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## Comparing the "Interests of Justice": What the International Criminal Court Can Learn from New York Law

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## COMPARING THE “INTERESTS OF JUSTICE”: WHAT THE INTERNATIONAL CRIMINAL COURT CAN LEARN FROM NEW YORK LAW

LINDA M. KELLER\*

### ABSTRACT

*This article addresses the debate over whether the Prosecutor of the International Criminal Court should adopt ex ante guidelines for prosecutorial discretion in order to increase transparency and legitimacy. It focuses on one of the most ambiguous provisions of the Rome Statute: allowing the Prosecutor to decline to prosecute in the “interests of justice.” Specifically, this article will examine the experience of New York in operationalizing a domestic statutory analogue to the Rome Statute provision: dismissal of cases “in furtherance of justice.” An analysis of New York law yields three core lessons that carry over to the international sphere despite differences in the systems. First, a requirement of a written rationale regarding the exercise of discretion does not necessarily yield thorough or convincing explanations. This undermines arguments that the legitimacy of the International Criminal Court will be enhanced by public explanations of prosecutorial discretion. Second, such explanations may backfire when the balancing of nebulous factors leads to apparently inconsistent or arbitrary reasoning and results, which may undercut the credibility of the decision-maker. Finally, the lack of a guiding theory to drive the interpretation of ambiguous criteria can lead to more confusion*

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\* Associate Professor of Law, Thomas Jefferson School of Law, San Diego, California; Visiting Professional, International Criminal Court, October 2011–March 2012. All opinions are solely those of the author and do not represent the views of the ICC. The author wishes to thank Professors Margaret deGuzman, Alexander Greenawalt, Anders Kaye, and Beth van Schaack for insightful comments on earlier drafts.

*than clarity when there is no agreement on the theoretical justifications for prosecution, as seen in both the domestic and international systems. The experience of New York, therefore, supports skepticism of the efficacy of ex ante criteria for the exercise of discretion, particularly for complex decisions regarding the interests of justice. If such criteria are nonetheless adopted, the New York experience offers suggestions on crafting a more effective approach.*

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#### INTRODUCTION

The International Criminal Court (“ICC”), particularly the Prosecutor, has been criticized for its policy and practices on the selection of situations and cases regarding international crimes, such as genocide, crimes against humanity, or war crimes.<sup>1</sup> Under the Rome Statute establishing the ICC, the Prosecutor has the discretion to decline to investigate a situation or prosecute a case for several reasons, including the nebulous concept of “the interests of justice.”<sup>2</sup> Many commentators have asserted that the legitimacy of the ICC would be enhanced if ex ante guidelines on

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1. See *infra* note 143.

2. Rome Statute of the International Criminal Court art. 53, July 17, 1998, 2187 U.N.T.S. 90.

prosecutorial discretion were adopted by the Prosecutor, particularly when the Prosecutor declines to investigate or prosecute in the interests of justice. Others have countered that guidelines for ambiguous provisions, which necessarily entail context-specific balancing tests, will only harm the court. All of these scholars are necessarily speculating about how particular detailed guidelines would affect the ICC. This article contributes to the debate at a time when the recently sworn-in Prosecutor may be considering the issue.<sup>3</sup> The article adds to the discussion by examining the decades-long experience of New York’s statutory criteria for dismissals in the furtherance of justice, a domestic analogue of declining to prosecute in the interests of justice.<sup>4</sup>

To date, the ICC Prosecutor has not exercised his or her discretion to drop a case because of overriding interests of justice. For example, after the Ugandan situation was referred to the ICC, certain members of the Acholi community in Northern Uganda urged the Prosecutor to suspend activity against the Lord’s Resistance Army (“LRA”) in the interests of justice, specifically, to promote the peace process between the government and the LRA.<sup>5</sup> The Prosecutor, however, rejected this request.<sup>6</sup> The Pre-Trial Chamber did not review the decision because it can check the Prosecutor’s interests of justice discretion only if the Prosecutor decides *not* to go forward with an investigation or prosecution.<sup>7</sup>

By contrast, there is a large body of case law in New York dealing with dismissals of criminal charges “in furtherance of justice.” An examination of a domestic parallel to the interests of justice, however imperfect, can shed light on the potential benefits and pitfalls of an enhanced list of factors to operationalize “interests of justice” determinations before the ICC. Although there are differences in the interests of justice provisions

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3. The term of the first Prosecutor, Luis Moreno-Ocampo, ended in June 2012, when Fatou Bensouda was sworn in as Prosecutor. See *Office of the Prosecutor*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx) (last visited Jan. 7, 2013).

4. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2011).

5. Office of the Prosecutor, *Policy Paper on the Interests of Justice*, INT’L CRIM. CT., at 4 (Sept. 2007), [http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCO\\_TPIInterestsOfJustice.pdf](http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCO_TPIInterestsOfJustice.pdf) [hereinafter *2007 Policy Paper*].

6. *Id.*

7. Rome Statute of the International Criminal Court, *supra* note 2, art. 53(3)(b). The PTC may, on its own initiative, review a decision not to go forward based on the interests of justice; in such a case, the Prosecutor’s decision must be confirmed by the PTC. *Id.* It can review the Prosecutor’s decision not to proceed on any grounds upon request of the Security Council or State that referred the situation to the ICC, but it can only request that the Prosecutor reconsider such a decision. *Id.* art. 53(3)(a).

and their implementation, there are sufficient similarities to yield lessons for the ICC.

Prior to examining the domestic law, Part I of this article briefly describes the ICC and its “interests of justice” provision. Part II examines the debate over whether further prosecutorial guidelines should be adopted, particularly for the ambiguous phrase, “interests of justice.” It summarizes the policies of the Prosecutor regarding interpretation of the interests of justice and describes the positions of prominent proponents and opponents of prosecutorial guidelines. Part III explains an analogous New York statute allowing dismissals in the interest of justice and its ten factors guiding discretion. It then compares the “interests of justice” provisions in the domestic and international contexts and shows the key similarities that would allow the ICC to draw on the experience of New York. It shows the potential parallels between the New York criteria and the “interests of justice” provision of the Rome Statute. Finally, Part IV analyzes New York case law on dismissals in the furtherance of justice and derives three key lessons: (1) the questionable efficacy of requiring explanations of reasoning; (2) the potential counter-productiveness of ambiguous criteria; and (3) the detrimental impact of a lack of consensus regarding the purpose of prosecution and punishment.

This article concludes that the potential for contradictory or seemingly arbitrary outcomes based on vague and contested criteria may outweigh the benefits of more detailed factors regarding the “interests of justice.” At the very least, the New York experience offers cautionary lessons that should be taken into account before the ICC Prosecutor adopts further criteria regarding the “interests of justice.” Finally, the article offers suggestions on minimizing the risks should the push for the adoption of guidelines prevail.

## I. INTERESTS OF JUSTICE UNDER THE ROME STATUTE

The Rome Statute establishing the ICC entered into force in 2002. As of January 2013, the ICC has 121 State Parties.<sup>8</sup> Under the statute, the Prosecutor is invested with the authority to determine whether investigation or prosecution is warranted.<sup>9</sup> The Prosecutor may open an

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8. See *The States Parties to the Rome Statute*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Feb. 15, 2013).

9. Rome Statute of the International Criminal Court, *supra* note 2, arts. 15, 16, 53–54.

investigation *proprio motu* with Pre-Trial Chamber approval or based on a referral from a State Party or the Security Council.<sup>10</sup>

Genocide, war crimes, and crimes against humanity fall under the jurisdiction of the ICC when they are committed on the territory of, or by a citizen of, a State Party or a State that accepts jurisdiction.<sup>11</sup> For a referral from the Security Council, there are no limits to the jurisdiction of the ICC based on territory or nationality.<sup>12</sup> A case is inadmissible if it lacks sufficient gravity or is being investigated, prosecuted, or has been investigated or prosecuted by a State with jurisdiction, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>13</sup>

The “interests of justice” provision is open-ended and gives the Prosecutor the most leeway to initiate, or decline to initiate, an investigation or prosecution.<sup>14</sup> Article 53 governs the initial investigation and prosecution stages. With regard to the initiation of an *investigation*, the Prosecutor shall go forward unless there is no reasonable basis to proceed.<sup>15</sup> The Prosecutor is instructed to consider whether: (a) there is a reasonable basis to believe that a crime within the jurisdiction of the court exists; (b) the case is admissible under Article 17; and (c) “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”<sup>16</sup>

Article 53 also allows the Prosecutor to decline to *prosecute*, even if there are sufficient grounds to seek an arrest warrant or summons for the accused in an admissible case.<sup>17</sup> Here, the statute provides that the Prosecutor can conclude that there is an insufficient basis for prosecution because “[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the

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10. *Id.* arts. 13–15.

11. *Id.* arts. 5, 12.

12. *Id.* arts. 5, 12–13. Jurisdiction over the crime of aggression is not yet operational, pending adoption of amendments to the statute defining aggression and related jurisdictional issues. The amendments cannot come into force until 2017 at the earliest. 2010 Review Conference: The Crime of Aggression, at 19–20, RC/Res.6 (June 11, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

13. Rome Statute of the International Criminal Court, *supra* note 2, art. 17(1).

14. See, e.g., James A. Goldston, *More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 383, 392–93 (2010) (“[T]he phrase ‘interests of justice’ . . . is elastic. It provides the Prosecutor a great deal of latitude . . .”).

15. Rome Statute of the International Criminal Court, *supra* note 2, art. 53.

16. *Id.* art. 53(1)(a)–(c).

17. *Id.* art. 53(2).

interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”<sup>18</sup>

The ambiguity of these provisions has led to criticism of the ICC. Specifically, the ICC has come under fire for its selection of situations and cases, with the Prosecutor often being the primary target. The Prosecutor has been criticized for focusing solely on African situations (all of the situations and cases to date come from the African continent), for bringing one-sided prosecutions (against rebel groups but not the government, for example, in Uganda), for bringing charges against both sides (in the situation in Darfur, for seeking an arrest warrant against President al-Bashir and for rebel leaders allegedly responsible for a relatively small attack against peacekeepers), and for not bringing charges in certain situations (for example, Iraq) or against certain States (for example, Western powers such as the United States or Britain).<sup>19</sup> In terms of the “interests of justice” provisions, critics have argued that the Prosecutor should not have proceeded with arrest warrants that might undermine peace processes in Northern Uganda and Sudan.<sup>20</sup> Rather, the Prosecutor should have declined to investigate or prosecute in the interests of justice under Article 53.<sup>21</sup> The chorus of criticism threatens the credibility of the ICC, leading commentators to propose mechanisms to operationalize prosecutorial discretion.

## II. DEBATE OVER GUIDELINES FOR ICC PROSECUTORIAL DISCRETION

Many commentators have suggested sound procedures, particularly guidelines, as a solution to the ICC’s legitimacy problem,<sup>22</sup> especially

18. *Id.* art. 53(2)(c).

19. See, e.g., Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 271–74 (2012) (illustrating several criticisms of prosecutorial discretion as a threat to the legitimacy of the ICC).

20. See, e.g., Aminta Ossom, *An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC*, 52 VA. J. INT’L L. DIG. 68, 73–74 (2011).

21. Michael Kourabas, Note, *A Vienna Convention Interpretation of the “Interests of Justice” Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, & the Situation in Northern Uganda: A “great qualitative step forward,” or a normative retreat?*, 14 U.C. DAVIS J. INT’L L. & POL’Y 59, 68–69 (2007).

22. See, e.g., CHRISTOPHER KEITH HALL, SUGGESTIONS CONCERNING INTERNATIONAL CRIMINAL COURT PROSECUTORIAL POLICY AND STRATEGY AND EXTERNAL RELATIONS, EXPERT CONSULTATION PROCESS ON GENERAL ISSUES RELEVANT TO THE ICC OFFICE OF THE PROSECUTOR 11–12 (Mar. 28, 2003), available at [http://212.159.242.181/iccdocs/asp\\_docs/library/organs/otp/hall.pdf](http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/hall.pdf) (urging adoption and publication of prosecutorial guidelines to manage public expectations and aid judicial review of decisions not to investigate); Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. 162, 168 (2005) (arguing it is “essential to know which criteria were used in decisions taken by prosecutors in order to

when it comes to prosecutorial discretion related to the selection process.<sup>23</sup> Mireille Delmas-Marty, for example, recently asserted “‘the interests of justice’ standard in Article 53 must be defined by explicit criteria.”<sup>24</sup> Others argue that a process that increases transparency may undermine legitimacy if it is implemented inconsistently or if it is based on incoherent goals of international criminal justice.<sup>25</sup>

As part of the early expert consultation process for the Prosecutor, in 2003, Avril McDonald and Roelof Haveman examined prosecutorial discretion and argued for the adoption of guidelines and criteria.<sup>26</sup> They noted the “need for ‘objectifying’ or pinning down the largely subjective criteria articulated in Article 53(1)” regarding initiation of investigations.<sup>27</sup> They also contended that establishing criteria for prosecutorial discretion decisions is crucial for several reasons, including “[t]o avoid fuelling any already existing perceptions of the ICC as a political court, to minimize any accusations of bias, and to increase transparency and boost the

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evaluate their legitimacy and legality”); Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 533 (2010) (arguing for ethics-based standards); Rod Rastan, *Comment on Victor's Justice & Viability of Ex Ante Standards*, 43 J. MARSHALL L. REV. 569 (2010) (agreeing with Lepard regarding need for selection criteria and method).

23. See, e.g., JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* 411–12 (2008) (noting that while the Rome Statute does not require the Prosecutor to offer public explanations, doing so might offer a sound approach to increase legitimacy and credibility); Mireille Delmas-Marty, *Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INT’L CRIM. JUST. 2 (2006) (arguing that the ICC must explain its criteria and methodology better, and advocating that decisions to investigate be based on a legitimacy/effectiveness axis while decisions to prosecute be based on an universal/relativism axis); Goldston, *supra* note 14, at 403–04 (discussing potential benefits of ICC prosecutorial guidelines provided that they are adopted by the Prosecutor and aimed at increasing public understanding of the court rather than determining case-specific decisions); Geert Jan Alexander Kooops, *Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective*, 15 CRIM. L. F. 365, 388–89 (2004) (advocating focus on prosecutorial guidelines and criteria, drawn from international criminal tribunals or domestic prosecutorial guidelines).

24. Mireille Delmas-Marty, *Internationalization of Law: Diversity, Perplexity, Complexity*, Prepared Text of Remarks at the American Society of International Law Annual Meeting (Mar. 29, 2012), in INTLAWGRRLS, Mar. 30, 2012, <http://www.intlawgrrls.com/2012/03/internationalization-of-law-diversity.html>.

25. See, e.g., deGuzman, *supra* note 19, at 289–91 (“[A]dherence to principles of good decision making cannot enhance [the ICC’s] legitimacy in the absence of agreed goals and priorities for ICC action. . . . Moreover, transparency may actually exacerbate perceptions of illegitimacy by exposing the incoherence underlying selection decisions.”).

26. AVRIL MCDONALD & ROELOF HAVEMAN, *PROSECUTORIAL DISCRETION—SOME THOUGHTS ON “OBJECTIFYING” THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE PROSECUTOR OF THE ICC, EXPERT CONSULTATION PROCESS ON GENERAL ISSUES RELEVANT TO THE ICC OFFICE OF THE PROSECUTOR 3* (Apr. 15, 2003), available at [http://www.issafrika.org/anicj/uploads/McDonald-Haveman\\_issues\\_relevant.pdf](http://www.issafrika.org/anicj/uploads/McDonald-Haveman_issues_relevant.pdf).

27. *Id.*



credibility of the Court as a strictly judicial institution. . . .”<sup>28</sup> McDonald and Haveman pointed out the many questions left unanswered by the inclusion of the subjective and vague “interests of justice” phrase in the Rome Statute.<sup>29</sup> They concluded, “Article 53 sets out some criteria, but it begs more questions than it answers.”<sup>30</sup> As a result, McDonald and Haveman advocated that guidelines be developed and made public.<sup>31</sup>

The Office of the Prosecutor (“OTP”) did subsequently adopt some regulations and policies that relate to prosecutorial discretion, but they do not fully satisfy commentators or critics.<sup>32</sup> In part, this stems from a deliberate decision by the OTP to refrain from adopting concrete criteria.<sup>33</sup> When it comes to interpreting the “interests of justice,” the OTP Regulations simply echo the Rome Statute.<sup>34</sup> While the draft regulations<sup>35</sup> and expert proposals<sup>36</sup> suggested additional “interests of justice” factors, the OTP chose not to codify such criteria in the regulations adopted in April 2009.

The more recent 2010 OTP Draft Policy Paper on Preliminary Examinations<sup>37</sup> reiterates the exceptional quality of decisions not to proceed in the interests of justice; for further detail, it refers to the 2007 OTP Policy Paper on the Interests of Justice (“2007 OTP Policy Paper”).<sup>38</sup> The 2007 OTP Policy Paper “deliberately [did] not enter into detailed discussions about all of the possible factors that may arise in any given situation.”<sup>39</sup> The 2007 OTP Policy Paper notes that the Rome Statute does not attempt to include all relevant specific factors and considers the OTP “bound to offer only limited clarification in the abstract,”<sup>40</sup> and accordingly, it lays out only abstract principles.

28. *Id.*

29. *Id.* at 5–9.

30. *Id.* at 9.

31. *Id.*

32. *See, e.g.*, Mireille Delmas-Marty, *supra* note 24.

33. *See generally* ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (Apr. 23, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf>.

34. *See id.*

35. *See* ICC, Draft Regulations of the Office of the Prosecutor, Version 3 (June 2003), available at <http://www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/istghdre.pdf>.

36. *See* McDONALD & HAVEMAN, *supra* note 26.

37. Office of the Prosecutor, *Policy Paper on Preliminary Examinations, Draft*, INT’L CRIM. CT. (Oct. 4, 2010), available at [http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf) [hereinafter *2010 Policy Paper*].

38. *2007 Policy Paper*, *supra* note 5.

39. *Id.* at 1.

40. *Id.*

The first principle is the exceptional nature of the interests of justice and the presumption in favor of investigation or prosecution.<sup>41</sup> The second principle emphasizes that the interests of justice should be interpreted via the object and purpose of the statute, specifically, the prevention of impunity.<sup>42</sup> The third principle provides that the interests of justice might take into account some aspects of peace, but it is not the same as the interests of peace, which falls under the mandate of the Security Council.<sup>43</sup>

The 2007 OTP Policy Paper does not provide concrete criteria for the interests of justice beyond the provisions of the statute. Rather, the paper stresses that the interests of justice concept is “one of the most complex aspects of the Treaty.”<sup>44</sup> It does elaborate on the factors that the interests of justice may be weighed against per Article 53(1)(c) and/or Article 53(2)(c).<sup>45</sup>

First, when determining the gravity of the crime under Articles 53(1)(c) and 53(2)(c), the Prosecutor considers the scale, nature, manner of commission, and impact of crimes.<sup>46</sup> Second, regarding the interests of victims, the 2007 OTP Policy Paper notes that these interests can be very complicated and require the Prosecutor to respect all views, for or against prosecution.<sup>47</sup>

As for the “particular circumstance of the accused” to be considered in conjunction with the interests of justice under Article 53(2)(c), the Prosecutor must consider the role of the accused in the crime as well as the age or infirmity of the accused.<sup>48</sup> The role of the accused in the crime includes both the significance of the accused in the “overall commission of crimes and the degree of the accused’s involvement” in particularly serious or notorious crimes.<sup>49</sup> Age or infirmity of the accused might preclude prosecution even for those most responsible if the accused is terminally ill or was subjected to serious human rights violations.<sup>50</sup>

Finally, the 2007 OTP Policy Paper indicates that while other justice mechanisms and peace considerations may be relevant in some circumstances, they should play a complementary role.<sup>51</sup> Peace processes

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2.

45. *Id.* at 4–7.

46. *Id.* at 5.

47. *Id.*

48. *Id.* at 6.

49. *Id.* at 7.

50. *Id.*

51. *Id.* at 7–8.

might be relevant to the “interests of justice” as broadly defined, but the object and purpose of the statute limit the scope of relevant peace and security issues.<sup>52</sup> The paper’s discussion, therefore, fleshes out general principles to a degree, but it falls short of adopting additional criteria for the interests of justice.

The 2007 OTP Policy Paper refers to the practice of the OTP as the best guidance on interests of justice issues. For example, the OTP has not declined to investigate or prosecute in the interests of justice, considering that none of the situations in Uganda, the Democratic Republic of Congo, or Darfur satisfy the exceptional circumstances necessary to overcome the presumption in favor of going forward.<sup>53</sup> Because the record of the OTP is limited, an examination of a much larger body of determinations regarding the interests of justice may be helpful.<sup>54</sup>

Outside of the OTP and its experts, there have been long-standing calls for guidelines, and some commentators have proposed various criteria. For example, Allison Marston Danner “argue[s] that prosecutorial decisions would be both actually legitimate and perceived as such if they are taken in a principled, reasoned, and impartial manner.”<sup>55</sup> Danner contends that *ex ante* standards should be adopted to minimize arbitrariness in discretionary decision-making.<sup>56</sup> She suggests that the Prosecutor should describe additional factors he or she intends to consider,<sup>57</sup> and she contends that “[a] prime goal of the prosecutorial guidelines should be to give content to this nebulous [‘interests of justice’] phrase.”<sup>58</sup>

Danner raises several issues that could fall within “interests of justice” determinations, including whether the Prosecutor should consider: (1) the impact of prosecutions on the area of the crimes; (2) alternative dispute resolutions; (3) the risk of destabilization of political situations; (4) ongoing conflict; and (5) expense or length of trial.<sup>59</sup> Regardless of the exact contours of the Prosecutor’s guidelines, Danner believes that the Prosecutor must make these guidelines public to ensure compliance and enhance the legitimacy of the Prosecutor’s decision-making.<sup>60</sup> In response to the concern that the guidelines will be so general that they will be

52. *Id.* at 8.

53. *Id.* at 2–4, 9.

54. See discussion *infra* Part III.

55. deGuzman, *supra* note 19, at 290.

56. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 538 (2003).

57. *Id.* at 542.

58. *Id.* at 543.

59. *Id.* at 544.

60. *Id.* at 546–47.

rendered meaningless, Danner states that the Prosecutor must “strike a balance between enough specificity to constrain and sufficient flexibility to allow for future learning and developments.”<sup>61</sup>

Similarly, “structured discretion,” including *ex ante* criteria for the interests of justice, would strengthen the credibility of the ICC, according to Philippa Webb.<sup>62</sup> In her article, Webb notes that the Rome Statute does not indicate how much weight to give to the enumerated interests of justice factors, which do not comprise an exhaustive list.<sup>63</sup> Webb proposes that the Prosecutor consider international peace and security, transitional justice, and resources as well as general principles (non-discrimination, deterrence, integrity).<sup>64</sup> Under Webb’s theory, the Prosecutor should make such criteria public, give reasons for decisions, and ensure consistency.<sup>65</sup>

James Goldston agrees in part, stating that “it is perhaps time” for the Prosecutor to set up guidelines.<sup>66</sup> Goldston notes that “[s]uch guidelines are common in domestic systems” and would be even “more warranted where, as in the case of the ICC, the jurisprudence concerning the crimes at issue is still relatively undeveloped, the impact of prosecutorial decisions on affected societies is potentially vast, and there is little directly analogous precedent upon which the Prosecutor may rely in reaching charging decisions.”<sup>67</sup> Yet Goldston is skeptical of the benefits of guidelines, as their implementation in complex, varied situations may not yield accountability to the extent expected.<sup>68</sup> Nonetheless, he concludes that the adoption of prosecutorial guidelines might create greater understanding of the difficult charging decisions made and the complicated mix of factors and considerations involved.<sup>69</sup>

Alexander Greenawalt agrees that *ex ante* guidelines may sometimes be useful for legitimacy, but he argues that much more is required to navigate the tension between prosecutorial independence and the challenges of prosecutorial discretion under the Rome Statute.<sup>70</sup> Greenawalt examines prosecutorial discretion as a reflection of the

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61. *Id.* at 550.

62. Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice,"* 50 CRIM. L. Q. 305, 306 (2005).

63. *Id.* at 326.

64. *Id.* at 338–44.

65. *Id.* at 345.

66. Goldston, *supra* note 14, at 403.

67. *Id.*

68. *Id.* at 403–04.

69. *Id.* at 405–06.

70. Alexander K.A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court,* 39 N.Y.U. J. INT'L L. & POL. 583, 587–88 (2007).

structure of the ICC and proposes a “pragmatic model of prosecutorial discretion.”<sup>71</sup> He focuses, in particular, on the “dilemmas of discretion” faced by the Prosecutor, including the issues of amnesty, selective prosecution or charging (choices to prosecute certain players to a conflict and choices to target certain crimes), the expansive nature of the crimes defined in the Rome Statute, and the timing of indictments.<sup>72</sup> As a result, the controversies over prosecutorial discretion stem not merely from the lack of sufficient guidance in the statute, but also from the nature of the issues at hand. Greenawalt states: “Guidelines developed to demonstrate the objectivity of prosecutorial choices are of little assistance if the problems are not of the sort themselves that can be effectively subjected to rule-based decisionmaking.”<sup>73</sup>

Greenawalt criticizes Danner and others for failing to offer specific guidance regarding difficult questions such as deference to amnesties or truth commissions.<sup>74</sup> He notes that Danner’s call for the Prosecutor to treat all cases similarly might undermine the Prosecutor’s ability to adapt to various contexts posed by different transitional societies.<sup>75</sup> He also fears that guidelines might be counter-productive:

The kind of guidelines that provide for meaningful *ex ante* decisional rules likely to demonstrate the ICC Prosecutor’s impartiality may not be the kind likely to embrace the full complexity and contingency of each situation. The Prosecutor may therefore be stuck between the Scylla of ossified *ex ante* decisional rules that promote certainty at the risk of substantive inadequacy and the Charybdis of open-ended criteria that leave great flexibility for individual circumstances but risk that the Prosecutor’s discretion may be no more guided than if those criteria did not exist in the first place.<sup>76</sup>

As noted above, Danner recognizes that there should be some flexibility built into the guidelines, but she leaves it to the Prosecutor to fully resolve how to achieve balance between constraint and flexibility. Greenawalt himself does not offer concrete guidelines. Instead, he would shift the focus to the ability of the Prosecutor to develop policies that meet

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71. *Id.* at 588.

72. *Id.* at 612–50.

73. *Id.* at 654.

74. *Id.* at 586.

75. *Id.* at 654–55 (referring to expert advice regarding the interests of justice offered to the ICC by McDonald and Haveman in addition to Danner).

76. *Id.* at 656.

the legitimacy challenges of exercising prosecutorial discretion in the midst of complex political situations.<sup>77</sup> He proposes explicit or constructive deference to political actors, such as the Security Council or regional bodies, when dealing with transitional regimes, rather than suggesting guidelines for discretion.<sup>78</sup>

In the face of uncertainty over the goals of the ICC, Margaret M. deGuzman is also skeptical of the efficacy of ICC prosecutorial guidelines. In her article, deGuzman reviews the literature calling for procedural solutions to enhance independence, impartiality, objectivity, and transparency.<sup>79</sup> She argues that principled decision-making based on good process is impossible without agreement on underlying principles, something that is lacking in the current ICC system.<sup>80</sup> She agrees with Greenawalt that some decisions may be ill-suited to the adoption of objectively applied *ex ante* criteria.<sup>81</sup> For example, deGuzman notes that increased transparency through the use of *ex ante* guidelines may “exacerbate perceptions of illegitimacy by exposing the incoherence underlying selection decisions.”<sup>82</sup> Because the ICC and the international community have yet to coalesce around a common goal or priority, deGuzman asserts that “articulating ‘criteria’ or ‘guidelines’ for selections may simply highlight the inconsistent manner in which such decisions are made.”<sup>83</sup> Further, deGuzman finds lacking the typical theories behind the exercise of discretion in selecting situations and cases—namely, retribution, deterrence, and restorative justice.<sup>84</sup> She concludes that an expressive theory is the most promising for creating consensus around an underlying principle that then gives rise to specific norms and priorities.<sup>85</sup> In other words, the project of formulating prosecutorial guidelines cannot begin until the ICC and the international community agree on the goals that these guidelines are supposed to advance.

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77. *Id.* at 671–73.

78. *Id.* at 660–71.

79. deGuzman, *supra* note 19, pt. II.

80. *Id.* at 290. deGuzman notes that Prosecutor Moreno-Ocampo did heed calls from Danner and others to some extent, as he circulated draft policy papers discussing selection criteria. *Id.* at 298. These papers, in pertinent part, are discussed above. See *2010 Policy Paper*, *supra* note 37; see also *supra* text accompanying notes 37–55.

81. deGuzman, *supra* note 19, at 292.

82. *Id.* at 291.

83. *Id.* at 298.

84. *Id.* at 301–11.

85. *Id.* at 312–13.

The “malleability of the factor-based approach”<sup>86</sup> to the interests of justice may actually undermine efforts to increase the legitimacy of the ICC. If the Prosecutor claims to follow strict *ex ante* standards that then give rise to inconsistent outcomes, the reliance on those standards seems “disingenuous” rather than impartial.<sup>87</sup> Margaret deGuzman concludes that “by purporting to follow unchanging criteria rather than admitting the policy choices he faces, the Prosecutor may actually detract from the Court’s legitimacy, strengthening accusations of improper political influence and even ‘victor’s justice.’”<sup>88</sup>

In sum, commentators and experts have frequently called for the OTP to promulgate prosecutorial guidelines and specific, detailed criteria. Commentators have also, however, voiced skepticism over the benefits of such guidelines and concerns that *ex ante* standards might backfire. The debate over the adoption and content of prosecutorial guidelines would benefit from an examination of another system’s experience with similar provisions. This article will narrow its focus to one controversial aspect of prosecutorial discretion: the interests of justice provision, specifically, declinations to prosecute under Article 53(2)(c). An examination of New York law on dismissals in furtherance of justice can shed light on whether detailed criteria will increase the legitimacy of the ICC by providing guidelines for choices that may otherwise appear biased, or undermine it by revealing apparent inconsistency or even incoherency in interpreting and applying the criteria.

Other commentators propose specific interpretations of the “interests of justice” based on domestic law. For example, Chris Gallavin compares the “interests of justice” provision to the “public interest” provision under the Code for Crown Prosecutors of England and Wales; he proposes a revised Article 53 that would allow the Prosecutor more leeway to consider the political impact of prosecution.<sup>89</sup> J. Alex Little examines U.S. domestic violence prosecution policies for lessons on the exercise of prosecutorial discretion that prioritizes prosecution over victim autonomy.<sup>90</sup> He concludes that prosecutions should go forward “even if the potential cost to victims is significant, arguing that the balance between accountability

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86. *Id.* at 296.

87. *Id.*

88. *Id.*

89. Chris Gallavin, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?*, 14 KING’S C. L. J. 179, 179–80 (2003).

90. J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT’L L. 363 (2007).

and victim autonomy at this point in the Court’s history should favor accountability.”<sup>91</sup>

Rather than looking to domestic prosecutorial guidelines, this article will draw on New York case law implementing the statute that allows for dismissals of criminal charges in furtherance of justice. It does not draw on domestic law to propose new guidelines for prosecutorial discretion under the ICC. Instead, this article’s examination utilizes the experience of a domestic criminal jurisdiction to analyze the benefits and risks of operationalizing more detailed criteria on the interests of justice.

### III. LESSONS FROM NEW YORK DISMISSALS IN THE INTEREST OF JUSTICE

Many jurisdictions in the United States have provisions that allow for dismissals of criminal proceedings in furtherance of, or in the interest of, justice.<sup>92</sup> New York is one of the only jurisdictions to introduce and codify specific factors to be considered.<sup>93</sup> These factors appear in Section 210.40 of New York Criminal Procedure Law (“section 210.40”).<sup>94</sup> According to one commentator, the existence of statutory criteria in New York has produced better-supported decisions than other, less “logical” state statutes.<sup>95</sup> Commentators have pointed to the New York statute as a model for dismissals in furtherance of justice.<sup>96</sup> After first outlining the New York statute, this Part illustrates the relevance of the New York analogue to the ICC despite differences between the two systems. It then examines the similarities between “interests of justice” factors in both systems. Finally, it analyzes New York case law and explains the implications of the New York experience for the ICC.

#### A. New York Statutory Criteria

New York common law provided loose criteria for interests of justice dismissals prior to the adoption of the section 210.40(1) factors,<sup>97</sup> but in

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91. *Id.* at 367.

92. See Sheila Kles, *Criminal Procedure II: How Much Further Is the Furtherance of Justice?*, 1989 ANN. SURV. AM. L. 413 (1991).

93. See *id.* at 422–23.

94. See N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2011). Section 210.40 covers felonies. The parallel statute for dismissing misdemeanors is Section 170.40. N.Y. CRIM. PROC. LAW § 170.40 (McKinney 2011).

95. Kles, *supra* note 92, at 468.

96. *Id.* at 472; John F. Wirenius, *A Model of Discretion: New York’s “Interests of Justice” Dismissal Statute*, 58 ALB. L. REV. 175, 222 (1994).

97. See, e.g., *People v. Clayton*, 342 N.Y.S.2d 106, 108–09 (N.Y. App. Div. 1973).



1979, the legislature adopted specific criteria.<sup>98</sup> The statutory amendment adding the factors was in direct response to the opinion in *People v. Belge* by New York's highest court.<sup>99</sup> In *Belge*, the court expressed concern that there were no "criteria for the responsible exercise" of interests of justice discretion, and the legislature responded.<sup>100</sup>

Sounding similar to commentators who urge the ICC Prosecutor to adopt criteria for greater legitimacy, judges in New York describe the criteria as beneficial. For example, one trial court judge favorably cited the Supplementary Practice Commentary for section 210.40, explaining that the additional ten factors guard against arbitrary decisions.<sup>101</sup> The factors compel judges to "consider and articulate real reasons" in granting motions to dismiss in furtherance of justice.<sup>102</sup>

Under section 210.40, dismissal of proceedings in the furtherance of justice is a vehicle to end a prosecution when:

such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice.<sup>103</sup>

The statute further provides:

In determining whether such compelling factor, consideration, or circumstance exists, the court must, to the extent applicable, examine and consider, individually and collectively, the following:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

98. See *People v. Rickert*, 446 N.E.2d 419 (N.Y. 1983) (referring to 1979 Amendments as direct response to the court's concerns).

99. See *People v. Belge*, 359 N.E.2d 377 (N.Y. 1976) (per curiam).

100. *Rickert*, 446 N.E.2d at 420 (citing *People v. Belge*, 359 N.E.2d 377 (N.Y. 1976)).

101. *People v. Joseph P.*, 433 N.Y.S.2d 335, 338 (N.Y. Jus. Ct. 1980).

102. *Id.*

103. N.Y. CRIM. PROC. LAW § 210.40(1) (McKinney 2011).

- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (h) the impact of a dismissal on the safety or welfare of the community;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
- (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.<sup>104</sup>

*B. The New York Statute’s Relevance to the ICC’s “Interests of Justice” Provision*

Despite differences between the New York and ICC “interests of justice” provisions and their implementation, there are key similarities that would allow the ICC to draw from the experience of New York. Concerns regarding transparency of decision-making, perceived legitimacy, and the theoretical underpinnings of prosecution and punishment are common to both systems. Prior to discussing these concerns and the concomitant lessons learned from New York case law, this section will explore both systems’ approaches to the “interests of justice” and the basis for drawing from New York jurisprudence to predict possible benefits and risks of adopting enhanced criteria at the ICC.

Under New York law, the prosecution, defense, or the court *sua sponte* may move to dismiss an indictment “in furtherance of justice,” a phrase used interchangeably with “in the interest of justice.”<sup>105</sup> While the defense and/or prosecution may put forth arguments regarding the interests of justice, only the court is required to set forth its reasons for dismissing an indictment in the interest of justice.<sup>106</sup> By contrast, under the Rome Statute, the Pre-Trial Chamber (“PTC”) can evaluate the equivalent of a suspension in the furtherance of justice only if the Prosecutor has declined to go forward with the prosecution based on Article 53(2)(c).<sup>107</sup> Despite

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104. *Id.*

105. “An order dismissing an indictment *in the interest of justice* may be issued upon motion of the people or of the court itself as well as upon that of the defendant.” *Id.* § 210.40(3) (emphasis added).

106. *Id.*

107. Rome Statute of the International Criminal Court, *supra* note 2, art. 53(3).

these differences, the experience of New York can yield lessons for the ICC on how it might implement additional criteria for the Rome Statute's interests of justice provision.

First, the motivation behind the "interests of justice" criteria is similar under the two systems. New York adopted criteria to curb the discretion of the courts because of concerns that courts were arbitrarily granting dismissals.<sup>108</sup> The adoption of the section 210.40(1) factors was, therefore, aimed at channeling discretion and requiring judges to justify their decisions.<sup>109</sup> Similarly, proponents of adopting ICC *ex ante* standards advocate that such standards will enhance the legitimacy of the Prosecutor's determinations.<sup>110</sup> Thus, despite the difference in location of discretion, the guidelines and motivation for "interests of justice" discretion are similar in New York and under the ICC.

Second, in both New York and under the ICC, the "interests of justice" provision is intended to be used sparingly and only in exceptional circumstances. Boilerplate language in New York cases states that section 210.40 discretion "should be 'exercised sparingly' and only in that 'rare' and 'unusual' case where it 'cries out for fundamental justice beyond the confines of conventional considerations.'"<sup>111</sup> Similarly, the ICC Prosecutor has repeatedly stated that the decision not to proceed in the interests of justice should be "highly exceptional."<sup>112</sup>

Third, although New York law is couched in terms of the rights of the defendant—whether the prosecution of the accused would result in injustice—courts interpret it much more broadly. The New York statute requires consideration of factors related to the victim, the community, and the public at large.<sup>113</sup> When interpreting "the interests of justice" under section 210.40(1), New York courts consider whether justice, broadly conceived, would be served by prosecution of the accused.<sup>114</sup> While the Prosecutor at the international level will be working on an even larger scale, the New York criteria encompass the interests of justice beyond the individual defendant.

Fourth, the ICC Prosecutor's decision not to prosecute a specific case in the interests of justice falls at an earlier stage than the New York

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108. *People v. Joseph P.*, 433 N.Y.S.2d 335, 338 (N.Y. Jus. Ct. 1980).

109. *See* discussion *supra* Part III.A.

110. *See* discussion *supra* Part II.

111. *People v. Caster*, 927 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. 2011) (citations omitted).

112. *2010 Policy Paper*, *supra* note 37, ¶ 75.

113. N.Y. CRIM. PROC. LAW § 210.40(1).

114. *See* discussion *infra* Part III.D.

decision. The New York statute applies to crimes already charged,<sup>115</sup> while the ICC “interests of justice” provision under discussion (Article 53(2)) relates to a decision not to bring charges.<sup>116</sup> These differences are not as great as they might initially appear. Given the extensive steps needed to investigate crimes of the magnitude that the ICC Prosecutor faces, it is likely that by the time of identifying potential suspects and determining whether to prosecute, the Prosecutor’s decision will be based on substantial information. Moreover, Article 53(2)(c) requires the ICC Prosecutor to consider all the circumstances related to prosecution before making a determination on the interests of justice.<sup>117</sup>

Furthermore, the difference in the number of players involved in the decision-making process between the two systems is not as significant when the broader participation of civil society at the international level is taken into account. There are fewer decision-makers at the ICC than in New York, but the audience of self-perceived stakeholders is broader. Unlike the multi-layered court system in New York,<sup>118</sup> the ICC decision-maker is often only one entity—the Prosecutor—and less frequently the PTC and Appeals Chamber (“AC”).<sup>119</sup> Yet the scrutiny of the ICC decisions by the international community widens the pool of potential players offering assessments of the situation. In particular, NGOs crucial to the creation and development of the ICC, as well as academics, believe that they have a stake in the legitimacy of the Court.<sup>120</sup> In addition, victims’ representatives and civil society more broadly may also be engaged with the ICC in a way not applicable in New York criminal cases. As a result, the concern with the interpretation of criteria at the ICC is not merely that incoming and outgoing prosecutors, or the Prosecutor and the judiciary, may diverge on the proper interpretation of “interests of justice” criteria. It is also that credible NGOs, academics, and perhaps even representatives of State Parties or UN members will put forth their own analyses based on the expanded criteria. When these analyses conflict with that of the Prosecutor, it may call into question the legitimacy of the ICC

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115. N.Y. CRIM. PROC. LAW § 210.40(1).

116. Rome Statute of the International Criminal Court, *supra* note 2, art. 53(2).

117. *Id.* art. 53(2)(c).

118. While there are occasional commentators in New York, the main players are confined to the judiciary. Thus, an examination of the implementation of the criteria by the New York courts will be the main focus of this analysis.

119. Rome Statute of the International Criminal Court, *supra* note 2, art. 53(2)–(3).

120. See discussion *infra* III.D (highlighting criticism of academics). Many NGOs are invested in the ICC. See, e.g., *About the Coalition*, COAL. FOR THE INT’L CRIM. CT., [www.iccnw.org/?mod=coalition](http://www.iccnw.org/?mod=coalition) (last visited Oct. 25, 2012) (consisting of 2500 civil society organizations in 150 countries working to support and strengthen the ICC).

in the same way that judicial disagreements among courts may undermine the perceived legitimacy of the New York adjudication process.

Moreover, this danger is exacerbated at the ICC. The ICC, as a new institution, may be undermined by apparently arbitrary or confusing implementation of nebulous criteria like proposed “interests of justice” factors because it has yet to fully establish its credibility. The ICC is also subject to greater scrutiny than New York courts. Thus, there are parallels between differences of opinion among numerous New York courts and a variety of stakeholders at the ICC.

Finally, the New York “interests of justice” determination takes place in an adversarial context, unlike at the ICC. Under the Rome Statute, there is no provision for motions of the parties regarding dismissal in the “interests of justice.”<sup>121</sup> In addition, the PTC does not review decisions of the Prosecutor to proceed with the prosecution of a case, regardless of claims from interested entities that it might not be in the interests of justice to do so.<sup>122</sup> Defendants who believe that a prosecution is not in the interests of justice have no recourse under Article 53.<sup>123</sup> There is no formal mechanism for argument from the defendants, victims, or members of the international community.<sup>124</sup> As a result, it would appear even more crucial to have the Prosecutor lay out his or her reasoning to gain the confidence of the public in his or her decisions, and in the legitimacy of the ICC more broadly. But the New York experience, using similar but more detailed factors than those in Article 53(2)(c) of the Rome Statute, suggests that enhanced criteria do not necessarily yield gains in transparency or legitimacy.

### C. Comparison of “Interests of Justice” Factors

The New York law provides a large body of “interests of justice” determinations, which can yield lessons for the ICC.<sup>125</sup> Although the criminal context differs from the types of ongoing conflicts typically faced by the ICC, the factors utilized by the New York courts sufficiently parallel the Rome Statute’s provisions. In both scenarios, the decision-maker is called upon to decide what “justice” requires. Moreover, the

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121. Rome Statute of the International Criminal Court, *supra* note 2, art. 53.

122. *Id.* art. 53(3).

123. *Id.* art. 53.

124. *Id.*

125. *Cf.* Little, *supra* note 90, at 388 (using extensive American experience regarding domestic violence to explore questions raised by the Ugandan case at the ICC, despite caveats regarding imperfect comparison).

enacted and proposed factors are aimed at curbing the discretion of the decision-maker (in New York, the courts; under the Rome Statute, potentially both the Prosecutor and the judiciary).<sup>126</sup> Thus, analysis of the New York jurisprudence will help determine whether implementation of a more extensive list of factors regarding “interests of justice” would likely benefit the ICC.

The section 210.40(1) factors largely parallel the “interests of justice” factors of the Rome Statute but are more extensive. The section 210.40(1) factors provide guidance as to when the court may dismiss an indictment in the interests of justice, based on its own initiative or on motion of the defendant or prosecutor.<sup>127</sup> Under the Rome Statute, the Prosecutor must obtain approval of the PTC with regard to declination to prosecute based on the interests of justice.<sup>128</sup> In order to maintain credibility with the ICC’s broader class of stakeholders, the Prosecutor must also attain their support—if not for the outcome of his or her decisions, then for the transparent, reasoned way his or her determinations are reached. Under Article 53(2)(c), the Rome Statute provides three factors related to the perpetrator: (1) gravity of the crime the perpetrator allegedly committed; (2) age or infirmity of the alleged perpetrator; and (3) his or her alleged role in the crime. Additional enumerated factors include: (4) interests of the victims; and (5) all other circumstances.<sup>129</sup>

The three factors related to the perpetrator under the Rome Statute find parallels in the New York factors. First, the gravity of the crime under the Rome Statute is related to the seriousness and circumstances of the offence under section 210.40(1)(a) and the extent of the harm under section 210.40(1)(b). Second, the age or infirmity of the perpetrator considered under the Rome Statute would be subsumed under section 210.40(1)(d), which includes the condition of the defendant. Third, the Rome Statute’s consideration of the accused’s role in the crime would fall under several section 210.40(1) factors, including (a) and (b) regarding circumstances and harm related to the offence respectively, (c) evidence of guilt, and (d) history or character of defendant.

The Rome Statute’s reference to the interests of the victims is more complex, reflecting the ambiguity of the term “victims.” It is paralleled directly under section 210.40(1)(i) regarding the attitude of the victim, though the judge in New York must deem such input appropriate. It may

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126. See discussion *supra* Part III.A.

127. N.Y. CRIM. PROC. LAW § 210.40.

128. Rome Statute of the International Criminal Court, *supra* note 2, art. 53(3).

129. *Id.* art. 53(2)(c).

come into play indirectly if “victims” is interpreted to encompass the community or public: sections 210.40(1)(g) and 210.40(1)(h) refer to the impact of dismissal on public confidence in the criminal justice system and on the safety or welfare of the community.

Finally, the reference under Article 53(2)(c) of the Rome Statute, authorizing consideration of all circumstances, is similar to the breadth of the section 210.40(1) factors. The New York statute contains a catchall factor under section 210.40(1)(j), allowing consideration of any other relevant fact indicating that conviction would not serve a useful purpose.<sup>130</sup> All other circumstances under the Rome Statute might also encompass section 210.40(1)(e), exceptionally serious misconduct of law enforcement.<sup>131</sup> The reference to all the circumstances or an interpretation of the term “justice” might also cover section 210.40(1)(f), the purpose and effect of sentencing the defendant for the offense.

Thus, the more detailed factors of the New York statute are similar to the current criteria of the Rome Statute, but theoretically provide for greater transparency and legitimacy due to their specificity and their longer history of use.

#### *D. Analysis of New York Case Law and Implications for the ICC*

New York courts have issued hundreds of decisions regarding dismissals in furtherance of justice, considering (at least in theory) the ten statutory factors.<sup>132</sup> A review of the New York experience will shed light on whether the ICC’s legitimacy would be enhanced by more detailed factors and public explanations of decisions regarding the interests of justice.

Specifically, an analysis of New York jurisprudence yields three lessons: (1) a requirement to provide a written rationale based on enumerated factors does not necessarily yield a full or satisfying explanation; (2) a full explanation can be counter-productive if it triggers controversy over matters of discretion, leading to apparently inconsistent results that can undermine legitimacy; and (3) reference to purposes of the criminal justice system can lead to more confusion than clarity when there

130. N.Y. CRIM. PROC. LAW § 210.40(1)(j).

131. See *2007 Policy Paper*, *supra* note 5, at 7 (noting that international justice might not be furthered by prosecution of an accused “who has been the subject of abuse amounting to serious human rights violations”).

132. See discussion *infra* Parts III.D.1–3.

is no agreement on the goals of prosecution and punishment or their relative weight.

### 1. *Efficacy of Requirement of Written Rationale*

Proponents of requiring the ICC Prosecutor to publicly explain his or her rationale based on *ex ante* standards imply that this will inoculate the Prosecutor from criticism for lack of transparency.<sup>133</sup> Yet the New York jurisprudence shows that even a statutory requirement does not ensure a thorough, let alone convincing, explanation of reasoning. For every case where the court provides a clear explanation with reference to the ten statutory factors, there are several where the court does little more than recite boilerplate language about the statute.

The New York statute provides that the court must “set forth its reasons” for granting a motion to dismiss in furtherance of justice.<sup>134</sup> New York courts have interpreted this to mean that, while the court should provide its reasoning, it need not engage in a “catechistic on-the-record discussion of items (a) through (j),” though a basis in at least one factor should be discernible.<sup>135</sup> Because the New York statute does not explicitly require an explanation for a denial, many courts deny such motions in a sentence or two, using boilerplate language.<sup>136</sup> In other cases, the court does not even include the boilerplate language before denying the motion.<sup>137</sup> Similarly, appellate courts in New York at times affirm or reverse the trial court’s dismissal with little explanation.<sup>138</sup> For instance, the Appellate Division of the Supreme Court reversed the trial court’s dismissal of drug charges without any discussion of the statutory factors or the lower court’s reasoning; it cited several cases in stating, “Upon consideration of the circumstances of this case and the factors set forth in CPL 210.40(1), we conclude that there is no compelling factor which

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133. See discussion *supra* Part II notes 26–31, 56–65.

134. N.Y. CRIM. PROC. LAW § 210.40(3).

135. *People v. Norman*, 789 N.Y.S.2d 613, 645 (N.Y. Sup. Ct. 2004) (citations omitted). It should be noted that “supreme court” in New York designates a trial court.

136. For example, in a recent case, the trial court quoted the boilerplate language regarding section 210.40, then stated, “[h]aving reviewed the Grand Jury minutes and the motion papers, the Court concludes that this case does not present one of those rare instances in which dismissal in furtherance of justice is warranted.” *People v. Caster*, 927 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. 2011) (citations omitted).

137. See, e.g., *People v. Walker*, 851 N.Y.S.2d 866, 869 (N.Y. Sup. Ct. 2008) (one-sentence conclusion rejecting case as rare instance where dismissal is warranted).

138. See, e.g., *People v. Lewis*, 868 N.Y.S.2d 909, 909 (N.Y. App. Div. 2008) (affirming dismissal in one short paragraph); *People v. M.R.*, 841 N.Y.S.2d 799, 799 (N.Y. App. Div. 2007) (affirming denial of dismissal).



warrants dismissal of the indictment in furtherance of justice.”<sup>139</sup> In addition, appellate courts affirm dismissals without any rationale or with a simple reference to the lower court’s reasoning, which can be particularly problematic when lower court opinions are difficult to find.<sup>140</sup>

While these decisions might be supportable on the merits and may not per se violate the statutory requirement of giving reasons for granting dismissals, they arguably violate the spirit of the statute by not giving lower courts or the public any guidance or reassurance that the decisions are not arbitrary. Such conclusory reasoning would obviously not increase transparency or augment the legitimacy of the ICC. If this is the result when the statute encourages articulation of the decision-maker’s rationale, there is reason to be wary of the efficacy of ICC prosecutorial guidelines that require full explanations. If the Prosecutor (or the Court) were to follow New York’s lead in relying on boilerplate language, for instance, the legitimacy of the ICC might be undermined, rather than enhanced, by what may be perceived as poorly articulated explanations of expanded criteria underlying “interests of justice” decisions.

Given the ICC Prosecutor’s reluctance to date to engage in debate over the interests of justice,<sup>141</sup> it is possible she would be reluctant to provide a thorough explanation when applying expanded interests of justice criteria, especially if it might limit future discretion. In addition, the first Prosecutor’s claim that he applied the law without considering political aspects<sup>142</sup> might have prevented a full implementation of enhanced criteria that necessarily entail political determinations. Similarly, the Court has often been reluctant to address issues related to prosecutorial discretion, particularly prosecutorial inaction,<sup>143</sup> making it possible that any judicial

139. *People v. Candelaria*, 855 N.Y.S.2d 259, 259–60 (N.Y. App. Div. 2008) (citations omitted).

140. *See, e.g.*, *Lewis*, 868 N.Y.S.2d at 909 (affirming dismissal in four sentences, relying on trial court decision with no reference to the facts of the case or specific statutory factors); *People v. Martinez*, 757 N.Y.S.2d 489 (N.Y. App. Div. 2003) (same); *see also* *People v. Vecchio*, 535 N.Y.S.2d 537 (N.Y. App. Div. 1988) (one sentence rationale relying on lower court opinion). Thanks to TJSL Reference Librarian Catherine Deane for confirming that the lower court opinions in *Lewis*, *Martinez*, and other cases are not readily available.

141. *2007 Policy Paper*, *supra* note 5, at 1.

142. Luis Moreno-Ocampo, Prosecutor, Int’l Crim. Ct., Address at Nuremberg: Building a Future on Peace and Justice (June 24–25, 2007), available at [http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf) (“My duty is to apply the law without political considerations.”). As noted above, Moreno-Ocampo’s tenure as Prosecutor ended, and Fatou Bensouda’s term began, June 2012. *See supra* note 3 and accompanying text.

143. Carsten Stahn, *Judicial Review of Prosecutorial Discretion: Five Years On*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 275 (Carsten Stahn & Goran Sluiter eds., 2009) (describing cautious stance of judicial review of prosecutorial discretion).

review would be similar to the less engaged jurisprudence in New York. Accordingly, any ICC standards adopted regarding “interests of justice” determinations should not assume that the relevant actors will adhere to non-statutory requirements for explanations of reasoning.

On the other hand, the New York and ICC jurisdictions face crimes that are different in magnitude. This difference might impact the tendency for conclusory reasoning because one might presume that greater stakes will engender greater care in providing explanations. As a result, the concerns about the potential for insufficient reasoning might seem excessive in the international context. It is nonetheless something to bear in mind because, in similar contexts, the ICC has been taken to task for insufficient or opaque reasoning.

For example, the Prosecutor has been criticized for giving superficial or unconvincing explanations of decisions not to go forward with an investigation, for example, in Iraq. In declining to initiate an investigation of alleged war crimes by British nationals in Iraq, the Prosecutor based his reasons on gravity; he indicated that the situation was not sufficiently grave due to the small number of victims (only 4–12 deaths, less than 20 victims of inhuman treatment).<sup>144</sup> According to deGuzman, the Prosecutor “conflated” the gravity threshold for admissibility and gravity of the crime as a factor for prosecutorial discretion.<sup>145</sup> More significantly, the Prosecutor has been “harshly criticized” for his explanation of his exercise of prosecutorial discretion in this context.<sup>146</sup>

Commentators point to the Prosecutor's “failure to provide clarity and detail” when articulating his reasons.<sup>147</sup> One commentator argued:

The problem with the decision not to proceed to investigate the situation in Iraq is that the Prosecutor's statement is especially glib given the complexity of the issues raised and the known level of violence in Iraq. . . . When the Prosecutor decides not to submit a request for authorization to initiate an investigation of a situation

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144. Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L. F. 281, 310–11 (2006).

145. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L. L.J. 1400, 1432 (2009); see also Ignaz Stegmiller, *Interpretative Gravity under the Rome Statute*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 611 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

146. Stegmiller, *supra* note 145, at 610 n.40 (citations omitted).

147. Murphy, *supra* note 144, at 311.

like that of Iraq to a [PTC] of the Court, it is imperative that he outline his reasons in detail.<sup>148</sup>

Similarly, the Prosecutor has been criticized for his failure to explain his conclusion regarding the gravity of the Darfur and DRC situations: “One major deficit of the [Office of the Prosecutor’s] early practice is not the application of the criterion of gravity as such, but the lack of transparency when applying it.”<sup>149</sup> The Prosecutor’s failure to provide convincing reasoning in a case as high-profile as the Iraq situation indicates that it is plausible that it might occur again in analogous contexts.

The Prosecutor is not the only entity in the ICC that might fail to provide a sufficient explanation of “interests of justice” decisions. The judiciary has faced similar criticism as well. For example, the AC was chastised by some commentators for overturning a PTC definition of gravity under Article 17(1)(d)<sup>150</sup> without providing sufficient guidance for proper interpretation. One commentator noted that although the AC is “under no obligation to develop a gravity test,” by failing to do so, “it left the Court with a legal vacuum.”<sup>151</sup> Any proposals for expanded criteria should, therefore, incorporate incentives for increased transparency in explanations regarding the interests of justice.

## 2. *Counter-productiveness of Explanations*

When New York courts do provide detailed analyses of the statutory factors to support their conclusions, the reasoning may simply provide ammunition for accusations of arbitrariness. Because the factors consist of vague criteria that must be weighed against each other according to the judgment of the court, reasonable minds may differ on the proper exercise of discretion on the facts. This plays out in various ways in New York jurisprudence. First, there are appellate court decisions that reverse lower court opinions because of apparent philosophical or theoretical

148. *Id.*

149. Stegmiller, *supra* note 145, at 611.

150. Rome Statute of the International Criminal Court, *supra* note 2, art. 17(1)(d) (providing that a case may be inadmissible due to insufficient gravity).

151. Stegmiller, *supra* note 145, at 616; *see also* Rod Rastan, *Review of ICC Jurisprudence 2008*, 7 NW. U. J. INT’L HUM. RTS. 261, 279 (2008) (commenting that “the absence of a definition of gravity in the majority decision means that much is left undecided and remains subject to future litigation,” while noting the importance of rejecting the PTC test).

disagreements on how to weigh ambiguous criteria.<sup>152</sup> Second, New York courts at the same level disagree about the proper interpretation of criteria, particularly the history, character, and condition of the defendant, and have been criticized on the grounds that their decisions are unpredictable and arbitrary. The experience of New York bears out Greenawalt’s point that complex factors weighed against each other do not lend themselves to predictability or outcome consistency.<sup>153</sup>

Transferred to the ICC context, similar disagreements will likely arise in the face of successive high-profile situations and intense scrutiny from the international community, if not other organs of the ICC. This may play out in several ways: (1) disagreements between Prosecutors (a minor issue, given the typical nine-year tenure of a prosecutor)<sup>154</sup>; (2) disagreements between the Prosecutor and PTC and/or AC; or, most likely, (3) credible analyses by outside commentators that reach outcomes different from the Prosecutor based on the same enhanced criteria. Any one of these three possibilities may decrease legitimacy for the Court given the intense scrutiny it is under. This, in turn, could be detrimental due to the Court’s need for continued backing by the international community.<sup>155</sup>

Explanations of reasoning can be counter-productive when appellate courts reverse lower court decisions based on theoretical differences over interpretations of vague criteria, showing little deference to the trial court. For example, in *People v. Schellenbach*,<sup>156</sup> there was disagreement over the seriousness of the charges and weight accorded to government misconduct. The trial court provided an extensive analysis of factors (a)–(i), with the catchall factor not applicable.<sup>157</sup> It went on to find that while the sexual assault crimes alleged were very serious, the circumstances undermined that seriousness where the prosecutor expressed doubt in the complainant and initially offered very generous plea bargains.<sup>158</sup> The prosecutor’s actions and statements also called into question the extent of harm and evidence of guilt.<sup>159</sup> The defendant’s prior misdemeanor record

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152. One commentator attributed an increase in reversals on the merits (rather than procedural error) to the adoption of the factors. *See* Wirenius, *supra* note 96, at 205, 222.

153. *See* Greenawalt, *supra* note 70, at 655.

154. Rome Statute of the International Criminal Court, *supra* note 2, art. 42(4).

155. The lack of an adversarial process does not change this conclusion, as the unpredictability of New York cases does not seem to stem from the vagaries of good or poor lawyering. Rather, the varying interpretations of amorphous notions like the character of the accused or the seriousness of a crime cause much of the unpredictability. *See* discussion *infra* Part III.D.2.

156. *People v. Schellenbach*, 862 N.Y.S.2d 730 (N.Y. Co. Ct. 2008).

157. *Id.* at 733–738.

158. *Id.* at 733.

159. *Id.* at 734.

was not considered significant, particularly as it was not related to sexual or violent crime.<sup>160</sup>

The trial court explained the governmental misconduct in great detail, while conceding it did not necessarily reach the “exceptionally serious” level compelling dismissal on its own.<sup>161</sup> The trial court concluded that although the purpose of imposing a sentence on a defendant includes deterrence, sentencing this defendant would “be a travesty of justice, given the facts of this case.”<sup>162</sup> Regarding the impact of the dismissal on the safety or welfare of the community, the court found no negative impact given the questions regarding the defendant’s guilt and the complainant’s credibility.<sup>163</sup> As for the victim’s attitude, the court did not give weight to the complainant’s wish to proceed given her history of noncooperation with the prosecutor and the prosecutor’s own reservations about credibility.<sup>164</sup> The trial court, therefore, determined that there were compelling factors supporting dismissal in the interest of justice.<sup>165</sup>

The appellate court disagreed. In a much shorter opinion (illustrating the lack of a thorough explanation as discussed above), it reversed.<sup>166</sup> It relied on the seriousness of the charges and the lack of “exceptionally serious” governmental misconduct.<sup>167</sup>

The *Schellenbach* decisions show how the same facts may give rise to two drastically different interpretations of ambiguous criteria like “seriousness” of the crime and governmental misconduct. A similar dynamic may play out at the ICC when the PTC reviews prosecutorial declinations or when commentators dissect the Prosecutor’s rationale.

Furthermore, explanations of reasoning across decision-makers can also do more harm than good if various actors apply the same criteria in different ways. New York courts have offered varying interpretations of vague criteria, such as the character or condition of the defendant.

For example, drug cases in New York dealing with the “character” of the defendant illustrate the potential implications for the ICC of similar disagreements between the Prosecutor, the PTC and AC, and commentators. In New York, it is unclear whether successful treatment for drug addiction warrants a motion to dismiss in the interest of justice. It is

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160. *Id.* at 734–35.

161. *Id.* at 735–36.

162. *Id.* at 737.

163. *Id.* at 737–38.

164. *Id.* at 738.

165. *Id.*

166. *People v. Schellenbach*, 888 N.Y.S.2d 153, 154 (N.Y. App. Div. 2009).

167. *Id.*

difficult to predict, in part, because improving one’s character is only one factor in the mix. While rehabilitation may weigh in favor of dismissal, it is typically insufficient to dismiss charges of violent crime.<sup>168</sup>

While it is unlikely the ICC will consider similar drug crime and addiction issues, the controversy in New York illustrates the amorphous nature of criteria related to the accused, such as “character” under New York law or related factors that enhanced ICC criteria might include. Moreover, looking at rehabilitation more broadly, the defendant’s capacity for rehabilitation through reintegration or the potential for reconciliation may well be relevant at the ICC level. In particular, consideration of whether the interests of justice warrant deferral to state prosecution or alternative justice mechanisms would likely rest in part on the character of the defendant vis-à-vis a form of rehabilitation. Regarding drug use specifically, it is possible the accused’s narcotics history will factor into a character assessment if the accused had been forced to use drugs prior to the commission of the crime. This scenario is relatively common with child soldiers, who may fall under the jurisdiction of the ICC for crimes committed after the age of eighteen.<sup>169</sup>

The New York case law on the significance of successful drug treatment is mixed even when dealing with nonviolent drug crimes. For example, courts have granted motions to dismiss in the interests of justice where the defendant completed residential treatment and obtained employment or overcame a drug addiction.<sup>170</sup> An appellate court went further in taking into account not only the defendant’s personal rehabilitation, but also public criticism of New York’s harsh drug laws in dismissing drug charges in furtherance of justice.<sup>171</sup>

On the other hand, a New York appellate court reversed a dismissal of drug charges where the defendant successfully completed treatment. Noting that the defendant’s motion was based mainly on completion of the

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168. See, e.g., *People v. Smith*, 630 N.Y.S.2d 84, 85–86 (N.Y. App. Div. 1995).

169. ICC accused Dominic Ongwen, currently under arrest warrant from the ICC, illustrates the potential for a scenario like this. His status as an abducted child turned Lord’s Resistance Army commander has given rise to arguments that prosecution and punishment at the ICC is inappropriate justice for Ongwen and his victims. Justice and Reconciliation Project, *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, JRP Field Note 7 (July 2008), available at [www.humansecuritygateway.com/documents/JRP\\_dominicongwen.pdf](http://www.humansecuritygateway.com/documents/JRP_dominicongwen.pdf).

170. See *People v. Brown*, 681 N.Y.S.2d 449, 451 (N.Y. Sup. Ct. 1998) (granting motion to dismiss where the defendant completed residential treatment and obtained employment); *People v. Bruno*, No. 4947/02, 2006 WL 1045065, at \*4–5 (N.Y. Sup. Ct. Apr. 19, 2006) (unpublished table decision) (dismissing drug possession charges where the defendant overcame a ten-year addiction to drugs and no longer posed a threat to the safety or welfare of the community through criminal drug use).

171. *People v. Marrow*, 798 N.Y.S.2d 560, 561 (N.Y. App. Div. 2005).

program, the court held (without providing any reasoning) that this failed to establish a compelling factor.<sup>172</sup> Similarly, a trial court considering a motion in the furtherance of justice dismissed defendant's argument about the "Draconian effect" of drug laws with "[s]o be it."<sup>173</sup>

Instead of clarifying when dismissals in the interest of justice are warranted based on the improved character of drug offenders under section 210.40(1)(d), the case law provides little clarity or predictability. By contrast, the outcome may depend on a mix of factors particular to the individual defendant. More troubling, it appears that the outcome can depend on the attitude of the judge(s) regarding rehabilitation and the severity of New York's drug laws. Other issues related to the defendant's character that are more relevant to the ICC, such as capacity for reintegration or status as a former abductee or child soldier, may engender similar opposing attitudes. Such disparate reasoning and outcomes could lead to accusations of arbitrariness at the domestic or international level.

The character of the defendant is not the only part of section 210.40(1)(d) that illustrates the danger of explanations based on vague criteria. Section 210.40(1)(d) also includes calls for consideration of the "condition" of the defendant, including physical condition, infirmity, or illness. The interpretation of "condition" is contested within the New York courts and by commentators. Likewise, it is unclear how age, infirmity, or related considerations might be expected to influence the interests of justice under the Rome Statute.

In New York, the early days of the AIDS epidemic led to many motions to dismiss in furtherance of justice based, in whole or in part, on illness. The New York courts have been criticized for being too stingy in granting such motions.<sup>174</sup> New York courts do occasionally grant a dismissal when a defendant's life expectancy does not exceed the time anticipated for trial or the likely sentence upon conviction;<sup>175</sup> it is otherwise unlikely, especially if other factors weigh against dismissal. The standard has evolved to require defendants to be "literally at death's door" such that incarceration would hasten death or be "grossly inhumane" for

172. *People v. McIlwain*, 751 N.Y.S.2d 503, 504 (N.Y. App. Div. 2002).

173. *People v. O'Neill*, 379 N.Y.S.2d 244, 247 (N.Y. Sup. Ct. 1975).

174. *Wirenus*, *supra* note 96, at 218.

175. *See, e.g.*, *People v. Camargo*, 516 N.Y.S.2d 1004, 1005 (N.Y. Sup. Ct. 1986) (defendant's life expectancy was shorter than the time needed for trial); *cf. People v. Wong*, 642 N.Y.S.2d 396, 397 (N.Y. App. Div. 1996) (affirming dismissal where defendant would probably "not survive the minimum term of imprisonment" for the charge, although the court states that this factor alone would not lead to dismissal).

the court to grant dismissal.<sup>176</sup> A defendant who cannot provide evidence of an extremely dire medical situation is not given the benefit of a compassionate dismissal. As a result, commentators have criticized New York courts for discriminatorily backtracking on the use of compassionate dismissals for illness.<sup>177</sup>

The history of New York illness cases demonstrates the controversy over whether the courts are properly exercising their discretion when considering the “condition” of the accused. The level of illness required for the court to consider the circumstances exceptional is unclear. Even if the decisions are warranted because a less stringent standard might undermine criminal justice (e.g., by encouraging crimes by some terminally ill but not completely incapacitated defendants), the illness cases can be problematic. They now hinge on a determination beyond the competence of the criminal justice system: the life expectancy of the accused.

Courts cannot adopt a compassionate release policy as part of the interests of justice, even one relying on medical opinions of life expectancy, without controversy. Case in point: Abdel Basset Ali al-Megrahi, who was convicted of the bombing of Pan Am Flight 103 (Lockerbie bombing).<sup>178</sup> Scotland granted al-Megrahi compassionate release in 2009 based on medical evaluations showing his life expectancy to be three months.<sup>179</sup> Many survivors of the Lockerbie bombing argued that release was inappropriate regardless of his illness or alleged short life expectancy.<sup>180</sup> In July 2011, almost two years later, al-Megrahi was alive and in attendance at a pro-Qaddafi rally in Libya.<sup>181</sup> He outlived Qaddafi, dying in May of 2012.<sup>182</sup>

This illustrates the problems with criteria like the illness of the defendant: first, there will be disagreements over whether a short life expectancy is sufficient for dismissal; and second, it is difficult to accurately predict the course of an illness. The ICC Prosecutor has indicated that international justice may not be served by the prosecution of

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176. See, e.g., *People v. Bloomfield*, No. 1942/01, 2002 WL 34393829, at \*27 (N.Y. Sup. Ct. 2002) and cases cited therein.

177. See Wirenius, *supra* note 96, at 219–20.

178. J. David Goodman & Robert Mackey, *Lockerbie Convict Appears at Rally in Libya*, N.Y. TIMES (July 27, 2011), <http://thelede.blogs.nytimes.com/2011/07/27/lockerbie-convict-appears-at-rally-in-libya/>.

179. *Id.*

180. *Id.*

181. *Id.*

182. Robert D. McFadden, *Abdel Basset Ali al-Megrahi, Lockerbie Bomber, Dies at 60*, N.Y. TIMES, May 21, 2012, at A24.



a terminally ill defendant,<sup>183</sup> but he or she will likely face the same challenges as New York and Scotland in applying this factor. Therefore, the experience of New York demonstrates that divergent interpretations of vague criteria may create controversy, and analogous controversy may diminish the benefits of adopting enhanced criteria at the ICC.

### 3. *Lack of Agreement on Goals of Prosecution*

Finally, the ICC faces challenges similar to New York in discerning agreement on the goals of prosecution and their relative weight. The underlying purposes of the criminal justice system should propel the exercise of discretion in the interests of justice. In New York, it should drive the balancing process of the ten factors, but there is a significant impediment: there is little consensus on the purposes of prosecution or how to balance them. There is no coherent criminal justice theory underpinning the interpretation of the section 210.40(1) factors or their application to certain facts. Instead, New York courts are left to pick and choose from among several theories when considering “the purpose and effect of imposing upon the defendant a sentence authorized for the offense” under section 210.40(1)(f).<sup>184</sup>

New York legislation provides that the purpose of the penal law is prevention “through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.”<sup>185</sup> Courts considering section 210.40 dismissals often refer to four recognized purposes under section 210.40(1)(f): “retribution, rehabilitation, isolation and deterrence.”<sup>186</sup> How they interpret and weigh these four purposes, however, varies.

For instance, in *People v. Vecchio*, the trial court granted a motion to dismiss drug possession charges, citing the four purposes of punishment.<sup>187</sup> The court noted that deterrence has largely failed, but is still considered the default response to crime.<sup>188</sup> It examined rehabilitation

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183. 2007 Policy Paper, *supra* note 5, at 7.

184. N.Y. CRIM. PROC. LAW § 210.40(1)(f) (McKinney 2011).

185. N.Y. PENAL LAW § 1.05(6) (McKinney 2011).

186. *See, e.g.*, *People v. Harmon*, 586 N.Y.S.2d 922, 925 (N.Y. App. Div. 1992) (citation omitted).

187. *People v. Vecchio*, 526 N.Y.S.2d 698, 700 (N.Y. Sup. Ct. 1987), *aff'd*, 535 N.Y.S.2d 537 (N.Y. App. Div. 1988).

188. *Id.* at 701.

programs and concluded that non-incarceration-based programs seem more effective at reducing recidivism.<sup>189</sup> As a result, defendant’s entry into a rehabilitation program should be rewarded even if it is post-arrest.<sup>190</sup> The court dismissed two counts of drug charges, enabling a probationary sentence where the defendant could finish his outside rehabilitation program.<sup>191</sup> It found that this rehabilitation would be a benefit to everyone, while incarceration for several years would “accomplish absolutely nothing.”<sup>192</sup>

By contrast, in *People v. Harmon*, the appellate court relied on a different interpretation of the same four purposes to reverse a dismissal of drug possession charges.<sup>193</sup> Although the defendant had dyslexia and suffered from other “unfortunate” circumstances, his return to the same location (presumably seeking illegal drugs) showed that he needed to be taught that he could not ignore the drug laws with impunity.<sup>194</sup> The *Harmon* court saw a felony conviction as necessary to deter the defendant and others, despite recognizing that the defendant needed help.<sup>195</sup> In fact, the court viewed conviction and sentencing as the appropriate vehicle for getting the defendant the help he needed.<sup>196</sup> Only a few years earlier, the *Vecchio* court saw incarceration as having a negative effect rather than a rehabilitative one.<sup>197</sup> Although other facts were also considered, both courts relied on the same four purposes of punishment, but interpreted and weighed them in distinctly different ways.<sup>198</sup>

In other cases, the courts emphasize one of the four purposes of punishment without any explanation. In *People v. Watson*, the court relied on deterrence (specific and general) in denying defendant’s motion to dismiss child endangerment charges.<sup>199</sup> The court stated: “In the event that a dismissal is granted, the defendant, or any other person, may think it acceptable to leave small children at home without proper supervision.”<sup>200</sup> In *People v. Murray*, the court referred to “security, deterrence and

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189. *Id.* at 702.

190. *Id.* at 699, 703.

191. *Id.* at 703.

192. *Id.* at 701–03.

193. *People v. Harmon*, 586 N.Y.S.2d 922, 925–26 (N.Y. App. Div. 1992).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 703.

198. Even if the charge in *Harmon* eventually led to probation, similar to the expected outcome in *Vecchio*, the court’s reasoning was distinct; as a result, it would be difficult to predict which interpretation of the theories of prosecution and punishment would prevail in the future.

199. *People v. Watson*, 700 N.Y.S.2d 651, 658 (N.Y. Crim. Ct. 1999).

200. *Id.* at 652.

rehabilitation” under section 210.40(1)(f), but the need to incarcerate the defendant to protect society from a serious crime was determinative in the court’s denial of the motion.<sup>201</sup>

If incapacitation were the most important purpose, then one would expect to see courts granting compassionate dismissals based on whether the defendant was capable of posing a danger to the public, rather than whether he was at death’s door. If the key purpose were rehabilitation, then courts would grant motions to dismiss based on successful drug treatment regardless of the type of drug-related crime or whether the program was entered into post-arrest. On the other hand, if the paramount purpose were retribution, then dismissals in the interest of justice would be determined after an analysis of whether the defendant deserved punishment based on his culpability, not his physical illness or addiction status.

If deterrence were the key consideration, then courts would grant dismissals depending on the impossible calculus of whether the defendant or others would perceive the dismissal as an invitation to commit future crimes. Given the criticisms of the rational actor model underlying deterrence in general,<sup>202</sup> the courts might interpret deterrence in varying ways.<sup>203</sup> Furthermore, the intersection of rehabilitation and specific deterrence theories would support far more dismissals of drug charges based on successful drug treatment. If various theories support prosecution, then consistency and predictability should be predicated on an agreed hierarchy of justifications currently lacking in New York case law.

The disparate New York case law bears out deGuzman’s theory that it is difficult, if not impossible, to develop consistent guidance without agreement on the underlying purpose of the criminal justice system.<sup>204</sup> The inconsistency across courts when identifying and interpreting the proper purposes of prosecution and punishment may lead to accusations of arbitrariness and bias. Moreover, the purpose of prosecution and punishment is only one of ten vague criteria open to inconsistent

201. *People v. Murray*, 634 N.Y.S.2d 985, 987–88 (N.Y. Sup. Ct. 1995). In fact, the court concludes that the motion to dismiss should be denied on this ground, but nevertheless goes on to discuss the subsequent factors. *Id.* at 988.

202. James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s impact*, 54 VILL. L. REV. 1, 16–18 (2009) (discussing deterrence and the rationality assumption).

203. *See, e.g., People v. Vecchio*, 526 N.Y.S.2d 698, 701 (N.Y. Sup. Ct. 1987), *aff’d*, 535 N.Y.S.2d 537 (N.Y. App. Div. 1988) (citing recognition of the failure of deterrence-based sentencing).

204. *See supra* notes 80–89 and accompanying text.

interpretations. If the purpose of the prosecution guided the interpretation of the ambiguous criteria, rather than standing as a (confusing) factor on its own, the remaining factors would be more successful in limiting arbitrariness and increasing predictability. Instead, section 210.40(1)(f) of the New York statute is also ambiguous, with courts giving different interpretations to various purposes and according them varying significance. New York jurisprudence shows that the implementation of more detailed factors for interests of justice without a shared, underlying theory is problematic, to say the least.

As has been discussed elsewhere,<sup>205</sup> the underlying purposes of the ICC are not entirely clear. Prevention, deterrence, retribution, restorative justice, rehabilitation, incapacitation, and expressivism have all been cited as potential goals of the ICC.<sup>206</sup> But there is as yet no agreement on the paramount purpose or purposes of the ICC, the preference for prosecution,<sup>207</sup> or how to consider potentially competing interests.<sup>208</sup> The goals of the ICC, and specifically the purpose of prosecution, are likely candidates for enhanced interests of justice criteria.<sup>209</sup> If they are not adopted as separate criteria, they are likely to guide the interpretation of the other factors. If enhanced criteria are intended to increase the transparency and legitimacy of the ICC, it is crucial for the ICC and its stakeholders to reach agreement on underlying principles to avoid the contradictory results exemplified by the New York jurisprudence.

In sum, the three lessons derived from New York are likely to carry over to the ICC context despite the differences between New York criminal law and the Rome Statute. First, although the judiciary is the sole decision-maker in New York, the difficulty of providing consistently thorough explanations would apply with equal force to the ICC Prosecutor, the PTC, or the AC. Similarly, the complexities of implementing criteria for an inherently nebulous concept such as the interests of justice will remain whether in New York (where statutory criteria are applied by the courts) or in the ICC (where prosecutorial guidelines might be adopted by the Prosecutor, perhaps reviewed by the

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205. See, e.g., deGuzman, *supra* note 19, at 300–01.

206. See, e.g., Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 265–78 (2008).

207. The OTP has mentioned the prevention of impunity. See *2007 Policy Paper*, *supra* note 5, at 4, 8–9. This, however, goes to the preference for prosecution in general rather than criteria for determining when the exceptional case for non-prosecution might exist.

208. See *supra* notes 79–83 and accompanying text.

209. See, e.g., Webb, *supra* note 62, at 335–44 (suggesting international peace and security, transitional justice, and deterrence as relevant factors).

PTC and AC, and critiqued by respected and influential commentators). Such disagreements over the proper interpretation of vague criteria may undermine legitimacy by highlighting discrepancies and yielding unpredictable outcomes. Finally, both New York and the international community have failed to articulate a shared vision of the underlying principles of criminal justice, particularly the purposes of prosecution and punishment. As a result, it is difficult to avoid accusations of arbitrariness in interpreting ambiguous criteria, whether at the domestic or international level.

The experience of New York, therefore, lends support to those skeptical of the adoption of specific criteria for ICC declinations in the interests of justice. Greenawalt intimates that it is impossible to adopt satisfactory criteria for inherently complex and ambiguous concepts.<sup>210</sup> The New York statutory factors and case law seem to support the argument that such criteria are difficult to craft and may actually backfire by encouraging more disagreement when interpreting and applying the criteria. Similarly, deGuzman fears that the use of additional “malleable” criteria will merely emphasize the inconsistency of decisions.<sup>211</sup> As a result, increased transparency may actually undermine legitimacy.<sup>212</sup> The cases discussed above highlight the courts’ inconsistencies when interpreting the factors, which could decrease the decision-maker’s legitimacy.

On the other hand, even skeptics may think that increased exploration of discretion may be beneficial. Goldston, despite his misgivings, concludes that prosecutorial guidelines may beneficially illuminate the difficulty of decisions and the complex calculus of considerations involved.<sup>213</sup> One commentator on New York’s “furtherance of justice” provision, Sheila Kles, rejected a dissenting opinion in the New York Court of Appeals, which warned of “the futility of developing all-encompassing rules to cover all situations of injustice.”<sup>214</sup> Kles countered: “The presence of a standard to apply in using these dismissals will, by its existence, limit arbitrariness. A standard compels reflection upon the reasons for a dismissal rather than simply permitting a mere statement that a case was dismissed ‘in furtherance of justice.’”<sup>215</sup>

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210. Greenawalt, *supra* note 70.

211. deGuzman, *supra* note 19, at 296–99.

212. *Id.* at 298–99.

213. Goldston, *supra* note 14, at 406.

214. Kles, *supra* note 92, at 470 (citing *People v. Belge*, 359 N.E.2d 377, 377 (N.Y. 1976) (Jason, J., dissenting) (per curiam)).

215. *Id.*

There is something to be said for the argument that some kind of criteria is necessary to forestall the exercise of discretion based on nothing but a conclusory statement. Unfortunately, the New York courts have still utilized conclusory statements on more than one occasion, particularly for denials. Moreover, the ICC does not face virtually unbounded judicial discretion like New York did prior to the adoption of the section 210.40(1) factors. The Rome Statute provides at least a few enumerated factors for the Prosecutor to consider when determining whether to decline to prosecute in the interests of justice. Those who are calling for further criteria advocate that additional factors would be beneficial. The experience of New York, however, strongly suggests that further factors might do more harm than good.

#### CONCLUSION

Commentators differ on whether the adoption of detailed prosecutorial guidelines for “interests of justice” determinations will enhance the legitimacy of the ICC. An examination of the New York experience implementing specific criteria for dismissals in furtherance of justice shows that adoption of factors is not a panacea.

The New York statutory factors and case law teach three specific lessons on mandating more detailed criteria for the ICC’s decisions regarding declination to prosecute. First, even a statutory requirement to explain judicial reasoning may not yield the desired transparency. As illustrated by several New York cases and criticism of the ICC, decision-makers are apt to reach conclusions without providing satisfactory rationales. Second, while guideposts may be useful, they may instead provide more fodder for disagreement on the merits. This may lead to more controversy, rather than less, particularly concerning broad, ambiguous criteria such as that related to the defendant’s history, character, and condition. Finally, the lack of a guiding theory to drive the interpretation of ambiguous criteria can produce contradictory or unpredictable results.

Nonetheless, commentators seem to expect ICC entities to provide thorough and effective rationales for decisions even though they have no such duty. Outside stakeholders make high demands as demonstrated by the criticism of the Prosecutor’s pronouncements and the Court’s decisions regarding gravity. While often acknowledging that there is no requirement that the ICC offer further reasoning, academics continue to propose that

better explanations would improve the ICC's credibility.<sup>216</sup> As a result, it is possible that the recently sworn-in Prosecutor will seriously consider adopting expanded interests of justice criteria in the near future, despite the risks.

The precise contours of such criteria are beyond the scope of this article, but some suggestions can be made based on the experience of New York. First, there must be full buy-in from the new Prosecutor and her office regarding implementation of any prosecutorial guidelines, including a genuine commitment to full explanations of its decisions, even those that reveal policy choices that are not made in a purely legalistic, technical manner. The Prosecutor might even consider an internal or external review board to facilitate this process, though this might prove too intrusive.<sup>217</sup> A more palatable approach might be to allow some of the stakeholders, including the defense and victims, to offer their thoughts on the issue in a more formal process.<sup>218</sup>

In addition, both the ICC and its stakeholders must accept some apparent inconsistency in outcome, recognizing that each situation will differ, and that context matters. The focus should be less on the outcome and more on the efforts of the Prosecutor to provide explanations. Furthermore, interested parties must accept that reasonable minds can differ when interpreting amorphous criteria. Criteria related to the interests of justice could be fleshed out with examples of various scenarios related to each factor in order to provide a framework for discussing nebulous concepts like the defendant's role or character.

In particular, an effort should be made to work toward common understandings of "justice" in terms of the ICC's goals, and specifically regarding the purposes of prosecution. The projects of adopting prosecutorial guidelines and agreeing on the underlying purpose of the ICC should work hand in hand, so that any prosecutorial guidelines reflect a shared vision of the ICC (as proposed by deGuzman).<sup>219</sup> Accordingly, the ICC could potentially avoid the confusing situation whereby New York courts appear to manipulate the breadth of the purposes of

216. See *supra* notes 55–66 and accompanying text.

217. Cf. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1277 (2011) (exploring ways to encourage disclosure and transparency of declinations of prosecution based on the belief that the law is wrong or application of the law to that particular defendant or in that particular context would be wrong, i.e., prosecutorial nullification).

218. *Id.* at 1279 (suggesting a "formal opportunity for the victim, law enforcement, and, in appropriate cases, even the defense counsel to lobby the prosecutor who signals that she is considering nullification in a given case").

219. deGuzman, *supra* note 19, at 312 (advocating expressivism as the central theory on which to build consensus).

punishment in order to reach conclusions based on individual conceptions of good law.<sup>220</sup> Keeping in mind the potential pitfalls illustrated by the implementation of “interests of justice” criteria in New York, the Prosecutor could work with the international community toward agreement on a shared understanding of the “interests of justice” and concomitant prosecutorial guidelines to see that vision come to fruition.

In weighing whether to heed the calls for enhanced prosecutorial guidelines, the Prosecutor should consider the cautionary lessons offered by the experience of New York about overestimating the potential advantages of adopting further criteria for such a fraught and complex decision as determining the interests of justice.

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220. Drug crime cases exemplified this problem, as judges seem to reach conclusions based on their personal views toward drug policy. *See* discussion *infra* Part III.D.2.