Human Rights Brief

Volume 12 | Issue 3 Article 11

2005

Updates from the International Criminal Courts

Mario Cava
American University Washington College of Law

Tejal Jesrani
American University Washington College of Law

Christian De Vos
American University Washington College of Law

Anna Triponel
American University Washington College of Law

Anne Heindel
American University Washington College of Law

UPDATES FROM THE INTERNATIONAL CRIMINAL COURTS

International Criminal Court

Côte d'Ivoire

On January 28, 2005, Luis Moreno Ocampo, Chief Prosecutor of the International Criminal Court, announced that the ICC will dispatch a team to Côte d'Ivoire to determine whether to initiate a full-scale investigation of the human rights abuses and war crimes that occurred during the civil war that followed an attempted coup against the current President, Laurent Gbagbo, in September 2002. Ocampo's announcement was a response to a September 2003 request by the Ivoirian government for the ICC to investigate alleged war crimes in Côte d'Ivoire.

The submission to the ICC pertains to violence that erupted after an attempted coup against Gbagbo on September 19, 2002, when insurgents secured control over the country's cocoa-rich northern region. Three major anti-Gbagbo militias rose to power in 2002: the Patriotic Movement of Côte d'Ivoire (MPCI), the Ivoirian Popular Movement of the Great West (MPIGO), and the Movement for Justice and Peace (MJP). The pro-Gbagbo and rebel forces blame each other for the thousands of deaths, rapes, and other atrocities that have occurred since the coup attempt.

The broader current conflict stems from a series of prior coup attempts that ensued after President Robert Guei violently seized power in 1999. Continuous fighting, fueled in part by ex-Liberian President Charles Taylor, perpetuated a war in Côte d'Ivoire's western region. In October 2001, the country's Supreme Court recognized Laurent Gbagbo as president after violent clashes between Gbagbo and his contender, former President Guei. Gbagbo maintained power despite a separate coup attempt in January of 2001.

Since May 2003, the United Nations has been instrumental in trying to facilitate peace in Cote d'Ivoire. In response to the continued violence in Côte d'Ivoire, in February 2004, the UN authorized a 6,000-strong peacekeeping force, supplemented by a 4,000-strong French Rapid Reaction Force, to monitor the demilitarized zone separating the insurgents in the north from the governmental forces in the south. Despite ongoing negotiations, multiple peace agreements, and the UN's peacekeeping efforts, however, the situation in Côte d'Ivoire remains highly volatile.

As part of its continuing operations in Côte d'Ivoire, the UN Security Council approved an International Commission of Inquiry (Commission), established by the Office of the High Commissioner for Human Rights, to investigate abuses that occurred after the September 2002 coup attempt, the time period over which the ICC may exercise jurisdiction. The Commission's report, which is currently with the UN Secretary General, has not been officially released, although a copy in French was leaked in January 2005. The report is said to contain an annex which lists alleged offenders. The document reportedly identifies 95 alleged perpetrators, including senior rebel officers and government officials responsible for crimes including extra-judicial killings, kidnappings, and inciting ethnic hatred. Chief Prosecutor Ocampo maintains that he has not yet seen the list.

The Commission's report apparently recommended ICC prosecution of the alleged perpetrators. The ICC has jurisdiction over crimes committed on the territory of a State Party to the Rome Statute after the Statute's entry into force on July 1, 2002. Although Côte d'Ivoire signed the ICC's Rome Statute on November 30, 1998, it has not ratified the Statute. Côte d'Ivoire may still request ICC involvement under Article 12 of the Rome Statute even though it is not a State Party to the Statute. Article 12(3) provides that "a State which is not a Party to this Statute . . . may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question." On February 15, 2005, the ICC Registrar confirmed that Cote d'Ivoire accepted ICC jurisdiction for crimes committed in its territory since September 19, 2002.

President Gbagbo's acceptance of ICC jurisdiction may determine the fate of his wife and other government officers, who are potentially subject to ICC investigations. UN diplomats indicated that the controversial list of alleged offenders implicates President Gbagbo's wife, Simone Gbagbo, in directing a death squad to kill her husband's rivals. At least two Security Council members have confirmed that Simone Gbagbo and Charles Ble Goude, leader of a pro-Gbagbo militia commonly known as the Young Patriots, are among those listed in the UN report. Goude is allegedly accused of acts such as kidnapping, inciting violence, stirring racial hatred, and disturbing public order. The recently-leaked information does not reveal the precise nature of the offenses, nor does it articulate the exact accusations being made. Côte d'Ivoire's UN ambassador, Philippe D. Djangone-Bi, denied the accusations against the first lady. Djangone-Bi emphasized Mrs. Gbagbo's strong dedication to human rights and democracy over the past 30 years.

Democratic Republic of the Congo

On March 15, 2005, Pre Trial Chamber I of the International Criminal Court (ICC) convened a closed session status conference with Prosecutor Luis Moreno Ocampo to discuss the current situation in the Democratic Republic of the Congo (DRC). According to international and nongovernmental organizations, since the start of ICC jurisdiction in 2002, continuous armed conflict between state-sponsored rebel groups has ravaged the DRC with mass murders, summary executions, rape, torture, and forced displacement.

Violence first erupted in the DRC on May 16, 1997, when the Alliance of Democratic Forces for the Liberation of the Congo (AFDL) toppled Mobutu Sese Seko, former president of the Republic of Zaïre, and Laurent Désiré Kabila rose to power as the new president of the DRC. In 1998, the AFDL ignited a rebellion against Laurent Kabila in which Zimbabwe, Angola, Chad, and Namibia supported the Kabila loyalist army. Rwanda, Uganda, and Burundi also sponsored two major rebel groups in the conflict, the Congolese Rally for Democracy and the Movement for the Liberation of the

Congo, with the aim of overthrowing Laurent Kabila. Kabila was assassinated on January 16, 2001, and his son, Josef Kabila, succeeded him as president. Despite a series of peace agreements and ceasefires, beginning with the Lusaka Agreement in July 1999, over three million civilians have died in the DRC due to the armed conflict and related malnutrition.

On April 19, 2004, Ocampo received a letter from President Kabila conferring ICC jurisdiction over crimes committed in the territory after the Rome Statute entered into force on July 1, 2002. In his letter, President Kabila asked Ocampo to determine if one or more persons should be charged with war crimes and agreed to cooperate with the ICC. Ocampo will determine whether there is a reasonable basis to initiate a full-scale investigation. He is examining the basis for an investigation under the Statute and the modalities for such an inquiry to reach an informed decision.

Darfur Update

JUST BEFORE MIDNIGHT on Thursday, March 31, 2005, the United Nations Security Council adopted a resolution to refer the situation in Sudan's Darfur region to the Prosecutor of the International Criminal Court (ICC or Court). Resolution 1593, which addresses developments in Darfur since July 1, 2002, was adopted by a vote of 11 in favor of the Resolution, with Algeria, Brazil, China, and the United States abstaining. Brazil, a supporter of the court, abstained in order to express its disagreement with concessions contained in the Resolution aimed at preventing a U.S. veto.

The two main Darfur rebel groups welcomed the Resolution and said they would comply by sending any members of their groups accused of crimes to the ICC. The Sudanese government, however, did not welcome the move. "I believe it is unfair, ill-advised and narrow-minded," Sudan's state minister for foreign affairs, Najeeb al-Kheir Abdul Wahab, told reporters. "It undermines the government's quest for justice in Darfur through reconciliation." The Secretary-General, however, congratulated the Council members "for overcoming their differences to allow [it] to act to ensure that those responsible for atrocities in Darfur are held to account."

The United Nations Security Council was recently in bitter disagreement about how to address the numerous suspected war crimes committed in Darfur. China and the United States, two of the five countries with veto power over Security Council actions, threatened to stall any ICC referral for accountability in Darfur. China and Algeria both argued that an attempt to bring Sudanese government, rebel, or Janjaweed militia leaders to justice before establishing peace in Darfur would be counterproductive. These two countries suggested that the Sudanese government should prosecute serious crimes against humanity within its own national legal system. Such a course of action would have raised serious questions regarding Sudan's will to investigate the crimes, prosecutorial and judicial independence, and potential for corruption, because the Sudanese government itself is implicated heavily in the crimes.

The United States, which called the Darfur crisis "genocide" in late 2004, had been at the forefront of recommending tough action on Sudan. The United States strongly opposes the ICC, however, because it fears that U.S. forces or officials could be the subject of politically-motivated referrals to the Court. Members of the U.S. Mission to the United Nations argued that supporting the referral of the Darfur situation to the ICC would imply U.S. support for the ICC in general. As an alternative to an ICC referral, they recommended the creation of a permanent African war crimes tribunal in Arusha, Tanzania, at the seat of the International Criminal Tribunal for Rwanda (ICTR).

Others have argued that U.S. agreement to refer the Darfur crimes to the ICC would not necessarily conflict with the United States' policy on the Court. An ICC investigation of crimes in Darfur would not expose any U.S. national or the government to criminal liability before the ICC. Additionally, the United States has argued that the Security Council should have the exclusive power to refer such situations to the ICC. In referring the matter to the ICC, the United States could argue that Security Council referrals are the only valid route to ICC prosecutions and that countries that are not party to the ICC remain immune from ICC control in the absence of such a referral. In addition to advocating for an immediate response to what the United States has deemed genocide in Darfur, such a course of action may help repair the damaged reputation of the United States on international human rights and its weak support of the UN. Finally, it may give the United States leverage in seeking genuine sanctions against Sudan. The United States already proposed a Security Council resolution, Resolution 1591, adopted on March 24, 2005. This Resolution sought to impose an arms embargo, an asset freeze on violators of a cease-fire in Darfur, and restrictions on offensive government military flights. Resolution 1591, however, omitted a venue for the trials.

The political will for a referral of the crisis to the ICC came after a report, submitted in January 2005 by a UN-appointed commission of inquiry, accused the Sudanese government and militia of "heinous crimes" in the western Sudanese region. The report included a list of 51 likely suspects; evidence of thousands of killings, pillaging, and rape in Darfur; and an approximation of 70,000 people dead and two million forced from their homes. The commission of inquiry, made up of international legal experts, recommended referral of the Darfur situation to the ICC for investigation and prosecution.

Resolution 1593, adopted by the Security Council, states that "the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully." Additionally, in order to assuage the fears of the United States, the Resolution notes that "nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State."

The resolution also invited the ICC and the African Union (AU) to discuss practical arrangements to aid the work of the Prosecutor and Court, including the possibility of conducting the proceedings in the region to "contribute to regional efforts in

the fight against impunity." The diplomatic showdown over the Darfur crisis marks a defining moment for the ICC—the first referral by the Security Council of a situation to the Court.

Rwanda

Eliézer Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A

On July 9, 2004, the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in the case of *Eliézer Niyitegeka v. Prosecutor*. The case was brought on appeal from a May 16, 2003, trial judgment finding Niyitegeka guilty on six counts: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; and murder, extermination, and other inhumane acts as crimes against humanity. The Trial Chamber sentenced Niyitegeka, who served as Rwanda's Minister of Information during the course of the 1994 genocide, to life imprisonment. Niyitegeka (Appellant) raised 53 grounds for appeal, alleging errors of both law and fact. The Appeals Chamber (Chamber) divided Appellant's grounds of appeal into eight categories, noting that, pursuant to Article 24 of the ICTR Statute, it must defer to the factual findings of the Trial Chamber and would only "revoke or revise" them if they found them to be "wholly erroneous" and if the error(s) "occasioned a miscarriage of justice." The Chamber further noted that it "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies." Thirteen of Appellant's grounds for appeal were dismissed for their failure to meet this standard. The Chamber also dismissed the eight categories of claims it considered at length and affirmed the Trial Chamber's sentence.

Genocidal Intent

The Appellant's sole substantive ground of appeal alleged that the Trial Chamber erred in its interpretation of the specific intent requirement for the crime of genocide under Article 2(2) of the ICTR Statute. This article states, in part, "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." In particular, Appellant argued that the Trial Chamber erred in law because it should have interpreted the words "as such" to mean "solely." He contended that, in failing to do so, the Trial Chamber impermissibly expanded the definition of genocidal intent, interpreting it as the commission of "specified acts against a gathering of persons because they were believed to be the enemy or supporters of the enemy," rather than acts against a group solely because of their membership in it. The Chamber disagreed and cited the *Kayishema and Ruzindana* ruling, which held that even if a perpetrator is not motivated solely by the intention to destroy a certain group, the existence of other personal motives does not exclude his or her criminal responsibility. "In other words," the Chamber noted, "the term 'as such' clarifies the specific intent requirement," and the Trial Chamber was correct in interpreting it to mean that the proscribed acts were committed against the victims "*because of* their membership in the protected group, but not solely because of such membership."

Procedural Error

Appellant also alleged that the integrity of the trial process had been undermined by the participation of Prosecution counsel Melinda Pollard, who had been under suspension from the practice of law at the time. The Chamber held that the integrity of the trial process could not have been undermined *per se* by counsel Pollard's suspension, noting the Tribunal's Rules of Procedure and Evidence (Rules) stipulate admission qualifications only for defense counsel and are silent on corresponding qualifications for Prosecution counsel. Nevertheless, Prosecution counsel are required to adhere to the Tribunal's standards of professional conduct, as well as to the Charter of the United Nations and its Staff Rules and Regulations, "which include a duty to act with integrity and honesty." The Chamber found no concrete evidence, nor did Appellant identify any specific instance, that the suspension of Counsel Pollard's license to practice law in New York "affected his trial or rendered it unfair." Moreover, because it was never shown that Pollard's representations at trial were factually incorrect—indeed, they were confirmed by the senior trial attorney on appeal—the Trial Chamber did not err in law by relying on Pollard's "representations and undertaking."

Appellant then argued that the Trial Chamber erred as a matter of law by not recusing itself after counsel Pollard, in cross-examining a witness, alleged that Appellant had implicated himself in commissions of rape. Appellant said this was a "highly prejudicial matter" that the judges could not expunge from their minds. The Chamber disagreed, affirming the holding in *Akayesu* (and the International Criminal Tribunal for the Former Yugoslavia's [ICTY] holding in *Prosecutor v. Furundzija*) that an appellant has the burden to rebut the presumption of impartiality that attaches to a judge or a tribunal. The Chamber determined that Appellant failed do this, noting in particular that the Trial Chamber had not found him guilty of rape as a crime against humanity.

Appellant next alleged that he had suffered an incurable disadvantage at trial because the indictment provided him inadequate notice of certain allegations made against him. In its response, the Chamber reiterated the ICTY Appeals Judgment in *Kupreskic*, which held that in an indictment the Prosecution is obligated to state the material facts underpinning all charges brought, but not the evidence by which such materials are to be proven. Failure to set forth the specific material facts of a crime constitutes a "material defect" in the indictment that may, in certain circumstances, cause the Appeals Chamber to reverse a conviction —though not automatically. The Chamber agreed that Appellant "had insufficient notice of two material facts underpinning the charges against him" regarding his alleged participation in two attacks on the towns of Kivumu and Muyira Hill in mid-May 1994. The Chamber therefore agreed that the Trial Chamber had committed an error of law in relying on this evidence. Nevertheless, it found that such errors did not invalidate the Trial Chamber's decision, as no conviction on any count of the indictment rested solely on Appellant's alleged involvement in those two attacks.

Standard of Proof

The Chamber found without merit Appellant's claim that the Trial Chamber had required him to prove his alibi beyond a reasonable doubt, and rejected his assertion that his evidentiary burden should only have been to show that, "on the balance of probabilities, he was where he says he was." It held that the approach articulated at trial conformed to the settled jurisprudence that "a defendant need only produce evidence likely to raise a reasonable doubt in the Prosecution's case" and that the Trial Chamber "correctly stated that the Prosecution bears the burden of proof and that an alibi defense does not bear a separate burden." The Chamber also found that Appellant had failed to show any instance in which the Trial Chamber did not apply the same standards in assessing Defense and Prosecution evidence.

Witness Testimony

The Chamber also dismissed Appellant's argument that the Trial Chamber erred in permitting the Prosecution to call witnesses without providing a reasonable explanation for the alleged unavailability of their original statements, and by treating the Prosecution's investigation notes as privileged under Rule 70. The Chamber acknowledged that, while the Prosecution has a duty to make available all "statements" of witnesses it intends to call at trial (pursuant to Rule 66(A)(ii) of the Rules), the jurisprudence has not made a clear distinction between "statements" and "internal documents prepared by a party which are not subject to disclosure." The Chamber determined that records of questions put to witnesses by the Prosecution, and the answers given, constitute witness statements under the Rules. Private notes jotted down during the course of an interrogation, or questions noted but never asked, however, are privileged under Rule 70 and their non-disclosure in this case did not constitute an error by the Trial Chamber. Furthermore, Appellant had not "sufficiently demonstrated" that the witness statements he objected to in fact existed. Indeed, the senior trial attorney stated that the Prosecution had "no such documents in its possession."

As to Appellant's allegation that he had suffered prejudice when the Trial Chamber allowed the Prosecution to call witnesses even though he had not seen their allegedly unavailable statements, the Chamber noted that Appellant had failed to demonstrate how he had suffered prejudice as a result, particularly as his counsel made no attempt to call any of the Prosecution's investigators to testify as to the contents of the alleged statements. Appellant's additional claim that the Prosecutor had violated Rule 41 by not properly preserving all the evidence at trial was dismissed by the Chamber for vagueness, since no actual instance of such a violation was identified.

The Chamber also addressed Appellant's claim that the Trial Chamber made general errors of law in its approach to the evidence of several witnesses, including reliance on uncorroborated testimony, the testimony of accomplices, and in-Chamber testimony inconsistent with prior statements. In each instance, the Chamber noted that the acceptance of, and reliance on, such evidence did not *per se* constitute an error in law, so long as the Trial Chamber took any inconsistencies into account when weighing its probative value. Moreover, when accomplice testimony is thoroughly cross-examined, as it was in the instant case, no error of law has been committed. Appellant further argued that the Trial Chamber had erred in its assessment of identification/recognition evidence and in relying on witnesses of questionable credibility. Considering these claims on a witness-by-witness basis, the Chamber concluded that "in no instance" did the Trial Chamber's assessment of evidence or testimony occasion a violation of Rule 24's "miscarriage of justice" standard.

Sentencing

Due to the severity of Appellant's crimes, the Chamber concurred with the Trial Chamber that the mitigating evidence offered at trial as to Appellant's good character was insufficient to merit a lesser penalty and upheld his sentence of life imprisonment.

Sylvestre Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-T

On June 17, 2004, Trial Chamber III of the International Criminal Tribunal for Rwanda (ICTR) delivered its judgment in *Prosecutor v. Sylvestre Gacumbitsi*. Sylvestre Gacumbitsi was charged with criminal responsibility for his major role in organizing and executing a campaign against Tutsi in the Rusumo commune in April 1994 while he was *bourgmestre*. The Trial Chamber found him guilty of genocide and the crimes against humanity of extermination and rape, and not guilty of complicity in genocide and the crime against humanity of murder. He was sentenced to thirty years imprisonment.

In finding Gacumbitsi guilty of genocide, the Trial Chamber examined his deeds and words together. The Trial Chamber found he demonstrated his genocidal intent through urging the *conseillers de secteur* (lower-level government officials) to incite the Hutu to kill the Tutsi, encouraging the Hutu public to rape and kill Tutsi, and personally killing a Tutsi (thereby signalling the beginning of an attack at Nyarubuye Parish during which many Tutsis were killed). His public instigations to rape caused serious bodily harm to Tutsi women and girls by leading directly to their rape by Hutu attackers. He also planned, instigated, ordered, committed, and aided and abetted the killing of Tutsi civilians by convening a meeting of *conseillers de secteur*, instructing them to incite Hutu to kill Tutsi, delivering boxes of weapons to them, checking up on their efforts, and personally killing a Tutsi. Moreover, his speeches urging the Hutu public to kill Tutsi led to several attacks, including one under his direct supervision. Additionally, he assisted the attackers by leading vehicle convoys, doing nothing to prevent attackers from being transported in communal vehicles, and being present throughout the attacks. Although the Trial Chamber found that he ordered the communal policeman over whom he had formal superior authority to kill, it did not find sufficient evidence that he ordered any other armed groups to participate in the attacks. It determined that neither Gacumbitsi's superior authority over these groups, nor circumstances suggesting that his words would have been perceived by them as orders, were established. After finding that the charge of complicity in genocide was an alternative count to genocide, the Trial Chamber dismissed it without discussion.

Based on similar factual allegations as those underlying the genocide charge, the Trial Chamber found Gacumbitsi responsible for extermination as a crime against humanity. It determined that Gacumbitsi both knew of the widespread and systematic attack that was taking place against the civilian population and had the intent to participate in the massacre of a large number of victims at Nyarubuye Parish. His intent was shown by his leading role in preparing and launching the attack, his subsequent visits to the parish to instigate attackers to kill survivors, and his supervision of the attackers. The Trial Chamber found Gacumbitsi not guilty of the crime against humanity of murder, however, due to a lack of evidence of his responsibility for the particular murders listed in the indictment.

As noted above, Gacumbitsi was found to have instigated the rape of several Tutsi women and girls that led directly them being raped. The Trial Chamber, however, found no link between his words and other rapes that had a more distant connection in time and space. In finding Gacumbitsi guilty of the crime against humanity of rape, the Trial Chamber determined that the definition of rape was not limited to "any penetration of the victim's vagina by the rapist with his genitals or with any object." It cited in support of this definition the *Akayesu* Trial Judgment, which defined rape "as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive," as well as the more recent *Kunarac* Appeals Judgment by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which further refined that standard to "the sexual penetration, however slight . . . of the vagina or anus . . . or mouth of the victim without the consent

of the victim."

The Trial Chamber noted that the "victims' lack of consent to the rapes" was adequately established by the facts that Gacumbitsi threatened to kill them in an atrocious manner if they resisted, and that the victims who did flee were attacked. It is unclear from this statement whether the Trial Chamber found the defendant's threat or use of force necessary to establish the victim's lack of consent. Earlier jurisprudence by the Trial Chamber in *Semanza* and *Kajelijeli* has established that non-consent should be "assessed within the context of the surrounding circumstances." This standard was supported by the ICTY Appeals Chamber in *Kunarac*, which then clarified that although "[f]orce or threat of force provides clear evidence of non-consent, . . . force is not an element per se of rape." It determined that

> [t]here are 'factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.' A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

Significantly, it noted that "the circumstances . . . that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible."

Because the Trial Chamber determined that Gacumbitsi was personally responsible for genocide and the crimes against humanity of extermination and rape under Article 6(1) of the ICTR Statute, it deemed it unnecessary to decide whether he could also be held responsible as a superior under Article 6(3), because these forms of responsibility "cannot be charged cumulatively on the same basis of facts. In case of cumulative charging, the Trial Chamber will retain only the form of responsibility that best describes the Accused's culpable conduct." This view seems to be in accord with a movement by both Tribunals towards alternative charging under these articles. For example, the *Kayishema* Trial Chamber found that these two forms of responsibility are "not mutually exclusive," but the more recent *Ntagerura et al.* Trial Judgment found that they are alternative modes of responsibility. Similarly, in *Blaskic*, the ICTY Trial Chamber allowed the cumulative application of personal responsibility and command responsibility, but in more recent cases, such as *Krstic, Krnojelac*, and *Naletilic & Martinovic*, the Trial Chamber has determined that only the mode of responsibility that most appropriately expresses the accused's culpability should be charged.

Nevertheless, in sentencing Gacumbitsi, the Trial Chamber considered that his "active participation in the said crimes explain[ed] why he could not take measures [as a superior] to prevent or punish the perpetrators" and was an aggravating factor. In doing so, it appears to have adopted the view of the *Ntagerura et al.* Trial Chamber that the alternative (uncharged) form of responsibility should be considered in sentencing "in order to reflect the totality of the accused's culpable conduct." *HRB*

Mario Cava, a J.D. candidate at the Washington College of Law, covers the ICC for the Human Rights Brief.

Tejal Jesrani, a J.D. candidate at the Washington College of Law, covers Darfur for the Human Rights Brief.

Christian De Vos, a J.D. candidate at the Washington College of Law, wrote the ICTR summary for the Human Rights Brief.

Anna Triponel, an LL.M. candidate at the Washington College of Law, wrote the ICTR summary for the Human Rights Brief.

Anne Heindel, Assistant Director of the War Crimes Research Office at the Washington College of Law, edited the ICTR Summaries.

Regional Human Rights Systems

continued from page 32

future investigations be handled in a way that complies with the state's international obligations, especially because so many victims are reluctant to come forward and report these human rights abuses for fear of retaliation.

The Commission's report also focuses on the Colombian government's role in permitting the proliferation and impunity of paramilitary groups. The Commission is concerned that, despite their commitment to a ceasefire agreement as a condition of the demobilization process, AUC members continue to be implicated in serious human rights violations, including massacres of defenseless civilians; the selective assassinations of social leaders, trade unionists, human rights defenders, judicial officers and journalists; and acts of torture, harassment, and intimidation.

Although the Colombian government claims it does not have an official policy of encouraging paramilitary activity, the Commission report reminds the government that, under jurisprudence of the inter-American system, the lack of an official policy is insufficient to relieve any government of liability for allowing paramilitary groups to flourish. The Court and the Commission have previously held governments responsible for violating the Convention when state agents acquiesce to paramilitary activities. The Commission report calls on the Colombian government to recognize its own responsibility in facilitating the formation of some of the paramilitary groups that have participated in civilian massacres and other human rights violations and criticizes it for failing to take the measures necessary to prohibit, prevent, and punish their criminal activities.

The Commission concludes that in order to comply with international legal standards, Colombia must uncover the truth of what has happened in its civil conflict, including the degree of government involvement in paramilitary activity. The Commission further recommends that the Colombian government adopt a comprehensive legal framework that establishes clear conditions for the demobilization of illegal armed groups to ensure that human rights abusers are held accountable. *HRB*

Christian De Vos, a J.D. candidate at the Washington College of Law, covers Europe for the Human Rights Brief.

Jennifer Podkul, a J.D. candidate at the Washington College of Law, covers the Inter-American System for the Human Rights Brief.

Tim Curry, a J.D. candidate at the Washington College of Law, covers Africa for the Human Rights Brief.