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Crisis of the liberal order

Global institutions such as the International Criminal Court are being widely criticised. Yet, they are sorely needed in times of great power rivalry

Twenty-six years ago, 120 states adopted the Rome Statute, creating the legal basis for the International Criminal Court (ICC), which commenced operations four years later. The establishment of the first universal and permanent international criminal court was a historic milestone in the development of international criminal law. Since 2002, the ICC has been dealing with the most serious crimes 'of concern to the international community as a whole', as Article 5 of the Rome Statute states. These crimes include genocide, crimes against humanity, war crimes and the crime of aggression. To date, 32 cases have been brought before the International Criminal Court. A total of 124 states are now parties to the ICC, including all member states of the European Union as well as numerous states from Africa, Asia and Latin America.

However, despite the ICC's important role in developing and strengthening international legal norms, the euphoria of the 1990s has since given way to considerable disillusionment. One major criticism is that the ICC itself has no coercive power to force states to implement its judgements. The Court's ability to function, therefore, heavily depends on the cooperation of the member states. The ICC is also accused of being politically biased and focussing almost exclusively on cases on the African continent. In fact, a large proportion of the cases dealt with so far have primarily concerned African states, although serious crimes have also been committed in other parts of the world.

This perception has led to growing scepticism towards the International Criminal Court, particularly in the Global South. In addition, some of the most powerful states in the world, such as the US, Russia and China, have still not ratified the Rome Statute. This not only undermines the universal validity and acceptance of the Court, but also reinforces the impression that the ICC is merely an instrument of the major powers to advance their political interests.

An asymmetrical balance of power

This criticism of the ICC is all the more serious given that it is directed not only at the International Criminal Court, but also at the asymmetrical balance of power in the liberal order as a whole. A central point of criticism from the Global South is that international institutions such as the United Nations, the World Bank and the International Monetary Fund continue to reflect the balance of power after the end of the Second World War and are dominated by Western countries.

For example, neither India, the world's most populous country, nor any African or Latin American state is a permanent member of the UN Security Council. To make matters worse, the functionality and acceptance of international institutions has been declining for years, so that we can now speak of an existential crisis of the liberal order. This applies not only to the ICC, but also to the United Nations, the World Trade Organization, the OSCE and the world climate conferences.

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Nevertheless, at a time when international institutions are increasingly being blocked or called into question, the ICC has proven to be one of the few glimmers of hope and an important cornerstone of the liberal order. On 17 March 2023, for example, the ICC issued an arrest warrant against Russian President Vladimir Putin for possible war crimes in Ukraine. Only a few weeks ago, arrest warrants were issued for former Defence Minister Sergei Shoigu and Chief of General Staff Valery Gerasimov. This makes it clear that even a nuclear power and a member of the UN Security Council must ultimately answer to international law. The decision of the International Criminal Court was not only highly symbolic, but also had direct practical consequences: for example, Putin was unable to travel in person to the 15th BRICS Summit in Johannesburg on 9 September 2023 as a result of this decision, as he would otherwise have been threatened with arrest by the South African authorities.

On 20 May 2024, ICC Chief Prosecutor Karim A. A. Khan also applied for an arrest warrant against three high-ranking members of Hamas as well as Israeli Prime Minister Benjamin Netanyahu and Defence

Minister Yoav Gallant in connection with the war in Gaza. The arrest warrants against Netanyahu and Gallant have provoked some harsh criticism in a number of Western countries. It was of course regrettable and inappropriate that the applications for arrest warrants against the members of Hamas and the Israeli government were made at the same time. That said, I already emphasised in an interview at the time that it is nevertheless wise to refrain from making hasty comments. Germany and other Western countries should await an impartial and independent examination of the allegations. Should Western states attempt to influence the Court's decision, this would significantly undermine both our own legitimacy and that of the ICC in future cases.

Khan has also made it clear through his applications for arrest warrants against members of the Israeli government that Western democracies cannot escape the jurisdiction of the International Criminal Court — contrary to the accusations of many countries in the Global South. Whether an arrest warrant is actually issued in the end must now be decided without prejudice by an independent panel of judges at the Criminal Court. However, the overriding interest in the integrity and legitimacy of the ICC ultimately outweighs any understandable political criticism of the actions of the Chief Prosecutor.

Strengthening international law

Especially in times when international institutions and rules are threatened by both authoritarian powers from outside and anti-democratic forces from within, the democratic world should do everything in its power to protect and reform the institutions of the liberal order. Germany, in particular, has always been a strong supporter of the International Criminal Court and is the second largest contributor after Japan. The German government should therefore actively work towards an expansion and further development of the Statute. As recently as 6 June of this year, the German *Bundestag* adopted a ground-breaking bill on the further development of international criminal law. The law, which was also passed by the *Bundesrat* (Federal Council) on 5 July, aims to tighten up the International Criminal Code and bring it into line with the Rome Statute, which has since been amended. The aim is to close existing loopholes in the International Criminal Code and to strengthen the rights of victims, particularly women and queer people, as well as to improve the international accessibility of international criminal proceedings.

The Social Democratic Party of Germany, in particular, successfully pushed through the parliamentary process to ensure that so-called 'functional immunity' does not stand in the way of prosecution for

crimes under the International Criminal Code. Now, this has been secured by law. As a result, it is ensured that public officials and public authorities are ultimately held accountable for the perpetration of international crimes. As recently as November last year, the Federal Foreign Office had commented to the International Law Commission on the issue of the immunity exception for international crimes and merely referred to a developing rule of customary international law. With the amendment in committee, the *Bundestag* has now sent an important signal in favour of strengthening the rules-based order and further development of international law. Next year's Review Conference of the Rome Statute offers a further opportunity to review and expand the jurisdiction of the ICC, particularly with regard to the crime of aggression.

Especially in times of great power competition and geopolitical tensions, we must not neglect the juridification of international politics. Ultimately, nothing less than the future of the liberal order is at stake.

Nevertheless, one should also remain a realist on this issue: The world has fundamentally changed since the heyday of 'liberalism' and the 'unipolar moment' in which the US was able to act largely as the sole regulatory power. We are on the way to a multipolar world with several centres of power. At the same time, the strategic rivalry between China and Russia on the one hand and the West on the other is steadily increasing. The competition between the major powers and the growing geopolitical tensions will – as in the Cold War – have a decisive influence on the functioning and development of international organisations.

We should therefore harbour no illusions. In view of current developments, it is unlikely that the major powers will accede to the Rome Statute in the foreseeable future. Nor can we rule out the possibility that states will repeatedly attempt to abuse the International Criminal Court for their own political advantage.

However, a multipolar world of competition between the great powers urgently needs a binding and fair set of rules in which the 'strength of the law' rather than the 'law of the jungle' applies. We must therefore create a multipolar order based on international law and rules-based institutions. This includes a permanent juridification of international politics, international arbitration and criminal jurisdiction, as well as treaty-based disarmament and arms control. We need effective and binding rules and mechanisms for arbitration, criminal justice and conflict resolution again.

The ICC, but also other international courts such as the International

Court of Justice (ICJ), the International Court of Arbitration, the International Tribunal for the Law of the Sea (ICJ) or the European Court of Human Rights have made an indispensable contribution to this in recent decades. Especially in times of great power competition and geopolitical tensions, we must not neglect the juridification of international politics. Ultimately, nothing less than the future of the liberal order is at stake.



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