability upon 4 commanders, on the basis that the charges of aggravated criminal conspiracy are made out and therefore the following charges of murder of protected persons. It does this on facts upon which they find prior knowledge of the Peace Community of San Jose de Apartado, that they were subject to precautionary measures, that they knew of the presence of the illegal paramilitaries who were the material authors of the atrocities, and that as platoon commanders they were in a position to do something and failed to do so. They note that the army tried to conceal the presence and use of paramilitary guides. It follows that the court then imputes criminal liability for murder of protected persons upon them.

29. It however absolves the actions or lack thereof of the non-commissioned officers (NCO's) and Colonel Espinosa and Major Castano. They do so upon the basis that the NCO were not in a position to take action, they were powerless and were following and awaiting orders of their senior officer; further that criminal liability could not be extended to Colonel Espinosa or Major Castano as actual knowledge of the events, the joint patrol and use of paramilitary guides could not be attributed to them.

30. On the basis of the facts as established a Joint Criminal Enterprise (hereafter JCE) can exist. The Antioquia Superior Court has already noted that the armed forces were aware of atrocities committed by the paramilitaries. It was accepted that there was a state of internal armed conflict. There is no evidence that the purpose of the joint patrol was to prevent atrocities, and as it did not in fact prevent these atrocities or purport to, it can be inferred that that was not the purpose of the joint patrol. The joint patrol can therefore be evidence of an implicit agreement to commit atrocities in light of the history of the conflict.

Overview

31. The International Criminal Tribunal for the Former Yugoslavia (ICTY) formulated JCE to attribute individual responsibility in situations where multiple individuals engaged in behaviour to promote a common criminal purpose.[28] The Appeal Court of the ICTY defined three different forms of JCE (commonly referred to as JCE I,[29] JCE II,[30] JCE III[31]).

32. The basic form of JCE (JCE I) serves as a mode of liability to assign individual criminal responsibility to all participants of a common criminal plan for the perpetration of crimes committed in furtherance of this common plan where the participants shared a common intent to commit the crimes, even if each individual carried out a different role in contributing to the crimes.[32] The systemic form of JCE (JCE II), covers situations where a plurality of persons participate in a common criminal plan which is implemented in an institutional framework,[33] like an internment camp. The extended form of JCE (JCE III) serves to assign individual criminal responsibility to participants of the common criminal plan where the crimes committed, did not originally form a part of the common criminal plan, but were nonetheless a natural and foreseeable consequence of the criminal plan.[34]

33. The objective elements of all three forms of a JCE are the same. JCE requires, the existence of a common criminal plan, involves a plurality of persons and requires that the accused participated in the JCE by any *'form of assistance in, or contribution to the execution of the common plan*'.[35] The necessary subjective element varies according to the form of JCE. The accused must share the intent to perpetrate the crime committed to be liable under JCE I. In JCE II personal knowledge of the system of ill-treatment suffices, and specific intent to commit the crime is not required so long as the accused willingly took part in furthering the system of ill-treatment.[36] Circumstantial factors such as the individual's position in the institution, the amount of time spent in the institution and the function that individual performed in the system can lead to an inference that the accused had the necessary

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28 *Tadić* Appeal Judgment*, supra* n.4*,* at paras.. 220.

29 JCE I, or the basic form of JCE, 'exists where the participants act on the basis of a common design or enterprise, sharing the same intent to commit a crime'. *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise*, Pre-Trial Chamber, 20 May 2010, Case File No: 002/19-09-2007-ECCC/OCIJ, available at < http://www.eccc.gov.kh/english/cabinet/courtDoc/605/D97_15_9_EN.pdf>, last visited 6 June 2010 [hereinafter the 'Pre-Trial Chamber decision'], at para 37.

30 JCE II, or the systemic form of JCE, 'exists where the participants are involved in a criminal plan that is implemented in an institutional framework, such as an internment camp, involving an organised system of ill-treatment' (Pre-Trial Chamber decision, *supra* n.6, para. 37)

31 JCE III, or the extended form of JCE, 'exists where one of the participants engaged in acts that go beyond the common plan but those acts constitute a natural and foreseeable consequence of the realisation of the common plan' (Pre-Trial Chamber decision, *supra* n.6, para. 37),

32 *Tadić* Appeal Judgment, *supra* n.4, para 228.

33 *Ibid*, para 202.

34 *Ibid*, para 204.

35 *Ibid*, para 227; See below under Part I 'Contribution of the accused', for a discussion of this requirement.

36 *Ibid*, para 220.

knowledge about the system of ill-treatment. Through JCE III the accused can be held responsible for crimes committed by other participants even if the s/he did not share a common intent with the other participants in the JCE that these crimes would be committed, so long as s/he was '*aware of the possibility that a crime might be committed as a [natural and foreseeable] consequence of the execution of the criminal act and willingly [took] the risk*'. [37]

34. The parameters of JCE have been further defined by the jurisprudence of the ad hoc tribunals and with the inclusion of JCE III, have formed a well-defined and wide net of liability for persons involved in the perpetration of crimes. Below is an overview of some of the refinements to JCE articulated in the jurisprudence of the *ad hoc* tribunals.

I. Formation, Nature and Scope of the JCE

35. ICTY jurisprudence allows for the imposition of liability through the concept of JCE where the common criminal purpose has been agreed upon in secret, through an informal arrangement or extemporaneously, to reflect the reality of the way in which a JCE is formed. Therefore the existence of a JCE can *'be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise*'[38] even where the common criminal plan was not '*previously arranged or formulated*'. [39] The objective of the criminal purpose or the means to achieve it must involve the commission of a crime within the jurisdiction of the tribunal applying JCE.[40] It is also unnecessary for each member of the JCE to be identified by name.[41] However, these evidentiary advantages are offset by the fact that it is essential to identify the precise objective, the geographic and temporal scope of the JCE and demonstrate that the common plan is in fact common for all members of the JCE.[42]

ii. Contribution of the accused

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37 *Ibid*, para 228.

38 *Ibid*, para. 227.

39 *Ibid*, para. 227; *Prosecutor v. Miroslav Kvocka et al.,* ICTY Trial Chamber, Judgment, 2 November 2001, Case No. IT-98-30/1-T, available at <http://www.unhcr.org/refworld/docid/4148117f2.html>, last accessed 22 June 2010 [hereinafter *Kvocka et al*., Trial Judgment], para. 117 and *Prosecutor v. Mitar Vasiljevic*, ICTY, Appeals Chamber, Judgment, 25 February 2004, Case No. IT-98-32-A, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41483ce34> last accessed 24 July 2010 [hereinafter *Vasiljevic* Appeal Judgment], para.100.

40 *Tadić* Appeal Judgment, *supra* n.4, para. 227; Further elaborated upon in *Prosecutor v A. T. Brima et. al.,* SCSL, Appeals Chamber, Judgment, 22 February 22 2008, Case no: SCSL-2004-16-A, available at <http://www.haguejusticeportal.net/Docs/SCSL/SCSL%20AFRC%20Appeals%20Chamber%20Full%20Judgement.doc> last vited 21 June 2010, at paras. 70-84 and *Kvocka et al*., Trial Judgment, *supra* n.27, para. 46.

41 *Prosecutor v. Radoslav Brdjanin,* ICTY Appeal Chamber, Judgment, 3 April 2007, Case No. IT-99-36-A, available at <http://www.unhcr.org/refworld/docid/48aae70a2.html>, last visited 16 July 2010 [hereinafter '*Brdjanin* Appeal Judgment'], para. 430.

42 *Brdjanin Appeal* Judgment, *supra* n.29, para. 430; *Prosecutor v. Milomir Stakić,* ICTY Appeal Chamber, Judgment, 22 March 2006, Case No. IT-97-24-A (available at <http://www.unhcr.org/refworld/docid/47fdfb550.html>, last accessed 22 July 2010) [hereinafter *Stakić* Appeal Judgement], para. 69.

36. The charged person's participation need not be a *sine qua non* without which the execution of the crime can not go forward.[43] However, a significant contribution is required.[44] The precise degree of contribution which will amount to a 'significant contribution', will depend on the facts of each case[45] and although the court requires a 'significant contribution' it does not require a 'substantial contribution'.[46]

iii. Remoteness of the accused: the nexus between the perpetrator and the participant of the JCE

37. Controversially, the jurisprudence of the ICTY has also established that it is not necessary for the actual perpetration of the crimes forming part of the JCE to have been performed by a member of the JCE.[47] Thus allowing the assigning of responsibility where a small number of powerful individuals, privy to the common criminal plan, use subordinates for the perpetration of the plan, as was the case in *Brdjanin* where military and paramilitary groups were used to carry out a common plan to remove non-Serbs from Serbian territories. As a result of this liability can be assigned where the crime committed is part of the JCE, even where the specific perpetrator is not and is simply being used as a 'tool' to implement the common criminal plan.[48] When applied to JCE III, this principle enables liability to be assigned where it was foreseeable that the crimes for which the accused is charged may be perpetrated by the persons used by the accused or by any other member of the JCE, in order to carry out the *actus reus* of the crimes forming part of the common purpose.[49]

38. From the above summary it can be seen that through the doctrine of Joint Criminal Enterprise, criminal liability extends to all the accused.

B. Command Responsibility

39. The Antioquia Supreme Court found that it could not attribute actual knowledge to Colonel Espinosa or Major Castaño of the use of paramilitary guides, the joint patrol or even the atrocities themselves.

Relevant law on Command Responsibility/ Superior Responsibility (SR):

40. SR is a norm of customary international law (*Čelebići* Trial Judgement §340-343). There has been no consistent position with regard to the nature of superior responsibility as in Article 7(3) of the ICTY Statute, Article 6(3) of the ICTR Statute, Article 6(3) of the SCSL Statute (the

43 *Tadić* Appeal Judgment, *supra* n.4, para. 199.
44 *Kvocka et al*., Trial Judgment, *supra* n.27, para. 309.
45 *Brdjanin* Appeal Judgment, *supra* n.29 para. 430.
46 *Ibid.*
47 *Ibid*.
48 *Stakić* Appeal Judgement, *supra* note 30, paras 418-419.
49 *Brdjanin* Appeal Judgment, *supra* n.29, para. 411.

ad hoc tribunals) and Article 28 of the ICC Statute. SR under Article 7(3) is generally perceived as an "indirect" form of superior responsibility in opposition to the "direct" form of superior responsibility for ordering a crime under Article 7(1). The Trial Chamber in the *Čelebići* case followed this reasoning:

"The criminal liability may arise either out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) or from his culpable omissions ("indirect" command responsibility or command responsibility *strictu sensu*)"[50].

41. The case law of the *ad hoc* tribunals has evolved towards the recognition of superior responsibility as a responsibility for omission[51]. This is currently the general position in the doctrine and in the jurisprudence. Superior responsibility is a responsibility for omission, for the failure of the superior to prevent the commission of crimes by his subordinates or for failure to punish his subordinates for the crimes committed. He is responsible for a "failure to perform an act required by international law"[52] and not for the commission of an illegal act.

42. *[The expression] "for the acts of his subordinates" as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act'*.[53]

43. Through the device of superior responsibility, the superior is still charged with the actual crimes of his subordinates, and not with a separate offence of failure to control.

<u>*THE ICC*</u>

44. The Rome Statute of the ICC constitutes the most recent codification on superior responsibility and has been subject to several controversies[54]. Article 28 provides:

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces ***under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where***:

(i) That military commander or person ***either knew or***, owing to the circumstances at the

50 *Čelebići* Trial Judgement, §333
51 *Hadžihasanović* §75.
52 A. Cassese, p.205
53 *Halilovi}* §54
54 See *infra*

time, ***should have known that the forces were committing or about to commit such crimes***; and

(ii) That military ***commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.***

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[55]

45. There must be a causal link between the omission of the superior and the crimes of his subordinates. If the superior could be held responsible for crimes committed before his position as a superior, then his omission to punish would be a free-standing, distinct offence, independent of any *mens rea* from the superior. The ICC Statute has expressly included this causal requirement in the provisions of Article 28.

Can a superior subordinate relationship exist between the troops and the paramilitaries if they were on joint patrol?

46. The superior subordinate relationship need not necessarily exist within a military structure. A superior can be held responsible for failure of his duty to punish if crimes have been committed by subordinates at the time when the superior had assumed command over them[56]. It applies the same rule for the situation of the accused Brima in Kono district. Brima arrived in Kono district in end of April 1998 and assumed command over the AFRC troops over the accused Kamara, thus exercising effective control over these troops. The Trial Chamber established that there was an actual superior-subordinate relationship between Brima and the AFRC troops in Kono.

47. The position of authority can be informal and loosely defined:

'The order need not be given in writing or in any particular form, nor does it have to be

55 The Rome Statute establishing the International Criminal Court

56 AFRC §799.

given directly to the perpetrator.'[57]

TEST FOR ESTABLISING RESPONSIBILITY

48. The three-pronged test for superior responsibility was established by the ICTY in the *Čelebići* Trial Judgement:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof".[58]

49. The functional element is the core requirement necessary to incur superior responsibility (i.e. the concept of effective control). The knowledge of the superior is determined with regard to the nature and the scope of the position of the superior[59]. The more the structure of the group will be organized, the easier it will be to establish effective control and therefore to establish *mens rea* through the existence of communication channels within the chain of command.[60]

C. CONSPIRACY

50. Some provisions of that ICC Statute are controversial (i.e. not accepted as customary international law), but the provisions relating to conspiracy appear to be generally accepted as representing the position in CIL. Article 25(3)(d) says that a person commits a crime within the ICC's jurisdiction if he or she,

'contributes to the commission or attempted commission of [a punishable crime] by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
"(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
"(ii) Be made in the knowledge of the intention of the group to commit the crime . . . ."

51. Jurisprudence from the ad hoc tribunals establishes that conspiracy requires the existence of an agreement, but it need not be formal or express. It could be inferred from concerted action. A tacit understanding of the criminal purpose would be sufficient, and the existence

57 AFRC §772; *Blaškić* Trial Judgement, §281-282.
58 *Čelebići* Trial Judgement, §346
59 *Aleksovski* Trial Judgement §80
60 *Kordić* Trial Judgement §428

of a conspiracy could be based on circumstantial evidence. Moreover, a conspiracy to commit genocide could be comprised of individuals acting in an institutional capacity, even in the absence of personal links with each other.[61]

V TORTURE, CRUEL, INHUMAN AND DREGRADING TREATMENT

52. The amici note the Antioquia Superior Court's decision that the ill-treatment and post-mortem dismemberment of Alfonso Tuberquia and his children Natalia and Santiago (whose throats were cut) after hostilities had ceased are - via a principle of Colombian criminal law ('consuncion') - encapsulated within the charge of murder of protected persons. It is understood that the Court rejects overall the prosecution's argument that the acts constitute the offence of inhumane and barbaric acts under domestic law.

53. However, in respect of both murder and the question of inhumane and barbaric acts Colombia's international human rights obligations may be considered relevant, particularly due to the duty of care the Court has attributed to officers connected with the state and the relevant Resolution of the Intra-American Court of Human Rights and the related previous decisions of the Constitutional Court which refer to such obligations.

54. Colombia has obligations both in respect of the protection of the right of life (for example under Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the American Convention on Human Rights) and the prohibition of torture and cruel, inhuman and degrading treatment. Article 1 of the UN Convention Against Torture (UNCAT) states that:

> … torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining… information or a confession, [punishment]… or for any reason based on discrimination of any kind… inflicted by or at the instigation of or with the consent or acquiescence of a public official…

55. In respect of the latter, it is an accepted principle of customary international law that states bound under UNCAT have both a negative obligation not to commit torture and cruel, inhuman and degrading treatment (CIDT), but also positive obligations in respect of prevention, investigation and punishment of those who commit such acts or are connected to the commission of such acts[62].

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61 *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-T, paras. 1043-48.

62 For the examples of international tribunals finding a connection between those non-state actors such as paramilitaries who commit acts of torture and CIDT, and state actors, see *Case Rio Frio Massacre v Columbia*, Judgment of 6 April 2001, Inter-American Court of Human Rights; *Case 19 Merchants v. Colombia*, Judgment of 5 July 2004, Inter-American Court of Human Rights; *Case Mapiripán Massacre v. Colombia*, Judgment of 15 September

56. International tribunals do not seem to abide by a general principle of considering only the most serious violation of human rights in any particular case. For example, there seems to be no established principle that if the right to life is potentially engaged because an individual has been murdered with the involvement of a state official, a court or tribunal is excluded from examining the question of violations of the prohibition against torture and CIDT in the same case. However, the specific facts of the case (and in particular the manner of death and extent of physical injury) may influence whether both or only one of these rights may have been violated. Indeed, international tribunals have assessed whether there have been both violations of the right to life and the prohibition on torture and CIDT in the same case, for example in the *Case of Mahmut Kaya v Turkey*, (Application no. 22535/93), 28 March 2000, European Court of Human Rights (in this case there was an issue of whether acts of torture were committed before death occurred).

57. Where officers connected to the state have been held to breach a duty to protect a vulnerable community of people, and have been connected to the commission of acts of extreme violence, consideration of the seriousness of the state's international human rights obligations and their relationship with these offences may be considered particularly important. Further aspects of a factual matrix can contain both torture, CIDH and result in death, they are not mutually exclusive, there may be overlap or even a bleeding into each other, recognition of torture and /or CIDH as a separate offence, not subsumed or overridden by another offence reflects the gravity with which such acts are viewed by international human rights law.

58. In 2010 the UNCAT committee in examining Colombia under periodicity noted with concern, 'The Committee notes that the Criminal Code includes a definition of the crime of torture. However, it is concerned that, in practice, a charge relating to crimes of torture does not clearly identify torture as a specific and separate offence, given that it is subsumed under aggravating circumstances relating to other offences regarded as more serious by judicial officials. ' they recommended that ' *The State party should adopt the necessary measures to ensure that crimes of torture are prosecuted as a separate offence and that the charge corresponds to the serious nature of the crime, and should not allow cases of torture to be subsumed under other related offences.* [63]'

VI COMPARATIVE ENGLISH LAW

2005, Inter-American Court of Human Rights; and *Cyprus v. Turkey* (2001) (No. 25781/94), European Court of Human Rights.

63 At paragraph 10 in CAT Concluding Observations, 04/05/10, CAT/C/COL/CO/4 at www.ohchr.org.

A. JOINT ENTERPRISE

59. Principles akin to those addressed by the Antioquia Superior Court, Criminal Appeal Chamber are also present within the English criminal legal system. Criminality may arise out of positive actions of the accused. It may also exceptionally arise out of a failure to act in specified circumstances.

60. English law provides that liability may be incurred either as a principal offender or as an accessory. A principal being the actual perpetrator of the offence. An accessory being an individual who either aids, abets, counsels or procures the commissions of an offence. Although the conduct between a principal and accessory would differ, for indictable only crimes, such as murder and serious offences against the person, section 8 of the Accessories and Abettors Act 1981 provides that an accessory shall be tried, indicted and punished as a principal offender. In addition liability can arise if the parties were acting in a joint venture.

Aid, abet, counsel or procure

61. An accessory's conduct need not include all four elements for liability to be established. An accessory may aid, abet, counsel *and* procure. However *only one* of the actions would be sufficient for culpability to be established.

62. Aiding or abetting generally requires assistance or encouragement at the time of the offence. Counselling or procuring would cover advice or assistance given at an earlier stage. This would include conduct if the accused were present at scene of the murders *but* also conduct amounting to assistance prior to the offence.

63. Aiding, abetting and counselling infer that there has been some common purpose and meeting of minds between the principal and the accessory, but not necessarily a prearranged plan, *R v Mohan [1967] 2 AC 187*. Procuring, however, does not require any common purpose, as to procure would be to 'produce by endeavour', *A-G's Ref (No. 1 of 1975) [1975] QB 773*. Although there must be some causal link between the procurement and the commission of the offence. Counselling, on the other hand, would not require a causal link. The attribution of criminal liability arises out of the intention that such advice or encouragement would lead to an offence, *R v Calhaem [1985] QB 808.* It follows, therefore, that if it was inferred that the parallel movement between the military and the paramilitary, was with a view to the paramilitary committing the acts alleged without a common purpose having been established but with a casual link present; the military would be culpable for the criminal acts as 'procurers' of the offence. Alternatively if the commission of the crime had been counselled but no casual link was established, culpability would still arise. The criminal conduct arises out of the motivation for the result to be achieved; therefore it is

irrelevant whether the principal would have committed the offence in any event.

64. Irrespective of whether there has been conduct amounting to aid, abetting, counselling *or* procuring; the intention of the accessory must be established. This does not require an accessory to have intended a particular outcome. Liability can be established where the accused's conduct is such that it is likely or virtually certain that the outcome would have occurred, *R v Hancock [1986] AC 455.* English law requires an assessment of the intention of the accessory rather than solely the understanding of the principal. The intention to assist can be inferred from the voluntary performance of acts which do in fact assist the principal offender, in the absence of a credible explanation from the accused, *R v Bryce [2004] 2 Cr App R 592*.

Joint enterprise

65. English law also provides the principle of joint enterprise. Culpability arises where an accused contemplates the commission of one (or more) of a number of crimes by the primary party and he intentionally lends assistance for the crime to be committed. If, however, the primary party went beyond what had been tacitly agreed as part of the joint enterprise, the secondary party would not be liable for the unauthorised act, *R v Anderson [1966] 2 QB 110*. Although the secondary party need not have the intention that the primary party commit the certain act, it would suffice if the secondary party realised that the primary party might commit the act, *R v Powell [1997] 2 WLR 959.* A real or serious risk would suffice, either at the scene or in advance, *R v Rook [1993] 1 WLR 1005.* Only acts which are fundamentally different from that contemplated by the secondary party would negate liability, however, it may still found liability for a lesser crime.

66. English law provides that although mere presence at the scene of a crime would not give rise to liability, it will suffice if presence constitutes encouragement, *R v Jefferson [1994] 1 All ER 270.* In circumstances where presence has been pre-arranged liability would clearly attach. If presence arises accidentally, liability can still be established if the secondary party is aware that presence is providing encouragement.

67. A further consideration in light of the index circumstances is that where presence is established and a secondary party had the right or ability to control the primary party and there is a failure to exercise the right or ability, culpability attaches. Mere passive acquiesce would suffice.

Liability resulting from a failure to act

68. Generally there is no liability for failure to act under English law; however, there are

exceptions to this rule. These include where there is a duty to act and where there is a duty to avert danger of one's own making. Both situations require causation to have been established. There is no specific reference to foreseeability, although it is envisaged within the tests formulated.

Duty to act

69. A duty to act arises where there is an official, contractual or public duty. In the English authority of *R v Dytham [1979] QB 72* a police officer was convicted of misconduct in public office. Whilst on duty the accused had stood 30m away from a nightclub where a man was beaten to death. The accused then left the scene without calling for any assistance. It was noted by the Court of Appeal that

70. "The allegation was not one of mere non-feasance, but of deliberate failure and wilful neglect. This involves an element of culpability which is not restricted to corruption or dishonesty, but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment."

71. Commentary on the case law in *Blackstone's Criminal Practice 2011 A1.15* states that the accused could have been liable for manslaughter if inaction was a factor contributing to death. Manslaughter had not been charged, thus there was no examination of causation. There is no requirement for 'fraudulent' conduct, rather a deliberate failure and wilful neglect.

Duty to avert danger of one's own making

72. The creation of a dangerous situation arising out of some fault could require an individual to avert any resulting danger. Criminal liability can be incurred for failing to do so, *R v Miller [1983] 2 AC 161*. The accused had been homeless at the time. He had fallen asleep whilst smoking a cigarette, when he awoke the mattress was smouldering. He did not call for help, instead moving to another room. He was convicted of arson. The Court of Appeal held that there was 'no rational ground' for liability to be excluded, where there has been 'conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence'.

Causation

73. A key question for liability to have been established, in both situations, is whether causation is apparent. Two factors must be assessed: whether there is a factual link between the

omission and the result, and whether that omission was a sufficient cause in law. Causation can be direct or indirect.

74. A factual link is established where the result would not have occurred, or would not have occurred at the time or in the way it did, but for the accused's omission. Legal causation is established where the omission was an 'operating and substantial' cause of consequence, *R v Smith [1959] 2 QB 35.* This does not require, however, that it is the only or even the principal cause*, R v Warburton [2006] EWCA Crim 627*. In addressing the second limb of the test, a subjective common sense approach is referred to, more specifically whether there has been some abnormal or culpable behaviour.

75. The chain of causation can be broken by an intervening act, which could be an act of a third party. This cannot be the case, however, where the intervening act merely complements or aggravates the initial omission.

Foreseeability

76. English law provides that foreseeability can be inferred where there is clearly an intention for a certain outcome to result. However, even where the accused may not have desired the consequence but it could be anticipated, liability may arise. Where an offence of murder has been charged, the relevant questions is whether the accused would have had foresight that the result was virtually certain, *R v Woollin [1999] AC 82*. Consideration would be required of what knowledge the accused had of the paramilitary units they had been patrolling with, whether they could have anticipated that the criminal acts could result from the failure to apprehend them based on the knowledge and circumstances of the situation.

VII IN SUMMARY

76. In summary, the amici respectfully invite the court to consider that criminal liability can be imputed to all the accused.

7th January 2013

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