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The Principle of Non-Impunity for International Crimes in Light of the American Position: A Critical Analytical Study

مبدأ عدم الإفلات من العقاب في الجرائم الدولية في ضوء الموقف الأمريكي:
دراسة تحليلية نقدية

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Abstract:

This study aims to analyze and evaluate the position of the of the United States of America (USA) toward the International Criminal Court (ICC) and its implications for the principle of non-impunity as a fundamental pillar of international criminal justice (ICJ). It focused on analyzing the dimensions of the American policy of rejecting the Court's jurisdiction, the legal and political measures adopted to shield U.S. nationals from international criminal prosecution, and the resulting challenges that have undermined the effectiveness of international accountability mechanisms, as well as the universality and credibility of international criminal justice.

The study concludes that consolidating the principle of non-impunity depends not only on the continued development of the international legal framework but also on the existence of genuine collective political will and broader international cooperation, particularly among the major powers. Such cooperation is essential to strengthening international accountability, enhancing the effectiveness of international criminal justice, and combating international criminality.

Keywords: Non-impunity, effectiveness of international justice, restriction of the International Criminal Court (ICC), International Crimes.

المخلص:

تهدف هذه الدراسة لتحليل وتقييم موقف الولايات المتحدة الأمريكية من المحكمة الجنائية الدولية، ومدى انعكاس ذلك على مبدأ عدم الإفلات من العقاب بوصفه ركيزة من الركائز الأساسية للعدالة الجنائية الدولية. وتركز الدراسة بالخصوص على بيان أبعاد السياسة الأمريكية الراضية للخضوع لاختصاص المحكمة الجنائية الدولية، والإجراءات القانونية والسياسية التي اعتمدتها لحماية رعاياها من المتابعة الجنائية الدولية، وما ترتب عن ذلك من تحديات أثرت في فعالية المسألة الجنائية الدولية ومصادقيتها. وقد انتهت الدراسة إلى أن ترسيخ مبدأ عدم الإفلات من العقاب لا يتوقف فقط على تطوير المنظومة القانونية الدولية، بل يتطلب فوق ذلك توافر إرادة سياسية جماعية وتعاوناً دولياً أوسع، خصوصاً من جانب القوى الكبرى، بما يعزز المسألة الدولية ويحد من الإجرام الدولي. الكلمات المفتاحية: عدم الإفلات من العقاب، فعالية العدالة الدولية، تقييد المحكمة الجنائية الدولية، الجرائم الدولية.

1. INTRODUCTION

By the end of the twentieth century, international law (IL), particularly its criminal branch, had undergone significant qualitative transformations that reflected the growing interest of the international community in limiting international criminality and promoting the consolidation of the principles of international justice. In this context, the principle of non-impunity emerged as one of the most prominent principles underpinning this development. It serves as both a legal and moral mechanism aimed at ensuring the accountability of perpetrators of serious international crimes and preventing them from escaping criminal responsibility, thereby contributing to the protection of international peace and security (IPS) and enhancing respect for the

rules of IL.

The status of this principle was further strengthened with the adoption of the Rome Statute in 1998, which established the (ICC) as the first permanent international criminal judicial body with jurisdiction to prosecute individuals responsible for committing the most serious crimes of concern to the international community as a whole. Complementary responsibilities were also assigned to the United Nations Security Council (UNSC) to support efforts to combat impunity by exercising the powers conferred upon it under the Charter of the United Nations (UN), whether by referring situations to the ICC or by establishing ad hoc international criminal tribunals (ICTs).

However, in practice, the effectiveness of these efforts and mechanisms has

remained contingent upon a number of political and legal considerations, foremost among them the nature of international relations and the extent of states' cooperation with the institutions of international criminal justice (ICJ).

In this context, the position of the United States of America (USA) stands out as one of the most significant and controversial subjects in the study of international criminal justice. This is attributable to the USA's political and legal influence, as well as its substantial role in shaping the structure of the international system.

The importance of this study stems from its examination of one of the fundamental issues in contemporary international criminal law: the extent to which the mechanisms of ICJ are capable of achieving their objectives in light of the interplay between legal considerations and the political interests of major powers.

This study also seeks to highlight the challenges facing the principle of non-impunity and to examine the extent to which it is affected by international political dynamics, thereby influencing the effectiveness of the ICJ system in ensuring accountability and delivering justice to victims.

Against this background, the central research question is as follows:

What is the position of the USA toward international criminal justice, and to what extent does it affect the effectiveness of the principle of non-impunity within the framework of international criminal law?

To address this question, the study adopts a descriptive-analytical approach. It begins by examining the conceptual framework of the principle of non-impunity and the mechanisms for its consolidation in international law, before analyzing the nature of the American position toward ICJ and evaluating its implications for the effectiveness of this principle.

Accordingly, the study is divided into three main sections. The first examines the principle of non-impunity and the mechanisms for its consolidation in

international law. The second analyzes the position of the USA toward international criminal justice. The third explores the manifestations of the American impact on the effectiveness of the principle of non-impunity.

1. The Principle of Non-Impunity and the Mechanisms for Its Consolidation in International Law

The principle of non-impunity is considered one of the fundamental pillars upon which contemporary international criminal law is based, as it is a legal mechanism that aims to ensure the accountability of perpetrators of serious international crimes and prevent their evasion of criminal responsibility. The importance of this principle has been reinforced with the development of the ICJ system and the pursuit of the international community to combat serious violations affecting human rights and international humanitarian law.

This section has come to clarify the concept of this principle, and to highlight the most important international mechanisms adopted to consolidate it and ensure its effectiveness.

1.1 The Concept of the Principle of Non-Impunity

Indeed, similar to national criminal laws whose main objectives are combating crime and limiting the escape of its perpetrators from punishment, what is called the "principle of non-impunity" has also developed in international criminal law. It is considered one of the main objectives that the Rome Statute of the ICC sought to consolidate and establish as a fundamental justification for strengthening complementarity between ICJ and national criminal systems, which can be regarded as a basic guarantee to prevent perpetrators of international crimes from escaping punishment¹.

It should be noted in this regard that the term "impunity" generally means: "the impossibility, in law and in fact, of holding criminally responsible persons who have committed criminal acts, with the aim of prosecuting, investigating, trying, and

imposing penalties upon them if their commission of those acts is established, in a manner that prevents victims from obtaining compensation and reparation for the harm resulting from those violations.²"

It is also meant in the field of international criminal law as "that situation in which it is impossible to subject perpetrators of international violations to monitoring, investigation, prosecution, or enforcement of punishment upon conviction, wholly or partially, for material or legal reasons, whether beyond their control or resulting from their own actions, leading to the deprivation of victims of their right to reparation and compensation for the harm they have suffered."³ Based on this concept and founded upon it, part of legal scholarship sought to formulate definitions of the principle of "non-impunity."

Some defined it as that principle connected with the necessity of imposing punishment, aimed at achieving justice through its imposition, and based on a set of rights recognized by IL, such as the right to life, the right to physical integrity, and opposition to disappearance... etc.⁴ Others considered that its meaning extends to the various measures taken by states individually or in cooperation with one another in order to reduce the international and domestic constraints that prevent the criminal prosecution of perpetrators of international violations, the restoration of victims' rights, and the uncovering of the truth in fulfillment of their international obligations.⁵

Based on these two definitions, it is possible to propose a simplified definition of the principle of non-impunity as a legal principle firmly established in international criminal law, the essence of which is that perpetrators of serious international violations must not be allowed to evade criminal responsibility, and that they must be subjected to accountability, trial, and punishment through national or international judicial mechanisms, in a manner that ensures the achievement of justice, the protection of victims' rights, and the strengthening of the rule of law at the

international level.

It should be noted that the "principle of non-impunity" may be confused with some similar terms such as "absence of criminal accountability," for example, which are usually distinguished from one another in terms of their consequences. While the principle of non-impunity focuses primarily on ensuring that perpetrators of violations are held accountable and do not evade criminal punishment, the meaning of "absence of criminal accountability" is limited to exempting the person from criminal accountability only, while they may still bear other forms of responsibility, such as administrative, financial, or even political responsibility.

1.2 Mechanisms for Entrenching the Principle of Non-Impunity in IL

Given the importance that the principle of non-impunity holds, the international community has sought to entrench it through a set of mechanisms, foremost among them the system of the ICC and the powers of the UNSC.

1.2.1 The role of the ICC in entrenching the principle of non-impunity

The Preamble to the Rome Statute of the ICC, which was approved during the Rome Diplomatic Conference in 1998 and came into effect in 2002,⁶ unequivocally asserts that grave offenses of concern to the global community must not evade accountability or punishment. Consequently, the Preamble emphasizes the importance of implementing effective measures at the national level while enhancing international collaboration, to eliminate the impunity enjoyed by perpetrators of such violations and to aid in preventing their reoccurrence. It also acknowledges the duty of each State to exercise its criminal jurisdiction by ensuring that individuals responsible for international violations are brought to justice, while concurrently affirming that the ICC serves a complementary function to national judicial systems⁷.

From this, it is evident that the ICC aims to tackle impunity through a range of legal mechanisms, most notably through the establishment of the principle of individual

criminal responsibility for international offenses adjudicated by the ICC in The Hague. Additionally, it recognizes the potential application of the principle of universal jurisdiction within national legislations, enabling domestic courts to prosecute individuals accountable for severe international violations. However, the application of this jurisdiction necessitates a significant level of international cooperation, which includes the collection of evidence, conducting investigations and trials in alignment with fair trial standards, and enforcing judgments against those guilty of such violations, thereby ensuring they are held accountable.⁸

In this context, the ICC Statute embraces the principle of legality in criminal law as a foundational element in the fight against impunity. Article 5 of the Statute delineates the violations within the Court's jurisdiction, categorizing them as the most serious infringements that pose a threat to the international community.⁹ These violations encompass genocide, violations against humanity, war crimes, as well as the violation of aggression, all of which necessitate prosecution, trial, and punishment in accordance with the Statute's provisions.¹⁰

The system of the ICC is also characterized by achieving a kind of balance between the jurisdiction of the Court as an international judicial body competent to deal with serious international violations and the jurisdiction of national courts. This balance appears in the establishment of the principle of complementarity, which makes the national judiciary the holder of the original jurisdiction in prosecuting the perpetrators of these violations, while the jurisdiction of the ICC remains a complementary jurisdiction exercised only when the inability or unwillingness of the State to undertake the necessary judicial proceedings is established.¹¹ Paragraph nine of the Preamble to the Rome Statute affirmed this principle, stating that the Court shall be complementary to national criminal jurisdictions.¹²

Nevertheless, this system raises some

legal issues related to the possibility of exploiting certain legal rules to obstruct the Court's exercise of its jurisdiction. Among the most prominent of these issues is the use of the rules of immunity, prescription, or amnesty within the framework of the national judiciary to avoid holding perpetrators of international violations accountable, which may lead to circumventing the provisions of the Court's Statute under the pretext of respecting the principle of national sovereignty. This issue appears in particular in Article 98 of the Rome Statute, which has been used in some cases to justify the refusal to surrender certain accused persons, which may open the way for the continuation of the phenomenon of impunity.¹³

1.2.2 The Role of the UNSC in Consolidating the Principle of Non-Impunity

The Security Council (SC) obtains its authority from two sources. The first source is the Charter of the UN under Chapter VII, which addresses situations that impact IPS or include acts of aggression, thereafter referring such matters to the ICC. The second source comes from the Statute of the Court, specifically Article 13(b), which states the following: The Court may assert its jurisdiction over a violation specified in Article 5 in line with the stipulations of this Statute if: (b) A scenario in which one or more of these violations seems to have been perpetrated is submitted to the Prosecutor by the SC, operating under Chapter VII of the UN Charter.¹⁴

The SC possesses the exclusive authority to uphold IPS; consequently, the Rome Statute permits the Council to refer a situation to the Court, enabling the Prosecutor to initiate an investigation into violations within the Court's jurisdiction, specifically those delineated in Article 5 of the Rome Statute. This referral is grounded on the authority granted to the Council under Chapter VII of the Charter.¹⁵

When the SC refers a specific "situation" to the Court under Chapter VII, the Court is not obligated to adhere to the stipulations outlined in Article 12(2) of the

Rome Statute, which require that the violation be perpetrated by a citizen of a State Party or inside the territory of that State. Nonetheless, such circumstance must entail a threat to peace and security.¹⁶ Consequently, the Court's jurisdiction in this matter is characterized as universal jurisdiction, since it is obligatory for all States.¹⁷

The mechanism for exercising jurisdiction in the case between the SC and the ICC incited vigorous debate among State representatives until the final moments of the ICC Statute's adoption, leading to a distinct division of opinions. One faction advocated for a precise delineation of the Court's jurisdiction while bestowing a significant role upon the SC, whereas another faction emphasized that such a relationship should not compromise the Court's independence, effectiveness, and efficiency in exercising its jurisdiction.¹⁸

Despite that, a consensual formula was reached regarding granting the SC this power, which, although it leads to giving the Court a political character, allows it the possibility of pursuing and trying persons belonging to non-States Parties who commit serious crimes falling within the subject-matter jurisdiction of the Court, since this referral is considered a means of preventing criminals from escaping punishment and trial before the Court.¹⁹

As for Article 13(b), the issuance of a SC decision to refer crimes committed by a non-State Party depends on the approval of the permanent members, which may use their right of veto, thereby stopping the referral in favor of themselves or one of their nationals, which leads to consolidating the principle of immunity for those States.²⁰ Some believe that the SC's authority to refer crimes includes a positive aspect and a negative aspect. The positive aspect is that only through this authority can crimes committed by non-States Parties be referred to the Court. The negative aspect relates to the necessity of the approval of the five permanent members and the non-use of the right of veto.²¹

There is no doubt that assigning these

powers to the SC in the Statute of the ICC came as a reflection of the growing role it has undertaken during recent years in the field of maintaining IPS, particularly through its interest in promoting ICJ, as demonstrated by its establishment of special ICTs as one of the newly introduced measures aimed at preserving IPS.²²

2. The Position of the USA on ICJ

Despite the international efforts aimed at consolidating the principle of non-impunity and strengthening the role of ICJ, the effectiveness of this principle remains dependent on the positions of the major powers and the extent of their support for the international mechanisms entrusted with implementing it. The USA is considered one of the most prominent states that adopted a reserved position toward the ICC, and this was reflected in the course of ICJ and the mechanisms of accountability for international crimes.

2.1 The Opposition of the USA to the Establishment of the ICC

The American administration sought from an early stage for the ICC to be established according to the American vision, as it was among the states most enthusiastic about establishing a permanent and codified international criminal judiciary. In this context, the US submitted to the UN General Assembly in 1946 a proposal prepared by Francis Biddle, one of the judges of the Nuremberg Tribunal, which included a call to adopt the Nuremberg Principles and establish a permanent and comprehensive international criminal code defining the international crimes affecting the peace and security of mankind, in addition to determining the penalties to be imposed on their perpetrators. This proposal received a response from the General Assembly, which proceeded to establish the IL Commission and entrusted it with codifying the Nuremberg Principles and studying the possibility of establishing a permanent ICC.²³

The American opposition to the ICC is reflected, at the level of the UN, in the US' effort to direct the establishment of the Court in a manner consistent with its

strategic objectives and ensuring the protection of its interests in the first place.²⁴ As the IL Commission began preparing drafts of the Court's Statute, the US realized that it would not be able to control its decisions or use the veto power to influence them, which could expose its citizens to accountability and place it on an equal footing with the rest of the states, something it was not prepared to accept.²⁵

From here, the USA began adopting a position opposing the establishment of the ICC, and this position continued until the convening of the Rome Conference, where it participated in the negotiations until their final stages, and succeeded in influencing the drafting of the Court's Statute and working to include some provisions that guarantee its citizens a degree of immunity and prevent them from being subject to international criminal accountability, foremost among them Article (98) of the Rome Statute.²⁶ The USA bases its opposition to the establishment of the ICC on several reasons, which can be summarized as follows:

2.1.1 The extension of the jurisdiction of the ICC to nationals of states not party to its Statute:

One of the most important issues that raised great controversy within the IL Commission since the early stages in which the idea of establishing the ICC was put forward was the issue of conferring jurisdiction on the Court. The USA insisted on restricting the Court's automatic jurisdiction and not extending it to nationals of non-party states without their consent, for fear of subjecting members of its military forces operating abroad to international criminal accountability. It justified its position by the need to respect state sovereignty, considering that granting an international organization the authority to try nationals of states that have not ratified the Statute constitutes an infringement of that sovereignty. However, this position did not receive the support of the majority, as Article 12 of the Rome Statute recognized the Court's jurisdiction according to the principle of territoriality, which constituted

one of the main reasons for the US' refraining from ratifying the Court's Statute.²⁷

2.1.2 Concern over the possibility of American soldiers being prosecuted before the ICC:

The opposition of the USA to the ICC stems from its fear that its agents and those working in its secret or public networks would be exposed to international accountability.²⁸ However, these concerns appear unjustified, because the Court intervenes only in the absence of a genuine national trial, and its jurisdiction is limited to crimes committed after the Rome Statute entered into force on 1 July 2002, and is limited to serious crimes committed on a large scale. Had the crimes attributed to Augusto Pinochet (Chile), Pol Pot (Cambodia), Idi Amin (Uganda), Slobodan Milošević (former Yugoslavia), and Foday Sankoh (Sierra Leone) been committed after this date, they would have fallen under the jurisdiction of the Court.²⁹

The US also opposed the appearance of Richard Holbrooke, the architect of the Dayton Peace Agreement, before the ICT for the former Yugoslavia, fearing that this would constitute a precedent that could lead to the summoning of American officials. It also expressed concern over the prosecution of its soldiers because of the military campaign in Kosovo in 1999 and the 78-day air campaign against the former Yugoslavia. However, the Prosecutor of the Tribunal denied the targeting of civilian sites, and these events also occurred before 1 July 2002, and therefore do not fall within the temporal jurisdiction of the ICC.³⁰

2.1.3 Concern over the ICC obstructing the role of the UNSC:

The US believes that the ICC might undermine the UNSC's primary authority in maintaining IPS. From its perspective, bestowing the Court with the jurisdiction to adjudicate the crime of aggression and ascertain accountability for it encroaches onto the powers of the SC as delineated in the UN Charter. The US aims to retain this authority within the SC, where it wields significant influence, and has asserted that

determining the occurrence of aggression is one of the responsibilities designated by the Charter to the SC, as the sole entity empowered to implement necessary coercive measures to address acts of aggression and mitigate their consequences. The intersection between the Council's and the Court's authorities has generated political and legal challenges that hindered the attainment of an international agreement on this subject.³¹

Following a two-year interval since the Rome Conference, the US' stance on the Rome Statute of the ICC experienced a modest alteration at the conclusion of President Bill Clinton's administration, when he endorsed the Statute on 31 December 2000, intending to maintain Washington's capacity to influence the Court's operations and participate in the Assembly of States Parties, while retaining its longstanding reservations. Clinton stated that this signature did not signify a fundamental shift in the American stance, but rather demonstrated ongoing support for the principle of individual criminal responsibility, consistent with the American legacy established during the Nuremberg Trials and the formation of ICTs for Yugoslavia and Rwanda. Many academics contend that this signing did not alter American policy, given it occurred at the conclusion of his tenure and lacked binding authority on the next government, suggesting it was more a symbolic gesture than a true commitment.³²

However, only five months passed before the new American administration led by President (George Bush) decided to withdraw the signature of the USA on 6 May 2001, on the grounds that this signature would hinder its fight against terrorism.³³ This position is considered an extension of an earlier American policy based on retreating from international judicial commitments when they conflict with strategic interests, as happened in 1984 with the International Court of Justice in the Nicaragua case. Thus, the ICC, since its establishment, faced opposition from the major powers, foremost among them the

USA, which affected its ability to achieve its objective of combating impunity.³⁴

2.2 The Refusal of the USA to Join the Rome Statute

The US was initially among the countries that participated actively in drafting the Statute, as it attended the Rome Conference with a large legal and diplomatic delegation, and succeeded in including some rules that were consistent with its orientations, most notably:

- Consolidating the principle of complementarity between national jurisdiction and international jurisdiction.
- Maintaining the role of the SC in the Court's system.
- Requiring the ratification of sixty states for the Statute to enter into force.
- Regulating mechanisms of cooperation with the Court.³⁵

David Scheffer, leader of the American delegation to the UN Conference on the Establishment of the ICC, emphasized in his address to the Senate Foreign Relations Committee on 23 July 1998 that a significant achievement for the US within the Rome Statute was the preservation of the UNSC's role, including the affirmation of its authority to intervene in order to suspend or terminate the operations of the ICC when deemed necessary.³⁶

Subsequently, it contested many essential elements of the Statute, including the incorporation of the crime of aggression within the Court's jurisdiction. The definition of this crime presents legal complexities, notwithstanding the prior definition established in UN General Assembly Resolution No. 14/33 of 1974, which some argue has evolved into a customary international law, particularly in light of the International Court of Justice's reasoning in its 1986 judgment in the case of *Nicaragua v. USA*.³⁷

It further asserted that the determination of the crime of aggression should be exclusively within the competence of the SC, so limiting the influence of large

nations, particularly those with veto rights, over the Court's operations. The US opposed the potential for the Court to assert jurisdiction over citizens of a non-party state, a concern articulated by former President Bill Clinton upon signing the Statute on December 31, 2000.³⁸

It subsequently sought to shape the interpretation of some elements of the Statute to restrict the Court's jurisdiction, particularly with the use of Article 16, which empowers the UNSC to suspend inquiry or prosecution. This strategy was used to shield American troops engaged in UN peacekeeping missions from the Court's jurisdiction. The American dissenting stance was further evidenced by its refusal to collaborate with the Court, alongside its efforts to establish bilateral agreements with several States to prevent the extradition of American citizens to the Court, in exchange for ongoing assistance to those States.³⁹

Subsequently, on 6 May 2002, the USA astonished the global community by announcing its withdrawal of signature from the Rome Statute, informing the UN of its intention not to become a party to the treaty and thereby absolving itself of any obligations imposed by the Statute.⁴⁰

At that time, John Bolton, the U.S. Under Secretary of State for Arms Control and International Security, sent a letter to UN Secretary-General Kofi Annan, stating that the USA had no intention of becoming a party to the Rome Statute of the ICC approved on 17 July 1998. Consequently, the US has no legal duties stemming from its signing on 31 December 2000. Given that the US demands a declaration of its intention to refrain from joining this treaty, this issue should be included in the Court's records. The American government at that time deemed the signing of the Statute a mistake that had been rectified. The US regards itself as a leader in prosecuting individuals to get justice and has aided several ad hoc international criminal courts, including those for the former Yugoslavia, Rwanda, and Sierra Leone. It upholds the greatest humanitarian standards globally in international justice and does not let any of

its people to be tried outside its court system.⁴¹

Many researchers believe that the real motive behind this position is the desire of the US to avoid its officials or soldiers being subject to accountability before the Court for international crimes, especially those mentioned in Article 5 of the Statute, such as war crimes and crimes against humanity, in order to preserve its freedom of movement in the international arena, despite the discourse it adopts regarding the protection of human rights and the promotion of IPS.⁴²

3. Manifestations of the American Influence on the Principle of Non-Impunity

There is no doubt that the position of the USA toward ICJ represented by the ICC has had direct or indirect repercussions on the principle of non-impunity. These repercussions can be drawn from the American practices aimed at restricting the work of the ICC, as well as from those domestic laws and bilateral immunity agreements concluded by the USA to protect its nationals.

3.1 The restriction by the USA of the work of the ICC

This restriction is reflected in the American influence on the SC on the one hand, and the political pressure and sanctions exercised on the ICC on the other.

3.1.1 Influencing the UNSC to restrict the work of the ICC

The USA launched a broad campaign to confront the ICC, and in this context resorted to exerting pressure on the UNSC, threatening to withdraw its participation in UN peacekeeping operations. In this context, it used its veto on 30 June 2002 against the renewal of the mandate of the peacekeeping forces in Bosnia, with the aim of ensuring that American soldiers and American personnel participating in international missions would not be exposed to any prosecution before the ICC.⁴³

It also threatened to stop its financial contribution to peacekeeping operations, which represents about 25% of the total funding, unless the SC issued a resolution providing protection for its soldiers and

American officials working abroad. These pressures resulted in the issuance of Resolution No. 1422.⁴⁴ The resolution provided for the suspension of the ICC from initiating any procedures relating to the investigation or prosecution of current or former personnel participating in UN peacekeeping forces for a period of twelve months,⁴⁵ with regard to war crimes and crimes against humanity.⁴⁶

The representatives of Germany and Argentina considered that this resolution constituted a risk of undermining the powers and credibility of the SC, on the basis that issuing the resolution under Chapter VII of the Charter of the UN in the absence of a threat to IPS represents a violation of the powers entrusted to it under the Charter, which consequently affects its legitimacy. Resolution No. (1422) was issued through coercion, and it is not consistent with the intent and purposes behind the drafting of Article (16) of the Rome Statute.⁴⁷

After one year had passed since the issuance of the previous resolution, the SC adopted Resolution No. (1487) on 12 June 2003, relying on the second paragraph of that same resolution, which allows the possibility of requesting an extension of immunity from prosecution before the ICC for a period of twelve months, for the benefit of officials and employees belonging to non-States Parties to the Rome Statute, who participate in operations established or authorized by the UN.⁴⁸

The USA, through its diplomatic and non-diplomatic moves, and by exploiting the international circumstances that followed its military intervention in Iraq, was able to push towards renewing Resolution 1422 for an additional year. This was achieved through the issuance of SC Resolution No. 1487 on 12 June 2003,⁴⁹ with the approval of 12 States, while Germany, France, and Syria abstained from voting. This resolution came identical in both its preamble and content to Resolution 1422 of 2002.⁵⁰

In criticizing this approach, the President of the Assembly of States Parties to the ICC expressed his deep concern over the resolution, considering that it leads to

placing a certain category of persons above the provisions of the law. The Secretary-General of the UN also expressed reservations regarding Resolution No. 1487, which renewed the application of Resolution 1422, warning that continuing to renew these resolutions annually would weaken the authority of the ICC and affect the credibility of UN peacekeeping operations.⁵¹

Less than two months after the issuance of Resolution 1487, the SC adopted Resolution 1497 on 1 August 2003.⁵² This resolution came on the occasion of the ongoing conflict in Liberia, where it provided for the establishment of a multinational force to support the implementation of the ceasefire. The resolution, based on what was stated in Resolution 1487, included the expansion of the exemption from the jurisdiction of the ICC to include members of the forces participating in operations established by the UN. However, this exemption came in Resolution 1497 in an absolute form and without any time limitation, unlike the previous two resolutions (1422 and 1487), which limited it to a period of twelve months renewable. The resolution also provided that jurisdiction would be limited to the contributing State itself, unless it expressly waived it.⁵³ These two resolutions were met with sharp criticism from a number of human rights organizations, as well as from the international coalition concerned with supporting the establishment of the ICC. The Secretary-General of the UN, Kofi Annan, also expressed his rejection of them, considering that they affect the authority of the ICC and at the same time undermine the legitimacy of the SC.⁵⁴

Relying on the aforementioned Article (16) to justify these resolutions is considered by many jurists to be an unsound justification, since this article is related to the suspension of investigation or prosecution in specific cases and under exceptional conditions, and does not, on the other hand, allow granting general and prior exemptions to certain categories of persons before the occurrence of any crime or the

realization of exceptional circumstances. Some researchers also argue that the SC exceeded its powers under the Charter of the UN because it did not establish the existence of an actual threat to or breach of IPS, which is a fundamental condition for activating the measures of Chapter VII. In addition to that, granting immunity to potential categories of perpetrators of international crimes is considered inconsistent with peremptory norms of IL, since it consolidates impunity and constitutes a serious infringement of the principle of the inadmissibility of impunity from international criminal responsibility.⁵⁵

3.1.2 Political pressure and the imposition of sanctions on the ICC

The policy of the USA toward the ICC has been characterized by hostility since its establishment, and in this context it has taken several practical steps, perhaps the most recent of which was the imposition of sanctions on the Court's judges, in a step aimed at confronting the Court's investigative procedures and the prosecution of persons accused of committing the most serious international crimes under the Rome Statute of the ICC.

The USA adopted a policy of imposing sanctions on judges and officials of the ICC whenever the Court initiated judicial proceedings affecting its citizens or the citizens of its allied states, especially with regard to opening investigations or issuing arrest warrants. In this context, on 5 March 2020, the Appeals Chamber of the ICC authorized the Prosecutor to commence an investigation into the crimes allegedly committed in Afghanistan, after having submitted on 20 November 2017 a request for authorization to open an investigation into the situation in Afghanistan since 1 May 2003. This request included members of the US armed forces and personnel of the Central Intelligence Agency, on suspicion of their involvement in committing war crimes.⁵⁶

The then US Secretary of State, Mike Pompeo, criticized on 5 March 2020 the decision allowing the investigation into the crimes committed in Afghanistan, considering it an illegitimate measure with

political motives, affirming that the US would take all necessary measures to protect its citizens from the ICC. On 11 June 2020, President Donald Trump issued Executive Order No. 13928, declaring a national emergency and authorizing the freezing of the assets of Court officials and banning the entry of their family members, justifying this on the basis of what he considered a threat to US national security and foreign policy resulting from the Court's investigations into acts attributed to the US military and intelligence agencies in Afghanistan. On 2 September 2020, Mike Pompeo announced the inclusion of Prosecutor Fatou Bensouda and the Head of the Jurisdiction, Complementarity and Cooperation Division, Phakiso Mochochoko, on the sanctions list pursuant to Executive Order No. 13928, subjecting them to measures by the Office of Foreign Assets Control and visa restrictions, warning that individuals and entities supporting them could also be subject to sanctions, in accordance with Section 4 of the said Executive Order.⁵⁷

On 1 April 2021, President Joe Biden issued Executive Order No. 14022, which revoked Executive Order No. 13928 issued by Donald Trump on 11 June 2020, resulting in the lifting of the sanctions imposed on Fatou Bensouda and Phakiso Mochochoko, and the termination of the visa restrictions imposed on some employees of the ICC. Despite welcoming this step, it did not bring about a fundamental change in the position of the US toward the Court, as US Secretary of State Anthony Blinken described Trump's decision as inappropriate and ineffective, but affirmed the continued opposition of the US to the Court's proceedings relating to Afghanistan and Palestine, and its objection to the Court exercising jurisdiction over nationals of non-party states, foremost among them the US and Israel.⁵⁸

At a moment when the ICC appeared closer than ever to testing its ability to impose its jurisdiction beyond the limits of the "consent of the major powers," the American sanctions on two of its judges revealed that the conflict was no longer

purely legal, but rather a political confrontation over the future of the rules-based international order.⁵⁹

On 21 November 2024, the ICC issued two arrest warrants for Israeli politicians Prime Minister Benjamin Netanyahu and former Minister of Defense Yoav Gallant, charging them with war crimes and crimes against humanity in the Gaza Strip. On 6 February 2025, President Donald Trump promulgated Executive Order No. 14203 regarding the imposition of sanctions on the ICC, asserting that the Court had undertaken illegitimate and baseless actions against the US and its ally Israel by initiating preliminary investigations into individuals from the US and certain allies, including Israel, and had misused its authority by issuing unfounded arrest warrants for Israeli Prime Minister Netanyahu and former Minister of Defense Gallant. The Executive Order said that the Court lacks legal authority over both the US and Israel, since neither is a signatory to the Rome Statute of the ICC nor has acknowledged its jurisdiction⁶⁰.

The American action, which aimed at two judges advocating for the inclusion of Palestinian territories within the Court's jurisdiction and endorsing arrest warrants against Israeli Prime Minister Benjamin Netanyahu and former Minister of Defense Yoav Gallant, seemed, as discussed in the program *Beyond the News*, to convey a direct message of intimidation: any judicial endeavor approaching Israel will be countered with the mechanisms of American power, rather than through legal proceedings.⁶¹

On 13 February 2025, in alignment with the ongoing strategy to exert pressure on the ICC, the US implemented economic sanctions and travel restrictions on Prosecutor Karim Khan, following Executive Order No. 14203 issued by President Donald Trump on 6 February 2025, thereby making him the inaugural Court official to face such sanctions.⁶² On 5 June 2025, US Secretary of State Marco Rubio announced additional sanctions under the same Executive Order against four

female judges: Solomy Balungi Bossa (Uganda), Reine Adélaïde Sophie Alapini-Gansou (Benin), and Beti Hohler (Slovenia), due to their involvement in decisions concerning the investigation of Americans in Afghanistan and the issuance of arrest warrants against Netanyahu and his former Minister of Defence Gallant. On 20 August 2025, Marco Rubio announced new sanctions targeting Judge Kimberly Prost (Canada), Judge Nicolas Guillou (France), and Deputy Prosecutors Nazhat Shameem Khan (Fiji) and Mame Mandiaye Niang (Senegal), alleging their involvement in the Court's proceedings against US and Israeli citizens, including their support for investigations and arrest warrants issued against Netanyahu and Gallant.⁶³

This move was not read by analysts as a procedural objection to the Court's jurisdiction as much as it was considered an attempt to redraw the boundaries of international justice according to the balance of power, not according to the texts of the law. Washington, which had previously welcomed the expansion of the Court's powers when they affected its adversaries, has today returned to undermining them when they touched its closest ally. In this context, an American contradiction that is difficult to ignore emerges. The US, as explained by the senior researcher at the Al Jazeera Centre for Studies, Dr. Liqaa Makki, does not oppose the Court in principle, but rather opposes it when it turns into a constraint on hegemony. The rules-based international order, in his view, is acceptable as long as it serves American interests, but it becomes a burden when it opens the door to accountability for Israeli leaders or American soldiers.⁶⁴

The Court affirmed in its statement that it stands firmly alongside its judges and alongside the victims of unimaginable atrocities. It also indicated that it will continue carrying out its duties without retreat and without submitting to any restrictions, pressures, or threats.⁶⁵

3.2 Domestic Laws and Bilateral Immunity Agreements Concluded by the USA to Protect Its Nationals

On July 18, 2002, marking the four-year anniversary of the adoption of the Rome Statute and its enforcement beginning July 1, 2002, following ratification by more than sixty nations, the United States Congress passed the American Service Members' Protection Act (ASPA). This statute was introduced by Senator Jesse Helms, then-Chairman of the Senate Foreign Relations Committee, in collaboration with Representative Tom DeLay, and was ultimately enacted into law by U.S. President George Bush on August 2, 2002.⁶⁶

The most important provisions contained in this law are as follows:

- Preventing any form of American cooperation with the ICC, including providing assistance or surrendering American citizens to it.
- Restricting the participation of the US in international peacekeeping operations unless it is guaranteed that its soldiers will not be subject to the jurisdiction of the Court.
- Prohibiting the exchange of classified information that could affect U.S. national security with the ICC.
- Suspending or restricting military and economic assistance to states supporting the Court, with the exception of certain allies.⁶⁷
- The ASPA, or the Hague Invasion Act (Section 2008), authorizes the President to use "all means necessary and appropriate to bring about the release of any U.S. person detained by the ICC," hence its designation as the "Hague Invasion Act."⁶⁸

An amendment was introduced to the ASPA, known as the "Dodd Amendment" contained in Section 2015 thereof, which authorized the US to cooperate with international efforts, including the ICC, to prosecute foreigners accused of committing genocide, war crimes, and crimes against humanity, especially in cases related to terrorism. This amendment reflects the contradiction in American policy between its concern to protect its nationals from the Court's jurisdiction and its effort to make use of the Court in combating terrorism

when its interests so require.⁶⁹

This law also drew widespread criticism, especially from European states, because it limits cooperation with the ICC, which may make the US a safe haven for some persons accused of committing serious international crimes. Likewise, the authorization granted to the U.S. President to use all possible means to secure the release of American citizens detained by the Court was considered a means of exerting pressure on allies and pushing them to conclude bilateral agreements preventing the surrender of American nationals, despite the possibility of settling such matters through diplomatic and peaceful means.⁷⁰

As an additional measure within the framework of intensifying pressure on states supporting the ICC, the U.S. Senate adopted in December 2004 what became known as the Nethercutt Amendment, which is considered more comprehensive than the ASPA within the policy of American escalation toward the Court. This amendment provided for the withdrawal of financial allocations directed to support certain foreign economies, including allies of the US that had ratified the Rome Statute without concluding bilateral agreements with it. However, this measure did not achieve its intended objectives, as it did not lead to the withdrawal of states from the ICC on a continuous or wide scale. Several states also declared their explicit rejection of these agreements, including Canada, the Netherlands, Norway, Switzerland, and Yugoslavia, while the European Union adopted a unified position rejecting the conclusion of such agreements.⁷¹

The American efforts were not limited to benefiting from domestic laws and the resolutions issued by the UNSC that provided protection to its nationals serving in international missions from being subject to the jurisdiction of the ICC. It also sought to strengthen this protection through concluding bilateral agreements with a large number of states.⁷² These agreements included a commitment by those states not to surrender or transfer American citizens to the ICC, and these efforts were often

associated with the exercise of political and economic pressure, represented by threatening to suspend or reduce the military and economic assistance provided to those states.⁷³

Among the most important problems facing the Court regarding immunity are the impunity agreements that the USA seeks to conclude with the governments of many states, which provide that the government concerned will not surrender or transfer citizens of the US accused of committing genocide, crimes against humanity, or war crimes to the ICC if the Court requests it to do so. These agreements also do not require the USA or the other states concerned to conduct an investigation or, even if sufficient evidence is available, prosecute such persons.⁷⁴

One of the major problems facing the Court with regard to immunity is that these agreements require neither the USA nor the other states concerned to conduct any investigation, even if sufficient evidence is available to prosecute those persons.⁷⁵ It is worth noting that the purpose of such agreements is to secure impunity and obstruct the exercise of the jurisdiction of the ICC to try any American citizen if they commit any crime falling within its jurisdiction. Had the USA intended only to ensure the exercise of its own jurisdiction to prosecute its nationals, the provisions of Articles (1 and 17) of the Statute of the ICC, which affirm the priority of national jurisdiction, would have been sufficient for that purpose.⁷⁶

There is no doubt that Article (98) of the Statute introduced a serious exception that could undermine the efforts for which the Court was established, as it recognized the right of States not to surrender wanted criminals where there are international agreements requiring the consent of the sending State. Paragraph 2 provides that: "The Court cannot advance a surrender request that necessitates the requested State to act contrary to its obligations under international agreements requiring the consent of the sending State prior to the surrender of an individual from that State to

the Court, unless the Court first secures the cooperation of the sending State to obtain such consent."⁷⁷

The US contacted governments in various parts of the world requesting them to conclude bilateral agreements requiring that its nationals not be surrendered or transferred to the ICC. It did in fact conclude such agreements with East Timor, Israel, Romania, and Tajikistan. It also exerted intense pressure on States to meet its demands, threatening to withdraw military assistance.⁷⁸ On 1 July 2003, it announced the withdrawal of military assistance provided to 35 States Parties to the Rome Statute that had refused to sign these agreements, and on 8 December 2004, it announced the withdrawal of economic assistance from the States that maintained their refusal.⁷⁹

The provision of this article applies in the case of bilateral or multilateral agreements between States in which it is agreed not to surrender the nationals of those States to other States or to the Court. The danger of Article (98) lies in the fact that it constitutes a restriction on the application of Article (27) of the Statute.⁸⁰ Although it excluded immunity as a legal defense, it nevertheless recognized the possibility for States to depart from this principle through such agreements.⁸¹

In application of this, the USA took the initiative to conclude numerous bilateral agreements with different States, under which immunity is granted to its citizens or members of its armed forces, while preventing their surrender to the ICC. It also focused its efforts on concluding these agreements with States Parties to the Rome Statute, which is contrary to the provisions of Article (27), which provides that no regard shall be given to the personal immunity of the perpetrator of an international crime.⁸²

The US considers these agreements to be lawful and consistent with the Rome Statute.⁸³ However, this claim has been refuted by many studies, which have shown, including by Amnesty International, that impunity agreements violate the obligations

arising under Article (53) of the Vienna Convention on the Law of Treaties.⁸⁴

From the above, we say that these difficulties facing the ICC with regard to the issue of immunity and the escape of perpetrators from punishment are matched by an important provision in the Statute, as Article 29 provides that: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." This means that international crimes are not extinguished by the passage of time, and that whoever is protected by immunity today may be held accountable in the future.

4. CONCLUSION:

At the conclusion of this modest study, it can be said that despite what the principle of non-impunity represents as one of the fundamental pillars of the system of ICJ, as it is a legal tool aimed at ensuring that perpetrators of international crimes do not remain beyond criminal accountability, the effectiveness of this principle does not depend only on the development of its legal rules and mechanisms, but is also linked to the nature of international balances and the extent of the responsiveness and agreement of the major powers, such as the USA, with the system of ICJ.

Accordingly, the study reached a number of findings and recommendations, which can be summarized as follows:

Study Findings:

- The concept of non-impunity is a key pillar of the International Court of Justice (ICJ). It seeks to guarantee the responsibility of offenders of grave international crimes and to prevent their evasion of punishment.
- The study showed that the effectiveness of the principle of non-impunity is based on a number of interconnected legal principles, such as the principle of individual criminal responsibility, the principle of non-recognition of official capacity, and the principle of complementarity, in a way that establishes the priority of justice over political or functional considerations.
- The ICC, as a permanent judicial mechanism established to prosecute those responsible for international crimes, has contributed to entrenching the principle of

non-impunity, despite the legal and political challenges facing its work.

- The UNSC has an important role in activating the principle of non-impunity, but the connection of its decisions to political considerations sometimes limits the effectiveness of this role.
- The American position toward the ICC has ranged between reservation and opposition, as reflected in its refusal to join the Rome Statute, its questioning of the jurisdiction of the ICC, and its continuous efforts to restrict its work.
- The refusal of the USA to join the Rome Statute weakened the principle of the universality of ICJ and affected the efforts aimed at strengthening the principle of non-impunity at the international level.
- The study showed that the USA exercised, in various ways, a noticeable influence on the effectiveness of the principle of non-impunity through the use of its political influence within the SC and the exercise of various pressures on the ICC.
- It became clear that the use of the right of veto, or the threat to use it, in some cases relating to international crimes contributed to obstructing the mechanisms of international accountability, which negatively affected the effectiveness of the principle of non-impunity.
- The study concluded that the effectiveness of the principle of non-impunity remains linked to the extent of the independence of the mechanisms of ICJ from the political considerations of the major powers, foremost among them the USA.

Study Recommendations

- Strengthen the independence of the ICC and protect it from political pressures that hinder the effective discharge of its mandate.
- Reform the relationship between the UNSC and the International Criminal Court in a manner that minimizes political influence over the administration of international criminal justice.
- Encourage non-States Parties, particularly the USA, to cooperate with the International Criminal Court in support of global efforts to combat impunity.
- Support international initiatives aimed at

restricting the use of the veto in matters involving serious international crimes, thereby preventing political considerations from obstructing international criminal accountability.

- Enhance international cooperation in the implementation of decisions issued by the International Criminal Court and in the prosecution of perpetrators of international crimes.
- Intensify academic and scholarly research examining the impact of major powers on the international criminal justice system, while proposing legal and institutional mechanisms capable of striking an appropriate balance between respect for State sovereignty and the imperative of combating impunity.
- Further develop the rules of international criminal law to reduce selectivity in the application of international justice and to reinforce the principle of equality of States and individuals before international law.

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- 80- Article 27 of the Rome Statute provides: "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."
- 81- Ibrahim Al-Sayyid Ahmad Ramadan, op. cit., p. 308.
- 82- Mohammad Sameh Amr, Alaqat Majlis Al-Amn bil-Mahkama Al-Jinaiyya Al-Dawliyya, Dar Al-Nahda Al-Arabiyya, Cairo, Egypt, 2008, p. 225.
- 83- Al-Raid Anwar Amjad, "Al-Hasana Ahad Al-TahaddiyatAllatiTuwajih Al-Mahkama Al-Jinaiyya," MajallatBuhuth Al-Shurta, No. 27, 2005, p. 480.
- 84- Ibrahim Al-Sayyid Ahmad Ramadan, op. cit., p. 309.