

Acceptance of International Criminal Justice and the Path to the International Criminal Court in Palestine

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*'Is this move to the ICC embedded in a strategy or is it – as it sometimes looks like – only the last try to change something with regards to occupation?'*¹

Nidal Al-Farajin² and Alexandra Engelsdorfer³

1. Introduction

On 1 April 2015, Palestine became the 123rd state party to the Rome Statute of the International Criminal Court (ICC) of 17 July 1998.⁴ According to the Statute's principles, Palestine, like any ICC member-state, must 'exercise its criminal jurisdiction over those responsible for international crimes' (Rome Statute 1999, Preamble). However, Palestine is a special case in the ICC's history for several reasons. First, the question of Palestine's state- or non-statehood characterises and continues to dominate discussions on Palestine and the ICC. Palestine's membership of the ICC goes beyond the case of Palestine itself, having political and legal consequences for the ICC and international criminal justice more broadly. Second, the *Palestinian-Israeli Interim Agreement on the West Bank and the Gaza Strip* from 1995, better known as the Oslo II Accords, limits the jurisdiction of the Palestinian Authority,⁵ including its criminal jurisdiction. Third, membership in the ICC is strongly opposed by Israel and parts of the international community, as it is feared that this (rather strategically political step) sets an end to peace negotiation efforts.⁶ By contrast, within Palestinian society hopes seem to be high that ICC membership will be a useful tool in peace aspirations with Israel, as became clear from the interviews conducted for this chapter. Two major goals are connected with the assignment to the Rome Statute: progress in the Palestinian ambition for statehood and justice for alleged atrocities on Palestinian territories by both sides. While the latter would suggest that trust in and acceptance of the ICC are high in Palestine, it is worth taking a closer look at 'who implements these [ICC] processes, what needs they respond to, and how particular [judicial] interventions are ultimately understood by affected populations' (Palmer and Clark 2012, 14). Or, put more simply, who in particular accepts the ICC and international criminal justice and how, and what opinions are held by different actors in Palestine on the ICC.

¹ Retrieved from an interview at the Rosa-Luxemburg Foundation in Ramallah conducted with Shawan Jabareen.

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⁴ International Criminal Court. 'ICC welcomes Palestine as a new State Party'.

⁵ The Palestinian Authority (PA) is the governing body of the Palestinian Territories and Gaza.

⁶ For a discussion on transitional justice 'replacing diplomacy' and its rather hindering effects on negotiations see Engstrom, Par 2013, 43.

Relying on the acceptance methodology as an analytical framework, this chapter engages with 'the pertinent question if and how international criminal justice is perceived and appreciated – in our terminology accepted by certain actors' (Buckley-Zistel 2016a, 1) in Palestine and thereby is embedded in the *Acceptance of International Criminal Justice* project. In accordance with the project's outlines, 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 (laws, institutions, or processes). This includes a range of active features from recognising to giving consent and expressing outright approval and belief' (Ibid.). This chapter is based on field work in Palestine between February and April 2016, when 92 interviews were conducted with actors from civil society, political parties, government, communities, and legal experts in international organisations, the justice sector, journalists and victims.

To set the scene, first this chapter will briefly outline moments of the Palestinian-Israeli conflict's history which are important for an understanding of the situation. In a short literature review it will then contextualise Palestine's path to the ICC within current debates on international criminal justice, and point out important unanswered questions and challenges which led to the research question. It will further describe the methodology applied for this research and present a landscape that highlights the main actor groups important for the question of the acceptance of international criminal justice in Palestine.

2. Contextualisation and History of Conflict

The Palestinian-Israeli conflict has a long history which in the literature is mostly attributed to the foundation of the State of Israel in 1948. As a consequence, 750,000 people were displaced, with the majority of them still living as refugees. The United Nations Relief and Works Agency for Palestine Refugees (UNWRA) estimates that there are more than five million registered Palestinian refugees,⁷ as descendants of displaced persons can inherit the refugee status from their fathers.

The conflict between Palestinians and Jews is not a modern phenomenon, but began around the turn of the 20th century (Kayyali al 1978). The history of the State of Israel does not start in 1948, but in 1917, when under the British mandate, Lord Balfour, the British Foreign Minister, issued a very famous declaration known as *The Balfour Declaration*, announcing his government's support for the establishment of 'a Jewish homeland in Palestine' (Said 1978, United Nations 2008). On 29 November 1947 the UN issued the Partition Plan - UNGA Res 181 (II) - which ended the British mandate and stated that what was then Mandatory Palestine should be split into two states: a Jewish state and a Palestinian state, but when David Ben Gurion announced the foundation of the State of Israel in 1948, Palestinians and the surrounding Arab States refused to accept the separation plan as they perceived it as unjust. Since then, wars and violence between Israelis and Palestinians have not stopped, and all peace negotiation efforts have failed.

⁷ Accessed 12 September 2016. <http://www.unrwa.org/who-we-are?tid=93>.

The conflict is not one between two equals, but is characterised by a strong asymmetry of power: on the one side is the Israeli state, which has the privileges and advantages but also the responsibilities of statehood, and on the other side there is Palestine, which is still struggling for the same status within the international community (Caplan 2011). In the Oslo Accords from 1993 (Oslo I Accords) and 1995 (Oslo II Accords) the government of Israel accepted the Palestinian Liberation Organisation (PLO) as the representative actor of the Palestinian people, and the PLO stated their recognition of the State of Israel. The Accords also stated the establishment of a Palestinian interim-government, the Palestinian Authority (PA). Nevertheless, major conflict issues remained unresolved, such as the Palestinian refugees' right of return to the land from which they were displaced or had to flee (Kimmerling and Midgal 1994), and the withdrawal of Israel from all territories which it occupied during the wars of 1967 and 1973. The level of violence and the extent of violations of human rights and humanitarian law committed due to this conflict have captured the attention of the international community, resulting in a broad range of views, opinions and possible alternative solutions to the problem. Despite the countless hours of negotiations and numerous peace agreements, Palestine and Israel have failed to find peace.

Because Palestine has not yet been recognised as a nation state, it is not able to fully operate as a state. The status of statehood would also imply fixed borders and state sovereignty, issues that have been some of the key-points of disagreement in various peace processes as well as Israeli settlements, control of Jerusalem, water resources, refugees, and the freedom of movement of Palestinians. This means, amongst other things, that the lack of an autonomously operating institutional system also affects the establishment of a juridical system in Palestine. According to the Oslo II Accords, the PA is restricted in its criminal jurisdiction which is partly covered by Israel. These historical outlines have greatly influenced the Palestinian engagement with international criminal justice and the Palestinian decision to approach the ICC.

3. International Criminal Justice in Palestine

International criminal justice had its beginnings in the period after World War II with the establishment of the International Military Tribunal in Nuremberg. The aim and purpose of this Tribunal was the prosecution of crimes committed under the Nazi regime. Convicting perpetrators under international law was also the goal of the international tribunals in Rwanda and Yugoslavia in the 1990s, fracturing the period of political stagnancy during the Cold War. International criminal justice is referred to by Buckley-Zistel et al. (2016) as 'the norms underlying the prosecution of individuals for committing the international crimes of genocide, crimes against humanity and war crimes by international courts and tribunals'. Following the history and development of international criminal justice, Engstrom (2013) characterises the creation of the International Criminal Court (ICC) in 1998 and its enactment in 2002 as the turning point from a 'Nuremberg model' to a 'Rome model.' It marks the shift of engagement of international forces *after* violent conflicts as it was the case under the Nuremberg model, 'to attempts to achieve accountability for atrocities even before a political settlement of armed conflict has been reached' under the Rome model (Engstrom 2013, 42). According to Engstrom (2013, 43), it is not just the paradigm change from international judicial intervention in post-violent conflict situations to involvement in ongoing conflict scenarios that comes with the foundation of the ICC, but also its effect on the legitimacy of international criminal justice:

‘While under the ‘Nuremberg model’ the military victorious parties used their power to pursue justice after the cessation of conflict, under the ‘Rome model’ interventions are undertaken by third-party judicial actors.’

These observations both resonate in the Palestinian case: though the involvement of international criminal justice in Palestine is partly concerned with alleged atrocities committed during the Gaza War in 2014,⁸ and therefore concerned with (officially) post-conflict situations, it is also supposed to regard to ongoing violations of human rights as a consequence of illegal Israeli settlement activities on Palestinian territory.

While the setting in a (at least partly) ongoing conflict situation is not especially unusual in current international criminal justice, the Palestinian case still differs from other ICC cases in its need for ‘global solutions.’ Setting international criminal justice in the broader context of Transitional Justice (TJ) discussions about local instead of global solutions is widespread. Local solutions are expected to be more sustainable for long-term non-violence aspirations. Besides their sustainability, local approaches are supposed to gain broader acceptance of conflict reconciliation and are more likely to concur with victims’ as well as perpetrators’ needs in the area concerned. At first glance, the Palestinian case contradicts the so called ‘local turn’ with its ambition for an ‘internationalisation’⁹ of the conflict. Following the debate on intertwining moments of the local and the global, Buckley-Zistel (2016b, 26) states that the:

‘Strong portrayal of the local as a victim and product of the global is put into question, instead prompting us to query how the local can exercise its agency and contribute to changing spatial structures at the global level.’

The Palestinian call for internationalisation can also be seen as an example of local agency that challenges ‘spatial structures at the global level’: with the ratification of the Rome Statute in 2015 Palestine not only pursued justice for alleged atrocities on its territory, but also brought the UN-concept of statehood into question.

3.1 The Palestinian Path to the ICC

Although Palestinian membership to the ICC is a relatively new development, engagement with international criminal justice goes back to close to the time when the ICC acted in force for the first time. In 2003, one year after the commencement of the construction of what is called the ‘Apartheid Wall’ by Palestinians and the ‘Defence Wall’ by the Israeli government, the General Assembly of the United Nations asked the International Court of Justice ‘to urgently render an advisory opinion on the question of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’.¹⁰ The International Court of Justice complied with the request,

⁸ Palestinian demands for the ICC to investigate on war crimes committed during the Gaza War in the context of *Operation Protective Edge* in 2014 are strong; however, according to the Rome Statute’s principle of subsidiarity, the ICC can only investigate if the concerned state ‘is unwilling or unable genuinely to carry out the investigation or prosecution’ (Rome Statute, Art. 17(a)). In the case of *Operation Protective Edge* Israel had initially started investigations on war crimes, but closed examinations in August 2016. Thereupon Palestinian official submitted the case to the ICC. See Khoury 2016.

⁹ For a discussion on ‘internationalisation’ aspirations see Høgestøl 2015.

¹⁰ International Court of Justice 2004.

but was unable to reach consensus and its advice as well as the decision to answer to the request was much discussed within the Court. Judge Thomas Buergenthal argued in his dissenting opinion that the Court 'lacked sufficient information and evidence to render the opinion.'¹¹ Following the majority of the Court, the advisory opinion found the construction of the separation wall 'in the Occupied Palestinian Territory, including in and around East Jerusalem, [...] contrary to international law.'¹² With the vague phrase 'in and around East Jerusalem' the statement highlights one of the key-issues in the history of international criminal justice in Palestine in general, and sets the framework for its relation to the ICC more specifically: the question of statehood and territoriality. Palestine has neither been granted international recognition as a state, nor have official borders been established. Accordingly, discourse about Palestine and the ICC is highly structured by questions on statehood, within as well as outside Palestine.

It has often been stated – and also shown to be relevant in the interview material – that joining the ICC is part of a broader political strategy of 'internationalisation'. Due to the lack of rights that come with the status of statehood and the stagnation of direct peace negotiations with Israel, the Palestinian Authority (PA) is seen to adopt this strategy by calling for solidarity and support from international society. What has long been *modus operandi* for international society throughout the history of Palestine (Pedersen 2015) also reached out to the politics of the PA. After the advisory opinion of the International Court of Justice in 2004, Palestine, before joining the ICC, approached international criminal law again, this time addressing the ICC. In 2009 Palestine declared its acceptance of the Rome Statute according to Article 12(3),¹³ which allows even non-member states of the Statute to grant 'ad hoc jurisdictions over crimes committed on their territories' (Høgestøl 2015). In response, the ICC prosecutors opened a primary examination on Palestine, concluding that due to its uncertain status with respect to statehood, Palestine's declaration could not be accepted (International Criminal Court 2012). Interestingly the court's definition of 'state' correlates with membership its status in the UN General Assembly. When Palestine was granted 'non-membership' status of the Assembly in November 2012, access to ICC jurisdiction became an option for the PA again, and found its realisation in application for full membership with the ICC according to Article 125 and 126 on 1 January 2015. In addition, Palestine repeated its declaration of Article 12(3) of the Rome Statute. The following day Palestine deposited its accession instrument with the UN Secretary General and acceded to the Rome Statute.¹⁴ By 7 January 2015 the Registrar of the ICC had accepted the declaration submitted under Article 12(3), and as a result, the Prosecutor of the ICC re-opened a preliminary examination on the situation in Palestine on 16 January 2015.¹⁵ With Palestine's declaration and its acceptance by the ICC, 'alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014'¹⁶ by both Israeli citizens and Palestinians will be pursued on an international stage, if the still-ongoing preliminary examination concludes

¹¹ Ibid.

¹² Ibid.

¹³ Accessed 7 September 2016. <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

¹⁴ Accessed 7 September 2016. <https://treaties.un.org/doc/publication/cn/2015/cn.13.2015-eng.pdf>.

¹⁵ Accessed 16 September 2016. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.

¹⁶ Accessed 14 October 2016. <https://www.icc-cpi.int/palestine>.

that the Rome Statute criteria for opening an investigation are met. Such investigation would mainly focus on war crimes committed by individuals during the 2014 Gaza war. The PA has sent several documents and dossiers on alleged atrocities to the Court that are considered to be evidence for crimes committed by Israeli citizens. Israel is not a member of the ICC and rejects the Palestinians' claim for jurisdiction through the Court.

Bearing in mind the outlined history of international criminal law and its setting in relation to Palestine, as well as the current status of the primary examination the acceptance of the actual instruments and procedures of the ICC within Palestinian society is still an under-researched topic.

4. Methodology

According to Mieth (2016), research on acceptance of international criminal justice has to clarify who, what, when and why acceptance is granted in a specific setting. This research mainly focuses on the 'who' question, thereby also seeking to gain insight into the other topics. Further research that engages with the question of *what* is actually accepted, be it 'the idea of justice, the particular justice institution or (part of) its particular outcomes'¹⁷ and the *how* is also necessary for a deeper understanding of international criminal justice processes in Palestine.

This study adopted a research design that embraces or emphasises empirical research. It used primarily a qualitative research methodology that adopts the use of tools such as semi-structured interviews with key informants representing each of the selected categories of actors in Palestine. This method was accompanied by observations during field visits, content analysis of public speeches, opinion polls, reports, the media, and statements of relevant actors. A purposive sampling strategy was chosen to select interviewees and actors with divergent opinions on international criminal justice. These actors have or have not accepted international criminal justice, or are involved in international criminal justice processes at different levels, either as policy makers, scholars, researchers, lawyers, media, NGOs, judges, victims, or in other ways. The actor categories in this article show low, mixed and high acceptance. Whether acceptance is gendered is also an important question, so the involvement of women as actors was also looked at and 19 women from the total number of 92 interviewees participated. Interviews were conducted in seven different locations in Palestine and Jordan, and the actors included government officials, political parties, civil society organisations, legal experts, and members of the community.

¹⁷ Ibid.

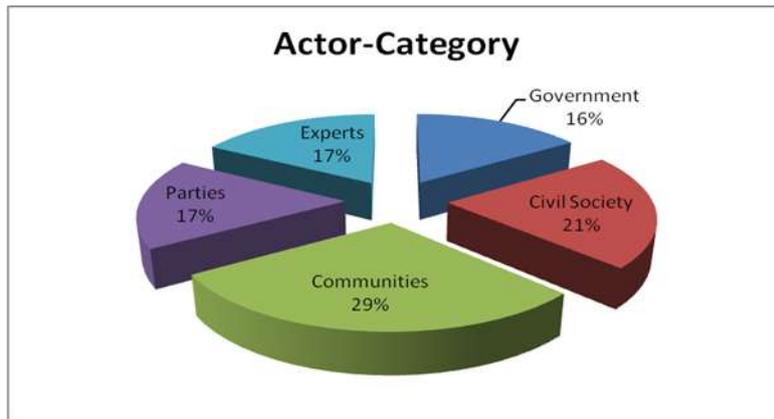


Figure 1 - Actor categorisation

5. Research Findings

5.1 Actor Categorisation

There are various actors relevant to the acceptance of international criminal justice in Palestine. Victims, political leaders, civil society organisations and opinion makers are all important in an analysis of acceptance. The actors listed below are the main players in influencing acceptance or non-acceptance in Palestine, as they have either high political or societal influence on opinions within Palestinian society. They were categorised in five groups that interact with society on different levels or through differing instruments. Although categorisations can help to reduce and organise complexity and observe occurring correlations, these categories are neither consistent nor permanent throughout Palestinian society. Rather, they are always changing and not always exclusive; actors can be part of more than one category.

Government. The government advises and supplies the ICC with files relevant to the cases and communicates with its ministers on the course of action. It has also great influence on the legislature through the presidential majority in Parliament. The government decides the official policy towards the ICC, implements international criminal justice norms and gathers evidence. The government's cooperation is important for the ICC in order to carry out examinations and investigations.

Political parties. Political parties influence acceptance in Palestine and also represent opposition positions. They can potentially put pressure on the government to accept or not to accept international criminal justice.

Communities. Communities characterise the formation of victims' organisation. Their interests, needs and expectations tend to be overlooked in processes of international criminal justice, although without their acceptance it is difficult to establish a successful outcome from the trials or tribunals. The definitions of justice within the category range from restorative, distributive to punitive justice. Opinion makers and community leaders from this category were interviewed, as

they are supposed to represent and influence the community's acceptance of international criminal justice.

Civil society. Civil society is lobbying the acceptance of international criminal justice and the ICC. Through its contact and cooperation with marginalised groups and victims, civil society is an important factor considering the acceptance of international criminal justice. Civil society can also exercise pressure on the government and collect evidence of international crimes as well as analyse cases of human rights abuses and report war crimes to the country's representatives. Civil society also plays a crucial role for the establishment of public awareness and knowledge about the ICC.

Legal Experts. Legal experts are scholars or lawyers who influence public opinion through the media.

5.2 ICC Acceptance in the Different Actor Groups

5.2.1 Government

Palestinian government actors say they are pursuing a new strategy: to put pressure on Israel after decades of armed struggle and failed on-and-off peace talks. They describe it as 'internationalising' the issue. One interviewee, a prosecutor in the Palestinian government, stated:

'This step aims to internationalise the conflict, and create an environment where everyone is commensurate opportunities, and activating the political and legal rights of Palestine as a state in the international system. Most of the discussion has centred on the moves on the political benefits'.¹⁸

The expected political benefits of joining the ICC leads to a rather high acceptance of the ICC, as revealed in the study. The PA undertook various steps to support and establish ICC institutions. As recommended by the Human Rights Council's fact-finding mission in June 2015 (United Nations Human Rights Office of the High Commissioner 2015), national mechanisms for investigation of alleged crimes committed during the 2014 Gaza war were established. A Higher National Committee to deal with the ICC matters was formed, technical committees to file cases and collect evidence on war crimes were set up, and network ties with stakeholders were strengthened.

Palestine still needs to complement these steps by adopting a national legislation to implement the Statute, setting up more institutions for cooperation with the ICC (central authority, courts and ministries), and building the capacity of the personnel of these institutions to handle cases involving war crimes, crimes against humanity, and genocide. The adopted steps point to progress in development and might already meet the general requirements of willingness set out in Article 17(1) of the Statute. Yet, willingness is not the sole determining factor for an ICC decision to start an investigation in Palestine and the test for assessing willingness will depend

¹⁸ Personal interview with prosecutor in Palestine Government, 27 March 2016.

on the speed with which the implementing legislation is adopted and on the quality of its content.

5.2.2 Political Parties

There is a high level of acceptance within the 15 Palestinian political groups and parties, including Fatah, which constitutes the PA government in the West Bank, and Hamas which forms the government in Gaza. Fatah representatives were among the first to support the call for joining the ICC, as it was reported in the conducted interviews. Hamas also approved of the plans to join the ICC, characterising the proposal as a legal action against occupation. Although an ICC investigation would also examine alleged war crimes committed by Hamas members during the 2014 Gaza war, Hamas leaders stated that due to the special 'situation of occupation' they would not expect to be pursued, as Hamas fighters would '[just be] defending [their] people' in an asymmetric conflict (Ibrahim/Daraghme 2014).

The only political party out of the 15 in Palestine which did not approve of joining the ICC was Islamic Jihad, which has a strong political standing in Gaza. It has to be noted, though, that according to the definition of acceptance applied in this research, the refusal to sign the proposal for the membership of ICC does not necessarily imply a general non-acceptance of international criminal justice. As acceptance is understood as a process rather than a product (which would be the support of the proposal in this case) and it is important to dig deeper and ask for the motivation and reasoning accompanying the decision. The survey's interview material suggests that a lack of trust in international institutions lead to a rejection of what has been framed as 'internationalisation' by Hamas and Fatah, which are political opponents of Islamic Jihad. It was stated that joining the Court would be an 'excessive hope' for the Islamic Jihad's declared goal of ending the 'occupation': 'We are in the Islamic Jihad not stand in the face of joining the court, but should not be excessive hope, and we with all the forms and tools of engagement with the occupation'.¹⁹ The argument of the ICC being an internationalised tool to come to a solution in the conflict with Israel and to progress the aspiration of Palestinian statehood was also pointed out by interviewees of the Popular Front for the Liberation of Palestine (PFLP), a left-wing party:

'Joining the ICC is a political and diplomatic battle, and possible to be expensive, complicated and long-lasting, but it provides us with an additional weapon to increase international pressure down perhaps to impose sanctions on Israel, as international sanctions against the apartheid regime in Vitoria which led to its collapse'.²⁰

¹⁹ Personal Interview with Islamic Jihad official, Palestine, 14 April 2016.

²⁰ Personal Interview with PFLP representative, Palestine, 7 April 2016.

5.2.3 Communities

'We are sick and tired of the continuation of the occupation; we need justice and protection.'²¹

The temporal factor that has to be considered when researching concepts of acceptance of international criminal justice is of great relevance in the Palestinian context with respect to the length of time the conflict has been going on for, and the hopes for peace that have been disappointed. Concepts of justice and acceptance of international criminal justice have undergone great changes. At first glance, it seems that acceptance, as means of international involvement, has increased over time due to the failures of direct political negotiations and peace talks with Israel. On closer inspection, it becomes clear that this observation cannot be generalised for all actor groups but depends on their specific position in society and their expectations. This can be seen by highlighting one of the most marginalised groups, the political communities of Palestinian refugees. Although a survey conducted by the Resource Center for Palestinian Residency and & Refugee Rights (BADIL), *Palestinian Refugees and Internally Displaced Persons 2013-15*,²² found that 42.4 per cent of interviewees were in favour of the ICC as an instrument to protect their rights, the level of acceptance has changed. Particularly in Jordan, where there are large refugee camps, acceptance of international criminal justice was low among the communities at the time the interviews were conducted. This could be because the survey was conducted before and at the time the application for the ICC was submitted.

In 2016, a representative leader of the Al-Wahadat Refugee Camp stated that:

'The Palestinian refugees here in Jordan they lost hope in two state solutions and peace process, refugees here do not trust Palestine authority to represent them and defend their rights, people feel hopeless to right to return, it has been 68 years of conflict.'²³

While in this quote a loss of hope 'in two state solutions and peace processes' is expressed, it does not lead, as could be observed for the actor groups of the Palestinian government and the majority of the political parties, to the support of 'other tools' to come to a reconciliation with Israel. Although missing support does not equal missing acceptance, it is unlikely to speak even of 'passive acceptance' that would at least imply tolerance of the international criminal justice processes and institutions. The interviews conducted for this research suggest that the missing acceptance is due to a disagreement with the process, in which refugees are hardly involved, and a lack of trust in the PA was repeatedly mentioned. Still, refugee communities are far from being a homogenous group. The few interviewees in favour of ICC involvement in Palestine emphasised that they merely count on international support for their cause: 'We want justice and protection and we wish to live in peace and want our rights protected and the ICC to bring to trail the criminals'.²⁴ Palestinian refugees, in comparison with Palestinian non-refugees, also

²¹ Personal interview with camp leader, 6 April 2016.

²² Accessed 29 October 2016. <http://www.badil.org/en/publication/survey-of-refugees.html>.

²³ Personal interview with camp leader (Al-Wahdt Refugee camp in Jordan), 18 April 2016.

²⁴ Personal interview with a community leader in Palestine, 3 April 2016.

have a special interest in international support: the 'right to return' to the homes they had to flee or were displaced from.

While hope and justice are terms often used in the interviews, it becomes clear that the concept of justice in general and also with regard to the ICC and international criminal justice is concerned with punitive justice for perceived Palestinian victims, and against perceived Israeli perpetrators, but it goes beyond that. Justice, which would be the expected outcome of an involvement with the ICC and as such a factor supporting the acceptance of international criminal justice, also implies the establishment of an internationally accepted Palestinian state. These high hopes can be interpreted as the result of misleading communication processes and a lack of knowledge about how the ICC and its institutions work, and what could be expected by ICC jurisdiction.

5.2.4 Civil Society

'Joining the ICC was due to pressure on Palestine National authority from the Palestinian civil society NGOs in response to popular and political and societal attitudes, a bold decision and is required and must be supported and encouraged by civil society'.²⁵

While refugee communities have had little influence on the process of joining the ICC, civil society actors such as human rights movements can have a major impact on the government and decision makers in Palestine and can transmit and include refugee needs. Civil society actors therefore play two key roles with regard to the acceptance of the ICC. One is the direct cooperation with the court itself. As provided in Article 15(2) of the Statute, the prosecutor may receive information from non-governmental organisations when they initiate investigations in order to be able to evaluate the seriousness of certain allegations (Haddad 2013).

Due to their particular experience in international human rights and humanitarian law, Palestinian NGOs are in a position to contribute to the complementarity duties at the national level that are implied by an ICC primarily examination (Bergsmo 2011). Civil society can also contribute to the capacity building of the institutions dealing with the court (judges, prosecutors, police, prison officers and ministers), through training, legislative support, studies, and expert opinions. It seems that the Palestinian government is aware of the important roles civil society actors play in the establishment of acceptance of international criminal justice within Palestinian society. Therefore, civil society representatives have also been included in the Higher National Committee for the ICC.²⁶ According to Article 2 of the Presidential Decree, the committee will be tasked with drafting and preparing the documents and cases to be submitted and referred by the State of Palestine to the ICC via a technical committee headed by the foreign Ministry.²⁷

²⁵ Personal interview with Civil Society NGO in Palestine, 26 February 2016.

²⁶ These includes representatives from Al-Haq, Al-Mezan Center for Human Rights, Palestinian Center for Human Rights and the independent Commission for Human Rights.

²⁷ Accessed 12 September 2016. <http://palestine.dk/presidential-decree-form-committee-following-icc/>.

In accordance with the interview-guidelines, interviewees of various civil society actors were asked if they accepted, rejected or were indifferent to the ICC. Asked for the acceptance of principles of the ICC, the majority of respondents (63 per cent) showed a high approval of the principles of ICC, its mechanisms, processes and institutions.²⁸

5.2.5 Legal Experts

Most experts (62 per cent) interviewed in this research show a high acceptance of the ICC as a strategic tool and political instrument for the establishment of a Palestinian state. One legal expert stated that the political process towards joining the ICC was legitimate and appropriate for Palestine. Numerous interviewees highlighted that in the aftermath of the Palestinian approach to the Rome Statute, domestic procedures have been developed to comply with international standards and principles of international justice. The Palestinian society in general as well as marginalised groups profit from these developments through a more legal accountability.

Although the level of acceptance of the ICC seems to be equally high within civil society as within the group of legal experts interviewed, the survey material suggests a different process of acceptance. Legal experts do not overly favour the ICC, but also point out critical aspects of the ICC as an instrument for justice. Their familiarity with legal process is higher than the knowledge that the average civil society actors usually has, and they predict that the ICC may take years to open an investigation and several more to reach any decisions: 'In my opinion, the ICC will take a long time in doing any action, possibly ten years as this is one out of a hundred steps.'²⁹

The knowledge that legal experts in Palestine have about international criminal justice could lead to a more stable acceptance of the ICC than it has been observed within refugee communities which have little knowledge about international criminal justice processes. Knowledge about what the ICC can and cannot achieve leads to expectations of the Court that are more likely to be met. As expected outcomes proved to be of high relevance for the acceptance of international criminal justice in Palestine, knowledge about its processes is a key factor.

6. Conclusion

Expectations in Palestine of joining the ICC continue to be high. ICC membership is mostly understood to be a political tool for obtaining justice in an asymmetric conflict, and for a means to progress the aspiration for Palestinian statehood. If the *expected outcomes* are not met, or 'local ideas of justice differ in context from what current international justice mechanism can offer', acceptance of international criminal justice will decrease (Mieth 2016). Another factor that could jeopardise acceptance of international criminal justice is the long duration of the primarily examination through the ICC, which is expected to result from difficulties to get information on the ground due to the restricted access to Gaza. Nevertheless, Palestine joining

²⁸ A total of 92 interviews were conducted in seven different locations in Palestine and Jordan and the actors included government officials, political parties, civil society organisations, legal experts, and communities.

²⁹ Ibid.

the ICC could be an important step for international criminal justice itself. The highlighted issues go beyond the Palestinian case and appear to be symptomatic for challenges the ICC is currently confronted with. One of the most urgent questions that must be answered with regard to acceptance of international criminal justice is which or whose definition of justice counts (Palmer and Clark 2012) and is applied in the legal processes that seeks to contribute to reconciliation and a stable post-conflict society. In light of the shifting landscape of statehood and territoriality around the globe, the Palestinian case could set new standards and update the ICC's definition of states.

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