

A NOTE FROM THE EDITOR-IN-CHIEF

December 2010

2010 has been a year of great achievements and challenges at the International Criminal Court (ICC).

The Court took a more proactive stand in bringing alleged perpetrators to justice by granting the Office of the Prosecutor the right to open an investigation into the situation in Kenya and by admitting the additional charge of genocide to the arrest warrant against the Head of State of the Republic of Sudan, Omar Al-Bashir. The *Bemba* trial commenced on 22 November 2010. Mr. Mbarushimana, who was arrested by the French authorities on 11 October 2010, will likely be tried at the ICC after the Paris Court of Appeals approved his extradition to the Court. Mbarushimana will be the fourth person to be brought before the ICC in relation to the situation of the Democratic Republic of Congo.

The rules on criminal procedure were further developed and strengthened due to emerging case law, which has provided the ICC with an approach on how to handle victims' issues and appeals procedures. The States Parties to the Rome Statute agreed on a definition for the crime of aggression at the ICC Review Conference, which took place from 31 May to 11 June 2010 in Kampala, Uganda. Naturally, the reactions to the outcome were mixed. Some felt that the Review Conference did not reach the desired outcome, as the field of application for the crime of aggression was given a limited scope. According to Article 15bis, the Court will only be able to claim jurisdiction for crimes of aggression committed by a State Party that accepted (by omission) that jurisdiction against another State Party to the Statute. Others stressed that by not requiring that allegations of aggression be dependent upon a final approval by the U.N. Security Council, the ICC was spared an overt amount of political interference and, as such, the Court was able to preserve its role as a strictly judicial organ.

The ICC also faced numerous challenges. The dilemma of non-disclosure of evidence, which started in 2009, reached a climax in 2010. ICC Trial Chamber I was forced to bring the *Lubanga* trial to a halt and to order the provisional release of the Accused. The Defense had not been provided with the evidentiary material to which it was entitled for purposes of a fair trial. Orders of the Chamber were not sufficiently complied with by the ICC Office of the Prosecutor. *Lubanga's* provisional release was overturned on appeal by the ICC Appeals Chamber.

This 2010-2011 Issue of the *Eyes on the ICC* pinpoints some of these recent developments.

Author Lenore Horton addresses the discretionary power of Prosecutors at International Tribunals and the ICC. She argues that increased discretion of the Prosecutor has led to greater accountability in international criminal law proceedings and a resulting greater fairness for the accused.

Author Anthony Diala provides an in-depth analysis of the Majority Decision of ICC Trial Chamber I of 14 June 2009 and the ICC Appeals Chamber Decision of 8 December 2009 with regard to re-characterization of the facts in the *Lubanga* trial, drawing connections to victims' justice.

Author Elizabeth Kimundi analyzes the Majority Decision of ICC Pre-Trial Chamber II of 31 March 2010 allowing the ICC Office of the Prosecutor to open an investigation into the situation in Kenya. Kimundi takes a closer look at the Kenyan history in which the post-election violence was imbedded. Coming from this analysis, she claims that the Chamber was correct to hold that the required elements of gravity and complementarity were met for the ICC to take the prosecution of the post-election violence into its own hands.

Author Kristin Gallagher discusses the legal ramifications of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, highlighting them through a gender-based perspective. Gallagher argues that the war crime of 'conscripting or enlisting children under the age of fifteen' should include not only boys but also girls, due to the broad language of the provision and the purpose of the punishment.

Author Jennifer Lincoln elaborates on the intersection between the principle of *nullum crimen sine lege* [Latin: no crime without a law] and crimes against humanity. She argues that the residuary category of crimes against humanity as interpreted in international criminal law poses a danger toward maintaining a fair trial for the Accused, and undermines the confidence of what the international community understands as being a crime against humanity.

Author Abadir M. Ibrahim analyzes the practical work and legal framework of the ICC from a human rights perspective by applying common factors of human rights mechanisms. By applying these factors, and by learning from past experiences, Mr. Ibrahim argues that the effectiveness of the ICC can be strengthened.

Finally, this year's issue concludes with a commentary from the field by Author Aurora Bewicke, who was present at the 2010 ICC Review Conference. Although the primary focus of the Conference was to define the crime of aggression, additional topics relevant to the discussion were also introduced. By reviewing the stocktaking in Kampala in relation to victims, Bewicke analyzes a spectrum of the Conference which has not yet received major attention.

I wish all readers of the 2010/2011 issue of *Eyes on the ICC* much enjoyment and a greater insight into the role and functioning of the International Criminal Court. The journal tremendously profited from the work of Managing Editor, Yasmin Tabi, all members of the Advisory Board, and all Assistant Editors. Much gratitude is due to the CASIN Board of Directors for their enduring trust and support for the journal.

Cordially,

Bernhard Kuschnik
Editor-in-Chief