

US Strategy To Immunize Its Citizens Before The International Criminal Court -Afghanistan Case-

استراتيجية الولايات المتحدة الامريكية لتحصين رعاياها أمام المحكمة الجنائية الدولية

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Abstract:

The United States of America pursues to establish its hegemony on the international arena a set of ways, including adapting international law according to its vision, and it has employed this approach during the negotiations for the establishment of the International Criminal Court by trying to impose a statute that enables it to control its decisions. its failure to achieve this made it embark on a hostile campaign against the court to undermine its functions, especially against its citizens involved in crimes committed on the territory that it invaded by it as part of its global war on international terrorism, adopting strategy to make those involved free from the court's jurisdiction

Through this paper, the objective is to shed light on this strategy, and its applications in Afghanistan

Key words: United States of America; Afghanistan; International Criminal Court; Judicial Exceptions; Immunity; Impunity.

Introduction:

More than twenty years after 120 delegates signed the Rome Statute, which established the International Criminal Court with the aim of ending impunity for the most heinous crimes known to humanity (war crimes, crimes against humanity, genocide, etc.). The Court has reached during this period to very little convictions, all of which were directed against Africans, this outcome has been criticized for its ineffectiveness and doubted especially by African countries, as it is indeed a court that seeks to achieve just global justice, it is accused of applying double standards, and its selectivity that it clearly reflects the dominance of African subjects of international criminal justice.

This was not the only objection faced by the Court, as the United States of America adopted an opposing position that does not recognize the legitimacy of the jurisdiction of this Court over citizens of non-party countries, and strongly rejects the subjection of American citizens to a judiciary that it described as less efficient and independent than the American judiciary. In seeking to protect its citizens and authorities from prosecution by the court (that was described as mentioned before), it adopted a strategy after its failed efforts to establish an international criminal court with standards that serve American goals and protect its interests in the first place.

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The aim that it is trying to be achieved through this paper is to shed light on this strategy, and trying to understand how this strategy was implemented in Afghanistan. This country has been chosen because of some reasons: its association with the United States of America, it is a case of the age of the court, and a case that The International Criminal Court tried to open an investigation to restore its shaken legitimacy, to prove that it worked away from criticism directed to it, and that it is not subjected to the desires of the major powers and that all individuals, regardless of their nationality, are equal before the law. In this context, two important questions ought to be answered: What does the United States of America trying to prove to the world through its struggle to obtain its judicial exceptionality from the jurisdiction of the international criminal court? Does this strategy really achieve the judicial exception in the Afghanistan case -The exception from Investigation-?

1- Congress' Guaranties to Protect US Soldiers Abroad:

Within the framework of the American approach to opposing the International Criminal Court and its powers, and in support of The Article 98 conventions, the US Congress ratified two laws:

1.1- American Service Members Act (ASPA)

During the campaign led by the United States of America to fight terrorism in the world resulted in the invasion of Afghanistan as a first ground where crimes were committed required accountability before the International Criminal Court. The first steps in its policy of opposition to the Court at the internal level and the official manifestation of its position were Americans Soldier Protection Act abroad. ⁽¹⁾ Among the most important provisions contained in this law and its perspective are the following:

(a) Prohibit all forms of US cooperation with the International Criminal Court, including:

- Prohibit cooperation by not providing any financial assistance to the Court or assisting it in the investigation, arrest, or exchange of any US person or foreign person permanently resident in the United States of America.
- Prevent any further action by the Court on US.

This prohibition applies to US organs and bodies, US courts, local governments, and federal governments. ⁽²⁾

(b) Limiting the participation of US forces in United Nations peacekeeping operations except under Chapters VI and VII of the Charter of the United Nations, and that such operations must be in countries that are not parties to the International Criminal Court; however, the President of the United States of America may allow US forces to participate in operations only if one of the following conditions is met:

- A Security Council resolution guaranteeing the immunity of the US armed forces ⁽³⁾.
- The existence of a convention of the type of agreement in Article 98 between the United States of America and the country in which military operations are carried out.
- The existence of a national interest that highlights participation in the process.

(c) Prohibit the direct or indirect exchange of any confidential information or documents with the International Criminal Court that impacts the national security ⁽⁴⁾.

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- (d) Prohibition of military assistance to any ratifying country of the Rome Statute except for NATO Member States as well as their non-member allies including: Australia Egypt, Israel, Czechia, Turkey, Japan, Jordan, Argentina, South Korea, New Zealand, and Taiwan.

However, the President may reconsider the embargo if the State has entered into an agreement with the United States of America in accordance with Section 98(2) and that agreement expressly prohibits the extradition of any US citizen to the ICC.⁽⁵⁾

- (e) This Act authorizes the President to use all means to free any American person detained by or on behalf of the International Criminal Court, any person holding the nationality of an allied country if so requested by his country, or any person enjoying American protection⁽⁶⁾, hence the name of this law is "Hague Invasion" or "Hague Invasion Act"⁽⁷⁾.

1.2- Nethercutt Amendment Law⁽⁸⁾

This law is part of the US Foreign Appropriations Act adopted by the US Senate in December 2004 as an additional measure to discipline countries supporting the International Criminal Court. This law include:

- Withdrawal of financial allocations intended to support the economies of some countries, namely countries that have ratified the Rome Statute and countries that have not ratified, and have not entered into Article 98 agreements with the United States.⁽⁹⁾
- Grant the President the authority to lift the embargo on NATO members and non-NATO allies without prior notice to Congress if this action is in the national interests of the United States.⁽¹⁰⁾

2- Security Council resolutions immunize Americans:

The United States succeeded in passing a set of resolutions, including Resolution 1422, which extends the work of UN peacekeeping forces in Bosnia and also exempts all American soldiers serving in peacekeeping forces within the framework of UN operations in the World and other US officials from ICC persecution for 12 months with the Council's intention to renew the duration⁽¹¹⁾.

The background to the issuance of the resolution is largely related to the invasion of Afghanistan by the United States and the defeat of the Taliban at the hands of American forces and the Afghan Northern Alliance (an ally of the United States). After the transfer of power to this latter, the status of American forces in Afghanistan became from forces that invaded Afghanistan to troops as part of the International Security Assistance Force in Afghanistan, most of which were under direct US command, except for one division that was under NATO command.

Thus, the issuance of Resolution 1422 immunizes American soldiers and officials and prevents the prosecution of charges before the International Criminal Court for crimes that will be committed within 12 months with the possibility of renewing that period, which was already renewed in June 2003 through Resolution 1487⁽¹²⁾, which coincided with the operations of the United States of America in Afghanistan in the face of the return of the Taliban, which was rearmed and began to engage in guerrilla warfare to expel American forces from Afghanistan as well as the operations of the United States of America in the framework of its invasion of Iraq in March 2003.

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By Resolution 1497 of August 2003, which was implemented on the Liberian conflict, the United States was able to grant its nationals there absolute immunity without time limitation, as can be seen from the seventh paragraph in the resolution, it confers on countries participating in peacekeeping operations that are not parties to the Rome Statute exclusive preliminary jurisdiction over the acts of their troops stationed in the host country.⁽¹³⁾

From the foregoing, it can be said that the strategy of the United States in issuing Security Council resolutions granting immunity to its citizens is a way to implicate the Security Council, as it has made it:

- a. Exceeds the powers conferred upon it by the Charter of the United Nations by issuing decisions in situations not considered a threat to peace and security or an act of aggression.
- b. Granting immunities in future cases, as the Security Council relied on Article 16 of the Rome Statute⁽¹⁴⁾, which recognizes the power of the Security Council to defer investigation or prosecution of cases that the Court has already begun to consider. However, granting immunities in future cases means defer investigation and prosecution that may or may not be considered by the court. The absolute immunities obtained by the United States under Resolution 1497 are implicating the Security Council in an absolute postponement of the investigation and prosecution of future cases related to the Liberian conflict in which the suspects may be American nationals; therefore, this dilemma is a provision for the effort to seek the issuance of postponement decisions to protect its citizens from prosecution by the International Criminal Court and submit to its jurisdiction.

The prosecution of any of those involved in it will be referred by the Security Council because of the veto power of the United States cannot be imagined and if the referral is made by other authorized parties, the Security Council will continue to Issuing decisions to postpone investigation or prosecution indefinitely based on those decisions cannot be imagined, as well. Especially since they have been criticized by many countries of the world, including permanent members of the UN Security Council⁽¹⁵⁾, so we find the United States focused heavily on the conventions of Article 98(2).

3- Immunity Agreements:

The United States was not satisfied with the resolutions of the United Nations Security Council, which granted immunity to its soldiers and citizens, but also searched for other legal solutions, where it used Article 98(2) of the Statute of the International Criminal Court very badly.

Since the article stipulates that the Court may not compel a State party to violate its obligations or laws by extraditing persons enjoying immunity, the United States of America has concluded bilateral agreements between it and some countries that include non-extradition of American citizens, relying on financial, sometimes military and political pressures. At other times, this is to undermine the work of the Court and reduce its actual activity in confronting the Americans, and so that these agreements are not contradictory to the international obligations of the United States of America and in order to give them some legitimacy, these agreements were preceded by a letter to the Secretary-General of the United Nations Kofi Annan, on 27/04/2001, clarifying its rejection of the Rome Statute and therefore is not bound by its provisions⁽¹⁶⁾ in

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accordance with the text of the first paragraph of Article 18 of the Vienna Convention on the Law of Treaties.⁽¹⁷⁾

However, many legal studies carried out by legal experts , including one carried out by legal experts of the European Union, have proven that the agreements that have been made by the United States of America are contrary to international law for a number of reasons:

- The interpretation of Article 98 by the United States of America is contrary to the general objective of the Rome Statute⁽¹⁸⁾.
- Agreements based on the American interpretation of Article 98 contradict the intentions of the delegations that participated in the drafting of the Statute of the Court, the wording of that article came to cover the Status of Forces Agreements (SOFA), Mission Agreements (SOMA), and to address the relationship between existing obligations under international law and future obligations under the Rome Statute.⁽¹⁹⁾ The original intention or rationale for that wording in Article 98(2) is to allow the continued implementation of the Force and Mission Agreements by States parties to the Rome Statute and thus these States can justify their non-cooperation with the ICC, or rather, the ICC will not request cooperation from them.⁽²⁰⁾
- These agreements conflict with the language used in the text of Article 98. The United States seeks through these agreements to obtain immunity for a large group of persons without reference to the agreement at the time. These studies were based in their justification on the fact that Article 98 means the (SOFA) and (SOMA) agreements, on the term sending state contained in the article; however, this term is not only related to these conventions but rather it is also used in other conventions such as extradition agreements, diplomatic and consular treaties, and the term sent includes any person working on foreign soil as a direct result of being sent there by his country, this is the closest interpretation of validity because if the negotiators wish to make Article 98(2) is limited to the (SOFA) and (SOMA) agreements, they would have clarified that, because the literal reading of Article 98(2) does not provide such an interpretation.⁽²¹⁾

As for the term person in Article 98 (2) according to the legal study of the experts of the European Union, it means all persons sent by the sending country, i.e. all persons who travel officially, this interpretation departs from its meaning contained in the (SOFA) agreement, while the term person contained in the agreements of Article 98 (2) supports the meaning that includes former and current government officials, contract employees, military personnel, a citizen, or any person whose protection is requested by the sending country.⁽²²⁾

- As for the issue raised about whether Article 98(2) applies to agreements and treaties signed before the signing of the Rome Statute or covers subsequent international conventions, it is stated in the legal study of the European Union that it includes previous conventions, including the renewal of the same agreements⁽²³⁾, even if after the signing of the Rome Statute. Although the (SOMA) and (SOFA) agreements remain in force. However, United States has launched a campaign to sign Article 98 conventions around the world with States Parties, and Non-Parties, due to the fact that the (SOFA) agreements provide inadequate protection against the possible jurisdiction of the International Criminal Court against the soldiers of the United States; also, the transfer of individuals into other court's jurisdiction was not mentioned nor prevented.

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This is the rationale behind this campaign, which was aimed at avoiding the possibility of being subject to the jurisdiction of the International Criminal Court⁽²⁴⁾, which leads us to conclude that the Article 98 conventions came to complement and fill the gaps of the (SOMA) and (SOFA) agreements and not a new form of agreement.

With regard to Afghanistan, the United States⁽²⁵⁾ has signed three agreements with it: the agreement signed between the International Security Assistance Force (ISAF) and the Transitional Government of Afghanistan; the agreement on the exchange of notes between the Embassy of the US in Afghanistan and the Ministry of Foreign Affairs of the Transitional Government of Afghanistan; and the Agreement between the Transitional Government of Afghanistan and the Government of the United States on the extradition of persons to the International Criminal Court (Article 98(2) agreement), which specifically would be highlighted in the following analysis⁽²⁶⁾.

The agreement stipulates that any extradition or transfer of current or former government officials, employees, including contractors, military personnel, or nationals from a party to the ICC or a third party intended to extradite or transfer such person to the Court is prohibited⁽²⁷⁾. In its preamble, it provides for the intention of the Contracting States to investigate and prosecute acts, when necessary, within the jurisdiction of the International Criminal Court⁽²⁸⁾.

Through the two texts, the prosecution of these individuals who commit acts that fall within the jurisdiction of the International Criminal Court is not excluded, and the existence of immunity for the same persons, is not excluded, as well. This is left to the country to which they belong, as this agreement does not impose the duty of prosecution and does not expressly provide for immunity.

With regard to the contradiction of this Convention with the Rome Statute and its consequences, it is known that in international law, when a contradiction arises between international conventions by the same signatory parties, the last international agreement that was signed prevails. In the case that is studied, the parties differ, the non-extradition agreement applies between Afghanistan, and the United States, and the Rome Statute obliges Afghanistan and the other States parties; therefore, Afghanistan is concerned with this contradiction. In the sense that in the event of circumstances that oblige Afghanistan to violate one of the two conventions, Afghanistan is the one who decides which agreement will be implemented and which agreement will ignore it; so, only after the decision that Afghanistan will take, the (Article 98)'s agreement can be considered a contravention of the Rome Statute.

In order to avoid this kind of situation, Article 98 has generated a solution to this situation, where the ICC is obligated not to make the state party in this position; therefore, Afghanistan will not end up deciding which agreement to implement and which to ignore.

As well as Article 119(1) of the Rome Statute, the ICC has jurisdiction to adjudicate any dispute concerning the judicial functions of the Court; therefore, the Court will be able to ignore any international agreement that violates Article 18 of the Vienna Treaty law⁽²⁹⁾, in other words, the competence to decide whether a State party is in a conflicting international obligation under article 98(2) lies within the court itself⁽³⁰⁾, but this also does not bring the article 98(2) agreement into line with the Rome Statute because it undermines the ability of the ICC to achieve its primary objective of ending impunity.

Returning to the issue that is discussed, the agreements between Afghanistan and the United States denied any possibility for Afghanistan to prosecute the persons officially sent by

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the United States that is, these agreements made Afghanistan relinquish its sovereign jurisdiction, while customary international law denies the right of any country to relinquish this jurisdiction or to remove it from other countries, and this cannot be done by an international treaty of any kind or content; therefore, under customary law, these agreements don't make Afghanistan lose its judicial rights because Afghanistan is a party to the court, it has the right to prosecute nationals of countries not parties to the Rome Statute if they have committed crimes within its jurisdiction and on the territory of a state party.

This right takes its legal basis, by ratifying the Rome Statute, where ratifying states have delegated their sovereign jurisdiction, and this mandate empowers the court to prosecute individuals who commit crimes on the territory of the state party. Therefore, in the presence of these agreements, the ICC has the right to prosecute Americans as much as Afghanistan can⁽³¹⁾.

This has already been confirmed by the International Criminal Court's opening an investigation into crimes committed in Afghanistan, suspects are members of the US armed forces and others from the CIA. While the court's ability is restricted for its request to Afghanistan to the extradition of such persons if they were on its territory, it may issue the same request to other States Parties in the case that such persons are present on the territory of those countries. This is due to the Article 98 agreements between the United States and Afghanistan have not prohibited or revoked the court's jurisdiction but restrict Afghanistan's cooperation with the court.

4- Accountability and the principle of complementarity on the American way:

The principle of complementarity is the cornerstone on which the jurisdiction of the International Criminal Court and the exercise of its jurisdiction, and on the basis of it, the priority of jurisdiction to punish crimes that fall within the substantive jurisdiction of the Court is vested to the national judiciary but if this judiciary refrains from exercising its jurisdiction for any reason or because it does not wish to exercise its jurisdiction, then the jurisdiction is vested in the Court as a complementary judiciary to the national judiciary.

This principle is also in fact a privilege that works in favor of developed countries as opposed to third world countries, and this is what William Schabas pointed out in his book "Introduction to the International Criminal Court" that the system will work in favor of rich and developed countries and against poor countries. Where the Prosecutor of the International Criminal Court can easily claim that the difficulties involved in the justice system in poor countries are almost impossible to overcome; therefore, it is a risk that Article 17 will become a very strict assessment tool for the judicial system in underdeveloped countries⁽³²⁾.

The United States is well aware of this, and its experience with the principle of complementarity and accountability was in the Barack Obama era⁽³³⁾, and also coincided with the Court's interest in the situation in Afghanistan and its announcement in 2007 to begin preliminary examination under Article 15 of the Court's Statute, after its Office of the Prosecutor at the time received much information regarding the situation there.

This experience was represented in accountability for the crimes of torture committed in Afghanistan, which is also one of the aspects of the investigation opened by Fatou Bensouda, which is the torture of Afghans by members of the US military and members of the CIA, where Congress conducted investigations over a period of seven years, which began in 2009, and relied on the documents of the CIA itself⁽³⁴⁾.

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These investigations resulted in a 6,000-page report, 600 pages of which were issued in the form of a revised executive summary in 2014, and the executive branch also conducted investigations and commissioned lawyers to prepare memoranda, who were accused of distorting the law to justify and legalize the policy of torture. After these investigations, some persons were prosecuted for their role in carrying out the crimes of torture, which was at the level of military courts and was limited to low-ranking officers, while outside the military justice system, an investigator contracted with the CIA was accused for exceeding authorized tactics and torturing a detainee to his death. The investigations excluded senior US officials who had a torture program where they lived free and profitable lives, for example, Ronald Rumsfeld, as Secretary of Defence, who supervised, authorized, and pushed for the expansion of torture techniques, he remained a free man until he died in 2021, as he spent his retirement years developing mobile apps, while James Mitchell, who made millions of dollars working as a contractor with the CIA and helped design torture techniques, now sells memoirs about his crimes and talks about them frequently on news channels and in think tanks.⁽³⁵⁾

From the above, it can be interpreted Prosecutor Fatou Bensouda's investigation of Afghanistan as clear evidence of the failure of the experience of the United States in accountability and its application of the principle of complementarity in the crime of torture because the principle of complementarity is negated either:

- The inability which cannot be raised under US laws that criminalize torture, in addition to the strength and independence of the US judiciary⁽³⁶⁾.
- Or the unwillingness because of its investigations and show trials.

However, the recent exclusion of the International Criminal Court of the United States from its investigations into Afghanistan and Prosecutor Karim Khan's call for it to act according to the principle of complementarity makes us wonder if this call is aiming to repeat the principle of complementarity in the American way or the principle of complementarity with fair investigations and trials into crimes within the jurisdiction of the International Criminal Court?

5- Imposition of Sanctions:

The United States of America is one of the most employing countries for the weapon of sanctions, specifically unilateral sanctions by a country; so, these sanctions impacted entire countries or impacted sectors and people responsible for programs and institutions within a particular country under the pretext of committing crimes or certain acts⁽³⁷⁾, in the era of Clinton, for example, the United States imposed Economic sanctions 61 times included 35 countries whose population constitutes 42% of the world's population, and in the era of Donald Trump, sanctions have become the most important types of policies through which the United States aims to achieve political, economic and social gains by exerting pressure on a country or international body to change its positions in the direction in which US wants it⁽³⁸⁾.

This is what has already happened with the International Criminal Court, where the threat of the United States if the court opened an investigation that impacted Americans. This has turned into reality by issuing a presidential order by President Donald Trump on June 11, 2020, which included sanctions⁽³⁹⁾ represented in imposing restrictions on granting visas to enter the United States and freeze assets, and these sanctions affected Prosecutor Fatou Bensouda, phakisomochochoko(Head of the ICC Jurisdiction, complementarity, and Cooperation Section), ICC judges, staff and their families, as well as human rights inspectors involved in any effort to investigate war crimes supposedly committed by US soldiers in Afghanistan, and these sanctions

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came in response to an appeal decision of the ICC issued in March 2020, which authorizes the opening of an investigation into war crimes and crimes against humanity in Afghanistan⁽⁴⁰⁾.

The background to this investigation dates back to 2017 when the Office of the Prosecutor requested the Pre-Trial Chamber authorize the investigation in Afghanistan based on the initial examination of the Prosecutor who concluded that US forces and CIA personnel had committed war crimes in Afghanistan, particularly in the period 2003-2004, where the preliminary examination that lasted more than a decade established that crimes against civilians, imprisonment and extrajudicial executions had been committed, and the US military had practiced torture in secret detention centers run by The CIA, with the knowledge and partnership of the Afghan government, which has tortured prisoners, and that the Taliban have also committed war crimes such as mass killings of civilians⁽⁴¹⁾.

In response, former National Security Advisor John Bolton announced in September 2018 that Trump administration would not cooperate with the court, threatening retaliatory measures if the investigations impacted citizens of the United States, Israel⁽⁴²⁾ or any other country allied with it⁽⁴³⁾, and President Trump reiterated the same position in his speech to the United Nations General Assembly in September 2018⁽⁴⁴⁾.

It should be noted that the Prosecutor's request was rejected by the Pre-Trial Chamber⁽⁴⁵⁾, which used the criterion of the interests of justice as a basis for rejecting the request and did not provide in its decision⁽⁴⁶⁾ to determine the interests of justice, but provided some factors that could be considered relevant to it, most notably:

- Time elapsed between the alleged crimes and the request.
- The rare cooperation that the Prosecutor received throughout the initial examination.
- The initial examination was carried out on the basis of information rather than evidence.

The Prosecutor's efforts did not stop at this refusal but she appealed the decision of the Pre-Trial Chamber before the Appeals Chamber, which in turn found that the Pre-Trial Chamber had erred in using the criterion of the interests of justice, and it had also erred in its interpretation of Article 15 paragraph (4) when it found itself obliged to assess the factors contained in Article 53 paragraph (1), and what was contained in paragraph Article 15 paragraph (4). The Appeals Chamber explained that the content and position of Articles 15 and 53 make them separate provisions, the first dealing with the initiation of an investigation while the second concerned with the Prosecutor's discretion to conduct an investigation. The Appeals Chamber amended the decision of the Pre-Trial Chamber and determined that the Prosecutor was authorized to initiate an investigation into the situation in Afghanistan.⁽⁴⁷⁾

Through this decision, we can interpret the Pre-Trial Chamber's rejection of Prosecutor Bensouda's initial request as acquiescence to US pressure and political considerations, in particular the errors proved by the Appeals Chamber and justified as the Pre-Trial Chamber's haste.

6- An attempt to understand the strategy in post-sanctions:

Our attempt to understand the landmarks of this strategy during this stage will be by listing the most important events related to the case of Afghanistan, and interpreting the position of the International Criminal Court on this case.

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6.1- The most important events and facts related to the subject

The stage witnessed many events, and we will try to present the most important of them in a chronological presentation:

- a. February 29th, 2020: The signing of a peace agreement between the United States of America and Taliban⁽⁴⁸⁾, which called for the withdrawal of the United States of America from Afghanistan within 14 months if the Taliban abide by the terms of the agreement, this agreement came after negotiations between the two parties in Qatar⁽⁴⁹⁾.
- b. March 5th, 2020: Authorization to start the investigation into Afghanistan.
- c. March 26th, 2020: The Government of Afghanistan⁽⁵⁰⁾ submitted a request for a halt to the investigation to give it the opportunity to conduct its own investigations.
- d. April 2020: The ICC approved the request of the Government of Afghanistan.
- e. June 2020: US Presidential Order on Sanctions on ICC Staff is issued.
- f. January 2021: Biden became President of the United States⁽⁵¹⁾.
- g. In February 2021: Karim Khan was elected Prosecutor of the International Criminal Court.
- h. April 2021: The issuance of the US presidential order related to the lifting of sanctions on the staff of the International Criminal Court, ⁽⁵²⁾ followed by statements by President Biden, where he stated that threatening and imposing financial sanctions on the Court and its employees were not an appropriate and effective strategy. And he confirmed Washington's continued opposition to the investigation of facts attributed to countries not parties to the Rome Statute.⁽⁵³⁾
- i. On June 16th, 2021: Karim Khan assumed the duties of Prosecutor of the International Criminal Court.
- j. August 2021: Final US withdrawal from Afghanistan, fall of the US -backed Afghan government, Taliban takeover of Afghanistan, Islamic State-Khorasan Province claims responsibility for a suicide bombing at Kabul airport during US evacuations that killed US military personnel and Afghan civilians.
- k. September 17th, 2021: Prosecutor Karim Khan submitted a request to the Pre-Trial Chamber to launch a new investigation excluding US and Afghan government forces and focusing on the Taliban and ISIL Khorasan Province.
- l. October 31st, 2022: The Pre-Trial Chamber issued a decision under Rule 18(2) of the Statute authorizing the Prosecutor to resume the investigation in Afghanistan⁽⁵⁴⁾.

6.2- Interpretation of the ICC's disposition of the case during this stage

We chose to interpret the most prominent positions that would clarify the features of the US strategy at this stage, specifically the positions of the prosecution apparatus because it is the most active at this stage, and concerning the Afghanistan Case, the content of the prosecutor request to resume the investigation in the Afghanistan case with the exception of Americans would be the topic of interpretation.

Prosecutor General Karim Khan justified his request by saying that the fall of the internationally recognized Afghan state and its replacement by the Taliban in governing the country represents an important change in the situation, which affects the conduct of real and effective local investigations within Afghanistan, and that he worked with parameters of the dangerousness and scope in limiting the investigation to crimes committed by the Taliban and the Islamic State of Khorasan Province, as he pointed out the lack and limitation of resources, he said that it does not allow consideration of the various aspects of the investigation because of the

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existence of investigations involving different regions of the world, and that the Office of the Prosecutor will seek to strengthen accountability efforts within the framework of the principle of complementarity regarding aspects of the investigation that have not been prioritized⁽⁵⁵⁾(implicitly calling the United States to act in accordance with the principle of complementarity after being excluded from the investigation).

This request was denounced and opposed by human rights defenders and human rights organizations, describing it as duplicitous, selective, and politicized of the International Criminal Court, which inevitably adds to its involvement⁽⁵⁶⁾.

In addition to this objection, there are those who supported what prosecutor Karim Khan did, and their justification for this was that the pressure that the Office of the Prosecutor was subjected to after allowing the investigation to begin in Afghanistan against Americans, made the fate of the case at stake, especially since the work of the court depends on the unconditional cooperation of countries, especially the largest ones. On this basis, the exception of the Americans will make the prosecutor's steps to move forward in the future, especially since the latter drew the attention of the United States of America to the need for it to investigate domestically.

This oscillation between support and opposition makes us try to interpret the prosecutor's request in light of his justifications provided to determine the direction of his policy:

- ✚ The US judiciary will investigate the case locally, which we believe will not be achieved for several reasons:
 - The experience of the United States of America with integration and accountability, which we have already discussed in detail, and which we concluded is a failure if we examine it with the criteria of real complementarity and accountability.
 - In addition, US military personnel are subject to their own legislation that does not include crimes that fall within the subject matter jurisdiction of the International Criminal Court.
 - Furthermore, the vast arsenal of impunity agreements that immunizes its military personnel and citizens, and impedes cooperation with the court.
- ✚ He noted that there was no prospect of a genuine and effective domestic investigation into crimes inside Afghanistan .He commended the participation of the former Government of Afghanistan in promoting accountability and fulfilling its obligations under the Rome Statute, which means that the principle of complementarity is in accordance just with the United States or with a loyal Afghan Government.
- ✚ He pointed out the factors on the basis of which priority is given to the issues, namely:
 - Crimes of an ongoing nature are a key factor in building credible cases that can be proven beyond a reasonable doubt in court and thus prioritize the crimes committed by ISIL in Khorasan as well as the Taliban because they continue to commit the same crimes that were previously allegedly committed, where he indicated the August 2021 attacks near Kabul airport, in which US soldiers and Afghan civilians were killed. It can be said that this was the reason behind an exception for crimes committed by US soldiers and loyal Afghans.
 - The gravity and scale of the crimes committed by Taliban and ISIL in Khorasan which include indiscriminate attacks on civilians, targeted extrajudicial executions, persecution of women and girls, crimes against children, etc...,

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cannot be compared with the crimes committed by American and Afghan soldiers.

✚ He pointed out the limited resources. Before delving into the analysis and interpretation of this factor, we must note that in order to enhance the performance, efficiency, and effectiveness of the International Criminal Court, the Assembly of States Parties appointed in early 2020 a group of international experts to make recommendations in this regard.

The report of this team revealed imbalances in the work of the four organs of the Court, including the Office of the Prosecutor, and also confirmed that the material and human resources of the Office of the Prosecutor do not allow it to initiate investigations into more than eight cases at the same time, while the number of investigations during the preparation of the report reached 14 investigations in addition to eight preliminary studies.

The team recommended that the Office of the Prosecutor should be decisive in determining which investigations will receive priority, for which sufficient resources will be allocated, those to which their priority and resources will be reduced, and then other investigations that are temporarily suspended⁽⁵⁷⁾, and also recommended that priority be given to cases that have the strongest evidence⁽⁵⁸⁾. He urged the Office of the Prosecutor to adopt feasibility factors to determine its priorities after the opening of the investigation and defined feasibility as the extent to which the Office is able to carry out an effective and successful investigation leading to the prosecution of the accused with reasonable expectations of conviction, taking into account the quality of the available evidence, the cooperation of countries, the security situation, and the ability to protect witnesses.⁽⁵⁹⁾

The Assembly of States Parties adopted the recommendations of this group and established a mechanism to follow up on their implementation within a specified time frame and within budget⁽⁶⁰⁾.

The prosecutor's justification for the resumption of the Afghanistan investigation, with the exception of US and Afghan soldiers due to limited resources, can be interpreted in two ways:

- As adoption of the reform program approved by the Assembly of States Parties. In order for the Office of the Prosecutor to carry out an effective and successful investigation into the Afghanistan case according to this program, the investigation would be limited to the Taliban and the Islamic State organization in Khorasan because it is not expected that there will be evidence available and of a quality that incriminates the American armed forces, especially the CIA, or its Afghan agents, and will not find cooperation from states, also it has no ability to protect witnesses.
- The other approach is a reform for the effectiveness of the Court that contradicts the principle of equality before the law, which makes us interpret the Prosecutor's justification in another way:
 - Since the Court depends on the funding of States parties, if we go back to what happened when the investigation was expanded to include suspected crimes of Russian forces in Georgia, US forces in Afghanistan, Israeli

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soldiers and commanders in Palestine, and Myanmar forces against the Rohingya, this matter angered the allies of these countries within the Assembly of States Parties that resorted to the funding policy. By virtue of the fact that the Court relies in its activities on the contributions of the States Parties mainly and these contributions are known as assessed contributions, which are determined according to the size and strength of the national economy in each country, a bloc of the most important donor countries (Germany, Japan, Britain, France, Italy, Canada) has adopted a policy of nominal zero growth, a policy in which the budget growth rate is within zero percent, which negatively affected the court's budget.⁽⁶¹⁾

Because the scarcity of the Court's resources causes delays in preliminary and official investigations, and thus reduces the number of cases that the Office of the Prosecutor can investigate effectively, from here we can understand the features of the strategy in the Biden era that it is based on influencing the Assembly of States Parties through financing, either funding its allies parties or American financing given that the Court also depends on donations for funding.

- Returning to the controversy surrounding the arrival of Karim Khan to this position, especially since most of the countries opposed to the ICC and allied to the United States, including Israel in particular, welcomed his success in the elections. If the states parties are the ones who choose the prosecutor by secret ballot and with an absolute majority, the success of a character known for:
 - His strong criticism of the International Criminal Court and accusing it of politicizing the judiciary.
 - Succeeded in defending African leaders(former Congolese Vice President Bemba, Kenyan leaders William Ruto, and Francis Mutaro), a defender of Saif al-Islam Gaddafi.
 - A character nominated by the British government who received significant support from the African Group that played a major role in his election succeeded against his biggest rival, the Irish candidate Farghalginor, a lawyer for the defense of Palestinian and Afghan victims.

All of what we mentioned earlier are indicators that support the idea of influencing the Assembly of States Parties as a key to understanding the strategy of the United States in the era of Biden, especially if we go back to the speech of David Schaeffer before The Senate Foreign Relations Committee on 23/07/1998, he noted that the United States had succeeded in including provisions in the Rome Statute consistent with its ambition⁽⁶²⁾, including:

- An Assembly of States Parties to oversee the administration of the Court.
- Accepting the basic principle of State Party funding of the Court.

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The United States may have been able to influence the Assembly of States Parties but the Pre-Trial Chamber's decision on 31 October 2022 was a safety valve against the politicization of the Court, as this decision granted permission to the Prosecutor to resume the investigation into all alleged crimes as they existed at the time of the Appeals Chamber's decision on 05 March 2020 which authorized the investigation at the request of the then Prosecutor Fatou Bensouda.⁽⁶³⁾

Conclusion

Through our research, we tried to clarify the strategy of the United States, through which it sought to immunize its nationals participating in its campaign against international terrorism before the International Criminal Court, despite the violations of the rules of international humanitarian law and the commission of crimes within the jurisdiction of the Court, and we have reached a number of results, most notably:

- The American interpretation of Article 98(2) of the ICC allows each State Party to evade its responsibilities under Article 86 of the Rome Statute, and weakens the effectiveness of the International Criminal Court in achieving justice, and corrupts its role as a complementary judicial body to national judicial bodies and aids impunity.
- The opening of the investigation in Afghanistan confirmed the error of the US interpretation of Article 98 (2) and thus the illegality of Article 98 conventions and their ineffectiveness as a strategy, and the International Criminal Court has thus closed the door for countries to follow in the footsteps of the United States, especially those with poor records in the field of human rights, but this is not enough, as it requires the Court to issue a decision clearly stating the scope and purpose of Articles 16 and 98 (2) and in particular that such a decision is based on Article 119 (1).
- The huge number of non-extradition agreements concluded by the United States with countries ratifying the Rome Statute and other countries remain an obstacle to the arrest of their citizens outside their borders because the ICC relies on cooperation in its work, and this is already proven by reality, as the court stood helpless in the arrest of Sudanese President Omar al-Bashir for lack of cooperation of countries, despite the referral of the Sudan case by the Security Council .The latter did not use its powers to compel states to cooperate with the ICC; therefore, the issue of Afghanistan will not have cooperation or obligation to cooperate – the veto power of the United States of America – even if it does not get that judicial exception.
- The privilege of complementarity – not the American way - enables the United States to achieve justice, evade the justice of the International Criminal Court, and dispense its strategy, especially immunity agreements (impunity agreements).
- It can be said that the arguments and justifications of the prosecutor for excluding the Americans from the judicial investigation into the Afghanistan case are weak, which lead the prosecution to a dilemma and allow the court to be accused of bowing to American pressure, which negatively affects its legitimacy, which Bensouda tried to restore.
- The struggle of the United States for a judicial exception is the main obstacle in the prosecution of crimes committed by Americans, both in Afghanistan and elsewhere, and the reality has proven that politically and practically the occurrence of an American

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before the International Criminal Court cannot be achieved. At least under the US-led unipolar system.

- The International Criminal Court remains in most cases, if not all, hostage to political considerations: the policy of the Prosecutor, the policies of the hegemonic states and even the policies of weak states (Africa and its influence on the International Criminal Court by changing the direction of its investigations towards the cases of suspects Americans and its allies).
- After the interpretation of the interests of justice in the Pre-Trial Chamber's decision of 12/04/2019 was almost a stumbling block to the opening of the investigation in the Afghanistan case, and the adoption of the reform program to enhance the effectiveness of the Court, based on the priority of cases within the limits of available resources, was almost a lifeline for American suspects, but the decision of the Appeals Chamber issued on 05/03/2020 and the decision of the Pre-Trial Chamber issued on 31/10/2022 preserved the independence of the Court as a judicial body and closed the outlets for politicization in the Afghanistan case. But this cannot be considered a failure of the United States in its efforts to achieve an American exception.
- The United States, through its struggle to make the judicial exception for its citizens from the prosecutions of the International Criminal Court, is trying to prove to the world:
 - a) The rules of international criminal law have rules that apply to the United States and others that apply to the rest of the world.
 - b) Acting according to double standards is an obligation for the Court when it comes to the United States because of the role it plays in the world, and countries must be convinced of these double standards because it hasn't simply the power and influence of this country and its allies.
- The reality showed the International Criminal Court is not and never was an independent judicial body, but rather an intergovernmental organization specialized in criminal justice administered by the Assembly of States Parties, and like other inter governmental organizations, it is subject to power relations between States and dominated by powerful States through the Assembly of States Parties.
- The United States, by influencing the Assembly of States Parties, was able to deliver a character such as Karim Khan to the prosecution apparatus, and through which it was able to direct the International Criminal Court and make it a tool to protect its criminal nationals, criminals of its allies, and a tool to weaken and condemn its opponents and the opponents of its allies.
- The reality has proven that dealing with the Court is on a political and legal basis at the same time, if the policy of the Prosecutor is selective, it is necessary to expose his practices and turn international public opinion against him, which is the role of the human rights organizations, and the demand for his removal from his post by the lawyer of the victims affected by his policy.

We got acquainted with the strategy of the United States as the hegemon and leader of a unipolar world order and seeks to maintain this privilege, but what will result in the parturition that the world is experiencing by the world for the birth of a new international order .American

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strategies of another kind would be emerged; however, they would always serve American interests.

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- (1) The law was proposed by Senator Jesse Helms, chairman of the House Foreign Affairs Committee, and the deputy Tom Delay, and it was issued in august 02, 2002.
- (2) Sec. 2004, American Service members Protection Act of 2002,[Public Law 107–206; Enacted August 2, 2002],<https://www.congress.gov/bill/107th-congress/senate-bill/857/text?r=5&s=1>.
- (3) United States of America managed issuing decisions from the Council Security .The main ones: 1497 Resolution 1422, Resolution 1487, and Resolution1497.
- (4) Sec. 2006, Ibid.
- (5) Sec. 2007, Ibid.
- (6) Sec. 2008, Ibid.
- (7) Subsequently, an amendment was made to this law during the President's era "BARAK OBAMA". And what was called the "DOD" amendment included in section 2015, where it is allowed to share the US in international efforts, including ICC efforts to sue Foreigners accused of committing crimes within its jurisdiction. The United States played a crucial role in the relocation of Ugandan "Dominic Ongwen "and Congolese "Bosco Ntaganda" to the Court, and also it participated in discussions and negotiations at the Kampala Conference, this amendment can be found here: <https://www.govinfo.gov/content/pkg/COMPS-3074/pdf/COMPS-3074.pdf>.
- (8) An Act making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2005, and for other purposes,[Public Law108–447; Enacted December 8, 2004],<https://www.congress.gov/108/plaws/publ447/PLAW-108publ447.pdf>
- (9) By law Nethercutt Amendment the United States Signed More Than 100 investment agreements publicly and secretly while refusing other countries to sign publicly (EU countries).
- (10) An Act making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2005, and for other purposes,op.cit
- (11) See paragraph1and paragraph 2, UN Security Council, United Nations peacekeeping, 12th July 2002 ,S/RES/1422(2002) .
- (12) See paragraph1and paragraph 2, UN Security Council, United Nations peacekeeping, 12thJune 2003,S/RES/1487(2003) .
- (13) Paragraph 7 states that: “Decides that current or former officials or employees of a contributing State not party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State in respect of all alleged acts or omissions arising out of or relating to the Multinational Force or the United Nations Stabilization Force in Liberia unless the contributing State expressly waives such exclusive jurisdiction.”
- (14) See paragraph1, S/RES/1487(2003) ; S/RES/1422(2002) .
- (15) Germany, France and Syria abstain on Resolution 1487.
- (16) John R. Bolton, International Criminal Court: Letter to UN Secretary General Kofi Annan, US DEP’T OF STATE ARCHIVE (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

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- (17) The first Paragraph Article 18 states that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty."
- (18) Abdullah Ali Abu Sultan, *The Role of International Criminal Law in the Protection of Human Rights*, First Edition, Dar Dijla, Amman, 2008, p. 309; quoted in Nouredine Sudani, *United States and the International Criminal Court*, *Al-Wahat Journal for Research and Studies*, Volume 10, Issue 2, 2017.
- (19) These agreements can be bilateral or multilateral agreements, they determine the legal status of the armed forces and civil servants of a state or Group of countries or to an international organization on a third State region, and they are held between the host State and the sending State belonging to individuals the subject of the agreement, which usually regulates the entry and exit of employees and military personnel Foreigners in the host State and in particular the civil and criminal jurisdiction over these, Exemptions Customs and tax, means of transportation and communication... etc.
- (20) Abdullah Ali Abbou Sultan, *Ibid*, p. 307.
- (21) Roger O'Keefe, "Article 98" agreements, the law of treaties & the law of state responsibility, in Szabó (ed.), *State Responsibility and the Law of Treaties* (The Hague: Eleven Publishing, 2010) 35–54.
- (22) Annex to General Affairs and External Relations, September 30, 2002, 2450th Council Session/02/279, EU Guiding Principles concerning Arrangements Between A State Party to the Rome Statute of the International Criminal Court and The United States Regarding the Conditions to Surrender of Persons to The Court.
- (23) Hiéramente, Mayeul, *The International Criminal Court and the United States: A Legal Analysis of the Dispute*, L'Harmattan, Paris, 2008, pp83-84.
- (24) See, Article 2 of Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, Signed at Washington September 20, 2002, and entered into force August 23, 2003.
- (25) These agreements were signed before Afghanistan signed the Rome Statute.
- (26) This agreement was considered as an executive agreement, thus not necessitating any Senate's ratification. Therefore, it entered into force on August 23, 2003, without any discussion before the US Senate, You can find it at the link :<https://www.state.gov/wp-content/uploads/2019/02/03-0823-Afghanistan-UN-and-Related-Organization-International-Criminal-Court-9.20.2002.pdf>.
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- (29) Article 119(1) of the Rome Statute: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court".
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- (32) Shabas. W, *An introduction to the international criminal court*, Cambridge university press, 2001.
- (33) During which it described the relationship between the United States and the International Criminal Court as cooperation and peaceful coexistence.
- (34) It came in a report of Congress declassified, that Central Intelligence Agency ran a program to facilitate extradition, arrest, enforced disappearances, secret detention and torture in a network of black locations abroad from 2002 to 2009. In Afghanistan, there were over four black locations,
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- (39) *Blocking Property of Certain Persons Associated With the International Criminal Court*, [Executive Order 13928 of June 11, 2020],
<https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>
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(50) US-Backed Government.

(51) He served as Vice President of the United States during the rule of Barack Obama, during which the relationship between the International Criminal Court and America was described as peaceful coexistence and cooperation, and Obama brought him to fill the gap in his political experience, specifically in foreign policy.

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