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Justitia en Leviathans: De strijd voor de internationale rechtsstatelijkheid

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Justitia en Leviathans: De strijd voor de internationale rechtsstatelijkheid

Rede

in verkorte vorm uitgesproken bij de openbare aanvaarding
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door prof. dr. mr. S. Vasiliev

Geachte rector, geachte aanwezigen,

Het is een bijzondere tijd om de leerstoel Internationaal recht te aanvaarden. Het voelt als het dirigeren van een orkest op het dek van de Titanic, of als preken in de ruïnes van een opgeblazen kerk.

Internationale juristen worden regelmatig geconfronteerd met de vraag: *'Stelt dat zogenoemde internationaal recht wel iets voor?*' Tegenwoordig worden zulke vragen gesteld met ergernis, of zelfs met *Schadenfreude*. Nauwelijks een dag gaat voorbij zonder dat het internationaal recht wordt doodverklaard, de Verenigde Naties als een mislukte organisatie wordt bestempeld, en internationale gerechtshoven als nutteloos – zo niet schadelijk – worden afgeschilderd.

De agressie van Poetins Rusland tegen Oekraïne begon ruim elf jaar geleden met de annexatie van de Krim. In februari 2022 mondde die uit in een grootschalige invasie waarbij steden en dorpen van de kaart werden geveegd en tienduizenden het leven lieten.

In de twintig maanden sinds de gruwelijke aanval van Hamas op 7 oktober, waarbij circa 1.200 Israëli's werden gedood en 251 mensen gegijzeld, heeft Israël de Gazastrook in puin gelegd. De civiele infrastructuur is verwoest. Ziekenhuizen en universiteiten zijn gebombardeerd. Bijna twee miljoen inwoners van Gaza zijn uit hun huizen verdreven. Vluchtelingen zijn levend verbrand in hun tenten. Israël heeft humanitaire hulp geblokkeerd, waardoor de bevolking werd blootgesteld aan uithongering. Gezaghebbende mensenrechtenorganisaties en deskundigen hebben dit optreden van Israël gekwalificeerd als genocide. Ik deel deze opvatting.

Ondertussen heeft Trump met zijn vastgoedlogica en een sloophamer aan decreten een ravage aangericht die de laatste restanten van de multilaterale orde dreigt te vernietigen. Hij overwoog Groenland over te nemen, Palestijnen uit Gaza te herhuisvesten en de Krim als Russisch grondgebied te erkennen.

Internationale crises belanden regelmatig bij het Internationaal Gerechtshof (ICJ), het Internationaal Strafhof (ICC), het Europees Hof voor de Rechten van de Mens en andere internationale gerechtshoven. Deze hoven zijn bevoegd om het internationaal recht te interpreteren, toe te passen en verder te ontwikkelen bij het beslechten van geschillen die aan hen worden voorgelegd. Zij kunnen de onderliggende conflicten echter niet zelf oplossen en beschikken niet over de middelen om hun uitspraken af te dwingen.

Zo beval het ICJ Rusland al in maart 2022 om zijn militaire operatie in Oekraïne te staken. Het droeg Israël driemaal op om humanitaire hulp en basisvoorzieningen tot Gaza toe te laten. De uitvoering van het arrestatiebevel dat het ICC heeft uitgevaardigd tegen Poetin en Netanyahu ligt eveneens buiten het bereik van dit Hof. De tenuitvoerlegging van gerechtelijke uitspraken berust bij staten. Wanneer het gezag van gerechtshoven wordt miskend, en zelfs hun bestaansrecht ter discussie wordt gesteld, zijn zij uiteraard machteloos. Maar wie draagt dan de schuld?

Vandaag ligt Justitia onder aanhoudend vuur van de Leviathans. De Romeinse godin van de gerechtigheid staat symbool voor de internationale gerechtshoven en het rechtsstatelijke ideaal. Leviathan is het Bijbelse zeemonster dat verschijnt als slang, draak of walvis. In een beroemde gravure bij Thomas Hobbes' magnum opus uit 1651 wordt Leviathan afgebeeld als een reusachtige gestalte. Met een zwaard in de ene hand en een scepter in de andere torent hij uit boven zijn domein. Deze kolos verbeeldt een soeverein: een autoriteit met absolute macht die geschillen beslecht en straffen of beloningen uitdeelt. Burgers doen vrijwillig afstand van hun natuurlijke vrijheid en zweren gehoorzaamheid aan de staat in ruil voor orde en veiligheid .
De afgelopen jaren heb ik mij beziggehouden met de legitimiteit, constitutionele grondslagen en institutionele vormgeving van internationale rechtspraak. In gezamenlijk onderzoek met professor Niels Blokker richtte ik mij op de instituties, normen en praktijken waarmee staten bestuurlijk gezag (governance) uitoefenen over internationale gerechtshoven. Uit dit project zijn twee proefschriften voortgekomen, die eerder dit jaar in Leiden zijn verdedigd door Maria Manolescu en Kritika Sharma. Verdere resultaten zijn in voorbereiding. Mijn tweede onderzoeksrichting betreft de rechterlijke macht in het licht van rechtsstatelijke achteruitgang. Bij nadere beschouwing blijken deze twee onderzoekslijnen nauwer met elkaar verweven dan op het eerste gezicht doet vermoeden.

De wereld van vandaag begint steeds meer te lijken op de Hobbesiaanse natuurtoestand van 'een oorlog van allen tegen allen'. Leviathans onttrekken zich aan elke vorm van internationale rechtsorde. Ze voeren ongehinderd oorlog en onderwerpen zowel hun eigen burgers als vreemdelingen straffeloos aan gruweldaden.

Deze lezing staat in het teken van de precaire positie van Justitia in een wereld die steeds nadrukkelijker wordt gekenmerkt door de wetteloosheid van Leviathans.

2. Leviathans op de loer

Is deze apocalyptische beeldtaal terecht?

Elke poging om de huidige wereldtoestand te duiden roept onvermijdelijk parallellen op met de jaren dertig en veertig van de twintigste eeuw. Te midden van de Tweede Wereldoorlog formuleerde Georg Schwarzenberger, een Duitse rechtsgeleerde in ballingschap in Londen, een krachtige verdediging van het internationaal recht – zowel tegenover sceptici die wezen op de onmacht ervan, als tegenover de schenders: de 'totalitaire agressors' Duitsland, Italië en Japan. Schwarzenberger betoogde dat westerse democratieën het internationaal recht doortastender moesten inzetten ter verdediging van zowel de kernbeginselen ervan als van zichzelf – tegen de opmars van wat hij noemde: 'totalitaire wetteloosheid'.

Deze oproep dateert uit een tijd waarin het internationale systeem nog in de kinderschoenen stond. Om Antonio Gramsci te parafraseren: dit was de tijd van monsters – de oude wereld was aan het sterven, terwijl de nieuwe wereld nog worstelde om geboren te worden; in dat interregnum deden zich allerlei ziekelijke verschijnselen voor. De kernregels van het internationaal recht inzake het gebruik van geweld, humanitair recht, mensenrechten en internationaal strafrecht moesten nog worden gekristalliseerd en verder worden ontwikkeld – door staten, en door de internationale gerechtshoven die later zouden ontstaan.

Nadat de monsters waren verslagen, werd de nieuwe wereldorde mede vormgegeven door het internationaal recht, zoals uitgedragen door de tribunalen van Neurenberg en Tokio, het ICJ en regionale hoven. Daarna volgden het ICC en een reeks ad-hoc- en bijzondere straftribunalen. Zonder deze gerechtshoven en tribunalen zou de hedendaagse internationale rechtsorde ondenkbaar zijn – zij zijn haar behoeders en vaak eerste *responders* in crisistijd.

Na acht decennia van moeizame vooruitgang begint dit bouwwerk af te brokkelen. De tijd van monsters breekt opnieuw aan, en de opkomende wereldorde is beangstigend. Het multilateralisme maakt plaats voor competitief autoritarisme en transactioneel exceptionalisme, gedragen door grote Leviathans als de VS, China, Rusland en India. De pijlers van de naoorlogse wereldorde – vreedzame geschillenbeslechting, het verbod op dreiging met of gebruik van geweld, en het beginsel van niet-erkenning van annexaties als rechtmatig – worden steen voor steen afgebroken.

Het internationaal recht, dat ooit bedoeld was om crises te temperen, verkeert zelf in een existentiële crisis. Het is dan ook geen toeval dat staten steeds vaker verwijzen naar concepten die slechts een vervalsing zijn van het internationaal recht. De VS en Europa spreken van de 'rules-based international order', terwijl Rusland en China het liever hebben over de 'multipolaire wereldorde'.

Schwarzenberger zou de hedendaagse internationale juristen bepaald niet benijden. Sinds 1943 is de wereld complexer geworden. Naleving van internationaal recht laat zich niet langer vatten in het simplistische en verouderde beschavingsverhaal van een confrontatie tussen westerse liberale democratieën en totalitaire dictaturen. Die dichotomie bood overigens nooit de morele helderheid die zij pretendeerde. De straffeloosheid van westerse actoren is een constante geweest, van de onbestrafte oorlogsmisdaden van de geallieerden machten en Vietnam tot de nasleep van 9/11, de misstanden van de 'War on Terror', de invasie van Irak in 2003, en verder. Palestina vormt daarop geen uitzondering.

Het profiel van een 'wetteloze agressor' is niet verdwenen. Het regime van Poetin past daar naadloos in. De wreedheden in Oekraïne zijn mede mogelijk gemaakt door de autoritaire regressie in Rusland, en hebben die bovendien verder aangewakkerd. Aanvankelijk bood de 'solidariteitsgerechtigheid' voor Oekraïne hoop tegenover autoritaire wetteloosheid. Na de invasie van 2022 leek het alsof staten serieus werk wilden maken van de bestrijding van straffeloosheid van een permanent lid van de Veiligheidsraad.

Toch werd die morele helderheid ontrafeld door Israëls totale oorlog tegen Gaza én de medeplichtigheid van westerse bondgenoten. Geloofwaardige aanklachten van genocide en overvloedig bewijs van kernmisdrijven hebben de VS en Europese landen er niet van weerhouden verantwoording te ondermijnen – en zich zo op te stellen alsof niet hun bondgenoot, maar de internationale hoven *het probleem* vormen.

Soevereiniteit is opnieuw in zwang – en in een hypertrofische vorm. Het onderscheid tussen 'vrienden' en 'vijanden' keert terug als beslissende maatstaf, ook in de omgang van Leviathans met Justitia. Carl Schmitt, een nazijurist en invloedrijke constitutioneel denker, stelde het vriend-vijandonderscheid centraal als essentie van 'het politieke'. In zijn boek *Der Leviathan in der Staatslehre des Thomas Hobbes* uit 1938, merkte hij op dat buiten de staat geen rechtsorde kan bestaan. 'Er is geen staat tussen staten', schreef hij, en de internationale betrekkingen vormen een buitenrechtelijke natuurtoestand, waarin Leviathans elkaar tegemoet treden zonder gebonden te zijn aan 'onzekere verbonden'. Deze kunnen te allen tijde worden opgeheven zodra Leviathan dit politiek noodzakelijk acht. Als de soeverein immers degene is die over de uitzondering beslist, dan geldt dat des te meer in zijn omgang met andere soevereinen.

Waar staat Justitia in dit alles? Zij wordt opgeroepen en bevoegd verklaard om recht te spreken, zolang Leviathans bereid zijn naar haar te luisteren – in de hoop dat zij hun legitimiteit versterkt en hun tegenstanders helpt te vangen, als aas aan de haak. Maar Leviathans liggen op de loer. Zodra Justitia hen vermaant zich aan onzekere verdragen te houden, begint haar prille en wankele rechtsorde een bedreiging te vormen – voor henzelf én hun 'vrienden'. Ze proberen Justitia onder controle te brengen, en als dat niet lukt, maken ze zich los. Ze verklaren Justitia tot 'vijand' en behandelen haar dienovereenkomstig. Leviathans hebben altijd volgens deze logica geopereerd – en tonen dat nu zonder schroom.

Waarvoor hebben we Justitia dan eigenlijk nog nodig?

Staten richten internationale gerechtshoven op, rechtstreeks of via internationale organisaties, met het oog op geschillenbeslechting, rechtsontwikkeling en rechtshandhaving. Deze gerechtshoven zijn hoeders van het internationaal recht en van gespecialiseerde regimes zoals het zeerecht, de mensenrechten en het internationaal strafrecht. Net zoals nationale rechters die andere staatsmachten controleren, vormen internationale tribunalen pijlers van internationale rechtsstatelijkheid. Zij begrenzen staten op internationaal niveau en, in toenemende mate, binnen hun interne aangelegenheden.

Gerechtshoven die door een gemeenschap van staten worden opgericht, versterken gedeelde waarden en normen en bevorderen publieke belangen. Zo is het EHRM gericht op het waarborgen van mensenrechten, terwijl het ICC tot doel heeft straffeloosheid voor internationale kernmisdrijven tegen te gaan. Zij bewaken de betreffende normatief geïntegreerde regimes en verstevigen de mandaat gevende gemeenschappen door staten, internationale organisaties en individuen een forum te bieden waarin ze hun collectieve belangen kunnen behartigen. Steeds vaker maken actoren gebruik van deze functie. Denk aan de zaken bij het ICJ waarin staten optreden op basis van *erga omnes*-verplichtingen onder het Genocideverdrag, evenals aan de zaken over klimaatverandering in Den Haag en Straatsburg.

In de internationale orde ontbreekt één soeverein die rechterlijke onafhankelijkheid kan garanderen; in plaats daarvan is er een veelheid aan Leviathans. Ook een duidelijke machtenscheiding is afwezig. Toch zijn internationale gerechtshoven rechterlijke instellingen *proprio sensu*: zij behoren zaken onafhankelijk en onpartijdig te behandelen. Anders zou het zinloos zijn voor staten om zulke hoven op te richten, te financieren, zaken bij hen aanhangig te maken en in de tenuitvoerlegging te voorzien. Staten hebben er belang bij dat de integriteit van deze gerechtshoven wordt gewaarborgd. Internationale rechtspleging is op zichzelf een publiek goed.

Tegelijkertijd dragen deze gerechtshoven doorgaans meer verantwoordelijkheden dan nationale hoven, zonder ingebed te zijn in grondwettelijke structuren of te kunnen rekenen op betrouwbare handhavings- en ondersteuningsmechanismen. Justitia's weegschaal mag in balans zijn – haar zwaard is bot. Deze hoven behandelen zaken die inherent politiek zijn en snel gepolitiseerd raken. Tegelijk zijn zij sterk afhankelijk van de politieke en financiële steun van staten die zij met hun uitspraken kunnen frustreren. Anders dan nationale rechtbanken, waarvan het gezag stevig is verankerd, rust hun rechtsmacht volledig op staatsinstemming.

Staten zijn vrij om zich niet aan te sluiten bij verdragen waarmee internationale gerechtshoven worden opgericht, en hoeven hun gezag dan niet te aanvaarden. Staten kunnen hun rechtsmacht ook uitsluiten via voorbehouden bij compromissoire clausules in verdragen. En mochten zij zich toch verbonden hebben, kan die instemming op elk moment worden ingetrokken – zonder werkelijke negatieve gevolgen. Uittreding blijft altijd mogelijk, vooral wanneer de juridische risico's te groot worden, zeker als de Leviathan, of diens belichaming – het leiderschap – zelf vervolging riskeert. Met andere woorden: Justitia mag het aas zijn dat Leviathan

inslikt, maar hij kan haar ook weer uitspuwen en ongemoeid verdergaan.

Er zijn vele manieren waarop Leviathans Justitia onschadelijk kunnen maken. Ze kunnen haar negeren, tegenwerken of slechts selectief meewerken, wanneer dat in hun belang is. De Verenigde Staten illustreert precies dit model van betrokkenheid. Dit land heeft alles in het werk gesteld om niet onder de rechtsmacht van internationale hoven te vallen, terwijl het tegelijk tracht die hoven van buitenaf te sturen. De VS ondertekende weliswaar het Statuut van Rome van het ICC, maar ratificeerde het nooit. Rusland heeft dat voorbeeld nauwgezet gevolgd.

Daarnaast behouden staten controle over internationale gerechtshoven via de instituties en procedures voor governance. Juist hier worden de afhankelijkheden van deze hoven het duidelijkst zichtbaar. Denk aan de Algemene Vergadering en de Veiligheidsraad van de VN in het geval van het ICJ en ad-hoc-tribunalen, en aan de Vergadering van Staten in het geval van het ICC. Deze governance-organen nemen rechtsgrondslagen aan, benoemen rechters, bepalen budgetten, houden toezicht op de naleving van uitspraken en bieden politieke ondersteuning bij de uitoefening van de rechterlijke functie.

De governance-instanties van gerechtshoven spelen een cruciale rol bij het waarborgen van hun doeltreffend functioneren. Staten beschouwen deze hoven echter vaak niet primair als rechterlijke organen waarvan de onafhankelijkheid moet worden gewaarborgd, maar louter als ‘nog maar een’ internationale organisatie in Den Haag.

Slecht bedoelde of gebrekkige governance kan deze hoven ernstig ondermijnen – tot aan irrelevantie of zelfs opheffing toe. Een voorbeeld is het lamleggen van de WTO-Beroepsinstantie door de VS. Een ander is de ontbinding van het Tribunaal van de Ontwikkelingsgemeenschap van Zuidelijk Afrika in 2011, nadat het tegen Zimbabwe oordeelde in een zaak over landonteigeningen. In dit verband verdient ook de abrupte en weinig omfloerste ontmanteling van het Speciaal Tribunaal voor Libanon, als gevolg van onwil om het te blijven financieren, vermelding.

In tegenstelling tot nationale rechtbanken in democratische rechtsstaten betekent dit niet noodzakelijk een schending van het internationale rechtsstatelijkheidsbeginsel. Staten mogen in principe internationale tribunalen oprichten én weer opheffen, wanneer zij van oordeel zijn dat hun mandaat zijn doel voorbijschiet. Maar opheffing moet op een ordentelijke manier plaatsvinden, met gepast respect voor de rechterlijke functie.

3. Leviathans ontketend

Wat gebeurt er wanneer de spanningen rond het optreden van een internationaal hof zo hoog oplopen dat Leviathans alle terughoudendheid laten varen en ongeremd handelen?

Staten beschikken over een breed arsenaal aan middelen om hun ongenoegen kenbaar te maken en fel uit te halen naar Justitia wanneer zij zich in een voor hen onwelkome richting beweegt. Sommige vormen van tegenreactie op wat staten beschouwen als gebrekkig functioneren kunnen hardhandig en indringend zijn, maar blijven binnen de grenzen van de rechtsstatelijkheid. Staten kunnen via governance-organen het functioneren van het hof extern laten evalueren, het juridische kader herzien of de rechtsmacht inperken.

Andere vormen van tegenslag lijken minder radicaal, maar zijn niettemin schadelijk voor de rechterlijke onafhankelijkheid. Wanneer staten scherpe kritiek uiten op bindende uitspraken en suggereren dat deze nietig zijn en zonder rechtsgevolg moeten blijven, ondermijnen zij het gezag en de onafhankelijkheid van internationale gerechtshoven. Een sprekend voorbeeld is de reactie van Duitsland en Hongarije op de beslissing van de Kamer van vooronderzoek uit 2021, die de reikwijdte van de territoriale rechtsmacht van het Hof in de situatie in Palestina bepaalde. Beide staten verwierpen die beslissing – in strijd met het beginsel van *Kompetenz-Kompetenz*: binnen het rechtskader zijn internationale hoven bevoegd om hun eigen bevoegdheden vast te stellen.

De governance-processen bieden legio mogelijkheden voor verzet, obstructie en ondermijning van binnenuit. Staten kunnen hun positie in bestuursorganen misbruiken om middelen in te trekken, het hof te onderwerpen aan micromanagement en verstikkende controle, essentiële wetgeving tegen te houden, benoemingen te forceren of cruciale steun te onthouden. Gerommel met samenstellingen, druk op personeelsbesluiten, het doorsnijden van institutionele levensaders – het zijn allemaal vormen van sluipende ondermijning van de rechterlijke onafhankelijkheid, die des te moeilijker vast te stellen zijn.

Verzet tegen de internationale rechtspraak is geen nieuw fenomeen, maar neemt recent extreme vormen aan. Vooral straftribunalen, die zich richten op individuele strafrechtelijke aansprakelijkheid, wekken hevige tegenstand op. Zij stellen niet de staat ter verantwoording, maar politieke en militaire topfiguren – belichaamde Leviathans. Zulke leiders portretteren zichzelf graag als slachtoffers van verzonnen aanklachten, en stellen hun status als verdachte gelijk aan een aanklacht tegen de staat of zelfs het hele volk.

Netanyahu heeft zijn arrestatiebevel van het ICC op die manier neergezet: het Hof zou, zo beweerde hij, de democratische staat Israël op één lijn stellen met de terroristische organisatie Hamas. Dat is een bewuste manipulatie. Netanyahu wordt persoonlijk verdacht van kernmisdrijven; het Hof velt geen oordeel over de aansprakelijkheid van staten en maakt geen morele of juridische vergelijkingen tussen staten of organisaties. Leiders die worden aangeklaagd voor

misdrijven beperken zich zelden tot retoriek: zij zetten Leviathan – het staatsapparaat dat zij beheersen – actief in om onderzoek en vervolging te saboteren en aansprakelijkheid te ontlopen. Het is een ongelijke strijd: Justitia kan Leviathan niet overmeesteren.

De zaken van het ICC tegen de Keniaanse leiders Uhuru Kenyatta en William Ruto, voortvloeiend uit het verkiezingsgeweld van 2007–2008, strandden na een gecoördineerde campagne van getuigenbeïnvloeding door de Keniaanse regering – waartegen het Hof geen weerwerk kon bieden. In 2019 trok de Filipijnse president Rodrigo Duterte zijn land terug uit het ICC, nadat een vooronderzoek naar zijn "War on Drugs" werd aangekondigd. Toch werd hij in maart 2025 gearresteerd en overgebracht naar Den Haag – niet dankzij de macht van het ICC, maar als gevolg van binnenlandse politieke verschuivingen.

In mei 2024 onthulden The Guardian en twee andere media dat Israël gedurende negen jaar een campagne van inmenging en surveillance had gevoerd tegen het ICC om een onderzoek naar de situatie in Palestina te dwarsbomen. De Mossad trachtte de aanklager te intimideren, en toen dat faalde, werden inlichtingenoperaties ondernomen onder direct toezicht van Netanyahu's nationale veiligheidsadviseurs – met actieve betrokkenheid van de premier zelf.
Wat in al deze voorbeelden opvalt, is de identificatie van de staat met de persoon van de leider. Leviathan wordt persoonlijk. Belichaamde Leviathans die zich vastklampen aan de macht om verantwoording te ontlopen, hebben ook op nationaal niveau steevast een problematische relatie met de rechtsstaat. Het betreft autocraten, of leiders van staten waar de rechtsstatelijkheid achteruitgaat. De hedendaagse Verenigde Staten en Rusland zijn hiervan sprekende voorbeelden.

De kwaal is besmettelijk: ook gevestigde democratieën van de 'vrije wereld' offeren rechtsstatelijkheid in toenemende mate op voor de straffeloosheid van henzelf en hun bondgenoten. Door bindende uitspraken van internationale gerechtshoven te negeren, verzaken zij hun verdragsverplichtingen en ondermijnen zij actief de internationale rechtsorde. De klassieke tegenstelling die Schwarzenberger maakte tussen liberale democratieën en totalitaire dictaturen biedt in dit opzicht geen houvast.

De frontale aanslagen op het ICC zijn emblematisch voor een tijdperk van wereldwijde erosie van rechtsstatelijke normen. De beruchte Amerikaanse 'Hague Invasion Act' uit 2002 – een wet die de president machtigt om militair in te grijpen indien Amerikaans of geallieerd personeel door het ICC wordt vastgehouden – werd jarenlang afgedaan als een juridische absurditeit.

Onder Obama werkte de VS op onderdelen pragmatisch samen met het Hof. Dat veranderde onder de eerste regering-Trump. Toen het Hof vasthield aan zijn onderzoeken naar Afghanistan en Palestina, die ook Amerikaans en Israëlisch personeel zouden raken, vaardigde Trump in juni 2020 een decreet uit dat leidde tot persoonlijke sancties tegen de aanklager van het ICC en haar medewerker.

Deze handelingen vormden een flagrante aantasting van de rechterlijke onafhankelijkheid en

zijn te kwalificeren als misdrijven gericht tegen de rechtspleging van het ICC in de zin van artikel 70 van het Statuut van Rome. President Biden trok de sancties later in, maar nam geen afstand van de onderliggende bezwaren. De nieuwe aanklager heroriënteerde het Afghanistan-onderzoek en liet vermoedelijke misdrijven van Amerikaans personeel buiten beschouwing. De intimidatie had kennelijk effect – zo oogde het.

In maart 2022 opende het ICC een onderzoek naar kernmisdrijven in Oekraïne. Toen arrestatiebevelen volgden tegen Poetin, voormalig minister van Defensie Sjojgoe en stafchef Gerasimov, sloeg het Kremlin terug. Oud-president Medvedev dreigde ICC-rechters met een raketaanval. De federale opsporingsdienst opende strafzaken tegen de aanklager en rechters, plaatste hen op de opsporingslijst en arresteerde hen in absentia. In september 2023 meldde het Hof een 'gerichte en geavanceerde' cyberaanval met spionagedoeleinden. Ook dat is te kwalificeren als obstructie van de rechtsgang.

In 2024 brak de hel weer los op een ander front. Voorafgaand aan het verzoek van de aanklager om arrestatiebevelen tegen Israëlische kabinetsleden stuurden twaalf Republikeinse senatoren hem een dreigende brief: *'Richt je op Israël, en wij richten ons op jou... Je bent gewaarschuwd.'* Een niet nader genoemde hoge ambtsdrager zou tegen hem hebben gezegd: *'Dit Hof is opgericht voor Afrikaanse krijgsheren en tuig als Poetin.'*

In november 2024 vaardigde het ICC arrestatiebevelen uit tegen Netanyahu en Gallant van Israël, en Deif van Hamas. Trump, inmiddels herkozen als president, stelde nieuwe sancties in tegen het Hof. Aanklager Khan werd als eerste getroffen. Hij heeft geen toegang tot zijn Microsoft e-mailadres meer, en zijn bankrekeningen zijn bevroren. ICC-presidente Akane verklaarde dat de sancties 'een existentiële bedreiging' vormen. Als banken, verzekeraars en IT-dienstverleners – ook in Europa – geen ondersteuning meer durven te bieden, raakt het Hof geïsoleerd, wat zijn functioneren in alle situaties ernstig zal ondermijnen.

De situatie in Palestina vormt een ultieme stresstest voor staten die partij zijn bij het ICC. Hun halfslachtige en soms onaanvaardbare reacties op de arrestatiebevelen tegen prominente verdachten verraden een schrijnend gebrek aan daadwerkelijke toewijding aan het Hof en bereidheid om hun medewerkingsverplichtingen na te leven. Frankrijk verklaarde dat het Netanyahu niet zou arresteren bij een bezoek, vanwege persoonlijke immuniteit – een redenering die bij Poetin nooit is gehanteerd. Polen gaf aan Netanyahu vrijgeleide te bieden tijdens de herdenking van Auschwitz. De Duitse bondskanselier stelde dat de arrestatie onbespreekbaar was – met andere woorden: *Staatsräson über alles*. De Belgische premier sloot arrestatie eveneens uit, met expliciete verwijzing naar Realpolitik. De internationale gemeenschap van staten die zich rond het Statuut van Rome heeft verenigd en het ICC mede heeft vormgegeven, desintegreert nu in rap tempo. Dergelijke verklaringen ondermijnen ten eerste het *Kompetenz-Kompetenz*-beginsel. Artikel 119(1) van het Statuut bepaalt dat geschillen over de rechterlijke taken door het Hof zelf worden beslist. Staten die partij zijn bij het Statuut kunnen die bevoegdheid niet terzijde schuiven, noch het oordeel van het Hof betwisten in een ander forum.

Ten tweede tasten zulke tegenspraken de nationale rechtsstaat aan. Overleveringsbesluiten behoren tot de bevoegdheid van de rechterlijke macht. Wanneer de uitvoerende macht op voorhand besluit niet mee te werken, schendt zij de scheiding der machten en ondermijnt zij het gezag van nationale rechter. Dat is onaanvaardbaar in een democratische rechtsstaat.

Netanyahu vermijdt intussen het luchtruim van staten waar hij bij een noodlanding gearresteerd zou kunnen worden. Toch sloten EU-lidstaten als Griekenland, Italië en Frankrijk hun luchtruim niet voor vluchten met hem aan boord. In april 2025 werd Netanyahu in Boedapest ontvangen door Viktor Orbán, die hem liet fulmineren tegen het ICC, en tegelijk aankondigde dat Hongarije zich uit het Hof zou terugtrekken. Daarmee werd Hongarije de eerste EU-lidstaat die een ICC-verdachte op zijn grondgebied ontving én zich terugtrekt uit het Statuut van Rome.

In 2023 verklaarde Orbáns kabinetschef al dat Poetin bij een bezoek niet gearresteerd zou kunnen worden. Een ontmoeting tussen Poetin en Netanyahu op Europees grondgebied – in Boedapest of, wie weet, in Bratislava – is dan ook niet langer ondenkbaar. Hongarije vormt een chronisch hoofdpijndossier dat de EU tot op heden onvoldoende heeft aangepakt. Het aangekondigde vertrek van Hongarije uit het ICC zou een ‘ernstige en voortdurende schending’ vormen van de EU-waarden zoals vastgesteld in artikel 2 van het Verdrag betreffende de EU. Dat zou, conform artikel 7, lid 2, tot schorsing van lidmaatschapsrechten moeten leiden. Toch bleef het stil vanuit Brussel. Het uitblijven van een reactie is beschamend en schadelijk voor de geloofwaardigheid van de Unie. Ook op EU-niveau staat de rechtsstatelijkheid onder zware druk.

4. Leviathans getemd

Wil Justitia standhouden, dan moeten de Leviathans tot rede worden gebracht. Daarvoor zijn ten minstevier onderling samenhangende wegen denkbaar.

Ten eerste: effectieve governance en formele geschillenbeslechting.

Internationale gerechtshoven kunnen niet functioneren zonder de bestendige inzet van staten die partij zijn bij hun oprichtingsverdragen. Die inzet moet zich vertalen in effectieve governance-processen en -organen die doortastend optreden, en publiekelijk stelling nemen wanneer het hof politiek wordt aangevallen of wordt gehinderd door niet-naleving. Deze instanties moeten beschikken over robuuste mechanismen om zowel wangedrag van partijstaten als inmenging door niet-partijstaten het hoofd te bieden.

Staten op hun beurt moeten over de politieke wil beschikken om pal te staan voor hun internationale gerechtshoven en daadwerkelijk gebruik te maken van deze mechanismen. Wanneer diplomatieke oplossingen falen, moeten Leviathans bereid zijn elkaar formeel tegemoet te treden in geschillenprocedures.

Geschillen tussen staten die partij zijn bij het ICC-Statuut over de interpretatie of toepassing daarvan – voor zover die geen betrekking hebben op de rechterlijke taken van het Hof – dienen in eerste instantie via onderhandeling te worden beslecht. Indien binnen drie maanden geen regeling wordt bereikt, wordt het geschil voorgelegd aan de Vergadering van Staten. Deze kan het geschil zelf beslechten (bijvoorbeeld via een bindende procedure uitgevoerd door een subsidiair orgaan van de Vergadering), of andere vormen van geschilbeslechting aanbevelen, waaronder een verwijzing naar het Internationaal Gerechtshof overeenkomstig diens Statuut.

De term ‘ander geschil’ in artikel 119, lid 2, van het Statuut van Rome beperkt wel de materiële reikwijdte van deze route. Geschillen die onder de rechterlijke taken vallen – zoals de veelbesproken kwesties van rechtsmacht, immuniteiten van functionarissen en samenwerking – zijn bij uitstek uitgesloten. Andere aangelegenheden die verband houden met governance-functies kunnen echter wél via deze route worden aangepakt. Denk aan geschillen over verkiezingen en de geschiktheid van rechters en de aanklager, de financiering van het Hof, of de opvolging door de Vergadering van een door het Hof vastgestelde niet-naleving.

Tot op heden is van geschillenbeslechtingsprocedures geen gebruik gemaakt, maar deze mogelijkheid verdient hernieuwde aandacht van de partijstaten en de Vergadering van Staten.

De tweede vector is het uitoefenen van politieke druk.

De strijd voor de internationale rechtsstatelijkheid kan niet uitsluitend met juridische middelen

worden gevoerd: dit is een opdracht voor de politiek. Geen enkele Leviathan – en evenmin een geopolitieke coalitie van Leviathans – mag worden toevertrouwd met het maken, bewaken en afdwingen van het internationaal recht. In dit zelfregulerende systeem kunnen alleen de Leviathans als gemeenschap hun gelederen ordenen en elkaar in toom houden. Dat vereist een multilaterale inspanning. Als Realpolitik de taal is die Leviathans spreken, dan moet internationale rechtsstatelijkheid daarin worden verankerd als haar grammaticale fundament.

Staten dienen de governance-fora en -procedures te benutten als versterkers van politieke druk op staten die uitspraken van internationale gerechtshoven naast zich neerleggen of de uitoefening van hun rechterlijke mandaat belemmeren. Partijen van het ICC ontberen vaak de politieke wil om elkaar aan te spreken wanneer het nodig is, en dat ondermijnt het systeem van binnenuit. Ook in reactie op externe bedreigingen – zoals die uitgaan van niet-partijstaten – moeten staten krachtdadiger optreden, zowel binnen als buiten de gerechtelijk governance-structuren. Gezamenlijke verklaringen waarin zij hun bezorgdheid uiten over gedragingen die de rechterlijke onafhankelijkheid van het Hof aantasten, zijn welkom maar ontoereikend: ze zijn zelden unaniem, doorgaans te diplomatiek en noemen de schendende staten en politici niet bij naam.

Aanvallen op het Hof zijn aanvallen op de rechterlijke onafhankelijkheid in het algemeen, en – zoals ICC-presidente Akane heeft gesteld – op de soevereiniteit van iedere partijstaat. Reacties op dergelijke aanvallen moeten verder gaan dan woorden alleen: zij moeten de vorm aannemen van tegenmaatregelen die de betrokken staat ertoe dwingen te stoppen met het intimideren van ICC-rechters en -aanklagers. De terughoudendheid om sancties in te zetten ter verdediging van het Hof wordt vaak verklaard uit vrees voor escalatie. Maar ook dat zendt een gevaarlijk signaal uit: namelijk dat partijstaten niets concreets zullen ondernemen om het ICC te beschermen tegen vijandige grootmachten, en dat de VS en Rusland het straffeloos onder druk kunnen blijven zetten.

De derde aanpak betreft de rol van internationale organisaties bij het bevorderen van rechtsstatelijke beginselen, mensenrechten en het internationaal recht.

De Verenigde Naties, de Raad van Europa en de Europese Unie dragen een eigen verantwoordelijkheid jegens Justitia. Ze kunnen meer doen – voor zover hun mandaten en capaciteiten dat toelaten – om hun lidstaten te mobiliseren ter verdediging van de internationale rechtsorde.

Als regionale organisatie met de hoogste mate van integratie tussen lidstaten had de EU hierin een voortrekkersrol kunnen vervullen. Al haar 27 lidstaten zijn – of waren tot voor kort – partij bij het Statuut van Rome. De EU stond lange tijd bekend als een trouwe voorvechter van het Hof. De Unie spraak herhaaldelijk haar steun uit voor universele toetreding tot het ICC en de volledige uitvoering van het Statuut. Ook maakte de EU steun voor het ICC tot een voorwaarde voor kandidaat-lidstaten en geassocieerde landen.

Onder de huidige Commissie en de Hoge Vertegenwoordiger voor het buitenlands beleid is de

steun voor het ICC selectief geworden – in lijn met de ongeschreven regels van de zogeheten 'rules-based international order', maar niet met de beginselen van internationale rechtsstatelijkheid. De dubbele standaarden komen schrijnend tot uiting in de inconsequente reacties van de EU op schendingen van samenwerkingsverplichtingen.

Toen Mongolië Poetin ontving in september 2024, publiceerde de Europese Dienst voor Extern Optreden onmiddellijk een verklaring waarin het Mongoolse falen werd betreurd. Toen Orbán niet alleen ICC-verdachte Netanyahu ontving, maar tevens de terugtrekking van Hongarije uit het Statuut aankondigde, bleef een EU-reactie uit. Hongarije blijft paradoxaal genoeg EU-lidstaat, terwijl het noch de waarden van de Unie eerbiedigt, noch meer voldoet aan de toetredingsvoorwaarden. Anders dan in 2020 bleef in 2025 ook een veroordeling van sancties van 'Trump 2.0' uit. Dat wijst op een gebrek aan consensus, en op de aanhoudende onvoorwaardelijke steun voor Israël door sommige lidstaten – zelfs te midden van een genocidale oorlog. Of is het een poging om een confrontatie met Trump te vermijden? Hoe dan ook: het ruikt naar dubbele standaarden.

ICC-presidente Akane deed een klemmend beroep op de EU om het *Blocking Statute* aan te passen, zodat het ook bescherming zou bieden aan EU-operators en het Hof zelf tegen de sancties van Trump. Tot op heden is daaraan geen gehoor gegeven, waardoor het Hof dreigt volledig verlamd te raken. Het gebrek aan betekenisvolle actie van de Unie tegenover Trumpiaanse vijandigheid jegens het ICC, en de passiviteit tegenover Hongarije, zijn verontrustend. Niet alleen zijn zij in strijd met bindend EU-recht, zij ondermijnen ook de doeltreffendheid van het EU-buitenlands beleid en de reputatie van de EU op het internationale toneel. De EU heeft de morele autoriteit die zij jarenlang claimde als kampioen van internationale gerechtigheid, prijsgegeven.

Tegen deze achtergrond is het hoog tijd dat andere regio's – in het bijzonder het mondiale Zuiden – het voortouw nemen in het bieden van principieel en consistent draagvlak voor internationale rechtsstatelijkheid. Dergelijke multilaterale staatsinitiatieven, gericht op het versterken van de beginselen van gerechtigheid en verantwoording via gecoördineerde juridische en diplomatieke actie, beginnen zich af te tekenen.

In januari 2025 kondigden Bolivia, Colombia, Cuba, Honduras, Maleisië, Namibië, Senegal en Zuid-Afrika de oprichting aan van de Haagse Groep. Deze coalitie heeft zich gecommitteerd aan de uitvoering van de uitspraken van het ICJ en, voor zover zij partij zijn bij het ICC-Statuut, aan de naleving van de daaruit voortvloeiende verplichtingen, inclusief de arrestatie- en overleveringsverzoeken met betrekking tot de situatie in Palestina.

De toekomst zal uitwijzen of de Haagse Groep zich evenzeer zal inzetten voor gerechtigheid in andere situaties – zoals Oekraïne – en of staten uit het mondiale Noorden zich zullen aansluiten. Indien dat gebeurt, zou dit een stap kunnen zijn richting een internationale gemeenschap 2.0, gebouwd op het principe van 'nooit meer' voor allen, niet slechts voor enkelen.

De vierde manier om Leviathan in zijn omgang met Justitia te beteugelen, is strafrechtelijke vervolging.

Het Tribunaal van Neurenberg stelde – in een inmiddels klassiek geworden formulering – dat 'mannen, niet abstracte entiteiten, misdaden plegen tegen het internationaal recht', en dat 'alleen door het bestraffen van individuen die dergelijke misdaden begaan, de bepalingen van het internationaal recht kunnen worden gehandhaafd'.

Hetzelfde geldt voor 'misdaden tegen de internationale rechtsstatelijkheid'. Ook die worden begaan door machtige individuen die het staatsapparaat aansturen en over staatsmiddelen beschikken waarmee zij de internationale rechtspleging kunnen ondermijnen. De integriteit van internationale rechtspleging kan slechts worden gewaarborgd wanneer deze belichaamde Leviathans persoonlijk ter verantwoording worden geroepen.

Dit is in het bijzonder van belang voor straftribunalen, die hooggeplaatste politieke en militaire leiders vervolgen. Zulke hoven krijgen vaak te maken met criminele vormen van verzet, die erop gericht zijn hun rechterlijke mandaat te dwarsbomen. Ondanks grootschalige getuigenintimidatie in diverse zaken bij het ICC, is het Hof er slechts in geslaagd een beperkt aantal vervolgingen en veroordelingen tot stand te brengen inzake 'misdrijven gericht tegen de rechtspraak' conform artikel 70 van het Statuut. Het track record blijft teleurstellend – in het bijzonder wat betreft de grootschalige getuigenintimidatiecampagne in Kenia. Ook naar aanleiding van Trumpiaanse sancties uit 2020 werd geen enkele zaak geopend.

Onvermijdelijk rijst de vraag of het ICC via artikel 70 wel voldoende is toegerust om staatsaanvallen van de schaal en intensiteit die we vandaag zien, het hoofd te bieden. De jacht die de VS, Israël en Rusland hebben geopend op het ICC overstijgt ruimschoots de categorieën van intimidatie en vergelding zoals omschreven in artikel 70, lid 1(d) en (e). Het Hof wordt geconfronteerd met openlijke bedreigingen aan het adres van zijn personeel, strafzaken tegen rechters en de aanklager, verregaande financiële sancties, desinformatie- en lastercampagnes, infiltratiepogingen, spionage en cyberaanvallen.

De omvang, ernst en systematiek van deze aanvallen gaan ver uit boven wat artikel 70 beoogt te bestrijken. Het gaat niet langer om pogingen tot omkoping of intimidatie van individuele getuigen of medewerkers, maar om convergerende aanvallen door enkele van de machtigste staten ter wereld, met inzet van enorme middelen en het volledige gewicht van hun wetgevende en uitvoerende machten. Deze campagnes zijn gericht op niets minder dan de vernietiging van het ICC als instituut.

De ontoereikendheid van de categorie van 'misdrijven gericht tegen de rechtspleging' met betrekking tot staatsgedrag komt des te sterker naar voren door de zwakte van het ICC-samenwerkingsregime. Het Statuut verplicht partijstaten hun strafwetgeving uit te breiden naar artikel 70-misdrijven wanneer deze op hun grondgebied zijn gepleegd of door hun onderdanen. Op verzoek van het ICC moeten partijstaten dergelijke zaken voorleggen aan hun bevoegde autoriteiten voor vervolging, die zorgvuldig moet worden uitgevoerd. De voorwaar-

den voor het verlenen van rechtshulp aan het ICC in verband met artikel 70-misdrijven worden echter volledig beheerst door nationale wetgeving van de partijstaten zelf.

Maar hoe kan het ICC ooit verdachten uit niet-partijstaten te pakken krijgen wanneer zij persoonlijke immuniteit genieten – zoals leden van de zogenoemde trojka – of functionele immuniteit bezitten, die geldt voor alle staatsfunctionarissen? Partijstaten kunnen weliswaar meewerken aan onderzoeken of vervolgingen onder artikel 70 van het ICC-Statuut, maar zijn daartoe niet verplicht. Zolang leden van de trojka nog in functie zijn, worden zij beschermd door ratione personae-immuniteit: geen enkele andere staat zal bereid zijn hen op verzoek van het ICC te arresteren. Na afloop van hun ambtstermijn blijven zij nog altijd beschermd door functionele immuniteit tegen vervolging in het buitenland voor de misdrijven gericht tegen de rechtspleging van het ICC.

Voor de kernmisdrijven lijkt zich een uitzondering op functionele immuniteit af te tekenen: het plegen van zulke ernstige misdrijven wordt niet langer beschouwd als een legitiem onderdeel van officiële taken. Voor misdrijven gericht tegen de rechtspleging van het ICC bestaat een dergelijke uitzondering echter niet – en die zal op korte termijn ook niet in het gewoonterecht ontstaan. Deze delicten vallen immers niet onder de categorie van kernmisdrijven uit het Statuut.

De enige mogelijkheid om (voormalige) hooggeplaatste functionarissen van niet-partijstaten – zoals Trump, Poetin of Netanyahu – voor dergelijke handelingen te vervolgen, is als bijkomende aanklacht, en dan alleen indien zij reeds zijn gearresteerd en overgeleverd aan het Hof in verband met kernmisdrijven. Zolang dat niet het geval is, genieten zij functionele immuniteit in het buitenland en kunnen zij niet aan het ICC worden overgedragen. In de praktijk betekent dit straffeloosheid voor wie zich schuldig maakt aan misdrijven tegen de internationale rechtspleging.

Dit onderstreept de noodzaak om de huidige categorie van ‘misdrijven gericht tegen de rechtspleging’ te herwaarderen als ‘misdrijven tegen de internationale rechtsstatelijkheid’: een vorm van hardnekkige staats- en systeemcriminaliteit, gericht tegen de internationale rechtspleging en daarmee ook tegen de internationale rechtsorde.

Praktisch gesproken vereist dit een versterking van de samenwerkingsverplichtingen voor staten die partij zijn. Daarnaast vormt de functionele immuniteit van ambtenaren van niet-partijstaten een structureel obstakel voor onderzoek en vervolging op nationaal niveau, alsook voor samenwerking met het ICC, zoals arrestatie en overlevering.

Een uitzondering op die immuniteit zou zich geleidelijk kunnen ontwikkelen indien een groeiend aantal staten misdrijven gericht tegen de internationale rechtspleging niet langer beschouwt als onderdeel van officiële taken, en bereid is om – op verzoek en in overleg met het ICC – onderzoek in te stellen en tot vervolging over te gaan.

5. Slotopmerkingen

Het is tijd voor slotbeschouwingen. Drie kernpunten verdienen het om met klem te worden onderstreept.

Ten eerste: dictaturen hebben geen monopolie op schendingen van internationaal recht.

Het orkestreren van wreedheden hoort niet tot het exclusieve domein van autocraten. Ook democratisch verkozen leiders maken zich hieraan schuldig, al wordt gehoopt dat bestaande *checks and balances* hen beteugelen en tot verlies van politiek draagvlak leiden. Dat gebeurt helaas niet altijd, of niet snel genoeg. Liberale democratieën, evenals staten die afglijden richting illiberalisme, ontketenen oorlogen, faciliteren en vergoelijken grootschalige misdaden, en trachten die te verdoezelen door zich te onttrekken aan het gezag van bevoegde internationale gerechtshoven.

De genocide in Palestina maakt pijnlijk duidelijk dat rijke en machtige staten, evenals regionale organisaties uit het mondiale Noorden, accountability slechts selectief ondersteunen – namelijk wanneer het hun geopolitieke tegenstanders betreft. Verantwoording voor henzelf en hun bondgenoten stuit op verzet. Dit ondermijnt niet alleen het gezag van internationale rechtspraak, maar ook de fundamenten van internationale rechtsstatelijkheid.

De frontale aanvallen op internationale rechterlijke organen zijn een symptoom van een dieperliggend, systemisch probleem: wanneer Justitia de waarheid spreekt tegen Leviathan, wordt zij tot zwijgen gemaand. Door het hanteren van dubbele standaarden en het ondermijnen van Justitia brengen Leviathans de 'vergiftigde kelk' – waarvoor de Amerikaanse aanklager Robert Jackson in Neurenberg waarschuwde – aan hun eigen lippen. De volle impact van deze zelfvergiftiging moet zich nog ontvouwen. Het verraad van de strijd tegen straffeloosheid in Palestina zal als een boemerang terugslaan op de afdwingbaarheid van verantwoording voor kernmisdrijven in Oekraïne.

Ten tweede: de enige uitweg is het doorbreken van dit cynische paradigma. Staten moeten uiteindelijk aanvaarden dat geen enkele actor boven de wet staat – en daar ook naar handelen. Het internationaal recht is bindend – voor 'vijanden', voor 'vrienden', én degenen die dat onderscheid maken. Dit is geen à-la-cartemenu.

De verwezenlijking van internationale rechtsstatelijkheid is een politieke opdracht, geen louter juridische. Geruchten over de dood van het internationaal recht – zoals ook mythes over zijn almacht – zijn zowel overdreven als schadelijk. Het internationaal recht is niet dood, maar de politieke wil om het in leven te houden verzwakt zienderogen, en moet dringend worden hersteld. Het recht is een onvolmaakt, maar essentieel instrument, dat door staten, volkeren, gemeenschappen en individuen wordt gebruikt, geëerbiedigd en verdedigd – of misbruikt, genegeerd en opgegeven.

Het recht zelf heeft geen handelingsvermogen; het is aan degenen die wél over agency beschikken om de juridische strategieën en institutionele mogelijkheden te mobiliseren die het recht biedt in hun strijd voor gerechtigheid. Onderdrukte en gekoloniseerde volkeren hebben het internationaal recht op moedige en creatieve wijze ingezet om het bevrijdend potentieel ervan te realiseren. Vertel Palestijnen, Oekraïners, Rohingya, Afghaanse vrouwen en andere slachtoffers maar eens dat internationale gerechtigheid een doodlopende weg is. Het verwerpen van het internationaal recht als weg naar gerechtigheid betekent voor hen het verlies van hun laatste hoop.

Ten derde: de nationale, supranationale en internationale rechtsstatelijkheid zijn onlosmakelijk met elkaar verweven. We maken momenteel een *polycrisis* van de rechtsstaat mee – op alle niveaus. De gezondheid van de rechtsstaat intern bepaalt mede hoe staten zich opstellen tegenover de internationale rechtspraak. Maar ook het omgekeerde geldt: de ondermijning van internationale gerechtshoven tast de eerbied voor de onafhankelijkheid van de rechterlijke macht aan, en ondergraaft zo de rechtsstaat op nationaal niveau.

De rechterlijke macht vormt de laatste verdedigingslinie die onze samenlevingen beschermt tegen totale wetteloosheid. Vandaar dat dit geen zaak is van internationale juristen alleen. Nationale juristen, EU-rechtsexperts, mensenrechtenactivisten, politici, academici – en iedere bezorgde burger – moeten waakzaam zijn. Wij allen moeten verantwoordelijkheid nemen en onze stem verheffen ter verdediging van Justitia, tegen de Leviathans die de rechtsstatelijkheid liever vervangen door de heerschappij van machthebbers.

Het eisen van respect voor het internationaal recht en het steunen van onafhankelijke internationale rechtspraak zijn vandaag de dag kleine, maar noodzakelijke daden van verzet – in vervulling van onze *erga omnes*-verplichtingen.

In die geest bood ik u deze lezing aan. Ik heb gezegd.


Open Universiteit
SERGEY VASILIEV
Justitia and Leviathans:
The Struggle for the
International Rule of Law

This pdf-brochure contains the text of the inaugural lecture
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Justitia and Leviathans: The Struggle for the International Rule of Law

Inaugural lecture

delivered in abridged form on the occasion of the acceptance of the title of Professor of International Law at the Open University

on Friday, 13 June 2025

by Prof.dr.mr. Sergey Vasiliev

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Cyril Ramaphosa et al, The Hague Group, 25 February 2025

I. Foreword

It is a curious time to be assuming the chair of international law. It feels like an assignment to conduct an orchestra on the deck of the Titanic, or preaching in the ruins of a blown-up church. International lawyers are used to hearing: 'Is your so-called international law even a thing?' Nowadays, such questions are posed with exasperation, and sometimes even with *Schadenfreude*. Hardly a day goes by without international law being pronounced dead, the United Nations dismissed as a failed organisation, and international courts useless – if not outright harmful.

Putinist Russia's aggression against Ukraine began with the annexation of Crimea over eleven years ago and is now more than three years into a full-scale invasion, in the course of which towns and villages have been wiped off the map and tens of thousands civilians have lost their lives.

In the twenty months since Hamas' horrendous 7 October attack—in which its fighters killed some 1,200 Israelis and took 251 hostage—Israel has laid waste to Gaza. The Israeli Defence Forces have driven nearly 1.9 million Palestinians from their homes, bombed out mosques, schools, universities and hospitals, and burned displaced refugees in tents alive. Israel has blocked humanitarian aid for Gaza, subjecting over two million Palestinians to starvation. The International Criminal Court (ICC) issued arrest warrants against Israeli Prime Minister Netanyahu and former defence minister Gallant for war crimes and crimes against humanity. Moreover, reputable human rights organisations, independent legal experts, and some politicians have characterised this conduct as genocide.[1] I share this assessment.

Meanwhile, upon assuming office as US President for the second time, Donald Trump has wreaked havoc with his real estate approach to international affairs. Trump 2.0 administration has swung the sledgehammer of executive orders with unseen efficiency to dismantle whatever remains of international law and multilateral institutions.[2] It has casually floated ideas about the US taking over Greenland, resettling Palestinians from Gaza, and reimagining the Strip as a beachside investment zone. It has also signalled openness to recognising Russia's territorial conquests in Ukraine as legitimate. The Trump 2.0 administration's attitude towards international law points inexorably to the end of the US-backed international order.[3]

Major international crises sooner or later make their way to international courts: the International Court of Justice (ICJ), the ICC, the European Court of Human Rights (ECtHR), and others.

1 See e.g. Amnesty International, '"You Feel Like You are Subhuman": Israel's Genocide against Palestinians in Gaza', December 2024; Human Rights Watch, 'Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water', December 2024.

2 Markus Gehring and Tejas Rao, 'International Law Under Pressure: An Analysis of the First Six Weeks of the 2025 Trump US Administration', *Verfassungsblog*, 24 March 2025.

3 Monica Hakimi and Jacob Katz Cogan, 'The End of the U.S.-Backed International Order and the Future of International Law' (2025) 119(2) *American Journal of International Law* 279.

States also continue to establish special and ad hoc international tribunals to address existing jurisdictional gaps. For example, the process of setting up the Special Tribunal for the Crime of Aggression in Ukraine is underway in the framework of the Council of Europe, given that the ICC is unable to tackle this crime at present.[4]

International courts interpret, apply, and develop international law when settling disputes and adjudicating cases brought before them, but they are not equipped to resolve the underlying conflicts. They can issue orders and decisions, but they cannot enforce them. In March 2022, the ICJ ordered Russia to suspend its military operations in Ukraine, just as it later ordered Israel to ensure access of humanitarian aid and basic services into Gaza – both to no avail.[5] Courts may issue arrest warrants, as the ICC has done for Putin and Netanyahu, but they cannot execute them. Enforcing such rulings and cooperating with international courts is the responsibility of states. Instead, states at best ignore these courts and at worst subject them to virulent attacks. With their authority defied and even their existence on the line, these courts may indeed appear useless. But who, then, is to blame?

Justitia finds itself under sustained fire from Leviathans. The Roman goddess of justice serves as an allegory of international courts and the ideal of the international rule of law they embody. Leviathan is a biblical sea monster, variously depicted as a serpent, dragon, or whale (Book of Job, chs 40-41). In the famous engraving in Thomas Hobbes' 1651 *magnum opus*, Leviathan is portrayed as a majestic colossus whose body is weaved of countless tiny men.

Holding a sword in his right hand and a crozier in the left, he rises above his dominion.[6] This figure symbolises the body politic: a sovereign holding absolute military, legal, religious, and ideological authority, who resolves disputes and issues punishments and rewards. The citizenry voluntarily concedes its natural freedom and pledges obedience to the Commonwealth in exchange for protection and social peace, that are unattainable in the 'state of nature', marked by the 'war of all against all' (*bellum omnium contra omnes*).

The international rule of law is the global public good that lies at the heart of the struggle between Justitia and Leviathans. By 'international rule of law', I mean the transplantation and

4 EU Directorate-General for Enlargement and Eastern Neighbourhood, 'International coalition agrees on the establishment of the Special Tribunal for the Crime of Aggression against Ukraine', 9 May 2025; Joint Statement of the Foreign Ministers Meeting on the conclusion of the work of the Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine ('Lviv Statement'), 9 May 2025, Lviv, Ukraine.

5 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Provisional Measures, Order of 16 March 2022, para 86; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Provisional Measures, Order of 26 January 2024, para 86, Order of 28 March 2024, para 51, and Order of 24 May 2024, para 57.

6 Thomas Hobbes, *Leviathan, or The Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civil* edited by David Johnson, 2nd ed. (W.W. Norton & Company 2020) 3.

7 In this vein, Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, 355-360. On the international rule of law as the 'externalisation' of the core rule-of-law values onto the international plane: Stéphane Beaulac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2008) 204, 220-221.

mutatis mutandis application of the principles of the rule of law, originally developed in domestic legal systems, to relations among states and other subjects of international law.[7] While fully recognising the limits of the domestic analogy, the notion conveys a normative commitment to legality in international governance and politics.[8]

Over the years, I have been studying issues of legitimacy, constitutional foundations, and institutional designs of international justice. As part of the International Justice Governance project, our joint venture with Prof. Niels Blokker, we have examined the institutions, norms, and practices of governance through which states govern international courts. This project has led to two PhD dissertations in Leiden defended by Maria Manolescu and Kritika Sharma, and more is in the pipeline.[9] My other line of research concerns the role of judges and lawyers in states undergoing democratic backsliding and rule-of-law erosion. These research strands intersect more than meets the eye.

Ravaged by conflict, the world today increasingly resembles the misery of the Hobbesian 'state of nature'. Leviathans clash with one another, unconstrained by any rules, and subject both foreign populations and their own citizens to atrocities. It is Justitia's predicament in this world marked by Leviathans' lawlessness that is the topic of this lecture.

In Part I, I zero in on the apocalyptic imagery, that is deliberately chosen to make clear what is at stake. In Part II, I highlight the inherent vulnerabilities of international courts and their importance as custodians of the international rule of law. Part III outlines the extraordinary scale of threats and attacks against international justice that are becoming a new normal. Part IV turns the gaze to the future in mapping out what could the potential solutions, followed by takeaways.

8 Richard Collins, 'Two Idea(l)s of the international rule of law' (2019) 8(2) *Global Constitutionalism* 191, 196

9 Adriana-Maria Manolescu, *Balancing Powers: Safeguarding Judicial Independence and Promoting Accountability of International Courts through Financial Governance* (PhD Thesis, Leiden University, 2025); Kritika Sharma, *The Assembly of States Parties to the International Criminal Court: A Good Governance Approach* (PhD thesis, Leiden University 2025). The third PhD, on the role of the international judicial governance institutions in respect of resistance to and backlash against ICTs, is being prepared in Leiden by Emre Acar.

II. Leviathans in wait

1. Time of monsters, again

Any attempt to diagnose the current situation inevitably invites parallels with the late 1930s and early 1940s. Writing at the height of WWII in London, the prominent German émigré international law and international relations scholar Georg Schwarzenberger mounted a vigorous defence of international law – both against its detractors, who were too keen to point out its impotence, and against its violators, the 'totalitarian aggressors' Germany, Italy, and Japan. Schwarzenberger argued that Western democratic states should deploy international law more decisively to uphold its fundamental principles and to defend themselves against the onslaught of 'totalitarian lawlessness'. [10]

This call to arms was made in 1943, when the international legal system was still in an embryonic state. Rephrasing Gramsci, it was the time of monsters: the old was dying and the new was struggling to be born.[11] The core rules of international law of the use of force, international human rights, international humanitarian law, and international criminal law had yet to be articulated, codified, and progressively developed by states and the international courts, most of which would emerge only later.

With the proverbial monsters defeated, the new post-war world order was shaped by international law as articulated and applied by the Nuremberg and Tokyo Tribunals, the ICJ, the ECtHR, and other regional human rights and economic integration courts. The ICC, along with a host of *ad hoc* and special criminal tribunals, followed in quick succession. The modern international legal order is unthinkable without these courts, as both its custodians and first responders in times of crisis.

After eight decades of unsteady and uneven progress, this edifice is crumbling. The Gramscian 'time of monsters' is upon us again – and the new world it is birthing is a terrifying one. Multilateralism gives way to the transactional exceptionalisms and competitive authoritarianisms of major global and regional powers, notably the US, China, Russia, and India. The foundational premises of the post-1945 order—peaceful resolution of disputes, the prohibition of the threat or use of force, and the norm against recognition as lawful of acquisitions of territory by force—are dismantled brick by brick. International law, the 'discipline of crisis', is itself sinking

10 Georg Schwarzenberger, *International Law and Totalitarian Lawlessness* (London: Jonathan Cape, Thirty Bedford Square 1943) 7 ('If … International Law is not required to remain completely helpless and impotent in such an emergency, its defences and remedies must be congenial to the magnitude of the challenge.')

11 Quintin Hoare and Geoffrey Nowell Smith (eds and trans), *Selections from the Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1971) 276 ('The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.') This language originating from the 34th entry in Gramsci's third prison notebook from 1930 is at times rendered as 'The old world is dying, and the new world struggles to be born: now is the time of monsters.'

into an existential crisis.[12] It is no coincidence that, in an official discourse of states, international law is increasingly being supplanted by its simulacra: the 'rules-based international order' in the rhetoric of the US and European countries, and the 'multipolar world' championed, for example, by Russia and China.[13] With multilateralism under assault and the international rule of law under siege, international courts are bearing the brunt of this retreat.

Schwarzenberger would not envy contemporary international lawyers trying to vindicate their field. Matters got more complex since 1943. Compliance with international law can no longer be framed in the stark, outdated civilisational terms of a showdown between Western liberal democracies and the totalitarian dictatorships of the Triangle Powers. That binary never truly offered the comfort of moral certainty. The impunity of Western actors has remained a constant feature – from the unpunished crimes of the Allied Powers and Vietnam to the aftermath of the 9/11 and the 'War on Terror', the 2003 Iraq invasion, and beyond. Clearly, Palestine is not an exception but rather part of the same pattern. Indeed, it is not only totalitarian dictatorships, but also liberal democracies—and states claiming to be democracies—that serially violate international law and promote impunity for themselves and their allies.

The Putin regime certainly fits the profile of a rogue, 'lawless aggressor'. Atrocities committed in Ukraine have been enabled by Russia's authoritarian regression and re-Gulagisation. Following the 2022 invasion, states, particularly in the West, initially appeared serious about confronting impunity – even when it meant taking on a permanent member of the UN Security Council. The international mobilisation for accountability in Ukraine – what may be called 'solidarity justice'*14* –was a reassuring response to authoritarian lawlessness. Yet Israel's total war on Gaza, and the complicity of its Western allies, has largely undone the semblance of moral clarity that the 'democracies *versus* dictatorships' binary claimed to offer. A plausible case of genocide, and overwhelming evidence of other core crimes, did not deter Global North states from undermining accountability efforts – and behaving as if the international courts were the problem, and not their ally's conduct.

Much ink has been spilt on the intractable tensions between state sovereignty and international justice, and on why sovereign states are—or must be—bound by the rule of law in international relations.[15] Today Sovereignty—with a capital S—is once again *en vogue*, returning in a naked and hypertrophied form. The distinction between 'enemies' and 'friends' has re-emerged as the measure of all things – including Leviathans' dealings with Justitia. Carl Schmitt, the influential constitutional law theorist and a Nazi, defended this enemy-friend binary as the very essence of

12 Along these lines, see Ntina Tzouvala, 'International law as a discipline in crisis' (2025) 79(1) *Australian Journal of International Affairs* 71.

13 John Dugard, 'The choice before us: International law or a 'rules-based international order'?' (2023) 36(2) Leiden Journal of International Law 223.

14 Sergey Vasiliev, 'Solidarity Justice for and beyond Ukraine' in Stefano Manacorda and Chantal Meloni (eds), *Le questioni aperte della giustizia penale internazionale nella prospettiva interna* (Giuffré Francis Lefebvre 2024) 133-149.

15 David Dyzenhaus, 'Hobbes on the International Rule of Law' (2014) 28(1) *Ethics and International Affairs* 53, 61; Jeremy Waldron, 'The Rule of International Law' (2006-2007) 30 *Harvard Journal of Law and Public Policy* 15, 21-22, 24.

'the political'.[16] In his 1938 book on the Leviathan in Hobbes' theory of state, Schmitt remarked, regarding Hobbes' grim view of interstate relations, that no security and no legal order can exist beyond the state, thereby implying the utter fragility, if not impossibility, of binding international law. "There is no state between states," Schmitt wrote: international relations are the extra-legal 'state of nature' where Leviathans engage each other free from any constraints laid down in 'insecure covenants'.[17]

Such covenants can be set aside whenever Leviathan deems it expedient – so much for *pacta sunt servanda*. If it is the sovereign who decides on the exception, as Schmitt famously stated, then this is all the more true in its dealings with other sovereigns.[18] As Schwarzenberger would note later, "the *inter-regna* of major wars ... throw open for debate the whole system of power politics and the thin covering layer of legal norms supposed to rationalize and mitigate the clashes between the Leviathans."[19]

Where is Justitia in all this? She can neither mitigate nor prevent clashes between Leviathans, nor can she bind them by the law. They summon her and grant her the privilege to restate the law to them – for as long as they are prepared to listen, hoping she repays them by boosting their legitimacy, granting them a competitive advantage in a conflict, and baiting their enemy. Leviathans lie in wait. Once Justitia's exhortations and the 'insecure covenants' of the international law threaten to entrap them or their 'friends', Leviathans no longer have use for her. It is *Justitia* itself that becomes the 'enemy' and must be destroyed. Leviathans become unleashed. They have always operated by this logic – and are no longer willing to conceal it.

2. Enter Justitia

States create international courts—either directly or through international organisations—for a variety of purposes: resolving disputes through the application of law to specific cases; affirming and developing norms; and contributing to international legal regime-enforcement.[20] Numerous international courts now operate as guardians of international law and/or of its specialised regimes, such as the law of the sea, human rights law, and international criminal law. International courts serve as key pillars of the international rule of law. Like domestic courts

16 Carl Schmitt, *The Concept of the Political. Expanded Edition, translated and with an Introduction by George Schwab* (The University of Chicago Press 1996) 25 ('The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.') and 29-30 ('The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. In its entirety the state as an organized political entity decides for itself the friend-enemy distinction.')

17 Hobbes (n 6) ch 13 and Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol, translated by Georg Schwab and Erna Hilfstein* (Greenwood Press 1996) 49 ('There is no state between states, and for that reason there can be no legal war and no legal peace but only the pre- and extralegal state of nature in which tensions among leviathans are governed by insecure covenants.')

18 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty, translated and with an Introduction by Georg Schwab* (The University of Chicago Press 2005) 5 ('Sovereign is he who decides on the exception.')

tasked with keeping other branches of government in check, their international counterparts are meant to articulate rule-of-law constraints on the sovereign power and state behaviour – both in the international arena and, increasingly, in their internal affairs.

Community-based courts, established and joined by states to form a community, adjudicate cases of concern to that community, reinforce shared values and norms, and promote public interests.[21] For instance, the European Court of Human Rights and the ICC are examples of courts at the centre of such normatively integrated regimes: the former upholding human rights standards and the latter pursuing accountability international crimes. By providing a forum to states and international organisations to litigate community interests, such courts help to construct or reenact the communities of their member states and the international community writ large.[22]

States have been increasingly making use of this adjudicative function of international courts in recent times.[23] This is exemplified by cases before the ICJ that states launched or intervened in to uphold their common interests and to protect global public goods, in fulfilment of their *erga omnes (partes)* obligations, for instance, under the 1948 Genocide Convention and the 1984 Convention against Torture.[24] The same trend is evident in contentious litigation and/or advisory proceedings on issues raised by occupation,[25] as well as regarding climate change, in The Hague and Strasbourg.[26] States may also turn to international courts primarily to attract public attention to an ongoing crisis or to obtain a form of censure against the respondent – even

19 Schwarzenberger (n 10) 32 ('The great periods of the development of International Law in general and of the laws of warfare and neutrality in particular are divided by the i*nter-regna* of major wars in past centuries and of world wars in our own time which throw open for debate the whole system of power politics and the thin covering layer of legal norms supposed to rationalize and mitigate the clashes between the Leviathans.')

20 José E Alvarez, 'What are International Judges for? The Main Functions of International Adjudication' in Cesare PR Romano et al (eds), *The Oxford Handbook of International Adjudication* (OUP 2012) 158; Armin Von Bogdandy and Ingo Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking' (2011) 12 *German Law Journal* 1341, 1342.

21 David D Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24(2) *Berkeley Journal of International Law* 401, 403 (on community-originated v party-originated courts).

22 Fleur Johns, *Connection in a Divided World: Rethinking 'Community' in International Law. Ninth Annual T.M.C. Asser Lecture* (TMC Asser Press 2024); Sarah Thin, 'Guardians of Legality? The International Judicial Function in an Era of Community Interest' (2023) 92 *Nordic Journal of International Law* 499. See also contributions in Eyal Benvenisti, Georg Nolte and Keren Yalin-Mor (eds), Community Interests Across International Law (Oxford University Press 2018).

23 Paula Wojcikiewicz Almeida, 'Enhancing ICJ Procedures in Order to Promote Fundamental Values: Overcoming the Prevailing Tension between Bilateralism and Community Interests' in Massimo Iovane et al (eds), The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry (Oxford University Press 2021); Letizia Lo Giacco and Brian K McGarry, 'Common Interests and Common Spaces: Visions of the Past and Future of International Justice' (2025) 85 *ZaöRV* 43; Sarah Thin, '"Proxy States" as Champions of the Common Interest? Implications and Opportunities' (2025) 85 ZaöRV 69.

24 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012 (II), 449-450, paras 68-70; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Judgment of 22 July 2022, ICJ Reports 2022, 515-518 paras 106-114; A*pplication of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and The Netherlands v Syrian Arab Republic)*, Order of 16 November 2023, ICJ Reports 2023, 602-603, paras 50-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Order of 26 January 2024; *Alleged Breaches of Certain International Obligation in respect of the Occupied Palestinian Territory (Nicaragua v Germany)*, Order of 30 April 2024, ICJ Reports 2024, 8 para. 23.

where the case stands little chance to meet jurisdictional and admissibility thresholds and being examined on the merits. Such 'lawfare' is not inherently problematic and remains consistent with the rule of law, as long as the judicial nature of the institutions is respected.

International justice represents an extrapolation of the institution of adjudication from the domestic context into an international order that differs markedly in constitutional terms. There is no single sovereign, but a plurality of Leviathans; no clear separation of powers; and no supreme authority to safeguard judicial independence. International courts are created as judicial institutions *proprio sensu*—not mere imitations of domestic courts—and are expected to adjudicate cases independently and impartially.

Admittedly, states may flirt with the idea of replacing some of the existing international courts and tribunals with 'kangaroo courts' that would lack judicial independence, be entirely subject to their control, and function as propaganda tools to undermine genuine judicial organs.[27] But absent such ulterior motives, there would be no point for states to establish and fund international courts, bring cases before them, and provide for the enforcement of their decision, if they had not intended those courts to be independent and impartial. States have a clear interest in safeguarding the integrity of international justice institutions they create to solve international disputes. International adjudication in itself constitutes a global public good.[28]

The statutes of international courts typically contain provisions on judicial qualifications, privileges and immunities, rules of conduct, disqualification procedures and disciplinary matters. Guarantees of judicial independence, however, remain regime-specific. The general international law framework is arguably not yet as robust in this regard as it ought to be, given the particular vulnerabilities of international courts.

These courts are vested with more—often unstated—functions than their domestic counterparts and carry the burden of high, and at times contradictory, expectations.[29] Yet unlike

25 On the right of self-determination as being owed *erga omnes*, in the sense of being the subject of legal interest of all states: *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, ICJ Reports 2024, 65 para 232; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004 (I), 199, para. 155; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, ICJ Reports 2019 (I), 139, para. 180.

26 E.g. *Obligations of States in Respect of Climate Change*, Request for advisory opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, 12 April 2023; *Duarte Agostinho and others v Portugal and 32 other States*, Decision, App no 39371/20, GC ECtHR, 9 April 2024; *Verein KlimaSeniorinnen Schweiz and others v Switzerland*, Judgment, App no 53600/20, GC ECtHR, 9 April 2024. See further Vladyslav Lanovoy and Miriam Cohen, 'Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings' (2025) 85 ZaöRV 97.

27 For the former Russian President Medvedev's proposal to establish such an alternative to the ICC: Dmitry A Medvedev, 'Lost Illusions, or How the International Criminal Court Has Become a Legal Nonentity' (2025) 69(1) Pravovedenie 24, 41.

28 Joshua Paine, 'International Adjudication as a Global Public Good?' (2019) 29(4) *European Journal of International Law* 1223.

29 Caron (n 21) 409; Mirjan Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329.

national courts, they are neither embedded in established constitutional structures nor able to count on readily available systems of institutional support. More than domestic courts—whose existence and functioning are generally guaranteed—international judiciaries contend with dockets that are profoundly political in nature or easily prone to politicisation. At the same time, they remain painfully dependent on the continuous political, financial, and organisational support of member states—those very states their judgments may upset or antagonise—not only for the enforcement of those rulings but also for virtually every other aspect of their operation.

Moreover, unlike domestic courts, the jurisdiction of international courts' is rooted in state consent which—despite formal limitations—can be withdrawn at any time and, in practice, without negative consequences.[30] States are free not to join agreements establishing international courts and are under no obligation to cooperate with them or recognise their authority. States not party are within their right to provide cooperation on a one-off basis or to oppose such institutions, when it suits their interests. The United States' engagement with international justice reflects such an opportunistic approach. At least since its debacle at the ICJ in *Nicaragua v US*,[31] it has sought to eliminate even the slightest chance of being subjected to international courts' jurisdiction. At the same time, it has been keen to exercise control over them from outside. Although the US initially signed the ICC Statute, it has never ratified it.[32] Significantly, Russia has been careful to follow the US example in this respect.[33] Since 2016, it is not bound by the duty to refrain from acts which would defeat the Statute's object and purpose.[34]

States may also keep courts at bay by withholding consent to jurisdiction through entering reservations to compromissory clauses in order to carve out jurisdictional exceptions for themselves and avoid being brought before the court.[35] Broader acceptance of the compulsory jurisdiction of international courts would enhance the international rule of law,[36] yet states continue to display only a modest appetite for it. The perceived 'mistakes' of joining a court and conceding jurisdiction previously can be easily reversed by withdrawing from international courts' constituent agreements. Indeed, states do not hesitate to take such steps when staying on as a

30 For a discussion on the ICJ, Beaulac (n 7) 214-215.

31 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 442, para. 113. Following this judgment, the US disengaged from the case and failed to appear in the proceedings on the merits; in 1986, it withdrew from the ICJ's compulsory jurisdiction in 1986. For detailed analysis, see Sean D Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' in Cesare PR Romano (ed), The Sword and the Scales: The United States and International Courts and Tribunals (Cambridge University Press 2009) 46-111.

32 The US signed the Rome Statute on 31 December 2000 but informed the UN Secretary-General of its intention not to ratify it in May 2002. Press Statement, 'Letter to UN Secretary General Kofi Annan from John R Bolton', 6 May 2002.

33 Russia signed the ICC Statute on 13 September 2000 but, after the publication of the ICC Prosecutor's 2016 Report on preliminary examination activities, among others in relation to the situation in Ukraine (ibid 33-41), it informed the depository of its intention not to ratify the Statute. 'Status of treaties. CHAPTER XVIII Penal Matters', Rome Statute of the International Criminal Court, UN Treaty Collection, at 15.

34 Vienna Convention on the Law of Treaties Vienna, 23 May 1969 (entered into force on 27 January 1980) 1155 UNTS 331, article 18(a).

35 For a recent example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v United Arab Emirates)*, Provisional Measures, Order of 5 May 2025, paras 28-33.

36 Chesterman (n 7) 359.

party poses legal risks – especially when Leviathan itself, or the prince impersonating it, faces accountability. Notable examples include the withdrawals of Burundi and the Philippines from the ICC Statute. As a form of resistance to international courts, withdrawals are not inconsistent with the international rule of law.

Last but not least, states hold reins over international courts through the institutions and processes for governing them. In this context, the many structural dependencies of international courts come to the fore become most apparent. International judicial governance institutions—where states sit as members—may take the form of organs of international organisations (such as the UN General Assembly and Security Council for the ICJ and for the UN ad hoc criminal tribunals) or treaty bodies (such as the Assembly of States Parties for the ICC). Governance institutions play a crucial role in ensuring courts' successful operation – or otherwise. They adopt and amend courts' legislative frameworks; nominate and elect judges and other principals; allocate budgets; ensure the enforcement of decisions; and provide management oversight, accountability, and forms of political and practical support essential to the proper exercise of judicial mandates.

International court governance, by definition, provides endless opportunities for resistance, backlash, and forms of 'interference from within'. Much depends on whether states parties regard the international court as a proper court—akin to a domestic judiciary, whose independence must be respected—or merely perceive it as 'yet another international organisation in The Hague'. States can attempt to steer courts in certain directions or neutralise them in ways incongruent with judicial independence. They may misuse their positions within governance bodies to subvert courts by suffocating them with inadequate budgets, subjecting them to micromanagement, and imposing on them overly intrusive forms of accountability – while failing to adopt necessary legislation, appoint competent judges, offer political support, or protect the courts and their staff from politicised attacks and external threats.

Ill-intentioned or incompetent governance can seriously harm the effective functioning of international courts, potentially leading to their marginalisation, desuetude, or even dissolution. Textbook examples of such outcomes include the paralysis of the WTO Appellate Body following the US' persistent refusal to approve new appointments, the disbanding in 2011 of the South Africa Development Community Tribunal after it ruled against Zimbabwe in a land seizures case, and the unceremonious dismantling of the Special Tribunal for Lebanon in 2021-2023 due to the lack of funds. While this is mostly unthinkable for domestic courts in democratic rule-of-law states, the closure of a court will not necessarily be an affront to the international rule law. Communities of states may establish and terminate international tribunals. It matters how they do that and, in particular, whether the judicial function and the principle of judicial independence are duly respected in the process.

It is fair to say that Justitia is no Behemoth – the Biblical land animal capable of defeating Leviathan. Justitia's scale may be perfectly balanced, but her sword is blunt. She may be the bait Leviathan once swallowed, but it can always spit that bait out and walk away unscathed. There are many ways—some lawful, others less so—for Leviathans to render Justitia inoperative and harmless.

III. Leviathans unleashed

What happens when tensions over an international court's actions escalate the point that Leviathans abandon all restraint and resort to brute force?

1. Lashing out

Leviathans possess a wide arsenal of methods to express their displeasure known and strike back at Justitia when her wheels begin to turn in what they perceive as the wrong direction. Some forms of backlash may be heavy-handed yet remain compatible with the rule of law. As noted, states may withdraw from a court's constituent instrument in accordance with the procedure it provides. A state—or a group of states—may take also act through the court's governance institution: initiating a comprehensive review of the court's performance, amending the legal framework, scaling down its jurisdiction, or even disbanding it altogether. Such responses to perceived institutional defects or failures are not necessarily unlawful and, in themselves, do not compromise judicial independence.

Other forms of resistance may be less heavy-handed but more objectionable in terms of respect for judicial independence and other core principles related of judicial function. Actions taken by states within judicial governance forums that circumvent orderly legislative or oversight measures, are one example. Interfering with the court's composition, pressuring the court principals to appoint or remove staff, cutting the court's lifelines, depriving it of necessary support, or causing its 'death by a thousand cuts', all fall within this category.

Another example is public statements expressing strong disagreement with a court's binding and final decisions, implying that those decisions are incorrect and need not, or shall not, be respected. For example, some states parties—Germany and Hungary—reacted in this manner to the ICC Pre-Trial Chamber's 2021 ruling affirming the scope of the Court's territorial jurisdiction in the Situation in the State of Palestine.[37]

The well-established principle of *Kompetenz-Kompetenz* entails that a court must be allowed to determine its own competence within the statutory parameters of its judicial mandate.[38] A state is entitled to hold its views on legal issues—such as the court's jurisdiction or immunities of state officials—which may be different from the court's conclusions. However, states parties should refrain from declaring a judicial decision as invalid or incorrect on the merits,

37 Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', *Situation in the State of Palestine*, ICC-01/18-143, PTC I, ICC, 5 February 2021. On 9 February 2021, then German FM Heiko Maas (@HeikoMaas) tweeted: 'Our legal view on jurisdiction of the International Criminal Court regarding alleged crimes committed in the Palestine territories remains unchanged: the court has no jurisdiction because of the absence of the element of Palestinian statehood required by international law.' Stefan Talmon, 'Germany publicly objects to the International Criminal Court's ruling on jurisdiction in Palestine', *German Practice on International Law*, 11 February 2021.

or from announcing that it will not be complied with. This crosses a critical line: such conduct undermines judicial independence and damages the court's authority as it may amount to, or be perceived as, an attempt to pressure the court into changing its course.

States' resistance to, and backlash against, international justice are far from new phenomena and have received considerable attention in international law and international relations scholarship.[39] Yet recently, defiance of international courts has taken on increasingly unsubtle and particularly virulent forms – unlike anything seen before. Leviathans tend to become particularly unrestrained confronting courts to which they are not parties and over which they exert no control.

2. Leviathans personified

International criminal law is where such extreme behaviour unfolds most often. This is related to the fact that in this domain it is individuals—often political and military leaders—who are facing accountability. With stakes so high, these powerful individuals—the personified Leviathans—often respond with hostile rhetoric that equates their personal status as suspects with the state or the people itself being in the dock, facing fabricated charges before an illegitimate tribunal.

Israeli Prime Minister Netanyahu has recently fought the ICC arrest warrant with precisely this kind of rhetoric. He claimed that by issuing a warrant against him, the Court has placed the democratic state of Israel on the same footing as Hamas, a terrorist organisation. This is a manipulative conflation. It is he, Netanyahu—as an individual—who stands accused of international crimes. The ICC determines individual criminal responsibility; it neither assesses the conduct of abstract entities nor draws equivalence between them.

38 ICJ Statute art 36(6) ('In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'); *Nottebohm Case (Liechtenstein v Guatemala)*, Preliminary Objection, Judgment of 18 November 1953 [1953] ICJ Reports 111, 119 ('in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.'); Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadić*, IT-94-1-A, AC, ICTY, 2 October 1995, para 18-19 ('this power can be limited by an express provision … in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. …[S]uch a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.')

39 E.g. Karen J Alter, James T Gathii, and Laurence R Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *European Journal of international Law* 293; Mikael Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash against International Courts: Explaining Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197; Jorge Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44(2) Yale Journal of International Law 179; Dilek Kurban, 'Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights' (2024) 35(2) European Journal of International Law 355, 360-364; Salome Addo Ravn, Misha Ariana Plagis, and Mikael Rask Madsen, 'International Courts and Sovereignty Politics: Design, Shielding, and Reprisal at the African Court' (2025) Leiden Journal of International Law (first view).

Indicted leaders rarely stop at hostile rhetoric it at that. They go further and weaponise Leviathan—the state apparatus at their disposal—to actively undermine investigations and prosecutions in an effort to evade personal responsibility. It is an unequal fight: Justitia may challenge Leviathan, but she cannot defeat it. The ICC cases against Kenyan leaders Uhuru Kenyatta and William Ruto, along with other defendants, concerning the 2007-2008 post-election violence, ended in the withdrawal or dismissal of charges.[40] This outcome resulted from a widespread and carefully orchestrated campaign of witness interference, carried out by or on behalf of the government of Kenya.[41] The ICC proved unable to respond effectively to the challenges posed by the 'cases against powerful, high level accused willing to engage in concerted propaganda campaigns and pervasive witness interference'.[42]

The Kenya debacle is far from an isolated case. When confronted with the prospect of investigation, then-President Rodrigo Duterte of the Philippines not only lashed out at the ICC Prosecutor and judges. Acting in evident self-interest, he also pulled the Philippines out of the Court in 2019 – the move that, however, did not ultimately prevent his arrest and transfer to The Hague. That outcome reflected not so much the ICC's authority and reach as the culmination of internal power struggle among the Philippine political elites.

As reported by *The Guardian* and other two media outlets in May 2024, Israel engaged in a nine-year-long campaign of surveillance and espionage against the ICC, aimed at preventing an investigation in the Situation in Palestine.[44] The Israeli foreign intelligence agency Mossad sought to intimidate the ICC Prosecutor and dissuade her from pursuing that investigation. When these efforts failed, Israeli security services—Shin Bet, Aman, and Unit 8200—conducted intelligence operations against the Court, overseen by Netanyahu's national security advisors, with Netanyahu himself taking a personal interest.[45]

What is striking across all of these examples is that there is no light between Leviathan and the leaders who pretend to personify it and cling to power to avoid accountability. It is common for such personified Leviathans who assault, retaliate against, and seek to destroy Justitia, to have a fraught relationship with the domestic rule of law. Often, they are leaders of autocratic

40 For a postmortem on the ICC's intervention in Kenya: Sara Kendall, '"UhuRuto" and Other Leviathans: The International Criminal Court and the Kenyan Political Order' (2014) 7 *African Journal of Legal Studies* 399.
41 'ICC OTP Kenya Cases: Review and Recommendations. Executive Summary of the Report of the External Independent Experts', Annex 1, Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation, 26 November 2019, 4 (E20) ('From early on the suspects/accused engaged in a pervasive—and successful—campaign of direct and indirect witness interference') and 5 (E22) ('the GoK did not support the OTP investigative activities, instead it either allowed interference with witnesses inside and outside of Kenya and with OTP activities in Kenya, including surveillance of OTP investigators, and/or may have been directly involved in such interference.')
42 ibid 1 (E5).
43 ICC press release, 'Situation in the Philippines: Rodrigo Roa Duterte in ICC custody', 12 March 2025.
44 Harry Davies et al, 'Spying, hacking and intimidation: Israel's nine-year 'war' on the ICC exposed', *The Guardian*, 28 May 2024.
45 ibid ('Netanyahu has taken a close interest in the intelligence operations against the ICC, and was described by one intelligence source as being "obsessed" with intercepts about the case.')

regimes or states undergoing democratic rule-of-law backsliding. Contemporary United States and Russia are cases in point.[46]

Yet the disease is infectious. Even established democracies have recently placed their own domestic rule of law on the altar of impunity for allies. By defying the authority and binding rulings of international courts, Leviathans of the 'free world' have been reneging on treaty obligations and actively undermining the international rule of law. In this context, Schwarzenberger's distinction between totalitarian dictatorships and liberal democracies offers little solace.

3. Justitia under assault

In an era marked by global rule-of-law backsliding, Leviathans' attacks on Justitia have reached unprecedented levels of intensity. Leviathans learn from one another and follow each other's example.

For years, the 2002 'Hague Invasion Act'—authorising US President to use 'all means necessary and appropriate' to release US or allied personnel detained by or on behalf of the ICC,[47] —was mentioned only with disbelief, regarded as an inanity unlikely ever to be acted upon. During the Obama years, the US was not hostile towards the ICC and even provided tactical cooperation. That changed dramatically under the first Trump administration, once it became clear that the Court would not desist from investigations into alleged crimes in Afghanistan and CIA black sites in Europe that could implicate US personnel, as well as Israelis' alleged crimes in Palestine.

Senior US officials, including Secretary of State Mike Pompeo and National Security Adviser John Bolton, repeatedly issued bellicose statements against the ICC.[48] Soon after, heavier blows followed. President Trump issued an executive order declaring a national emergency and authorising asset freezes and travel bans against ICC officials involved in those investigations.[49] As a result, personalised sanctions were imposed on the ICC Prosecutor and a member of her staff.[50]

46 On the US under Trump 2.0, see Editorial Board, 'Who Will Defend the Defenders of the Constitution?' New York Times, 22 March 2025; John Gerstein, 'Rule of law is "endangered," chief justice says', Politico, 12 May 2025. On Trumpism in its first rendition, see Kurt Mills and Rodger A Payne, 'America First and the Human Rights Regime' (2020) 19(4) *Journal of Human Rights* 399.

47 American Service-Members' Protection Act, 2 August 2002, 116 Stat 905, 22 USC 7427 ('The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.')

48 Sergey Vasiliev, 'The Legal Line Crossed in Bolton's Attack on the ICC', *Just Security*, 17 September 2018, https://www.justsecurity.org/60762/legal-line-crossed-boltons-attack-icc/.

49 Executive Order 13928 'Blocking Property of Certain Persons Associated With the International Criminal Court', 11 June 2020, (2020) 85(115) Federal Register 36139.

50 Human Rights Watch, 'US Sanctions on the International Criminal Court: Questions and Answers', 14 December 2020, https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court.

Such measures—typically reserved for suspected terrorists—were now weaponised against an international court and its officials for doing their job. This kind of intimidation and reprisals is characteristic not of law-abiding states that respect judicial independence, but of mafia organisations that have declared war on the judiciary. As a direct affront to the ICC's judicial independence and the international rule of law, these acts constituted offences against the administration of justice as defined by the ICC Statute.[51]

President Biden revoked Trump's executive order and lifted the sanctions against ICC personnel as ineffective – without, however, withdrawing US objections to ICC investigations.[52] Everything was quietly forgotten; the ICC and States Parties seemed content to move on. There was no reckoning. The new ICC Prosecutor refocused the Afghanistan investigation on alleged crimes of Taliban and Islamic State–Khorasan Province, while deprioritising those aspects of the inquiry that might implicate US servicemembers and antagonise the US.[53] It appeared that the campaign of state bullying against the ICC had yielded results.

In March 2022, shortly after the launch of Russia's full-scale invasion, the ICC Prosecutor opened an investigation into crimes in the Situation in Ukraine. To support this effort, he requested and obtained substantial additional financial and practical assistance by states parties.[54] There was bipartisan support in the US for the ICC's mandate in Ukraine.

In June 2022, the Dutch General Intelligence and Security Service intercepted a Russian spy at Schiphol Airport. The agent had posed as a Brazilian citizen due to begin an internship at the ICC Office of the Prosecutor.[55] He was apprehended before he could take up the position and infiltrate the Court, whose investigations in Ukraine and Georgia were of great interest to the Russian authorities.

After ICC arrest warrants started coming against top Russian officials, Moscow reacted with outrage. Former President and deputy chairman of the national Security Council Dmitry Medvedev repeatedly insulted ICC judges on his social media channels and openly threatened

51 ICC Statute, article 70(1)(d) ('Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties') and (e) ('Retaliating against an official of the Court on account of duties performed by that or another official').
52 Executive Order 14022 'On the Termination of Emergency With Respect to the International Criminal Court' 1 April 2021 ('the United States continues to object to the International Criminal Court's ... assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council and will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction', but 'the threat and imposition of financial sanctions against the Court, its personnel, and those who assist it are not an effective or appropriate strategy for addressing the United States' concerns with the ICC.')
53 Statement of the Prosecutor of the International Criminal Court, Karim AA Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, 27 September 2021.
54 Sergey Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice' (2022) 20(4) JICJ 893.
55 'AIVD disrupts activities of Russian intelligence officer targeting the International Criminal Court', 16 June 2022.
56 On 20 March 2023, criminal cases were opened against ICC Prosecutor Khan (UK) and Judges Tomoko Akane (Japan), Rosario Salvatore Aitala (Italy), and Sergio Gerardo Ugalde Godinez (Costa Rica).

the Court with a missile strike. Just three days after the warrant for Putin was issued, Russia's Investigative Committee opened criminal cases against the ICC Prosecutor and Pre-Trial Chamber II judges who had signed it. ICC officials were put on the wanted list and arrested *in absentia*.[56]

Identical measures soon followed in respect of the judges responsible for warrants targeting Moscow's proxies in South Ossetia, as well as those concerning senior military leadership, including former defence minister Shoigu and the Chief of General Staff of the Russian Army Gerasimov.[57] In September 2023, the Court reported a serious cybersecurity incident – later qualified as an unprecedented 'targeted and sophisticated' cyberattack against its computer information system 'with the objective of espionage'.[58] These events may qualify as offences against the administration of justice by the ICC but also go far beyond the conduct prohibited by Article 70 of the Statute.

A political firestorm engulfed the ICC on the other front in the lead-up to, and following, the Prosecutor's request for arrest warrants against the Israeli Prime Minister and Defence Minister, as well as senior Hamas leadership.[59] Twelve US Republican senators addressed a threatening letter to the Prosecutor, admonishing him not to apply for the warrants: 'Target Israel, and we will target you... You were warned.'[60] An unnamed senior elected official reportedly told the Prosecutor: 'This Court was built for African warlords and for thugs like Putin.'[61]

On 21 November 2024, the ICC judges issued arrest warrants for Israel's Netanyahu and Gallant, as well as Deif, the commander of the Hamas military wing.[62] The Biden administration condemned in strong terms both the applications and the warrants but did not support the 'Illegitimate Court Counteraction Act', a bill adopted in the US House of Representatives but not but not by the Senate.[63]

However, the 47th President Trump, already on his first day in office, reversed his predecessor's revocation of the earlier executive order against the ICC, and within a month issued a

57 Criminal cases and arrests in absentia related to ICC Judges Reine Alapini-Gansou (Benin) and Haykel Ben Mahfoudh (Tunisia). 'Russia Arrests ICC Judge Mahfoudh in Absentia – Mediazona', *The Moscow Times*, 11 November 2024; 'Russia Arrests ICC Vice President Alapini-Gansou in Absentia', *The Moscow Times*, 13 November 2024

58 Statement of the ICC Spokesperson on recent cybersecurity incident', 19 September 2023; ICC press release, 'Measures taken following the unprecedented cyber-attack on the ICC', 20 October 2023.

59 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine', 20 My 2024.

60 'Exclusive: "You Have Been Warned": Republican Senators Threaten the ICC Prosecutor over Possible Israel Arrest Warrants', Zeteo, 6 May 2024 ('The United States will not tolerate politicized attacks by the ICC on our allies. Target Israel and we will target you. If you move forward with the measures indicated in the report, we will move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States. You have been warned.')

61 CNN, 'Exclusive: ICC Chief Prosecutor explains why he's seeking arrest warrants for leaders of Hamas and Israel', 20 May 2024, https://edition.cnn.com/videos/tv/2024/05/20/amanpour-icc-karim-khan-arrest-warrants-hamas-netanyahu.cnn (fragment at 19'02).

62 ICC press release, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant', 21 November 2024.

new order imposing crippling sanctions on the Court.[64] Prosecutor Khan was the first person to be designated for sanctions under this order, but more designations are expected in the near future. Several prominent UK lawyers who had assisted the Prosecutor in reviewing the charges underlying the warrant applications were warned by the UK Foreign Office that they too could be sanctioned under Trump's order.[65]

As ICC President Akane has stated, Trump's sanctions pose nothing less than 'an existential threat' to the Court.[66] They risk undermining the ICC's performance across all situations.[67] Sanctions impair the ability of companies, including EU operators, to provide the Court with banking, insurance, and IT services. The Court condemned the issuance of the executive order,[68] while the Bureau of the ASP and 79 States Parties issued statements expressing concern.[69]

The situation in Palestine is proving to be an unmanageable stress test for both the Rome Statute system and the international rule of law – not only because of the unprecedented frontal assault on the ICC, but also due to the underwhelming or harmful responses of some states parties to ICC arrest warrants against high-profile suspects. Their reactions have revealed a lack of genuine commitment to the ICC and an unwillingness to fulfil cooperation obligations. The international community of states that has been consolidating around the Rome Statute, and co-constituted by the ICC, is showing serious fractures and is now rapidly disintegrating.

Following the issuance of the warrant against Netanyahu, European states' commitment to the ICC has begun to erode. France announced that it would not arrest Netanyahu should he visit because he was entitled to personal immunity – a stance it had never taken with respect to Putin.[70] Poland stated it would not arrest Netanyahu if he attended the commemoration of the liberation of Auschwitz in January 2025.[71] German Chancellor Merz declared that he would

63 HR 8282, 4 June 2024.
64 Executive Order 14148 'Initial Rescissions of Harmful Executive Orders and Actions', 20 January 2025, (2025) 90(17) Federal Register 8237, 8238; Executive Order 14203 'Imposing Sanctions on the International Criminal Court', 6 February 2025, (2025) 90(28) Federal Register 9369.
65 This includes Judge Meron, a Holocaust survivor and former President of the ICTY and MICT. Rachel Sylvester, 'Top British human rights lawyers could be hit by Trump sanctions', *The Observer*, 25 April 2025.
66 Judge Tomoko Akane, President of the International Criminal Court, Opening remarks at the 23rd session of the Assembly of States Parties, 2 December 2024, The Hague, 3 ('These measures would rapidly undermine the Court's operations in all situations and cases and jeopardise its very existence.') and 7 ('The danger for the Court is existential.')
67 Ibid 4 ('I have mentioned the existential threat of sanctions. Let me be honest. There isn't such a thing as selective sanctions or coercive measures. If the Court collapses, this will inevitably imply the collapse of all situations and cases.')
68 ICC press release, 'ICC condemns the issuance of US Executive Order seeking to impose sanctions on the Court', 7 February 2025; 'Statement of ICC President Judge Tomoko Akane following the issuance of US Executive Order seeking to impose sanctions on the International Criminal Court', 7 February 2025.
69 'Statement by the Bureau of the Assembly of States Parties in support of the independence and impartiality of the International Criminal Court', 23 January 2025; 'Joint Statement - Sanctions International Criminal Court (ICC)', 7 February 2025.
70 Mared Gwyn Jones, 'Fact check: Where do EU countries stand on ICC's arrest warrant for Netanyahu?' Euronews, 3 December 2024; Sondos Asem, 'France says it can't arrest Netanyahu because of ICC immunity', Middle East Eye, 27 November 2024.
71 Kieran Guillbert, 'Poland says Netanyahu will not be arrested if he attends Auschwitz memorial event', Euronews, 10 January 2025.

find a way to allow Netanyahu visit Germany without him being arrested.[72] Thus, top German officials view the protection of Israeli leadership from international accountability as part of Germany's unconditional commitment to Israel's security – its 'reason of state': *Staatsräson über alles*. The Belgian Prime Minister also stated that he could not imagine Netanyahu being arrested in Belgium, explicitly invoking *Realpolitik*.[73]

First, such statements contravene the principle of *Kompetenz-Kompetenz*. More specifically, Article 119(1) of the Rome Statute provides that any dispute concerning the Court's judicial functions shall be settled by the Court's decision. For states parties, this provision forecloses any avenues for contestation and dispute-settlement other than the Court itself.[74] It follows that states parties to the Statute are not entitled to challenge the Court's decision-making prerogatives or to call into question its authoritative interpretations of the law.[75]

Secondly, these statements undermine the rule of law within the states parties concerned. The decision to execute an ICC request for surrender lies with the judicial branch, not the executive. When a government pre-emptively declares that it will not arrest an ICC suspect— in defiance of an ICC decision—it effectively tramples upon judicial competence and undermines the separation of powers. Such conduct is incompatible with the constitutional principles of democratic states governed by the rule of law.[76]

Thirdly, statements often translate into actions. Netanyahu has avoided flying over states parties which could arrest him in case of an emergency landing. But many EU member states—including Greece, Italy, and France—did not close their airspace to the aircraft carrying him, thereby allowing him to pass through their jurisdiction without being arrested. In April 2025, Hungarian Prime Minister Viktor Orbán went further still: he hosted Netanyahu in Budapest, let him deliver another tirade against the ICC, and—to add insult to injury—announced Hungary's withdrawal from the ICC Statute altogether.[77]

72 Jens Thurau, 'Merz invites Netanyahu to Germany despite ICC arrest warrant', *Deutsche Welle*, 1 March 2025.
73 'Belgium would likely not arrest Israeli PM Netanyahu - De Wever', *The Brussels Times*, 4 April 2024, citing Belgian PM Bart De Wever: 'And to be very honest, I think we would not do it either. There is also realpolitik. I think no European Member State would arrest Netanyahu if he were on their territory.'
74 William A Schabas, 'Article 119. Settlement of disputes/Règlement des différends' in William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn (OUP 2016) 1484-85 (article 119(1) does not preclude disputes regarding ICC judicial functions being brought to other judicial fora with jurisdiction by states not party, individuals, or competent organs of international organisations such as the UNGA and UNSC).
75 Likewise, Akane (n 66) 6 ('We expect that State Parties respect the prerogative of the Court, as a judicial institution, to interpret the law and that they do this consistently across all situations. Public calls for disrespect of our decisions and legal interpretations risk weakening the Court's legitimacy and credibility and ultimately your own interest that international law is respected and atrocities are prevented and punished.')
76 On Germany: Kai Ambos, 'Rechtsbruch mit Ansage: Warum ein Deutschlandbesuch von Ministerpräsident Netanjahu sowohl mit dem Völkerrecht als auch mit der Gewaltenteilung in Konflikt gerät', *Verfassungsblog*, 25 February 2025.
77 Barbara Tasch and Anna Holligan, 'Hungary withdraws from International Criminal Court during Netanyahu visit', BBC, 3 April 2025. The withdrawal was subsequently approved by the Parliament: Vida Benjámin and Andrea Horváth Kávai, 'Hungarian Parliament votes in favor of Hungary leaving International Criminal Court', Telex, 20 May 2025.

Hungary is the first and only EU member so far to have hosted an ICC suspect on its territory and to have announce its intention to withdraw from the Rome Statute. In 2023 Orbán's chief of staff stated that Hungary would not arrest Putin if he were to visit, citing the absence—over two decades after Hungary became a state party—of domestic legislation implementing the ICC Statute.[78]

If it goes on like this, the prospect of a personal meeting between Putin and Netanyahu taking place on European soil—in Budapest or perhaps in Bratislava—in the near future can no longer be ruled out. This is (and must be) the European Union's headache: Orbán's Hungary has already been subjected to the Article 7(1) TEU procedure and the rule-of-law conditionality mechanism.[79]

Yet, Hungary's recalcitrance as EU member state has yet to be treated by the Union with the seriousness and resolve this critical situation demands. Hungary's projected withdrawal from the ICC should be regarded as part of a broader pattern of non-compliant behaviour that constitutes a 'serious and persistent breach' of the EU's foundational values under Article 2 TEU. Such a breach should, in principle, trigger the suspension of Hungary's rights as an EU member state.[80]

Yet not even a public statement has been issued by the EU's High Representative for Foreign Affairs and Security Policy. This silence is not merely troubling – it is shameful. It has damaged the EU's credibility as an international actor and exposed the fragility of its professed commitment to accountability and the (international rule) of law. At the EU level too, the rule of law is under immense pressure.

78 'Hungary would not arrest Putin, says PM Orban's chief of staff', *Reuters*, 23 March 2023.
79 Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20 December 2022; Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22 December 2020. The attempt by Hungary to have this regulation annulled failed: Case C 156/21, Judgment, CJEU, 16 February 2022).
80 Treaty on the European Union, arts 2 and 7(2).

IV. Leviathans tamed

If Justitia is to be salvaged, the Leviathans must be brought back to their senses. The search for solutions may proceed along four interrelated vectors.

1. Governance and dispute-settlement

Firstly, international courts require genuine and sustained commitment from their states parties. That commitment must translate into more effective judicial governance institutions – bodies capable of keeping a finger on the court's pulse, acting decisively, and speak out when the court is subjected to political attacks or obstructed by non-compliance. Governance institutions must be equipped with robust mechanisms to address both non-cooperation or misconduct by states parties and interference by non-party states. States must demonstrate the political will to stand up for their international courts by activating those mechanisms in practice. Where diplomacy fails, Leviathans must be prepared to confront one another through formal dispute-settlement procedures.

The ICC Statute provides for a mechanism for resolving disputes between two or more states parties concerning the interpretation or application of the Statute—excluding those relating to the Court's judicial functions—under Article 119(2). Such disputes must first to be addressed through negotiations. If no settlement is reached within three months, the matter shall be referred to the Assembly of States Parties, which may either (i) resolve the dispute itself or (ii) recommend other means of settlement, including referral to the ICJ, in accordance with its Statute.[81] The ASP itself cannot refer the dispute to the ICJ or any other forum; it may only recommend that the states parties pursue such a course. Any referral to the ICJ thus requires the consent of the parties to its jurisdiction – for example, taking the form of a special agreement pursuant to Article 36(1) of the ICJ Statute. Notably, Article 119(2) of the ICC Statute does not, in itself, constitute a compromissory clause.

Therefore, the Assembly could play an important role in the resolution of 'other' disputes concerning questions that fall outside of the Court's judicial functions. If negotiations between states parties fail after three months, the Assembly must be seized of the matter. It may then either facilitate resolution through a settlement procedure before a subsidiary body—potentially with binding effect—,[82] or assist the parties in framing their dispute for referral to another forum. The reference to 'other dispute' in Article 119(2) limits the material scope of this residual

81 The available means include those stipulated in UN Charter art 33. Roger Clark and Simon Meisenberg, 'Article 119' in Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th edn (Beck/Hart/Nomos 2022) 2847.
82 ICC Statute art 112(4).

avenue to matters beyond the Court's judicial functions encompassed by its dispute-settlement competence under Article 119(1). Thus, contested questions of jurisdiction, immunities of state officials, and obligations related to cooperation with the Court are excluded from the category of 'other disputes' and cannot be addressed through the residual dispute-settlement mechanism.[83]

Nonetheless, many disputes relating to the ICC's governance functions falling within the ASP's purview may be addressed under Article 119(2). These include disputes over the election of Court principals and candidates' eligibility, the Court's privileges and immunities, the Court's financing, and follow-up to judicial findings of non-compliance with cooperation requests referred to the ASP under Article 87(7).[84]

Despite the existence of these avenues for dispute settlement, none has been used to date – likely due to states parties' reluctance to frame controversies surrounding the Court's operations as formal disputes. But these avenues remain available and merit serious consideration by both states parties and the ASP in the future.

Finally, beyond dispute settlement under Article 119(2), the ICC membership—acting through the UN General Assembly—could potentially request an advisory opinion from the ICJ 'on any legal question' related to state parties' obligations in connection with the ICC Statute.[85] Article 119 only concerns 'disputes', as distinct from abstract 'legal questions', and arguably does not preclude this avenue. Moreover, an advisory opinion by the ICJ would not be binding, nor would it compromise the ICC's independence by virtue of offering an authoritative statement of the law relevant to the question posed. The ASP itself cannot request such an opinion nor be authorised to do so by the General Assembly, as it is neither an UN organ nor a specialised agency.[86]

2. Political pressure and sanctions

The struggle for the international rule of law, as a political ideal at the international plane, cannot be won by the force of law alone. As the ICC President has rightly observed, 'this is the responsibility of politics.'[87] In the horizontal international order—where no super-sovereign exists—no single Leviathan, nor a coalition of Leviathans, can be entrusted as the sole maker, custodian, and enforcer of international law. In such a decentralised and self-regulating system, only Leviathans collectively—as a community—can keep their ranks in order and in

83 Clark and Meisenberg (n 81) 2848-50; Timothy O'Neil, 'Dispute Settlement under the Rome Statute of the International Criminal Court: Article 119 and the Possible Role of the International Court of Justice' (2006) 5(1) *Chinese Journal of International Law* 67, 71.
84 Clark and Meisenberg (n 81) 2849-50; O'Neil (n 83) 72.
85 UN Charter art 96(1). Schabas (n 74) 1487-88; Clark and Meisenberg (n 81) 2854.
86 UN Charter art 96(2). Clark and Meisenberg (n 81) 2853.
87 Akane (n 66) 7 ('Conflicts and persecutions are plaguing the world. The Court is not the only solution to this. Courts don't make wars, nor do they make peace by itself. This is a responsibility of politics.')

check. This is, by necessity, a multilateral endeavour. If *Realpolitik* is the common language Leviathans speak, then the international rule of law must become its basic grammar.

States should leverage the fora and procedures of judicial governance institutions as platforms to channel and amplify collective political pressure on those members that fail to comply with judicial decisions or actively seek to undermine the Court. Experience shows that ICC states parties often lack the political will to exert pressure on their counterparts – whether to ensure compliance with obligations under the Statute, to halt interference with the ICC's mandate, or to hold one another accountable.[88] This reluctance to confront other states over their breaches of cooperation duties is corroding the system from within. Change is long overdue – especially now, as the Court faces an existential threat.

With respect to external threats—those originating from states not party to the ICC Statute—states parties must act decisively, both within and beyond the Court's governance institution. To date, their responses have largely been confined to unilateral and joint statements to express concern over conduct that threatens the Court's independence and subverts its mandate. Yet such statements are typically diplomatic to a fault: they avoid naming the offending actors and signalling potential consequences that might deter future transgressions. Moreover, they often lack unanimity, with some states parties routinely 'missing in action'.

Hostile attacks on the Court are, in fact, attacks on judicial independence everywhere. As the ICC President has stated, they strike at the sovereignty of every state party. Responses to such misconduct must go beyond rhetoric and take the form of tangible measures—such as sanctions and countermeasures—designed to compel the offending state to cease its intimidation of ICC judges and prosecutors. The reluctance to adopt such measures in defence of the Court stems from a fear of escalation. Yet, this hesitancy sends a self-defeating and dangerous message: that states parties are unwilling to defend the Court in practice, and that powerful non-party states—such as the US and Russia—may continue to attack the Court and harass its officials with impunity.

88 E.g. 'ICC OTP Kenya Cases' (n 41) 5 (E23) ('Nor did the States Parties seem to have the political will to pressure the [Government of Kenya] to act consistent with its obligations under the Statute and to refrain from allowing interference with and/or interfering with the OTP criminal justice activities.')
89 Statute of the Council of Europe (signed at London, 5 May 1949, ETS No 1) PA3 and art 3; Charter of the Organization of American States (signed in Bogotá on 30 April 1948, 119 UNTS 3, entered into force December 13, 1951, as last amended by the Protocol of Managua on 10 June 1993, in force as of 25 September 1997) art 3; Constitutive Act of the African Union (signed on 11 July 2000 in Lomé; entered into force on 26 May 2001) art 4(m); Treaty on the European Union (Consolidated Version, 7 June 2016, C202/15) arts 2 (rule of law), 3(5) ('strict observance and the development of international law') and 21 ('the rule of law, the universality and indivisibility of human rights and fundamental freedoms, ...and respect for the principles of the United Nations Charter and international law.')

3. International organisations and initiatives

Many international organisations—such as the UN—and regional organisations—including the Council of Europe, the Organisation of the American States, the European Union, and the African Union—are committed to the principles and values of the rule of law, human rights and freedoms, and international law.[89] Accordingly, they bear their own responsibilities towards Justitia. It is high time they mobilised themselves and their member states in defence of the international rule of law, to the fullest extent their mandates and capacities allow.

As a regional organisation with the highest degree of integration among its members, the European Union could have been a trailblazer and a role model in this regard. All 27 of its member states are—or rather, have until now been—parties to the ICC Statute. The EU was long regarded as a steadfast champion of international justice and principled supporter of the ICC. This is reflected, among others, in the 2006 ICC-EU Agreement and the 2011 Council Decision.[90] The Union has repeatedly affirmed its commitment to the universality and full implementation of the Rome Statute, making adherence to its values, ratification of the Statute, and support for the ICC key elements of the pre-accession conditionality for candidate states, as well as a premise of its relationship with associated states.[91]

The previous EU High Representative for Foreign Affairs and Security Policy steadfastly expressed, on behalf of the Union, grave concern over attacks on the ICC—including Trump's 2020 executive order—,[92] and over threats, retaliation, and criminal cases initiated by Russian authorities against the ICC staff.[93] Following the outbreak of the 2023 Gaza war, the High Representative reminded EU member states of their obligation to execute the ICC's arrest warrants against Israeli and Hamas leaders.[94]

However, under the second Von der Leyen Commission, and with the new High Representative at the helm of EU foreign policy, the Union appears to have lost its way. It is difficult to ignore that its support for the ICC has waned or become markedly selective. While this may

90 Agreement between the International Criminal Court and the European Union on cooperation and assistance, 28 April 2006, OJ L 115/50; Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76, 22 March 2011.
91 Peter van Elsuwege, 'How Hungary's Withdrawal from the International Criminal Court Affects the Credibility of the European Union', *Verfassungsblog*, 9 April 2025, referring to 'Cluster 6: External Relations', Conference on accession to the European Union of Albania, AD 25/24 CONF-ALB 8/24, Brussels, 13 December 2024, at 8 (stating that Albania-US agreement on exemptions for US officials and personnel is contrary to Council Decision 2011/168/CFSP and that Albania 'needs to ensure full compliance with the EU position' by the date of accession); art 6(2) ('The Parties agree to support the ICC by implementing the Rome Statute… and its related instruments, giving due regard to preserving its integrity.')
92 EEAS press statement, 'International Criminal Justice: Statement by the High Representative following the US decision on possible sanctions related to the International Criminal Court', 16 June 2020.
93 EEAS press statement, 'Russia: Statement by the High Representative on threats against the International Criminal Court', 23 March 2023, https://www.eeas.europa.eu/eeas/russia-statement-high-representative-threats-against-international-criminal-court_en?channel=eeas_press_alerts&date=2023-03-23&newsid=0&langid=en&source=mail; id, 'Russia: Statement by the High Representative on threats against the International Criminal Court', 22 May 2023.
94 Xinhua, 'EU foreign affairs chief says member states are obliged to implement ICC decision', 24 November 2024.

conform to the unwritten rules of the so-called 'rules-based international order', it lays bare how little remains of a genuine commitment to the international rule of law.

The EU is dealing in double standards, as evidenced by its inconsistent responses to non-cooperation by ICC states parties. In September 2024, Mongolia hosted Putin, who had previously avoided travelling to states parties where he risked arrest and surrender to the ICC. Mongolia sought—unsuccessfully—to justify its failure to arrest him by invoking his immunity as the head of state of a non-party state.[95]

While ICC jurisprudence on this issue remains contested and contestable,[96] the cooperation obligations of states parties arising from the ICC's arrest warrants and related requests for arrest and surrender currently in circulation are clear.[97] The EU's European External Action Service promptly issued a statement expressing regret over Mongolia's failure to cooperate with the ICC and arrest the suspect.[98]

But when Viktor Orbán not only hosted ICC suspect Netanyahu—allowing him to berate the Court from Budapest—but also announced Hungary's withdrawal from the ICC Statute, a dramatic and unprecedented move by an EU member state, no statement was issued by the European Union. The invitation and non-arrest of an ICC suspect, followed by an announced departure from the ICC, constitute a clear violation of the principle of sincere cooperation and evoke the language of 'serious and persistent breaches' of EU values – the potential basis for suspending Hungary's rights in the EU.[99]

It is, indeed, paradoxical for a state to retain EU membership while failing to respect the Union's fundamental values and no longer meeting the conditions required of newly acceding states.[100] As the European unity on ICC membership and support continues to unravel, Brussels' silence is deafening.[101] Can anyone guarantee this would change if Orbán were to host a *tête-a-tête* between Netanyahu and Putin in the near future – a scenario that is unlikely yet no longer implausible?

95 Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, *Situation in Ukraine*, ICC-01/22-90, PTC II, ICC, 24 October 2024; Decision on Mongolia's request for reconsideration, *Situation in Ukraine*, ICC-01/22-123, PTC II, ICC, 18 March 2024.
96 See e.g. Ward Ferdinandusse, 'Why the ICC Should Respect Immunities of Heads of Third States', Just Security, 19 March 2025.
97 Sergey Vasiliev, 'The International Criminal Court goes all-in: What now?', EJIL:Talk!, 20 March 2023.
98 EEAS Press Team, 'Mongolia: Statement by the Spokesperson on the visit of the Russian President', 3 September 2024.
99 TEU arts 4(3) ('the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties') and 7(2)-(3).
100 Case C 156/21 judgment (n 79) para 126 ('Compliance with those values [TEU art 2] cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.')
101 Eldar Mamedov, 'EU hypocrisy on parade as Netanyahu goes to Hungary without a peep', Responsible Statecraft, 4 April 2025.

Furthermore, unlike in 2020, no clear condemnation of Trump 2.0 sanctions was issued by the head of the European External Action Service in 2025.[102] One may speculate about the reasons for her reticence. It may reflect a lack of consensus among the EU member states, as well as the continued unconditional support for Israel by some of them amidst what amounts to a genocide of Palestinians in Gaza.[103] It could also signal a desire to avoid confrontation with the US President by simply sitting it out. Be that as it may, the optics could hardly be worse.

Last but not least, the ICC—through its President—has been imploring the EU to amend the Blocking Statute so as to extend its application to US sanctions against the Court.[104] Such a measure would shield EU companies from the effects of these sanctions and help ensure the Court's continued functioning. Designation of the institution itself, or of additional individuals such as judges and deputy prosecutors, under the executive order would render the Court's survival all but impossible. As of late May 2025, the EU has yet to amend the Blocking Statute.

The EU's lack of meaningful action in response to US anti-ICC belligerence, and its complete paralysis in the face of Hungary's obstructionism, are deeply problematic. Not only are these failures inconsistent with binding EU legislation, they also undermine the effectiveness of the Union's external action and damage its credibility on the international stage.[105] They signify the abandonment of the moral authority the EU once claimed as a champion of international justice. If the EU is unable to prevent its own members from openly defying the ICC and breaching their cooperation obligations, how can it credibly lecture candidate and associated states in its neighbourhood on the importance of the universal ratification of the Rome Statute and a commitment to fighting impunity for international crimes?

Against this backdrop, the time has come for other regions—particularly the Global South—to assume and *exercise* leadership in offering principled and consistent support for international justice. Multilateral inter-state initiatives aimed at reaffirming the principles of accountability through collective action and coordinated legal and diplomatic measures have begun to emerge.

102 The only statement—delivered not by the High Representative herself—mentioned the ICJ first, although it had not been threatened unlike the ICC, and contained not a word of condemnation but only referred to a 'serious challenge to the work of the ICC': EEAS press statement, 'International Law: Speech by Commissioner for Democracy, Justice, Rule of Law and Consumer Protection McGrath at the EP Plenary on behalf of High Representative/Vice-President Kallas on protecting the ICJ and the ICC', 11 February 2025.
103 It is only on 20 May 2025 that the European Commission decided to initiate a belated review of EU-Israel Association Agreement, as requested by 17 EU member states, in order to determine Israel's compliance with obligations under article 2. EEAS press team, 'Foreign Affairs Council: press remarks by High Representative Kaja Kallas after the meeting', 20 May 2025.
104 ICC press release, 'ICC President visits Brussels, urges European Union to take immediate action to protect the Court', 20 March 2025 ('to not use the Blocking Statute means that the European Union abandons the Court and abandons the principles which have been developed after the two world wars. You must not abandon the hope of the victims.')
105 van Elsuwege (n 91).
106 The Hague Group, 'Inaugural Joint Statement', 31 January 2025.
107 Cyril Ramophosa, Anwar Ibrahim, Gustavo Petro, and Varsha Gandikota-Nellutla, 'Israel's Actions Strike at the Foundations of International Law', Foreign Policy, 25 February 2025.

In January 2025, Bolivia, Colombia, Cuba, Honduras, Malaysia, Namibia, Senegal, and South Africa announced the establishment the Hague Group.[106] Self-described as 'a coalition committed to taking decisive, coordinated action in pursuit of accountability for Israel's crimes', the Group aims 'not to undermine multilateralism [but] to salvage it.'[107] The founding members pledged to 'take further effective measures to end Israeli occupation of the State of Palestine and remove obstacles to the realisation of the right of the Palestinian people to self-determination', while inviting other nations to join them 'in the solemn commitment to an international order based on the rule of law and international law'.
More specifically, the Hague Group states committed themselves to implementing the provisional measures indicated by the ICJ and, where applicable, to fulfilling their obligations as states parties to the ICC Statute in relation to arrest and surrender requests in the Situation in the State of Palestine.[108] Time will tell whether the Group will be equally prepared to support international justice in other situations, notably in Ukraine – and how many Global North states would join its ranks. If they do, this initiative may mark a first step towards constructing an 'international community 2.0' – one built on the principles of justice and accountability, and a shared commitment to 'never again' for all, not for some.

4. Crimes against the international rule of law

The Nuremberg Tribunal famously stated that 'crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' The same could certainly be said of 'crimes against the international rule of law'. These too are committed by men—often powerful figures with access to the machinery and resources of the state—who deftly use those levers to undermine the administration of justice by international courts. The integrity of international justice and the international rule of law can only be preserved if those individuals who orchestrate assaults on international judicial institutions are held to account.

This is particularly relevant for international criminal tribunals, which target not Leviathans as such, but those who personify them: high-level political and military leaders. Such institutions frequently face criminal forms of resistance aimed at derailing their judicial and prosecutorial mandates. All of them have either asserted inherent jurisdiction to address contempt of the court (e.g. the UN ad hoc tribunals) or been conferred auxiliary jurisdiction over the 'offences against the administration of justice' (e.g. ICC).[109]

108 Cuba and Malaysia are not states party to the ICC Statute.
109 ICTY Rules of Procedure and Evidence (IT/32/Rev.50, 8 July 2015) Rule 77; ICTR Rules of Procedure and Evidence (adopted on 29 June 1995, as last amended on 13 May 2015) Rule 77; MICT Statute arts 1(4)(a) and Annex 2, art 4; MICT Rules of Procedure and Evidence (MICT/1/Rev.8, 26 February 2024) art 90; ICC Statute art 70(1).
110 Prosecutor v Bemba Gombo et al, Situation in the Central African Republic (ICC-01/05-01/13); Prosecutor v Gicheru, Situation in the Republic of Kenya (ICC-01/09-01/20). The Article 70 case against Paul Gicheru was terminated after closing statements but before the judgment could be issued, due to the defendant's death in unexplained circumstances, amid suspicions of poisoning, while on conditional release in Kenya: Decision Terminating the Proceedings against Paul Gicheru, ICC-01/09-01/20-337, TC III, ICC, 14 October 2022.

Despite the staggering scale of witness intimidation across situations pending before the ICC, the Court has successfully prosecuted and tried only a handful of Article 70 offences, primarily relating to false witness evidence and interference with evidentiary sources.[110] Largely for reasons beyond its control, its track record has remained underwhelming, particularly with regard to investigating and prosecuting the widespread campaign of witness intimidation in the Situation in Kenya. Based on publicly available information, no cases were opened in response to US officials' threats against the Court and sanctions under Trump's executive orders of 2020 and 2025.
Inevitably, the question arises whether the ICC is equipped to address state-led assaults of the kind witnessed today through the limited framework of Article 70. This is, rather, a rhetorical question. More fundamentally: does the hunt on the ICC declared by the US, Israel, and Russia not far exceed the existing categories of 'intimidation' and 'retaliation' envisioned as 'offences against the administration' under Article 70(1)(d) and (e)?[111]

The ICC is now facing overt threats to the physical safety of its staff, criminal cases targeting its principals, far-reaching financial sanctions, disinformation operation, hostile propaganda, smear campaigns, infiltration attempts, espionage, surveillance, and cyberattacks. The systematic, severe, and virulent nature of this conduct defies—and ultimately exceeds—what Article 70 was designed to encompass.

We are no longer speaking of 'mere' coordinated efforts to interfere with ICC proceedings through witness intimidation or subornation, as seen in the Situation in Kenya. The present threat originates from several distinct but converging campaigns unleashed by some of the world's most powerful states. These efforts mobilise vast resources and the full force of those states' legislative and executive machinery, and they are aimed squarely at the destruction of the ICC as an institution.

The inadequacy of the narrow Article 70 framework for tackling state conduct is compounded by the weakness of the ICC's cooperation regime in relation to such offences – particularly when compared to the already insufficient and often under-enforced cooperation obligations applicable to the core crimes listed in Article 5 of the Statute. Cooperation or judicial assistance that states parties provide in relation to offences against the administration of justice is governed by their domestic law.

When the Court requests forms of cooperation equivalent to that under Part 9 of the Statute, it shall indicate Article 70 as the legal basis.[112] The Statute provide no further parameters concerning states' obligations to cooperate with the ICC's investigations and prosecutions under Article 70. It merely obliges states parties to extend their domestic criminal legislation on offences against the integrity of their own investigative or judicial process to include Article 70 offences, when committed on their territory or by their nationals.

111 Supra note 51.
112 ICC Statute art 70(2) and ICC Rules of Procedure and Evidence Rule 167.

Additionally, upon the Court's request, they must submit such cases to their competent authorities for prosecution, and are expected to do so diligently and with adequate resourcing.[113] The Court may consult with states that have jurisdiction before deciding whether to exercise its own or to request one of those states to do so, taking into account factors such as the effectiveness of domestic prosecution, the seriousness of the offence, and procedural and evidentiary considerations.[114]

The ICC's personal and territorial jurisdiction under Article 70 is notably broad, as the regular jurisdictional regime and preconditions for the exercise of jurisdiction over core crimes set out in Part 2 of the Statute do not apply.[115] As a result, Article 70 jurisdiction extends to offences against the administration of justice allegedly committed by nationals of states not party to the Statute—such as the US, Israel, and Russia—regardless of the l*ocus delicti*. Moreover, even when acts of intimidation or retaliation against ICC officials occur outside the territory of a state party, their consequences inevitably unfold within the territory of the Court's host state—the Netherlands—as well as in other states parties where the Court operates.

However, the absence of strong cooperation obligations for states under the Statute, coupled with the issue of immunities, effectively neuters the liberal jurisdictional regime applicable to Article 70 offences. Article 27, which affirms the irrelevance of immunities or special procedural rules attached to official capacity, is located in Part 3 of the Statute. As a result, such immunities do not bar the Court from exercising jurisdiction over individuals who would otherwise be entitled to them in relation to Article 70 offences.

But here is the million-dollar question: how can the Court ever secure custody of suspects from states not party to the Statute who enjoy personal immunity (the *troika*) or functional immunity (in effect, any state agent)? States parties may—but are not obliged to—cooperate with the ICC's investigations or prosecutions under Article 70 – unless their domestic legislation imposes such a duty.

While the members of the troika remain in office, they are shielded by *ratione personae* immunity—no foreign state would be prepared to arrest them at the Court's request. Once they leave office, they continue to benefit from *ratione materiae* immunity, as do all incumbent or former state officials, thereby remaining beyond the reach of foreign criminal jurisdiction.

For certain serious crimes under international law, an exception to functional immunities may be emerging.[116] The underlying idea is that the commission of grave offences cannot, and

113 ICC Statute 70(4).
114 ICC RPE Rule 162.
115 ICC RPE Rule 163(2).
116 ILC Draft Articles on Immunity of State officials from foreign criminal jurisdiction, art 7. Second report on immunity of State officials from foreign criminal jurisdiction by Claudio Grossman Guiloff, Special Rapporteur, UN Doc A/CN.4/780, ILC, 76th session Geneva, 14 April–30 May and 30 June–31 July 2025, para 87.

should not, be considered part of a state official's duties. However, no such exception currently exists—or is likely to emerge any time soon in customary law—for offences against the administration of justice: these are not core crimes.

As a result, the only plausible path for (former) high-ranking officials of states not party—figures such as Trump, Putin, or Netanyahu—to be prosecuted and tried for such crimes before the ICC is as a 'bonus charge': that is, if they are already arrested and surrendered to the Court in connection with core crimes. In the absence of a core crimes case against them at the ICC, and without effective cooperation for their arrest and surrender in that connection, they will continue to enjoy functional immunity before foreign courts and are unlikely ever be surrendered to The Hague on the basis of Article 70 alone. Essentially, this means lasting impunity for those non-party state officials who perpetrate 'crimes against the international rule of law'.

This predicament underscores the need to reconceptualise 'offences against the administration of justice' as a more insidious and intractable form of state or systemic criminality directed against the international rule of law and therewith against the international legal order as a whole. In practical terms, the concept must be given sharper legal contours and the institutional teeth to ensure enforceability. In particular, it should entail stronger and harmonised cooperation obligations for states parties under the ICC Statute—as well as under the statutes of any future international courts—with respect to such offences.

A second, and equally urgent challenge lies in the functional immunity enjoyed by foreign officials from states not party in relation to Article 70 offences. This is a stumbling block to domestic investigations and prosecutions, and to the ICC's ability to secure cooperation in the form of arrest and surrender. Over time, an exception might crystallise in customary international law – and potentially be developed through the work of the International Law Commission. For that to occur, an increasing number of states must come to reject the notion that 'crimes against the international rule of law' fall within the scope of official duties, and begin to waive immunities and prosecute conduct aimed at undermining international courts, either on their own initiative or at the request of the ICC.

V. Concluding remarks

Three fundamental points deserve to be restated by way of conclusion.

First, totalitarian dictatorships do not hold a monopoly on violations of international law. The orchestration of atrocities is not the exclusive domain of autocrats. History shows that democratically elected leaders may commit such violations as well – despite the hope that existing democratic checks and balances will restrain them and lead to a loss of political and popular support. Unfortunately, this does not always happen, or not quickly enough to prevent the worst. Liberal democracies—and states sliding towards illiberalism—initiate and wage wars, enable and condone serial crimes, and seek to cover them up by defying international courts with jurisdiction.

The persistent impunity for egregious violations of international law in Palestine are a painful reminder that affluent and powerful states and regional organisations in the Global North have supported accountability selectively – when it concerns the 'enemies' of the 'free world', but not, thus far, when it comes to their allies or themselves. This undermines the authority of international courts and erodes the foundations of the international legal order.

The current attacks on international rule-of-law institutions are not an aberration, but a symptom of a deeper, inherited malaise – and the logical corollary of the system as it stands. When Justitia dares to speak truth to Leviathans, she is swiftly put back in her place. By practising double standards and pushing Justitia around, Leviathans have brought to their own lips the 'poisoned chalice' that US Prosecutor Jackson eloquently warned of at Nuremberg. The full consequences of this self-poisoning is yet to unfold. But it is clear that the betrayal of the fight against impunity in Palestine will boomerang – undermining, first and foremost, the cause of accountability in Ukraine.

Second, the only antidote to that poison is a decisive rejection of the very paradigm that sustains it. It must be recognised, once and for all, that no state or actor stands above the law – and states must act on this principle. International law binds not only 'enemies', but also 'friends' – and those who presume to draw that distinction. The international rule of law is not a menu à la carte: it must be embraced unconditionally and without exception.
Realising the political ideal of the rule of law is, at its core, the work of politics – not of law as such. Therefore, the rumours of the international law's death, like the myths of its omnipotence, are both exaggerated and pernicious. International law is not dead, but the political will to keep it alive is wearing thin and must be urgently restored. Law is an imperfect but indispensable tool – one that states, peoples, communities, and individuals may choose to use, respect, and defend, or abuse, neglect, and abandon. The law has no agency of its own; it is up to those who do possess it to mobilise the strategies and institutional options it offers in the pursuit of justice and accountability.

Subjugated and colonised people have drawn upon international law with admirable courage and creativity, seeking to realise its rights-affirming and emancipatory promise in resisting oppression. Try telling Ukrainians, Palestinians, Rohingyas, Afghan women, and other victims that international justice is a dead end. To discard international law as a pathway towards justice would be to deprive them of their only hope.

Third, the rule of law at the national, supranational (EU), and international levels is deeply intertwined – in a constant feedback loop. We are witnessing a 'polycrisis' of the rule of law at present. The health of domestic rule of law shapes states' attitudes towards international courts. Conversely, states' assault on international courts erode respect for the judicial function and independence of national courts as well, weakening the rule of law at home.

Courts are the last bastion preventing our societies from descending into total lawlessness. Therefore, this is not a crisis that for international lawyers alone. Domestic lawyers, EU lawyers, progressive politicians, human rights defenders, academics—every concerned citizen—must be on high alert and ready to act. There is only so much that judges can say extrajudicially, and only so much that prosecutors can convey through charging instruments or preventative statements; the rest is up to the society as a whole.

We must step up—and speak up—in defence of the rule of law against Leviathans seeking to supplant it with the rule of man. Today, demanding respect for international law and standing up for independent international courts are the necessary micro-acts of resistance in fulfilment of our *erga omnes* obligations.

It is in this spirit that I have offered this contribution.