PROSECUTORY AMBIVALENCE OR THE GRAVITY OF CRIMINAL LIABILITY: THE BURDEN OF ADMINISTRATIVE DISCRETION IN INTERNATIONAL CRIMINAL LITIGATION

A. Amuda-Kannike (SAN)[1]
G. C. Aaron [2]
B. D. Ogoloma[3]
E. E. Jumbo [4]

Introduction

Statutorily, the International Criminal Court (ICC) has on officer who is empowered to decide which cases are to be prosecuted before the court or not. The officer is called the ICC Prosecutor. At any point in time, the prosecutor decides when a situation can constitute an international criminal or wrongful act as to prefer charges before the ICC [1].

The crucial issue of "gravity of criminal liability" in relation to those cases filed before the ICC has been recognized under the Rome Statute which is the yardstick upon which the prosecutor measures the limits of his or her discretionary powers in terms of bringing a charge or discarding the petition for wanting in merit.

A. Amuda-Kannike, Ph.D, SAN: Faculty of Law, Niger Delta University, Wilberforce Island, Bayelsa State, Nigeria. He is also a Senior Advocate of Nigeria (SAN) and the Managing Counsel of Amuda-Kannike (SAN) & Co, No 8, Mbonu Streetm D-Line, Port Harcourt, Rivers State, Nigeria.
G. C. Aaron: School of Law, Pacific Western University, Denver, Colorado, USA
B. D. Ogoloma: School of Law, Pacific Western University, Denver,Colorado, USA
E. E. Jumbo, Ph.D, JD, **BL:** Centre for International Law Studies, Southgate Institute of Technology, Uyo, Akwa Ibom State, Nigeria

1. R. Brubacher, Prosecutorial Discretion within the International Criminal Court, (2004) 2 Journal of International Criminal Justice, p. 71

However, it should be appreciated that the actual influence and consequence of relying on the issue of "gravity" is in itself controversial, especially as the Rome Statute on its own kick-started the controversy by failure to give a definition to the concept of "gravity" nor does any other working instrument of ICC assist in explaining the term "gravity" [2]. This work will look at historical analysis of the concept of gravity, with the view of critically analyzing the statutory powers of the ICC prosecutor vis-a-vis the issue of gravity to determine where the confusion or problem lies.

Historical Analysis Vis-A-Vis the Basis of the Concept of Gravity

When the parties to the Rome Statute met at the Rome Convention, especially when deliberating on Article 17(1)(d) of the Statute which was at the beginning of the meeting, proposed as Articles 35, the idea behind this Article was what eventually became the concept of gravity and which was historically said to be that the Statute has always threaded through it. This idea is based on the fact that gravity of the crime alleged should be such that awakens international conscience and condemnation. This means that the Court should hear only the most serious cases of truly international concern in every given circumstance[3].

Those who drafted the Rome Statute, especially Article 17(1) d) had a mindset that only major offenders should be tried by the ICC and that

---

2. L. Cote; International Justice; Tightening up the Rule of the Game (2006)81 *International Review of the Red Cross*. p. 133
3. L. Sadat & S. R. Carden; "The New International Criminal Court: An Uneasy Revolution (March 2000) 88 *George Town Law Journal*, p. 381 at 419.

those offences that are not categorized as major offences even where they fall within the court's jurisdiction should not be presented to the court in order to avoid wasting the court's time and resources on minor offences of lesser "gravity" compared to very serious offences of "high gravity"[4]. It is unfortunate that the concept of gravity was not ascribed any definition in the Rome Statute nor was it also defined in the ICC Rules of Procedure and Evidence creating the gap as to what is the objectivity of the concept of gravity and its applicability.

It was part of historical knowledge that because of the reality about this confusion as to definition, Venezuela and later on Chile objected that the concept of "gravity" is vague as could be seen in the Rome Statute and that there is a serious need to give adequate and appropriate definition to it. This questions was ignored by the drafters of the Statute. Therefore, it can be seen that the confusion in this aspect of the Statute was historically started from at the Rome Convention as the observation of Venezuela and Chile were not accorded any significance in the Rome Statute nor any other international instruments [5].

The Prosecutor and Gravity on the Field

The issue of gravity was first interpreted by the ICC prosecutor by way of applying same under the Rome Statute and this issue became vivid at any time the prosecutor tries to defend the basis of his unilateral discretion in preferring to prosecute certain cases than the others which

4. S. R. Ratner & J. S. Abrams; "Accountability for Human Rights Atrocities in International Law; Beyond the Nuremburg Legacy, (Oxford University Press, 2001) p. 213

5. See L. Sadat & S. R. Carden, at 419 and see also R. Murphy, "Gravity Issues and the International Criminal Court (2006) 17 Criminal Law Forum, 281 at 282.

he or she felt should not be prosecuted before the ICC. It should be understood that the prosecutor also have dragged the "Pre-Trial Chamber

1, into the controversy surrounding the issue of gravity as we shall see later in this work.

The Prosecutor over-bearing interpretation and usage of the concept of gravity could be traced to a lot of submissions and sensitization [6] made about the issue of gravity measurement and how the exercise of his discretion is affected in terms of investigation and prosecution. From observed facts and circumstances of the workings of the prosecutor, the concept of gravity is taken as a tool on one hand and it is necessary to be used as the criteria to be met, before the ICC would admit/hear a case and on the other hand, gravity is to be used as the basis of a selection exercise in rejecting some cases and picking other cases for investigation and eventual prosecution. This, in a nutshell has to do with "situations" and "cases".[7]

The Prosecutor in using "gravity" as a "scale" for measurement, listed certain conditions which form the basis of weight or gravity [8] and they are seen as (i) what are the numbers of persons, that were confirmed as

---

6. There were statements made by Luis Moreno Ocampo, former Prosecutor of ICC at an informal meeting which took place at the Ministry of Foreign Affairs, for Legal Advisers at New York on 24/10/2005. See also paper on the issue of gravity and its application by the office of the prosecutor in respect of communications received by the office of the prosecutor as at 16/7/2003.
7. The word "situations" means a temporal, territorial and in some other cases personal parameters used in determining whether or not a particular situation or circumstance will lead to investigation and prosecution, while when you talk about, "cases" it means a particular incident or circumstance when crimes could be and have been committed.
8. R. Murpy, Gravity Issues and the International Criminal Court, (226) 17 Criminal Law Forum p. 281 at 282.

having been killed (ii) what are the numbers of victims in international crimes such as deliberate killings or rape cases which are crimes categorized as involving physical integrity (iii) how severe are the crimes involved (iv) what level of scale can the crimes be place (v) what is the system involved in the crimes (vi) what is the nature of the crimes involved (vii) what were the manner in which the said international crimes were committed (viii) what were the level of impact created by those crimes or crime when they occured [9].

The prosecutor did not look at himself as being responsible for deciding which of the cases should become his first case as far as those crimes committed in Northern Uganda are concerned, which said cases/crimes involves those committed by Uganda National Army and the L.R.A of Uganda who are opposed to the National Government of Uganda. In using the measurement of gravity according to the prosecutor, he has no alternative other than saying that after investigation, the decision was to charge five members of the L.R.A. of Uganda to the ICC in accordance with the Statute of Rome but that the forces loyal to the Ugandan Government have no case to answer having tactically decided not to press any charge in this direction [10].

_____

[9] See the Speech of Louis Moreno-Ocampo, who was the former prosecutor of the ICC. The speech was made during an informal meeting of the Legal Advisers of Ministries of Foreign Affairs, New York meeting of 2005, see also ICC Office of the Prosecutor, Report on the Activities Performed during the first three years (June 2003-June 2006 accessed through internet on 22/8/2015 at 12.51 am via http/w.w.w.iccow.org/documents/3 year report %20

[10] *ibid*

It will be recalled that in this circumstance, the ICC prosecutor is not alleging that the activities of the forces loyal to the government was not sufficiently a grave one which can make the case admissible for trial before the ICC but that the prosecutor's stand and argument was that the Lord Resistance Army (L.R.A.) acts in international crimes were graver than those of the forces loyal to the government [11]. What this connote is that the ICC prosecutor can use his power and discretion to investigate and prosecute the alleged crimes and not that he weighs the gravity of the alleged crime or crimes before accepting that it should be investigated and prosecuted. This in essence, means that the ICC prosecutor have in this regard ignored the principle of "gravity" in choosing to prosecute the case of the L.R.A of Uganda.

It can therefore be said that the ICC prosecutor closed his eyes against the provisions of Article 17(1)(d) of the Rome Statute which is to the effect that where a case is not of sufficient gravity to justify further action by the court, such a case will not be admissible. In this regard, it can be seen that the ICC prosecutor has used the case of L.R.A of Uganda to cause confusion and suspicion as to whether "gravity" is the basis and yardstick to determine the admissibility of a case to be investigated and prosecuted or whether it is a question of impunity as to which case is to be discretionarily investigated and prosecuted by the prosecutor who has more or less turned himself also to be a "Judge" of the ICC. In other words the public view and opinion as to the respect of ICC is disturbing.

11. The ICC prosecutor in the case of Iraq decided vehemently that the alleged conduct of the government forces was gravely insufficient to be admissible before the ICC and as such cannot make a case against the government loyalist forces.
Further, it is no gain-saying, that negative perception of the members of the public about the ICC is most likely to have not only the jurisdiction of the ICC but also whether or not the court is legitimate in all ramifications.

In adding his voice to this issue, Ray Murphy [12] stated that the importance of outlining in detail how determinations that certain cases are not of sufficient gravity are made, and that failure to do so may cause alienation of victims and discredit the court, it is of great importance to find out which particular criteria was used in the decisions taken by the prosecutor in order to evaluate the legality and legitimacy of such a decision by the prosecutor.

The Prosecutor and the Allegation about "Victor Justice"

There is no doubt that because of the discretionary power of the ICC prosecutor as to which case is to be investigated and prosecuted, there has been serious allegations, that the prosecutor is neither investigating nor prosecuting any international crime; but that he is only involved in pursuing with zeal and vigour, what is known and popularly called ***'Victor Justice'***; which is to the effect that only one side of a conflict is prosecuted, whereas the other side of the conflict who are in power and has the upper hand are not prosecuted in accordance with the rule set of those who utilized the "principle of victor justice"[13].

[12] R. Murphy; Gravity Issues and International Criminal Court, Op Cit at 168 esp at 313

[13] Victor Justice can be said to consist of the military occupation, and it includes the absence of independent Judges or Prosecutor. Another characteristic of Victor Justice is that nature is one sided, because only the crimes of those who are defeated were prosecuted. There is also the act of holding suspects responsible for the actions or inactions that do not amount to international crimes when such crimes were committed. The victorious party in the war are mostly exempted from being punished for war crimes.

In view of the foregoing, the issue of Victor Justice was put clearly by Robert Mc Namara[14] when in considering the nature and circumstances of international crimes vis-à-vis international criminal tribunals in the *Fog of War* documentary; he stated that the other perpetrators of the bombings in Tokyo were not brought to face charges of war crimes because they belong to the "Victor State" (Victorious Party) and not that the crimes committed is not a terrible one worthy of prosecution.

The ICC prosecutor himself cannot deny the fact that political consideration of *Victor justice* cannot affect the discretion as to whether or not to investigate and prosecute a case before the ICC. Therefore, any contention raised, as to suggest that political considerations may not have any influence in the decision of the prosecutor of ICC is without basis [15].

However, the issue of *Victor Justice* is not new as far as international criminal litigation is concerned. Under this assertion, the Nuremburg trials can be said to have achieved the objective for which it was instituted, which is to show to the whole World that the "Nazists" behaviours were intolerable and condemnable, the trials were seen as being bias in favour of the "allied forces" who actually conducted the investigation and conducted the trials and this was seen as a complete door opener to what is now known as "Victor Justice" [16].

14. R. McNamara, Fog of War, cited in J. Graubert; Is There No Alternative? Victor's Justice Pragmatic Legalism and the ICTR. Accessed through the internet on 2/9/2015 (4.30a.m) at htp//www, allocademic.lt
15. W. A. Schabas; "The Limits to Criminal Accountability of State Actor, Is Victor's Justices Still with Us? Opp cit at 12.
16. C. Rudolph; "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals (2001) 55 (5) international organization, 665-691

It is not in doubt that the unfortunate problems of post-second World War prosecution especially in the area of suspicion, is still a raging controversy

among nations and scholars who felt concerned that the war crime tribunals vis-à-vis the ICC, was set up and backed up by the "victorious parties" in the War against those who were defeated. There is even the contention that is supportive of the foregoing assertion and that is the known fact that the ICC prosecutor decided to put his focus on Uganda and Congo rebels without considering any atrocities committed by those who are loyal to the Government in power.

Thus, significant number of scholars have advised the ICC that the danger to be faced by them in relation to this approach of Victor Justice is that the ICC will become embroiled in civil strife and would deploy the powers of the international criminal law to strengthen one party against the other party who seems not too relevant and not in power.[17]

A close scrutiny of the reason behind the ICC prosecutor giving credit to his office about self-referral strategy is rather an abuse to the office than a blessing, because both the investigation and prosecutions that eventually took place, with all due respect, can be said to be one side in the resolution of the international crime/crimes arising from such conflict, as it did not meet the required minimum condition in domesticated criminal liability litigation. Flowing from the above stated facts is that the ICC prosecutor is often being caged to do the biding of those in power by exerting the *Victor justice* principle because, once he or she is helping to investigate and prosecute the perceived enemies of

17. G. P. Fletcher, "The Grammar of Criminal Law, American, Comparative and National, Volume I: *Foundation*, Oxford University Press, (2007) at 189

the state, then the prosecutor is seen as performing wonderfully well to the state, then the prosecutor is seen as performing wonderfully well and in accordance with the Rome Statute. Thus, the "chain of the cage" principle is applied by mustering courage and determination to investigate and

prosecute those loyalist of the government in power. When this happens, it is then seen that the prosecutor has attacked the "bees" which implies that those governments backing the idea of "self-referral" would begin to castigate not only the prosecutor but also the ICC itself.

The above scenario occurred with respect to the self-referral sent by the Republic of Uganda and Democratic Republic of Congo based on the encouragement of the ICC prosecutor. The reason for this action is not far-fetched because no government who is in power would allow ICC prosecutor to investigate and prosecute it voluntarily or through what can be described as self-inflicted wound or self-inflicted punishment[18]. In this regard, the ICC prosecutor cannot deny the fact that all is not well when performing his duties.

The discretionary power of investigation and prosecution is considered by him or her outside the issue of "gravity of the offence" but the prosecutor seems to blackmail the idea of "gravity" beyond normal, because it would seem not to possess any political colouration which influences his or her decision in the investigation and prosecution of international crimes.

18. W. A. Schbas, "Prosecutorial Discretion V. Judicial Activism at the International Criminal Court, Op. cit at 753

The question asked at this stage is; could gravity be the basis of investigation by the ICC prosecutor or is it the prosecutor himself or the political gang-up or its ambiguous referral process?

The question posed above, seems water-tight for the ICC prosecutor to answer as there seems to be the tendency to defend every action take with respect to that office and the discretionary power attached to that office. One clear issue in the circumstance is that, if gravity is a "human-being" it would have gone to court to challenge the ICC prosecutor for using its name to justify the use of discretionary power when in actual fact, the prosecutor through some international forces which seems to play important roles in keeping the office, dictates the phase, nature and manner of the investigation and prosecution of international crimes with the ICC prosecutor himself or herself creating additional burden of inviting "self-referral" which have caused more controversies rather than solving the problems of the prosecutor[18(a)].

The Prosecutor and the Pre-Trial Chamber in Relation to Gravity

Having relatedly explained the nature and dynamics of gravity in international criminal litigation, there is the need to do justice to this discussion, by looking at the discretionary power of the prosecutor and the decision of the pre-trial chamber as to see whether such a decision can influence the ICC prosecutor in relation to its subsequent discretionary power of either to investigate an international crime or

[18(a).] Article 53(1) of the Rome Statute re-enforced Article17(1)(d) of the same Statute because Article 53(1) and (2) states that in determining whether there is a "reasonable basis" to proceed with an investigation or a prosecution, the prosecutor shall consider, inter alia" the gravity of the crime".

not, vis-a-vis considering the weight attached by the pre-trial chamber to matters adjured to possess adequate gravity. It should be noted here, that 'adequate gravity' implies critical circumstances of a criminal nature with

appropriate and substantial conditions to compel the attention of the chamber with respect to international crime/crimes.

This study observed that the limits of such substantial conditions are within the ambivalences of the prosecutor and under the Rome Statute as we have earlier seen, it is subjective. At this point what is necessary for the consideration of the pre-trial court is the popular word "gravity" and this could either be considered by the pre-trial chamber as either favorable or not favourable[19].

Consequently, Article 17(1)(d) of the Rome Statute came up for interpretaiton by the Pre-trial Chamber 1; when considering "gravity" in order to know who is deceiving who on this issue of "gravity". The pre-trial chamber stated that the following conditions must be inherent in the facts of a given case which will show adequate gravity to allow such a case to come within the purview of the above mentioned Rome Statute. The conditions listed by the court to be met in this regard are in the form of answering these question thus; [20]

(i) Is the conduct which is the subject matter of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct).

(ii) Considering the position of the relevant person in the state entity, organization or armed group to which he belongs, can it be considered that

---

19. See Article 17(i) (d) of the Rome Statute

20. W. A. Schabas; "Prosecutorial Discretion V. Judicial Activism at the International Criminal Court, Op Cit at 751: W. A. Schabas; The Limits to Criminal Accountability of State Actors- is Victor Justice still with us? 20, 15, Accessed through the internet; http/www.allacademic.com/meta/p.mla-apa-research-citation /3/1/1/1/4/p311142-index.htm/.processed and accessed on 5/9/2015 at 7.15p.m

such person falls within the category of most senior leader of the situation under investigation? And.

(iii) Does the relevant person fall within the category of most senior leader suspected of being most responsible, considering(a) the role played by the relevant person through acts or omissions when the state entities, organizations or armed group to which he belongs commit systematic or large scale crimes within the jurisdiction of the court and (b) the role played by such state entities, organizations or armed groups in the overall commission of crime within the jurisdiction of the court in the relevant situation?

The Pre-trial Chamber 1 used the above criteria listed above in deciding that there exist enough gravity of offence in the case of *Prosecutor v. Lubanga*[21] because there were various harms to social life as a result of the use of under aged children to prosecute War and also that Lubanga had been the leader of a revolutionary organization as far back as year 2000, 2002 and 2003 respectively.[22]

The interpretation done by the court in relation to what amounts to gravity pursuant to Article 17(i) (d) of the Rome Statute with due respect to pre-trial Chamber 1 of the ICC is rather unfortunate as the test/ criteria set up is overwhelmingly rigid to meet up and accord with the norm of international criminal justice system because there are circumstances where exceptions ought to be allowed to still come within the arm-bit of the provisions of Article 17(i) (d) of the Rome Statute. It is submitted that the following questions are enough to attack the rationale behind the rigid interpretation given by the per-trial chamber, which are;

(i) What is the yard-stick to be used to measure either systematic pattern of incidents or large scale incidents?

(ii) What is the yard-stick to be used to measure social alarms to such conduct in international community especially when a country such as the United States with due respect can cause social alarm once the state/accused involved is its enemy and will suppress social alarm when such state/accused is its friend?

(iii) Why did the court evaluate the social alarm caused in the international community instead of using the basis of the social alarm as could be found within the affected community or state?

In further consideration of the interpretation or "gravity" given by the pre-trial chamber, which will result the investigation and prosecution of a case, it is disheartening to hear the court saying that the accused must only be those who are most senior leader or leaders of the armed group or state entity which means that only those who qualify as leaders can be tried by the ICC through the prosecutor.

Therefore, all the subordinates who committed international crimes of overwhelming gravity are to be excluded from investigation and prosecution. It equally means that the ICC trial is meant to try leaders of the state or rebel groups who cause international crimes and not for the trial of those who directly perpetrated or acted out those crimes. The interpretation of the pre-trial Chambers in this regard is not in-tandem with the provisions of Article 1 of the Rome Statute which states thus;

---

21. The Prosecutor v. Thomas Lubanga Dyilo, Decision on the prosecutor's application for a warrant of Arrest, Article 58' Pre-trial Chamber 1, Case No. ICC /01/04-01/06, 10th day February, 2006.
22. *ibid*, Par 67.

An international criminal court ("the court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the court shall be governed by the provision of this statute.

From the quotation above, we submit that it was therefore wrong for the Pre-trial Chamber 1 to interpret "gravity" as found in Article 7 (i) (d) of the Rome Statute without considering the provision of Article 1 of the same Statute. If the Pre-trial Chamber 1 had considered this provision alongside, Article 7 (i) (d), there is the likelihood that the interpretation would have been flexible and not rigid [23]. It is therefore not in doubt that it was wrong for the Pre-trial Chamber of the ICC to have read wordings and interpretation into Article 7(i) (d) of the Rome Statute on

the issue of "gravity" which said wordings and interpretations was not contemplated by the draftsmen of the Rome Statute neither could it be said to have been slightly mentioned by the Rome Statute.

It is further contended that the decision of the Pre-trial Chamber 1 on the issue of gravity and interpretation of the Rome Statute is tantamount to saying that we are out to investigate and deal with all the perpetrators of international crimes in line with the law but we shall use our discretion against the same law, by allowing ninety percent (90%) of those who are guilty of the crimes to go scot-free and we shall only try ten percent (10%) of them for the crimes and we do not even know how many of such persons among the ten percent (10%) would still go unpunished after the trial". _____

23. The running words in Article 1 of the Rome Statute is; "…. exercise its jurisdiction over persons for the most serious crimes of international concern…" The Statute did not state that it is meant to "… exercise its jurisdiction over most senior leader of the situation under investigation or most senior leaders suspected".

Therefore, the question arising from this observation goes thus, "is the prosecutor competent in this regard to make a proper interpretation of "gravity" as to decide the direction of the case or will the prosecutor allow the ambivalence of his discretion to take over his conduct in the prosecution of cases. Only time will tell, as the battle in relation to this controversy is already a serious international concern that is yet to be resolved.

Conclusion

The position and the office of the ICC prosecutor both physically and legally is seriously important in order to allow the ICC to function effectively. Therefore, the said office was specifically provided for in the Rome Statute by virtue of the provision of Article 15 of the said Statute. However, it is important to state that the way and manner the ICC prosecutor will function on and manage its office was provided for in Article 15(1), (2) (3), (4), (5) and (6) of the Rome Statute but that all these functions are to be mostly carried out using a parameter called "gravity" as provided for under Article 17(1) (d) of the Rome Statute which is to the effect that any case without sufficient level of gravity should not be investigated by the prosecutor and should not be tried by the court.

It has further been observed that so much controversy lie at the heart of Article 17(1) of the Rome Statute with respect to the discretionary power of the ICC prosecutor on which case is to be investigated and prosecuted using "gravity" as the parameter of the decision. The question have always been whether "gravity" is actually properly interpreted and used to determine whether a case should be investigated or prosecuted at all?

We have seen in the course of this work that the ICC prosecutor and the pre-trial court rather than actually interpreting and properly using "gravity" as expected under the Rome Statute, by allowing for flexibility

in the interpretation, decides otherwise by considering extraneous matters and rigid interpretation of "gravity" which ultimately defeats the purpose.

Thus, the both the court and the prosecutor as provided for under the Statute approach this issue under the guise of the Statute but with intent on "Victor Justice" and selective justice. The result of this action is the negative international perspective of the ICC which also impacts on its dignity and respect.

Recommendation

In view of the foregoing, it is accordingly recommended that the Rome Statute be amended to formally give a flexible definition of the word "gravity". This is because the current definition of 'gravity' as viewed by Pre-trial Chamber 1, is too rigid. It is thus recommended that, any other definition, should not consider extraneous matters not contemplated in Articles 17(1)(d) and 53 (1) and (2) of the Rome Statute to find their way into the definition of the word "gravity" of an offence.

The ICC prosecutor should be sanctioned if he is found to pursue "Victor Justice" rather than using the basis of "gravity" as expected by the Rome Statute. The Rome Statute should make provisions for sanction in this respect because once the prosecutor and the court close their eyes from the law on "gravity" and begin to apply it selectively, then the whole essence of justice and the reason behind the establishment of the ICC will be defeated as people will lose confidence in the ability of ICC to do justice to all.

It is further recommended that the ICC prosecutor should distinguish the explanation about the criteria of gravity when looking at a case which is to be admissible by virtue of Article 17 of the Rome Statute. The prosecutor should rely more on the available facts and incidental evidence

rather than on discretion not adequately backed up by facts. This will bring transparency and enhance public confidence in the ICC.

It is further recommended that both the ICC and the prosecutor should steer-clear of being used politically. The prosecutor should not be involved in self-referral by the state parties otherwise, he may not be seen as being neutral when considering the issue of "gravity" and its applicability