After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice
An Introduction

Susanne Buckley-Zistel

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1. Introduction

*Please note that this is a preliminary introduction since the Acceptance Project is still ongoing. It will be updated once all country studies have been finalised in late 2016.*

Following World War II, a number of Germans responsible for heinous crimes were taken to court in the city of Nuremberg. In total, 22 people were tried by judges from the Allied powers who presided over the hearings: Great Brittan, France, the United States of America, and the Soviet Union. The Nuremberg trials were the first time that justice was rendered by agents from outside a country for crimes committed by officials from within that country. In other words, Nuremberg was the first case of the application of international criminal justice in a situation country; in fact it led to the development of the very norms – the Nuremberg Principles – on which international criminal justice is based today. Even though this form of justice was initially appreciated or at least accepted by large parts of the population, sentiments changed over time as an increasing number of Germans were directly or indirectly affected by external transitional justice measures (Weinke, 2011). Nuremberg thus presents an interesting case study of whether and, if so, how international criminal justice is accepted in a situation country. This question is central to this publication, and the research project from which it stems, which seeks to investigate how international criminal justice in the form of trials and tribunals is accepted by people who live in the countries in which the crimes were committed.

Acceptance has a number of aspects. It moves beyond the mere reception of international criminal justice, such as the passive acknowledgement of its processes, to a more active reception or approval by various actor groups. In the context of this project, acceptance is defined as the agreement, either expressly or by conduct, to the principles of international criminal justice in one or more of its forms (legal systems, institutions, or processes). This includes a range of actions from recognising, to giving consent, to expressing outright approval.

International criminal justice is the device with which the international community responds to crimes such as genocide, war crimes, and crimes against humanity. It is a normative stance which currently finds actualisation in courts and tribunals that have emerged since the mid-1990s, half a century after Nuremberg. Beginning with the ad-hoc tribunals for Rwanda and the former Yugoslavia, via a number of special tribunals and hybrid courts, it is now mainly exercised by the International Criminal Court (ICC) in The Hague. At the time of writing, the ICC’s Office of the Prosecutor (OTP) was conducting investigations into crimes in ten countries including Kenya, which will be discussed below, and preliminary examinations in a further

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seven, including Colombia, Nigeria, and Ukraine which feature in this introduction and our project, too.

Given that the crimes investigated took or take place against the backdrop of violent conflict or repression, social and political acceptance of international justice is paramount because it affects the relationship between and amongst politicians and the population of the country concerned, recognising that justice not only serves the purpose of putting past wrongs right and enforcing the law, but that is has – and many would argue should have – a political and social impact as well.

As a consequence, in the inception phase of the International Nuremberg Principles Academy, the acceptance of international criminal justice was one of the three central pillars of research, alongside legitimacy and universality. In 2015, the Academy launched its first interdisciplinary research project entitled Exploring Multiple Dimensions of the Acceptance of International Criminal Justice in the Post-Nuremberg Era. The objectives of the project were: (1) to assess the state-of-the-art of academic literature on acceptance of international criminal justice; (2) to provide in-depth analysis of how international criminal justice is accepted in situation countries; (3) to enhance the capacity of emerging scholars from situation countries to conduct this kind of research; and (4) to develop a methodology for assessing acceptance as a resource for future projects inside and outside the academy. Between 2015 and 2016, the project team selected three rounds of research fellows from situation countries ranging from Cambodia to Uganda, and trained them in the basics of international criminal justice, social science research methodology, and data analysis. They were social scientists or legal scholars studying at doctoral or post-doctoral level, and came from diverse institutional backgrounds including academia, think tanks, and NGOs. The outcome of their research in form of country case studies forms the heart of this publication. It was not the objective of the project to produce a set of case studies for a structured comparison, but rather to draw on the different disciplinary backgrounds of the research fellows and their particular orientation within their field. Nevertheless, through the training and the developed methodology, the fellows all focused on the same aspects. This rich sample of case studies serves to deepen the understanding of the acceptance of international criminal justice. Even though at the time of writing the project was ongoing, it was possible to offer a preliminary synthesis from the individual case studies, which shall be discussed below.

2. Political and Social Acceptance

Political and social acceptance refer to if and how international criminal justice in the form of international or hybrid tribunals or examinations and investigations by the ICC is approved by various political actors and parts of society. The following aspects can be distilled from the case studies.

2.1 Acceptance of a Court and its Proceedings

Since international criminal justice mainly appears in the form of courts and tribunals, the question arises if these institutions are accepted in and of themselves. Our research shows that they can reach high levels of acceptance if they enjoy a high level of credibility, and if simultaneously there is little trust in the national judiciary’s ability to deal with the crime and to
enforce the law. Taking the example of Ukraine, Valentyna Polunina refers to polls which suggest that large parts of the population have more trust in the ICC than in their own institutions, because the latter are believed to be under the influence of political actors, and thus partial. The Ukrainian government has granted the ICC ad hoc jurisdiction over international crimes committed in the country since early February 2014, and the OTP is currently assessing whether the crimes committed fall under the statute of the ICC, and whether it should request authorisation from the Court to open a formal investigation. In the same vein, Kimsan Soy describes in his chapter how the Extraordinary Chambers in the Court of Cambodia (ECCC) is trying the most senior members of the Khmer Rouge accused of being responsible for crimes perpetrated during the Cambodian genocide. The ECCC is seen as more credible than its predecessor, the People’s Revolutionary Tribunal (PRT), which tried Khmer Rouge leaders in 1979. The ECCC is a hybrid court created in 1997 by the Cambodian government in conjunction with the United Nations, and includes both national and international judges.

This form of acceptance might change if a tribunal operates for a long time, or if a particular case drags on. As Ana Ljubojevic shows, some parts of the Serbian population accuse the International Criminal Tribunal for the former Yugoslavia (ICTY) of being slow and dysfunctional. The Tribunal was established in 1993 to prosecute crimes committed during the violent conflicts in the Balkans in the 1990s, and it is still operating today.

2.2 Acceptance of a Court’s Output

The level of social acceptance seems to rise and fall with the degree to which the parties concerned consider a judgement to be appropriate. In Cambodia, as explored in Soy’s chapter, the initial sentencing by the ECCC of a key Khmer Rouge leader to a long prison term (abated by the years he had already spent in custody) was viewed less favourably than the life sentence imposed in an appeal judgment, in particular by victims’ organisations but also by the government. Soy concludes that the acceptance of international criminal justice thus also depends on the outcome of the process, and that for some interest groups the crucial point might be the imposition of the maximum available penalty. This resonates with Ljubojevic’s findings, which show how the perception and ultimately acceptance of the ICTY in Serbia shifts with who is being tried. When people of Serbian nationality are sentenced, the Tribunal is often accused of being unfair and biased. In her interviews, this was partly explained by the perception that the Court is a political rather than a judicial institution, which places responsibility for international crimes during the Balkan wars mainly on Serbs.

The acceptance of a court’s output may be influenced by external actors, as was the case in Cambodia were the hybrid tribunal received great support from international agents after delivering its first sentence, which was of life imprisonment. Soy reports rumours that donors to the Court had threatened to withhold funds if it did not deliver a verdict within a reasonable timeframe. He concludes that failure to obtain a conviction, or a conviction with too lenient a penalty might have been interpreted as the failure of the UN to deliver justice to the victims, thus undermining its acceptance.
2.3 Acceptance in a Particular National Context

Given that tribunals by typically act against a backdrop of political strife in post-violence societies, both the political and the social landscape are very fragmented, influencing how the various parties to the conflict see and thus accept their work. This is evident in Tamirace Fakhoury's chapter on the Special Tribunal for Lebanon (STL) established in 2009, an international hybrid tribunal to prosecute those responsible for the assassination of the former Lebanese President Rafic Hariri in 2005, and for the deaths of 22 others. The Tribunal cuts into the divide between the political parties that dominate the post-war tensions, leading some to accept the tribunal – and call for it in the first place – and others to paint it as a externally-imposed mechanism which undermines the country’s sovereignty while enabling external powers such as the USA and Israel to interfere with national politics. Given the public debate about the STL in Lebanon, its society is divided along the political lines of accepting or disdaining the court, provoking public questioning of the utility and relevance of a court in a deeply divided post-conflict society where it increases tensions. This, then, leads to little acceptance by significant sections of the society.

2.4 Acceptance by Political Actors

If and how politicians accept international criminal justice is another thread that runs through the case studies. In Kenya, for instance, politicians’ attitudes towards international criminal justice – here the intervention of the ICC after the post-election violence in 2007/8 – oscillates between acceptance and defiance, as explained by Geoffrey Lugano in his chapter. The ICC opened investigations in 2010 to bring to trial those responsible for the large scale violence which ensued after the presidential election in 2007. Lugano focuses mainly on political leaders and, borrowing from Jelena Subotic (2009), argues that they highjack justice for their own political ends. Highjacking justice implies showing compliance with international norms to the outside while failing to propagate normative changes domestically, thereby allowing ulterior strategies such as political mobilisation. In Kenya, this found expression in, *inter alia*, the efforts of two people accused by the ICC to blame the Court for being a neo-colonial instrument and manipulate public discourse, thereby contributing to their victory in the next election. Here, then, acceptance is mimicked to the outside but it is not genuine.

This argument resonates in the chapter by Polunina on Ukraine, where the government has granted the ICC jurisdiction over recent international crimes. Even though the government shows signs of commitment to prosecuting these crimes, it is reluctant to accept the ICC's jurisdiction due to a lack of political will and a poor understanding of the Court’s work. Instead, Polunina argues, Ukraine uses the ICC’s mechanisms selectively and opportunistically as a political tool, adopting it only when it wants a compromise between cooperating with the ICC and not disturbing the relationship with various interest groups opposed to such cooperation.
3. Legal Acceptance

While acceptance is of significance at the political and societal level, it also has a strong legal component due to the compliance with international standards and the domestication of international criminal justice norms into the domestic legal system. Various issues have emerged in the course of the research projects.

3.1 Acceptance as Domestication

Interventions of the ICC may prompt discussions or processes of legal acceptance in terms of domesticating international criminal justice norms, i.e., translating them into a national legal system. The Court operates on the principle of complementarity, placing the primary obligation to investigate and prosecute international crimes on state parties. It only exercises jurisdiction over the case when a state party is unwilling or unable to investigate or to prosecute. As a consequence, the investigation of the ICC itself prompts discussions about processes so that perpetrators can be tried in the situation country rather than in The Hague.

While this form of acceptance is very powerful and has far-reaching implications, it nonetheless faces challenges. As shown in Benson Chinedu Olugbuo’s chapter, Nigeria serves as a good example of both national and international political dynamics affecting the willingness of a government to accept international criminal justice. Nigeria has been under preliminary examination by the ICC since 2010 because of the conflict between Nigerian security forces and the insurgency group Boko Haram. Even though the country has deposited its instrument of the ratification of the Rome Statute in 2001, it has so far failed to domesticate it into national law to render it enforceable. This is due to the political tensions between different political actors in the government and the opposition, but it is also symptomatic of a broader negative attitude towards the ICC in Africa, thus serving as a sign of resistance against what is interpreted as being neo-colonial. The latter argument resonates in a number of other African cases including Kenya, but also in Serbia where the ICTY is portrayed as a product of Western conspiracy.

In a similar vein, Colombia is undergoing a process of domesticating international criminal justice. Colombia is under examination of the ICC due to the crimes committed during its decades of violent conflict. In 2005, the OTP opened a preliminary examination, prompting a number of changes in the country. As the study of Nelson Camilo Sánchez León highlights, acceptance in the legal field can be subdivided into: acceptance of the principles of international criminal justice, its working methods and how to conduct investigations; acceptance of the preliminary examination of the OTP in the country; acceptance of the opening of a case by the OTP; and eventual prosecution by the Court. In Colombia, as in other countries, this draws in a range of actors including security and combatant groups (military, paramilitary, guerrilla), as well as sectors of the government (ministries for justice and defence), the judiciary, political parties, and civil society organisations. Given the particular context of Colombia, which is trying to end years of war and move to a sustainable peace, the process of acceptance in form of domestication has been affected by considerations from all sides regarding if and how trials may affect the peace process.
3.2 Acceptance by Drafting new Legal Frameworks

Legal acceptance can also occur when new legal frameworks are developed, for which the case of Kosovo serves as a good example. Since Kosovo is a very young country, much of its institutions are newly formed, potentially allowing the development of national legal norms and principles in line with international criminal law. In her chapter, Dafina Bucaj explores how this domestication was driven by external agents such as the European Union Rule of Law Mission in Kosovo (EULEX) and the United Nations Interim Administration Mission in Kosovo (UNMIK). As a result of their interventions, Kosovo has opted to abide by international norms and to domesticate a number of sets of provisions, creating a domestic level of application of international criminal justice norms as part of the national legal system. Bucaj argues that, in general, there has been a significantly positive approach towards the acceptance of international standards, because they were seen as a necessary step towards democratisation, and that this has also shaped a positive attitude to legal norms more generally.

This form of acceptance might be influenced by incentives from external parties. In the Western Balkans, the attractive prospect of EU accession is tightly linked to the degree of cooperation of the post-war states with the ICTY. For Ukraine, being party to the ICC is one of the provisions of the association agreement between the country and the European Union, although Ukraine has not conceded yet.

3.3 Acceptance by Adhering to Existing Legislation

From a legal perspective, acceptance may also denote rendering justice in line with existing international criminal justice norms in cases where international and national legal frameworks co-exist, as they do when a hybrid tribunal has been established. In other words, this form of acceptance recognises the superiority of international criminal law over national. This can be seen in the first verdict of the ECCC and the subsequent appeal against it. In his contribution, Soy explores how, in the hybrid court composed of international and Cambodian judges, disputes about whether to apply the Cambodian Criminal Code or the ECCC legal framework took place.

4. Conclusions

International criminal justice is simultaneously focused on the crime itself (deontological) and forward looking (teleological) (Cryer et al., 2014, 29). Its objectives are, *inter alia*, retribution, incapacitation, rehabilitation, prevention, education, vindication of victims’ rights, and recording history (*ibid*; Tallgren, 2009). The teleological aspect is highly normative and carries a strong moral weight into situation countries. That this aspiration is close to how international criminal justice is accepted, and that this is contingent on many factors, has become apparent in the case studies of this research project.

A number of themes run through these case studies. Since the objective of this project was not to compare countries, but rather to deepen knowledge by drawing on various perspectives and disciplines, the cases serve well to illustrate how international criminal justice is, or is not, accepted in situation countries. Political and social acceptance may take various forms and be
confronted with various challenges. It depends on if and how courts and tribunals are accepted, as well as how their activities are perceived. Of major importance is how the national context of an often divided society affects how it is understood, and how politicians use the courts for their own political ends. Legal acceptance hinges on whether and how international criminal justice is domesticated into a national legal system, and whether pre-existing international norms are being adhered to. The findings resonate with similar studies on the acceptance of transitional justice.\(^2\)

Assessing the acceptance of international criminal justice in situation countries is essential and with the growing importance of the ICC, the issue will remain relevant for some time to come. Given that each situation country has particular political and social structures and unique experiences regarding the committing of international crimes, assessments require a strong empirical element rather than a search for general insights. To contribute to their richness is what this project seeks to achieve.

\(^2\) For an overview, see Mieth, 2016.
5. Bibliography


The opinions expressed in this publication are solely those of the author and do not necessarily reflect the views of the International Nuremberg Principles Academy.