Hakemli Makale

MIRJAN DAMAŠKA'NIN 'AMAÇLAR VE BAŞARILAR ARASINDA ULUSLARARASI CEZA MAHKEMESİ' ADLI MAKALESİ ÜZERİNE BİR ELEŞTİRİ: ULUSLARARASI CEZA MAHKEMESİNİN ÇELİŞKİLERİ

A Critique to Mirjan Damaška' 'International Criminal Court between Aspiration and Achievement' Article: The Paradoxes of the International Criminal Court

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ÖZET

Bu çalışmanın amacı Mirjan'nın 'Amaçlar ve Başarılar Arasında Uluslararası Ceza Mahkemesi' adlı çalışmasını tartışmaya açmaktır. Damaška ilgili makalede bir yandan Uluslararası Ceza Mahkemesi'nin normatif yapısını ele alırken, diğer yandan da mahkemenin amaçları ve başarıları arasındaki artan ayrışmayı incelemektedir. Mirjan Damaška mahkemenin birçok başarısı arasında, mağdurların ve tanıkların korunması noktasındaki sorunların aşıldığına önemle vurgu yapmıştır. Ne var ki, Uluslararası Ceza Mahkemesi varoluş amacı olan yaptırım uygulama noktasında kapasite eksikliği çekmektedir ve de bağımsız bir kuruluş olma karakterinden yoksundur.

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Buradan hareketle, makalede Mirjan Damaška'nın makalesine eleştirel açıdan yaklaşmakta; mevcut sorunların Uluslararası Ceza Mahkemenin meşruiyetini sorgulamaya açtığını ve Mahkemeye yöneltilen eleştirilerin mahkemenin karşıtlarını güçlendirdiği yönündeki argümanlar tartışılacaktır.

Anahtar Kelimeler: Mirjan Damaška, Uluslararası Ceza Mahkemesi, Niyet, Başarı, Eksiklik ve İnceleme

ABSTRACT

This research aims to examine Mirjan Damaka's article "The International Criminal Court between Aspiration and Achievement." Mirjan Damaka examined the International Criminal Court's normative structure and the growing gap between its aspiration and achievements in his paper. The International Criminal Court, among its many accomplishments, overcomes challenges by protecting and helping victims and witnesses. Despite its founding aims, however, the International Criminal Court lacks enforcement ability and independent structural characteristics. As a result, this study will argue Mirjan Damaka's missing points by examining how these challenges call into question the Court's credibility and empower the Court's adversaries.

Keywords: Mirjan Damaška, International Criminal Court, Aspiration, Achievement, Gap, Review

1. METHOD:

In this report, the paper will examine the paradoxes that arise from the International Criminal Court's (hereinafter the ICC) framework's antipathetical approaches. This paper aims to compare and contrast other scholars' perspectives on the International Criminal Court's paradoxes, as well as to assess what the Court has promoted to international law and how it has dealt with present disputes. This

analysis starts by examining the enforcement power of ICC's prosecutors in current disputes and complexities on state cooperation.

The paper will then aim to address the aforementioned post, which discusses complementarity paradoxes and the position of the International Criminal Court's Prosecutor. The paradoxes concerning the participation of victims are then discussed. Finally, as a means of mitigating inequalities, the issue of the Trust Fund will be investigated.

2. INTRODUCTION

Since 2002, the Rome Statute is centralised by the International Criminal Court, (hereinafter the ICC) with its *sui generis* nature, within the institutional structure of international justice systems, the ICC has had extensive international jurisdiction over the crimes of war, crimes against humanity, aggression and genocide. However, while States and their officials commit crimes around the world, despite its founding purpose, the ICC continues to be ineffectual in prosecuting such crimes.

The current status quo in international relations is contradicted by the idea of an international society constituted of sovereign states with differing traditions, religions, and traditions, and state practices. As seen in the past, International law and international politics are inextricably linked with each other. The interaction between these two phenomena shows itself in the functions and structure of the court to explain its potential as an independent body to control States' criminal activities.

Damaska, in his article, attempts to set forth this issue under the ICC's aspiration and achievements. Yet, the article fails to note sufficiently why ICC has not been successful to solve criminal disputes. Due to this reason, this critical review presumes to flesh out some of the contradictions of Damaska's article. Therefore, this paper reviews the critical problems; state cooperation and participation in ICC mechanism, complementarity issues, the ineffectiveness of prosecu-

tion office, and reducing disparity that addresses some of the International Criminal Court's fundamental contradictions. The tasks listed below are intertwined with one another. It would be exceedingly difficult, if not impossible, to portray accomplishments and ambitions in this manner.

3. THE PARADOXES

3.1. The Paradox of the ICC and State Cooperation:

This section presents a review discussing critical approaches to the International Criminal Court and the methods developed: specifically, the terms of aspiration and achievement, as well as the use of the term of paradox as a critical technique to analyse how the International Criminal Court is used in the cases.

International law has always been in an odd situation, fighting to demonstrate that it is credible indeed and that its subjects will follow its principles. International lawyers and scholars have attempted to establish rule hierarchies since the archaic time, arguing that any universal value should be based on a ground that can be made without reservations. Considering that States have legislation and executive bodies which apply rules to the common citizens, one can assert applying international law in the same fashion as national law to the international community. Thereby, notions such as *'jus cogens'*, '*erga omnes'*, and *'non-derogable right'* find their entire existence in international law.

One of the most important paradoxes of ICC emerges at this point. This could be imagined as an illusion that there are no borders between the national and international spheres in terms of cooperation. Yet, state cooperation determines the International Criminal Court's legitimacy as an independent court. The ICC relies on state support to carry out its primary functions and obligations at all stages. As the ICTY Appeals Chamber expressed that complying with the international tribunals are an obligation *erga omnes* for State or an

obligation that all States owe to the international community.[1] The Rome Statute provides the legal structure which should include full cooperation with the ICC's to investigate and prosecute criminal offences.[2] However, as significantly seen in Omar al-Bashir case, the African Union called members to not collaborate in the detention of the offender and has rejected the foundation of Ethiopia centred ICC office. The call for non-cooperation in President al-detention Bashir's is in breach of the Rome Statute, which allows ICC states parties to comply with the court.[3]

The ICC's inability or reluctance to comply with problems has become an operational reality, most notably in the UN Security Council, as alluded to in the Darfur and Kenya cases. The willingness of states to cooperate or provide information, particularly in UN Security Council Referrals of non-State parties, has become the *"elephant in the room*" of admissibility proceedings.[4]

The Prosecutors may also ask the Court for help and cooperation under Article 93, which is known as "*reverse cooperation*"[5]. Even though States Parties have a general obligation to comply with the ICC, the Statute should include appropriate contact networks and languages[6]under the 9th section of the Rules of Procedure[7]. For com-

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1 Prosecutor v. Tihomir Blaskic (Trial Judgement), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, available at: https://www.refworld.org/cases,ICTY,4146f1b24.html [accessed 6 April 2021].

2 Blatmann, R. and Bowman, K. (2008). "Achievements and Problems of the International Criminal Court: A View from Within", *Journal of International Criminal Justice*, 6(4), p.722.

3 Keppler, E. (2012). "Managing Setbacks for the International Criminal Court in Africa", *Journal of African Law*, *56*(1), pp.2-3.

4 Akande, D. (2012). "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC", *Journal of International Criminal Justice*, *10*(2), pp.299-324.

5 Gioia, F. (2011). Complementarity and 'reverse cooperation'. In C. Stahn & M. El Zeidy (Eds.), The International Criminal Court and Complementarity: From Theory to Practice (pp. 807-829). Cambridge: Cambridge University Press.

6 Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194 [2011] ICC Pre-Trial Chamber II ICC-01/09-58 21-04-2011, 21 April 2011. available at https://www.icc-cpi.int/pages/record.aspx?uri=1062611 [accessed 12 March 2021].

munication issues, the ICC has an agency known as the Assembly of States Parties (ASP). However, the organ's efficacy is debatable.[8] A state's refusal or inability to cooperate is likely to imply either reluctance or inability. Non-cooperation by states may be viewed as passive refusal. The declaration of a lack of resources does not inherently imply inabilities, such as failing to meet demands for arrest and transfer of persons or evidence preservation are not met, rather, it designates indicative of deliberate state conduct. This is due to the erroneous assumption that the International Criminal Court (ICC) will intervene if they do not investigate or prosecute crimes. States would prefer not to intervene. It obstructs government cooperation.

As pointed in Rome Statute: *"There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice"*[9], the second criterion is an unjustified delay, which is accepted as an essential element of a fair trial. Furthermore, the point of the proceedings in which the interval occurs, such as the investigation and prosecutorial stages, is used to assess unwillingness.[10] It points out that, in contrast to its domestic counterparts, the International Criminal Court is not backed by a draconian sanction regime. As a result, the Court's rulings must depend on outside assistance to be implemented. The ICC's vulnerability stems from a sovereignty problem.

The Rome Statute is a challenge to independence and the versatility of government officials worldwide, especially in the United States, working to patronize national interests. Cryer[11] emphasizes

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7 Article 86, Rome Statute (n 3)

8 ''Report of the Bureau on Non-Cooperation (11th ASP)' (Assembly of States Parties 2012) ICC-ASP/11/29 Available at https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/11th%20session/Pages/eleventh%20session%20of%20the%20assembly%20of%20states%20parties.aspx, [accessed 12 March 2021].

9 *Op.Cit*., the Rome Statute.

10 Damaška, M. (2009). "The International Criminal Court Between Aspiration and Achievement", *UCLA Journal of International Law and Foreign Affairs*, 19, p.21.

11 Cryer, R. (2005). "International Criminal Law *vs.* State Sovereignty: Another Round", *European Journal of International Law*, 16(5), p.980.

while the state sovereignty argument continues to play a role in 'real-politik', it prevents also the actualisation of international criminal justice at every step. The studies have been conducted to bolster up this argument. As Kaul[12] points out, the Court lacks administrative authority and a law enforcement agency of its own. However, the Court is reliant on states' full alignment to carry out its sentences due to a lack of resources and expertise. Furthermore, the global economy necessitates constant US diligence to ensure international peace and security.[13] This contradiction itself exposes the realisability problem of ICC. According to Bolton[14], the International Criminal Court (ICC) prosecutor is targeting state officials. He believes the US would have been accused of war crimes due to dropped atomic bombs on Nagasaki and Hiroshima. On the one hand, while calling on a state to help strengthen the court, on the other hand, the court opens its triableness to the discussion. This, though, is a paradox.

Despite this, Damaška's essay has attracted criticism from academics. According to Malekian's[15] analysis, one major weakness in the paper is that it does not consider or discuss Islamic law. The problem arises here: the ICC's legal framework is structured on civil and common law, and delegates failed to consider the world's third-largest legal system. The absence of Sharia law, which governs over 350 million citizens, is a point of contention for Arab states. Furthermore, the number of Arab judges is debatable.[16] The Chinese and Hispanic law systems were also neglected. When the ICC aims to bridge the gap between achievement and promise, it needs to change its homogeneous framework to a heterogeneous one. If not, the Court is defenceless in the face of its adversaries. The ICC therefore should concentrate its efforts on another judicial system such as Islamic law.

Kaul, H.P. (2007). "The International Criminal Court: Current Challenges and Perspectives", *Washington University Global Studies Law Review*, p.578.

13 Scheffer, D. (1999). "The International Criminal Court: The Challenge of Jurisdiction", *America Society of International Law Proceedings*, 93, p.68.

14 Bolton, J.R. (2001). "International Criminal Law *vs.* State Sovereignty: Another Round", *Law and Contemporary Problems*,64(1), p.170.

15 *Op.cit,* Malekian, p.612.

16 *Ibid.*

3.2. The Complementarity Paradox and the Court

The complementarity feature of the Court does not substitute domestic jurisdictions, which is another paradox. The Rome Statute, Article 17, emphasises that the Court can perform as a "complementary" clause, meaning that it can only prosecute if states refuse to do so. Damaška[17] pointed *"The ICC's tremendous weakness against the states, the greater complexity of the ICC's procedural arrangements is a factor making the realisation of its objectives more difficult."* The principle of complementarity, according to Kaul[18], conduces to a paradox for the Court. Herein Kaul takes position from Damaška's side at the point of discussion on complementarity. The Court would be offered little to do if states fulfil their primary obligations in prosecuting crimes. The statute, on the other hand, contains vague guarantees on due process; it delimits its jurisdiction and enunciates supremacy over all national laws, including those of countries that have refused to submit to the Court's jurisdiction.[19]

Furthermore, Damaška does not strive to distinguish between the different forms of complementarity, and his explication lacks what scholars refer to as "*positive complementarity*". These haven't been found yet. The ICC should make an appeal to the domestic courts for caseload sharing at this stage. The claim presented in "Burke-White's study[20] was created to fill a legal lacuna. He coined the term "proactive complementarity" to describe a new approach to resolving the ICC complementarity issue. It claims that the Court should work more closely with national governments and allow states to prosecute foreign crimes on their own. For instance, the International Criminal Tribunal for the Former Yugoslavia (*hereinafter ICTY*) realized that its

17 *Op.cit,* Damaška. p.24.

18 *Op.cit*. Kaul, p.577.

19 Walker, A.J. (2004). "When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees", *West Virginia Law Review*, 106, p.259.
Burke-White, W. W. (2008). "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", *Harvard International Law Journal,* 49, p63.

workload was heavy. It made it impossible to complete its work on time. As a result, this Court assigned low profile cases to domestic courts. The majority of cases were sent to Bosnia- Herzegovina's National Court.[21]

Damaška addresses the disparity between the ICTY's and the ICTR's primacy approaches, which are diametrically contrary to the ICC's complementarity concept. According to Kyriakakis[22], the primacy, or in other words supremacy of the ICC over national courts, the policy has increased the Security Council legal impact decisions on the credibility of both international and national judicial systems.

As Justice Jackson's stressed that "*courts try cases, but cases also try courts*."[23] Israel case is a picture of this argument. It is clear that the resolution of the Israeli-Palestinian conflict is not a criminal procedure, it is a political question.[24] Therefore, the ICC is at the crossroads of jurisprudence; to maintain its legitimacy, the Court should be cautiously apolitical.[25] This issue is crucial about the Israeli and Palestinian case.

However, despite several reports from the United Nations bodies and independent agencies confirming that Israel is responsible for grave human rights/humanitarian law violations committed in Palestine (the Gaza Freedom Flotilla and Operation Cast Lead)[26], the Palestinian case demonstrated that the International Criminal Court's role to provide universal justice has been suffered by the United States's actions.

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21 Ibid, Burke-White, pp.67-105.
Kyriakakis, J. (2008). "Corporations and the International Criminal Court: the Complementarity Objection Stripped Bare", *Criminal Law Forum*,19, p.142.

23 Crowe, D. (2014). *War Crimes, Genocide, and Justice: A Global History*. Springer, p.161.

24 Sachs, N. (2015). Why Israel Waits: Anti-solutionism as a strategy. *Foreign Affairs*, *94*(6), 74-82.p.75.

25 Balachandran, G., & Sethi, A. (2015). Israel–Gaza Crisis: Understanding the War Crimes Debate. *Strategic Analysis*, *39*(2), 176-183.

26 Human Rights Watch Report, http://www.hrw.org/ world-report-2010/israel-occupied-palestinian-territoriesopt (accessed on 10 July 2013. Note: Also, Similar approach was seen at he Gaza Freedom Flotilla Case.

The US and Israel hide behind legal points such as the legitimacy of Palestine as a state. Because according to Article 12 (1) of the Rome Statute, Palestine is not a recognized country within the jurisdiction of the ICC. Therefore, Palestine could not make a statement to accede to the Rome Statute considering paragraph 3 of the aforementioned Article and the ICC have no jurisdiction over Palestine. But, despite the prosecutor has discretionary power to interpret this issue and the right to make a statement before the Pre-trial Chamber of the Court (the PTC), she did not use this power.

In the Afghanistan case, the Court can take action against the U.S. about certain alleged war crimes, such as U.S. Army Lieutenant William Calley case who was responsible for the murder of hundreds of civilians. The ICC Chief Prosecutor, Fatou Bensouda, according to Article 15 of Statute, efforts to open an investigation proprio motu (on her authority) against the U.S.[27] The subject of this investigation was the US' alleged crimes. Since 2003, the US has been accused of committing crimes in Afghanistan. But, U.S. blocks Prosecutor's Visa to Enter the State and obstructs justice by threatening economic sanctions; the PTC refused the Chief Prosecutor application. Schabas commented that the PTC avoids the risk of rupturing the relationship between the ICC and the US.[28]

However, in the complementarity issue, it causes a legitimacy crisis, feeling victimised and withdrawal from the Rome Statute. Because, African and Asian states, as seen in the Philippines' "war on drugs" case, interpreted that the court is targetting unfairly to African

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27 Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan (Nov. 20, 2017), https://www.icccpi.int/Pages/item.aspx?name=171120-otp-stat-afgh [Accessed 14.09.2021]

28 William Schabas' comment on this situation in 'Out of Africa – Israel is referred to the ICC', at, http:// humanrightsdoctorate.blogspot.com.au/2013/05/ out-of-africa-israel-is-referred-to.html?utm_source=feedly (accessed on 10 July 2013) in Du Plessis, M. (2013). Universalising international criminal law-the ICC, Africa and the problem of political perceptions. *Institute for Security Studies Papers*, *2013*(249), p.12.

and Asian states and undermine their sovereignty while protect developed western states. As a result, even if the principle of priority policy is followed, prosecutors will not get caught up in the dilemma of complementarity issue.

3.3. The Prosecutor and Paradox of the Court

The Prosecutor of ICC is at the forefront of one of the most critical ongoing controversies in moral and legal theory. According to Damaška[29], the man who is responsible for conducting trials and investigations, before the Court starts, should inform all states on the intention of prosecution to an international crime. The Pre-Trial Chamber gives a right to the Prosecutor Office to conduct a hearing, which is known as the power of *motu proprio*. This is structured to handle mass-crime cases during ongoing wars, collect evidence to convict whoever holds the greater responsibility for grave offences and assure the appearance of those pursued by the Court. The prosecutor's power of propio motu jurisdiction, according to Moreno-Ocampo[30], has been the topic of heated debate in Rome. The US fought an impartial prosecutor, claiming that they couldn't tolerate acts taken in the absence of a political motive while bringing a case. The Rome Statute created a paradox. Therefore, if a state fails to meet the prosecutor's requirements, which are reported by internal ICC protocols and decisions, the state has the right to assert a conflict of jurisdiction transferred by the ICC.[31]

Newton[32] stressed '*non bis in idem'* clauses through Article 20 of Statute does not erect a strict barrier to a case's ICC admissibility, but rather acts as a rational shield for enforcing complementarity in the

29 *Op.cit,* Damaška. p.23.

30 Moreno-Ocampo, L. (2007). "The International Criminal Court: Seeking Global Justice", *Case Western Reserv Journal of International Law*, 40, p.219.

31 Tolbert, D. (2008). "International Criminal Law: Past and Future", *University of Pennsylvania Journal of International Law*, 30, p.1291.

32 Newton, M.A. (2001). "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court", *Military Law Review*, p.38.

ICC and prosecutor's practices. Some people are becoming increasingly worried that ICCs are being disadvantaged. According to Damaška[33]:

> *"An important, and indeed troubling, question for all votaries of the international criminal court is thus whether the ICC is the proper institution to entrust such a significant part of the response to victimisations produced by massive human rights violations."*

According to Bolton, the evidence shows that the prosecutor and the ICC are unable to meet their core objectives due to a lack of real-world enforcement capacity.[34] ICC supporters have no evidence to back up their theories, despite their optimistic rhetoric. The evidence shows that the Prosecutor and the Court are unable to fulfil their primary objectives due to a lack of enforcement authority in the real world.[35] The ICC, on the other hand, cannot act without the Prosecutor Office that performs its duties effectively.[36] Therefore, the Court's managing problems are considered serious than thought and these problems tried to be solved by importing a manager or consultant, which had not met the expectations, from the international business community. [37]

In the prosecution, the prosecutors held different perceptions on some issues. One of these issues is gender-based discrimination. During the conflict in Kosovo[38], Rwanda[39], Congo, sexualised violence against women and children became prevalent. Systematically raping women and children was used as a form of ethnic cleansing. Gender-

33 *Op.cit,* Damaška. p.28.
34 *Op.cit.* Bolton. p.175.
35 *Op.cit*. Bolton. p.175.
36 *Op.cit*, Kaul, p.579.
37 Raynor, K. (2019) 'International Criminal Justice: Where Does It Go from Here?' (Speech, Lincoln's Inn, 22 May 2019) [available at https://opiniojuris.org/wp-content/uploads/Lincolns-22-May_ForKevinJonHeller-2.pdf]
38 UNFPA, Gender-based violence in Kosovo – A Case Study , May-July 2005, available at http:// www.unfpa.org/women/docs/gbv_kosovo.pdf . [accessed 12 March 2021].
39 Human Rights Watch/Africa and Human Rights Watch/Women's Rights Project (1996). "*Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*", Human Rights Watch, New York.

based crimes such as forced abortion, forced pregnancies, forced sterilisation, sexual slavery, rape and violence techniques have been used in warfare to humiliate, terrorize, or even exterminate entire ethnic groups. However, there are few international conventions expressly banning these offences, and until recently, these offences regrettably was only limited to rape.

Such as in the Akeyesu[40] and Kunarac[41] cases, rape is defined as a form of aggression and crimes of violence. The ICC Statute, on the other hand, was the first to completely reject the connection between sexual violence and dignity.[42] In this manner, the Special Court for Sierra Leone (*hereinafter the SCSL*) has hit a new landmark, as it has been given a much wider mandate.[43] It was the first court to prosecute the crime of sexual slavery and to prosecute.[44] The SCSL has thus reached a new milestone, as it has been granted a much broader mandate. The SCSL was the first court to investigate and prosecute the crime of sexual slavery.

The ICC Statute not only recognizes a spike in the number of sexual assault crimes but also addresses the gender-based crime debate. The procedure is far from complete. In this field of law, some of these rules have been codified by the ICC, while others have been developed. Cambodia East Timor, Kosovo and Sierra Leone are among the newly formed hybrid tribunals that have been encouraged to prose-

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40 Prosecutor v. Jean-Paul Akayesu (Appeal Judgment), ICTR-96-4-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001, available at: https://www.refworld.org/cases,ICTR,4084f42f4.html [accessed 6 April 2021].

41 Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, available at: https://www.refworld.org/cases,ICTY,3ae6b7560.html [accessed 6 April 2021].

42 Than, C. and Shorts, E. (2003). "*International Criminal Law and Human Rights*", Sweet & Maxwell, London, p.349

43 Article 2 (g) of the Statute of the Special Court of Sierra Leone, UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, available at: https://www.refworld.org/docid/3dda29f94.html [accessed 6 April 2021].

44 Oosterveld, V. (2009). "Th e Special Court of Sierra Leone's Consideration of Gender-Based Violence: Contributing to Transitional Justice?", Human Rights Review, 10. pp. 73-98.

cute these types of crimes. As Kelly Askin points out, significant progress has been made in the perception, conceptualization, definition, prosecution, and punishment of different types of sexual abuse.[45] The ICC did not only enact rape as an offence in international law but also refers new offences; forced pregnancy is one of them.[46]

However, the link between sexual violence and gender-based crimes is not considered in some cases. The Prosecutor defines the relationship between "*sexual crimes are crimes of gender inequality enacted violence*". [47] In addition, similar offences may be classified differently, such as rape for female victims and torture for male victims.[48]

At this point, if it is necessary to make constructive criticism and suggestion, in terms of the ICC judiciary, judges must be more committed to one another and to the institution. In the past, it is unfortunate that the judges' terms were not renewed in this regard. This can lead to organizational amnesia and the Court is seen as a stepping stone from one career peak to another. In addition, the space wars between the Chambers and the OTP should end with the Chambers having to respect the legal areas of the prosecutor's office. In this regard, the recent interruption of the PTC's appeal against the Prosecutor's Office's refusal to authorize an investigation in Afghanistan is a step in the right direction.

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45 Askin, K.D. (2005). 'The Jurisprudence of International War Crimes Tribunals', in Helen Durham and Tracey Gurd, (eds), Listening to the Silences: Women and War, Martinus Nijhoff , Leiden, pp. 126-127.

46 Article 6(b) of the ICC Statute's Elements of Crime.

47 Moreno-Ocampo, L. (2010). "Keynote Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence", *Law & Social Inquiry*, *35*(4), pp.839-846.

48 UN News Service, *ICC sentences former Congolese vice-president Bemba to 18 years in prison for war crimes*, 21 June 2016, available at: https://www.refworld.org/docid/576a466b40c.html [accessed 6 April 2021].

3.4. The Paradox of Participation of Victims

Damaška[49] pointed out at analysis of the ICC:

> *"Two sets of issues arise: one set concerns issues stemming from the increased participation of victims in criminal procedure and engendered by proceedings designed to repair the harm caused to victims... Firstly, according to the ICC's trial ritual, the victims, or their representatives, may be permitted to deliver opening and closing statements. But emotionally charged stories of massive atrocities can easily generate an atmosphere of revulsion and anger."*

Trumbull argued[50] that views and fears are critical in highlighting the right of testimony related to the accused's guilt or innocence in case fair trial. It should be determined on a case basis whether or not victims are entitled to answer in general. Participatory rights would bring little relief to the growing number of victims. The trial of only a few well-chosen influential perpetrators of atrocities should be the priority of international criminal courts, where there is still the strongest evidence. Pikis[51] pointed out allowing plaintiffs to submit evidence unfairly moved the burden of proof away from the prosecution and violated the rights of the defense. As a result, victims are restricted from sharing their "opinions and concerns." Victims have a right to be active, according to supporters of victim involvement, because it will help them prevent "secondary victimization." It would also assist the victims in his or her recovery.[52]

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49 *Op.cit*, Damaška. p.28.

50 Trumbull, C.P. (2008).*"*The Victims of Victim Participation in International Criminal Proceedings*", Michigan Journal of International Law,* 29, 2008, p.782.

51 Pikis, G. M. (2010). "*The Rome Statute for the International Criminal Court Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*", Leiden, Martinus Nijhoff Publishers.

52 *Ibid,* p.799. See also the *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo* , ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, available at: https://www.refworld.org/cases,ICC,4f69a2db2.html [accessed 6 April 2021].

Although Trumbull[53] does not follow Damaka, he believes that participating in the program will assist victims in regaining control of their own lives and ensuring that their words are respected and heard. He went on to say that victim advocates believe that involvement will help victims recover their self-esteem. The prosecutor's main interest should be to prevent a conviction, and the survivor must be able to participate for evidence related to the reparations award to be released. Since international justice is an expensive organisation, the ICC depends on financial support from international organizations or states, financing is a critical challenge for the ICC.[54] A total of $500 million has been spent, mostly on the salaries of officers and foreign travel. The promised victim participation seems to be a long way from the International Criminal Court Chambers.[55] Damaška[56] argues that he can predict:

> *"…the drain on the Court's energy and resources flowing from the right of victims to participate in the initial procedural stage. The Trust Funds resources alleviate the misery of mass victimization: in 2007, for example, it had only 3 million Euros at its disposal. Considering the large number of victims produced by crimes within ICC jurisdiction, this is a mere pittance especially if victims expect individual monetary compensation."*

One of the most significant problems facing the ICC, according to Blattmann and Bowman[57], is the accused's constitutional right to be convicted without unreasonable delay. However, a close review reveals that Damaška did not refer to this problem.

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53 *Op.cit,* Trumbull. p.802.

54 Cogans, J.K. (2002). "International Criminal Courts and Fair Trials: Difficulties and Prospects", *Yale Journal of International Law*, 27, 2002, p.132.

55 Schabas, W. A. (2007). International Criminal Tribunals: A Review of 2007. *Northwestern* Journal of International *Human Rights*, *6*, 391.

56 *Op.cit,* Damaška. p.31.

57 *Op.cit*, Blattmann and Bowman, p.729

4. REDUCING DISPARITY

In the context of the ICC, leaders should expedite urgent matters for justice, build credibility quickly, and then maintain momentum. Surely, for the leaders of a judicial institution, this will be difficult. Because such a body contains both judicial and prosecutorial independence within itself.

Damaška[58] stressed the vacancy cannot be completed by offering independent enforcement authority to the Court. Shortly, its effectiveness will be determined by the whims of the international political situation. Victims will not be required henceforth to seek civil damages in national courts under the ICC. The ICC has the jurisdiction to determine damages of the victim and to award reparations to those that have been wronged.

Damaška[59] suggested at this stage that victims who have been the target of atrocities should be moved to the Trust Fund. Therefore, the Trust Fund will have to take over all of the reparation functions. However, Damaška ignored one problem at this point: the founding papers' provisions do not provide for a complete transition of all functions. [60]

The purpose of the Truth Commission was to publicize most of the regime's truths in the most convincing way possible and then move the world forward. It is not necessary to defend the worldwide adoption of the South African method[61]. Communities and people have indeed chosen amnesia because coping with past mistakes is too painful for them, and they want to look forward.[62] Another cruel reality,

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58 *Op.cit*. Damaška. p.32.

59 *Op.cit*, Damaška. p.33.

60 *Op.cit*, Kaul, p.577.

61 South Africa's method (response) was to establish the Truth and Reconciliation Commission (TRC), which grants amnesty to perpetrators who speak the truth about the past and reveal their crimes to the victims, with the purpose of bringing former adversaries together. The Commission's main goal was to encourage peace and forgiveness between apartheid offenders and victims via full exposure of the truth.

62 *Op.cit*. Bolton.p.178.

according to Kaul[63], is the well-known lack of financial and other capital. Investigating crimes in the DRC, CAR, Uganda, or Darfur presents operational and technical challenges that no other court or prosecutor has ever encountered.

New institutions, such as the International Criminal Court and ad hoc tribunal, do not have the same impact as long-established institutions like the ICJ. These bodies should be allowed for time to establish themselves as a daily part of the international area, with a noticeable and appropriate role and that is fulfilled in partnership with established institutions.[64]

5. CONCLUSION

In this paper analysis, this paper addressed Mirjan Damaška 's instructive position and attempted to analyze the ICC's paradoxes, namely a distance between aspiration and achievement. The paper attempted to substantiate his argument that the ICC is affected by the features of states' domestic legal systems. The paper tried to emphasize state cooperation on the preceding pages since Damaška defines the International Criminal Court as a "*giant without arms and legs*" with some justification.[65] His analysis, on the other hand, has some flaws, for instance the deprivation of a concept of "*true complementarity*." The Court's jurisdictional position is highly unpredictable in the political environment, and it can lead influential players to abandon international criminal justice. Damaška, neglected to refer that unless delusive ambitions are scaled back, these institutions are expected to expand at a much faster rate in the future, necessitating a change to hold politics off from the courtroom.

63 *Op.cit*. Kaul, p.578.

64 Kirsch, P. (2001). "The International Criminal Court: Current Issues and Perspectives", *Law and Contemporary Problems*,64(1), 2001, p.4.

65 Op.cit. Damaška. p.22. see also Cassese, A., Gaeta, P., Baig, L., Fan, M., and Gosnell, C. (2013). "*Cassese's International Criminal Law",* Oxford University Press, Oxford.

Furthermore, as Damaška states in the conclusion, the Court should not commend victim involvement to a weak criminal court. Since method traumatizes victims by unreasonably high demands for meaningful compensation. Nonetheless, he makes no mention of how this problem could be addressed under the ICC's auspices.

In particular, the Court should reject some of its more ambitious universalist language and communicate with victims and other partners with more realistic expectations.[66] Although universalism has improved its credibility among some viewers, it has also resulted in deception and risks alienating those who support it. To summarize, the International Criminal Court faces a dilemma as it does not have supremacy jurisdiction over international crimes and states do not comply. This weakness of the Court's organization has emerged as the most important impediment to its success. [67] Despite some flaws, this paper will serve as a basis for future study and will help discuss the International Criminal Court's paradoxes.

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66 *Ibid*, Raynor

67 Brown, B. S. (1998). "US Objections to the Statute of the International Criminal Court: A Brief Response". *NewYork University Journal of International Law and Policy,* 31, pp.855-866.

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