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Pinzauti, G.; Panepinto, A.; Abu Zuluf, B.; Amara, A.; Ciarán Browne, B.; Nuseibah, M.; Mariniello, T.

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The Irrelevance of the Oslo Accords for ICC Jurisdiction Over (Alleged) Crimes Committed against the Palestinian Bedouin Community

GIULIA PINZAUTI

INTRODUCTION

THE INTERNATIONAL CRIMINAL COURT (ICC) is regarded by many in Palestine and around the world as the appropriate forum to advance accountability for alleged crimes committed against the Palestinian Bedouin community in the West Bank. Although these alleged crimes are currently not included in the scope of the investigation, as defined in the Summary of Preliminary Examination findings (which sets out the conclusions reached by the Office of the Prosecutor at the end of the Preliminary Examination in the Situation in Palestine),¹ they fall within the scope of the Court's territorial, temporal and subject-matter jurisdiction. Indeed, the alleged crimes are Rome Statute crimes, that is, war crimes and crimes against humanity, that were allegedly committed on Palestine's territory – a state party to the Statute – following 13 June 2014. In line with relevant Appeals Chamber jurisprudence, the prosecution is required to investigate the situation in Palestine as a whole, thus including the alleged crimes committed against the Palestinian Bedouin community.² It would be particularly important for the prosecutor to do so in this situation in order to avoid separating the Bedouin community from the broader Palestinian polity.

One key legal issue that arises with regards to the prospects of bringing to justice those responsible for the alleged crimes at issue is whether the Oslo Accords that

¹'Situation in Palestine' (Summary of Preliminary Examination Findings), www.icc-cpi.int/sites/default/files/itemsDocuments/210303-office-of-the-prosecutor-palestine-summary-findings-eng.pdf.

²*Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 OA4 App Ch (5 March 2020) 60.

were concluded in 1993 and 1995 between the Israeli Government and the Palestinian Liberation Organization (PLO) preclude the Court's jurisdiction over alleged crimes committed in Area C – the area of the West Bank that is under full Israeli civil and security administration, as explained in section 8.1 below – including those against the Palestinian Bedouin community. This chapter seeks to answer that question.

In its decision on the scope of the Court's jurisdiction over the State of Palestine in February 2021, the Court did not conclusively resolve the issue of whether and to what extent the Accords are relevant to its jurisdiction. Pre-Trial Chamber I affirmed, by majority, that the Accords 'are not pertinent to the issue of the authorization of an investigation' without elaborating at length on the basis for its decision.³ It also appears to have deferred its consideration of the issue to later proceedings.⁴ The majority seems to have followed the reasoning of the 2020 judgment in the *Situation in Afghanistan*, in which the Appeals Chamber held that the bilateral agreements between the United States and Afghanistan that limited Afghanistan's jurisdiction over US nationals for crimes committed in Afghanistan were not 'a matter for consideration in relation to the authorisation of an investigation'.⁵ In that judgment, the Appeals Chamber further held that those agreements may affect the execution of cooperation requests under Part 9 of the Statute, and that under Article 19 of the Statute, states could raise jurisdictional challenges at the appropriate time.⁶ Following the same line of reasoning, the Oslo Accords do not bar the prosecutor from investigating alleged crimes committed on Palestine's territory, but may have an impact on the proceedings at a later stage.

Following the Prosecutor's decision to deprioritise the investigation of the conduct of US troops and CIA operatives in Afghanistan, litigation in the situation in Afghanistan is not likely to provide any clarity on the effects of bilateral agreements on the Court's jurisdiction.⁷ There is, however, reason to worry about the future of the situation in Palestine. In fact, the then presiding judge of Pre-Trial Chamber I has expressed the firm view that the Oslo Accords bar the Court's jurisdiction over alleged crimes committed by Israelis, as well as over crimes committed in Area C, and in East Jerusalem.⁸ In his opinion, to investigate these crimes the prosecutor would need Israel's consent as the state having territorial or personal

³ *Situation in the State of Palestine* (Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine') ICC-01/18, PT Ch I (5 February 2021) 129.

⁴ The PT Ch emphasised that its conclusions pertained to the initiation of an investigation, while reserving the right to examine 'further questions of jurisdiction which may arise' at a later stage of proceedings. *ibid* 131.

⁵ *Afghanistan Appeal Judgment* (n 2) 44.

⁶ *ibid*.

⁷ Prosecutor Khan decided to focus investigative activities on alleged crimes committed by the Taliban and the Islamic State – Khorasan Province (IS-K) in Afghanistan, and to deprioritise other aspects of this investigation. 'Statement of the Prosecutor of the International Criminal Court, Karim A.A. 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), www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application. The bilateral agreements between the US and Afghanistan have no bearing on the Court's jurisdiction over alleged crimes committed by the Taliban and IS-K in Afghanistan.

⁸ Kovács believes that 'the Prosecutor may exercise her investigative competences *under the same circumstances that would allow Palestine, as a State Party, to assert jurisdiction over such crimes under its legal system*, namely by duly taking into account the repartition of competences according to the Oslo Accords'.

jurisdiction.⁹ If that position were adopted by the Court, it would preclude it from prosecuting the alleged crimes committed against Palestinians in Area C, including those against the Bedouin communities. Moreover, in their *amicus curiae* submissions in subsequent proceedings, some states parties and other interveners challenged the Court's jurisdiction over Israeli nationals based on the Oslo Accords.

Discussing the relevance – or rather, the irrelevance – of the Oslo Accords for ICC jurisdiction over alleged crimes committed in Palestine, including vis-à-vis the Bedouin communities in Area C, is thus important. This chapter argues that the Oslo Accords do not bar ICC jurisdiction over Rome Statute crimes committed in Palestine's territory. Section 8.1 will provide a short overview of the repartition of competences between Israel and Palestine as set out in the Oslo Accords. Section 8.2 will then explain how the Accords do not affect Palestine's jurisdiction to prescribe, and consequently the Court's territorial jurisdiction, while limiting Palestine's enforcement jurisdiction. Section 8.3 will argue that the Accords have an impact on ICC proceedings as far as complementarity and cooperation are concerned. Finally, the chapter concludes on why the ICC prosecutor should investigate the alleged crimes committed against the Palestinian Bedouin community in Area C, which fall within the ambit of the Court's territorial jurisdiction.

8.1. THE OSLO ACCORDS

The events leading to the signing of the Oslo Accords are well known: following secret negotiations which began during the first *Intifada* and the mutual recognition between the PLO and Israel, on 13 September 1993 Mahmoud Abbas on behalf of the PLO and Israel's Foreign Minister Shimon Peres signed the Declaration of Principles on Interim Self- Government Agreements (Oslo I) in Washington.¹⁰ The Accord envisaged a gradual withdrawal of Israeli military forces and gradual transfer of powers during an interim period of originally five years.

Subsequently, in September 1995 the parties signed The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (Oslo II), which superseded all interim agreements previously signed. The West Bank was divided into three areas (A, B and C). In Area A, the Palestinians were to acquire control over civil matters, with responsibility for internal security and public order.¹¹ In Area B, Palestinians were to acquire control over civil matters and public order, whereas Israel retained the power to protect Israelis from the threat of terrorism.¹² In Area C, Israel had territorial jurisdiction, except for the functional jurisdiction of the Palestinian Council (which later became the Palestinian National Authority, or PNA) over Palestinians for 'civil powers and responsibilities not relating to territory'.¹³

See *Situation in the State of Palestine* (Judge Péter Kovács' Partly Dissenting Opinion) ICC-01/18-143-Anx1 (5 February 2021) 370.

⁹ *ibid* 371.

¹⁰ I Malik, 'Analysis of the Oslo Accords' (2001) 21 *Strategic Studies* 134, 135. For an analysis of the legal status of the Accords see the authorities cited in n 18.

¹¹ Arts XI(2) and XIII(1) Oslo II.

¹² *ibid* Arts XI(2) and XIII(2).

¹³ *ibid* Arts XI(2), XIII(2)(8), XVII(2) and (4).

The Accords envisaged a gradual transfer of responsibility to the Palestinians regarding Areas B and C ‘except for the issues of permanent status negotiation [including Jerusalem and the settlements] and of Israel’s overall responsibility for Israelis and borders’.¹⁴ Furthermore, Israel maintained control over external security.¹⁵ On criminal matters, the Palestinian Council had jurisdiction over ‘all offenses committed by Palestinians and/or non-Israelis’ in the West Bank and Gaza, with the exclusion of certain territories, such as Area C.¹⁶ Israel retained jurisdiction over offences committed by Israelis on Palestine’s territory and over Area C.¹⁷ Because of the Accords’ repartition of competences in criminal matters between the Palestinian Council and Israel, some states, scholars and practitioners claim that the ICC lacks jurisdiction over alleged crimes committed by Israelis on Palestine’s territory, which are not within Palestine’s criminal jurisdiction domestically. However, as the following sections will illustrate, this interpretation is faulty given that ICC jurisdiction is not dependent on states parties’ domestic criminal jurisdiction.

Whereas the precise legal character of the agreements is still debated, their legally binding character is not open to interpretation.¹⁸ A statement made by the Palestinian President on 19 May 2020 – announcing that Palestine is absolved ‘of all the agreements and understandings with the American and Israeli governments and of all the commitments based on these understandings and agreements, including the security ones’¹⁹ – raised questions on the continued validity of the Accords. The PNA subsequently clarified that ‘the Statement was not made as part of the record of [ICC] proceedings and did not in any way purport to, nor does it, legally affect the question presently before the Chamber’.²⁰ Furthermore, on 19 November 2020, it was reported that the PNA would resume civil and security cooperation with Israel.²¹ Thus, despite violations of the agreements on both sides, neither party has

¹⁴ *ibid* Arts XI(2)(c), XIII(2)(b)(8), XII(4)(a).

¹⁵ *ibid*, Art X(4).

¹⁶ Annex IV Art I.

¹⁷ Annex IV Art I(2).

¹⁸ Some authors consider the Accords as treaties between two states, to which the VCLT applies. See for example J Quigley, ‘The Israel-PLO Interim Agreements: Are They Treaties?’ (1997) 30 *Cornell International Law Journal* 720. Others argue that Palestine was not a state at the relevant time. Nevertheless, the Oslo Agreements can still be considered legally binding under the customary international law of treaties as agreements ‘between other subjects of international law’. See Art 3 VCLT; O Kittrie, ‘More Process than Peace: Legitimacy, Compliance, and the Oslo Accords’ (2003) 101 *Michigan Law Review* 1661, 1675; GR Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (OUP, 2010) 5758. Some authors claim that the Accords are legally void because the Palestinians’ consent was coerced through the illegal use of force. R Wilde, ‘Legal Opinion: Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza “legal” or “illegal” in international law?’ (29 November 2022), www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_opt_legal_opinion.pdf.

¹⁹ Palestine News and Info Agency, ‘President Abbas declares end to agreements with Israel, US; turns over responsibility on occupied lands to Israel’ (Wafa, 19 May 2019), english.wafa.ps/page.aspx?id=cBrJbOa117154132029acBrJbO.

²⁰ *Situation in the State of Palestine* (The State of Palestine’s response to the Pre-Trial Chamber’s Order requesting additional information) ICC-01/18 (4 June 2020) 6.

²¹ D Jacobs, J Kern and D Reisner, ‘Implications for the ICC on the Resumption of Israeli-Palestinian Cooperation and the Relevance of the Oslo Accords in Current ICC Litigation’ (*OpinioJuris*, 4 January 2021), opiniojuris.org/2021/01/04/implications-for-the-icc-on-the-resumption-of-israeli-palestinian-cooperation-and-the-relevance-of-the-oslo-accords-in-current-icc-litigation.

formally abrogated them. This chapter will proceed on the premise that the Accords are legally binding.

8.2. WHY THE OSLO ACCORDS DO NOT BAR THE COURT'S JURISDICTION OVER ALLEGED CRIMES COMMITTED AGAINST THE BEDOUIN COMMUNITY

As discussed in the preceding section, pursuant to the Oslo Accords, Israel (not Palestine) has exclusive criminal jurisdiction over conduct by Israelis in the Occupied Palestinian Territory. Likewise, Palestine's jurisdiction does not extend to Area C in the West Bank or to East Jerusalem. Importantly, this set-up was intended to be for a five-year period, although it has been extended over time.

Several influential voices (states, prominent academics and practitioners) interpreted these clauses in the Oslo Accords to have preclusive effect on the Court's jurisdiction over Israelis and over alleged crimes committed in Area C and in Jerusalem.²² The background to this argument, in a nutshell, is that the prevailing interpretation of Article 12 of the Rome Statute is that it is premised on a delegation-based theory of jurisdiction.²³ Therefore, a state party like Palestine would not be able to delegate jurisdiction to the ICC if it does not have that jurisdiction domestically in the first place (*nemo dat quod non habet*). Aside from the fact that the delegation-based theory of jurisdiction is not universally accepted, those arguments misconstrue the principle *nemo dat quod non habet*, conflate the distinct notions of a state's jurisdiction to prescribe and its enforcement jurisdiction, and disregard the law of occupation.²⁴

In a separate opinion appended to the Pre-Trial Chamber's decision of February 2021, Judge Kovács also reached the conclusion that the Accords preclude the Court's jurisdiction over those crimes that are excluded from the reach of Palestine's domestic jurisdiction, although he followed a different line of reasoning. In summary, he argued that the Court should have considered the Accords as part of the applicable law under Article 21(1)(b) of the Statute,²⁵ and challenged the transposition of the Appeals Chamber's reasoning in the *Afghanistan* decision to Palestine's situation.²⁶

²² See for example the following submissions in the *Situation in the State of Palestine* (ICC-01/18): Observations by the Federal Republic of Germany (16 March 2020) 26–28; Submission of Observations Pursuant to Rule 103 by the Czech Republic (12 March 2020) 12–13; Submission Pursuant to Rule 103 (Todd F Buchwald and Steven J Rapp) (16 March 2020) 25–26; Observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence (Badinter et al) (16 March 2020) 51–56; Observations on the Prosecutor's Request on behalf of the Non-Governmental Organisations: The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs (16 March 2020) 84–98; *Amicus Curiae* Observations of Prof Laurie Blank, Dr Matthijs de Blois, Prof Geoffrey Corn, Dr Daphné Richemond-Barak, Prof Gregory Rose, Prof Robbie Sabel, Prof Gil Troy and Mr Andrew Tucker (16 March 2020) 79–82. See also Y Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute. A Response to Yaël Ronen' (2010) 8 *Journal of International Criminal Justice* 329, 339–42.

²³ Shany (n 22) 331–32.

²⁴ Situation in the State of Palestine (Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States) ICC-01/18, 30 April 2020, 69ff.

²⁵ Kovács Partly Dissenting Opinion (n 8) para 285.

²⁶ *ibid* paras 360–61.

In his view, the proper approach to determine the extent of the Court's territorial jurisdiction was a harmonised interpretation of the provisions of the Accords and of the Rome Statute that would have allowed Palestine to comply with its international obligations under both treaties.²⁷ In practice, under this view the Court would also be bound by Palestine's domestic criminal jurisdiction – a view which is challenged in section 8.2.2. Kovács' remaining arguments will be addressed in section 8.3.

8.2.1. The Oslo Accords do not Constitute 'Applicable Treaties' under Article 21(1)(b) of the Rome Statute

I respectfully disagree with Judge Kovács' contention that the Court should have looked beyond the sources in Article 21(1)(a) – namely the Statute, Elements of Crimes and the Rules of Procedure and Evidence – to rule on the geographical scope of its territorial jurisdiction, and that the Oslo Accords constitute 'applicable treaties' under Article 21(1)(b) of the Rome Statute.²⁸

First, as a matter of hierarchy of sources, the Court should not resort to the sources in Article 21(1)(b) (applicable treaties and the sources and rules of international law) 'unless it has found no answer in paragraph (a)'.²⁹ In the case at hand, the scope of the Court's territorial jurisdiction is clearly regulated in Article 12 of the Statute, which provides that the Court may exercise its jurisdiction if the state 'on the territory of which the conduct in question occurred' is a party to the Statute. Such is the case with the alleged crimes committed on Palestine's territory, including those against the Bedouin community. Therefore, there was no need to resort to Article 21(1)(b).

Second, the Oslo Accords have no bearing on the Court's jurisdiction even if they are binding on Palestine. The Court's jurisdiction in Article 12 is not defined by reference to states parties' domestic criminal jurisdiction pursuant to the international obligations they may have contracted. Whenever international obligations contracted by a state party are relevant for the law and practice of the ICC, the Statute expressly refers to such obligations. One example is Article 98, which refers to a member state's 'obligations under international law'. However, there is no such reference in Article 12. Thus, the Oslo Accords are not applicable in relation to the Court's jurisdiction.

In any event, according to authoritative commentators, 'applicable treaties' in Article 21(1)(b) of the Statute refers to those treaties of general application that form the basis for the definitions of crimes over which the Court has jurisdiction. Such treaties include, for instance, the Geneva Conventions, the Genocide Convention, the Convention on the Rights of the Child, the Vienna Convention on the Law of Treaties (VCLT), the UN Charter and treaties to which the Court is a party.³⁰ According to deGuzman, the provision should not be understood to include international agreements binding on the states that would normally have jurisdiction in given situations.

²⁷ *ibid* para 366.

²⁸ *ibid* paras 284–85, 308.

²⁹ W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2016) 519.

³⁰ M deGuzman, 'Article 21' in K Ambos, *Rome Statute of the International Criminal Court. Article-by-article Commentary*, 4th edn (Beck, 2022) 1129, mn 26; Schabas (n 29) 519–20.

In her view, given ‘the ICC’s wide-ranging jurisdiction ... this could contribute unnecessarily to the fragmentation of international criminal law’,³¹ and this argument is compelling. Following this line of reasoning, bilateral agreements binding on a state party, such as the Oslo Accords, do not form part of the applicable law under Article 21(1)(b).

For these reasons, the logical premise on which Judge Kovács’ opinion is founded – that the Oslo Accords are relevant ‘applicable treaties’ to determine the scope of the Court’s territorial jurisdiction – is flawed.

8.2.2. ICC Jurisdiction is not Dependent on States Parties’ Domestic Criminal Jurisdiction

When a state accedes to the Rome Statute and then confers jurisdiction to the ICC through a referral (Articles 13(a) and 14 Rome Statute), the Court’s jurisdiction over Rome Statute crimes committed on that state’s territory is automatic. No further expression of consent is necessary to give effect to the Court’s jurisdiction. As Stahn illustrated, there is also no requirement that the state in question has a parallel jurisdictional title in its domestic legal order.³² In fact, as Schabas put it, ‘Article 12(2) authorizes the Court to exercise jurisdiction over “the territory” of a state party and not over “the territory over which their courts exercise criminal law jurisdiction”’.³³

If the Court’s jurisdiction were dependent on the domestic criminal jurisdiction of the state concerned, this would create a very volatile situation for the Court, given that domestic law can change over time. This instability would seriously undermine the Court’s function. Such an interpretation would also be at odds with the rationale of the principle of complementarity, according to which the Court can step in when a state party is unable to prosecute because it lacks the necessary domestic legislation.³⁴ This too suggests that the Court can exercise jurisdiction independently of a parallel jurisdictional title in the state concerned.

In this sense, the Court’s jurisdiction is independent of the domestic criminal jurisdiction of the state party concerned. Any interpretation of the principle *nemo dat quod non habet* that presupposes that the ICC is bound by the domestic criminal jurisdiction of a state party is thus erroneous.³⁵

³¹ DeGuzman (n 30) Art 21 mn 26.

³² C Stahn, ‘Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet* Doctrine – A Reply to Michael Newton’ (2016) 49 *Vanderbilt Journal of Transnational Law* 443, 449.

³³ *Situation in the State of Palestine* (Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence – Professor William Schabas) ICC-01/18 (15 March 2020) para 25.

³⁴ Stahn (n 32) 449.

³⁵ *ibid* 448–49; R Rastan, ‘Jurisdiction’ in C Stahn (ed), *The Law and the Practice of the International Criminal Court* (OUP, 2015) 156–57; *Situation in the State of Palestine* (Submission pursuant to Rule 103 – Professors Asem Khalil & Halla Shoaibi) ICC-01/18 (16 March 2020) para 4. *Contra*: K Ambos, ‘“Solid jurisdictional basis”? The ICC’s fragile jurisdiction for crimes allegedly committed in Palestine’ (*EJIL:Talk!*, 2 March 2021), www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine.

In any event, there is also an alternative theory of ICC jurisdiction that is grounded on the right to punish (*jus puniendi*) of the international community and is thus entirely independent of any delegation by states.³⁶ Under this ‘universalistic’ view, ICC jurisdiction is inherently international in nature and does not derive from a bundle of delegated national jurisdiction titles. If one assumes that the basis of the Court’s jurisdiction is *jus puniendi*, any bilateral agreements on the exercise of domestic criminal jurisdiction are clearly irrelevant for the Court’s jurisdiction.

Judge Kovács, in his partly dissenting opinion appended to the Pre-Trial Chamber’s decision on the scope of the Court’s territorial jurisdiction in Palestine, held that the Court’s jurisdiction mirrors Palestine’s domestic criminal jurisdiction as defined by the various Israeli–Palestinian agreements dividing the exercise of competences between them.³⁷ He quoted a *dictum* in the *Rohingya/Myanmar* Jurisdiction Decision in which the Chamber (over which he presided) held that

the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to Article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute.³⁸

However, when read in context, that paragraph does not suggest that the Court can only exercise jurisdiction if there is a parallel jurisdictional title in the state party concerned. Rather, the paragraph explains the reasons why the Court can exercise jurisdiction when only part of the relevant conduct occurs on the territory of a state party, similarly to what happens in domestic legal systems. This is far from asserting a requirement of parallel jurisdiction between the Court and the state party concerned. Any different interpretation would be legally unsound and should not be followed.

To conclude on this point, the fact that Palestine, by virtue of the Oslo Accords, cannot exercise its domestic criminal jurisdiction over Israelis and over crimes committed in Area C does not mean that the Court cannot investigate and prosecute such crimes.

8.2.3. The Oslo Accords Limit Palestine’s Enforcement Jurisdiction but do not Affect its Prescriptive Jurisdiction

The arguments on the relevance of the Oslo Accords also overlook the distinction between prescriptive jurisdiction and enforcement jurisdiction. The capacity of a state, such as Palestine, to delegate its jurisdiction to the ICC is a manifestation of its capacity to make the law, that is its *prescriptive* jurisdiction.³⁹ O’Keefe describes

³⁶ *Prosecutor v Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (ICC-02/05-01/09-397), 6 May 2019, 115; K Ambos, ‘Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law’ (2013) 33 *Oxford Journal of Legal Studies* 293; C Kreß, ‘Article 98’ in Ambos (n 30) mn 126–27.

³⁷ Kovács Partly Dissenting Opinion (n 8) para 370.

³⁸ Request under Regulation 46(3) of the Regulations of the Court (Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’) ICC-RoC46(3)-01/18 (6 September 2018) 70.

³⁹ A Abofoul, ‘The Oslo Accords and the International Criminal Court’s Jurisdiction in the Situation in the State of Palestine’ (*Opinio Juris*, 28 July 2020), opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine.

a state's jurisdiction to prescribe as 'a state's right under international law to assert the applicability of its law to given circumstances, whether by means of primary or subordinate legislation, executive decree, or judicial action'.⁴⁰ A state's prescriptive jurisdiction is plenary under customary international law, meaning that it is unqualified and absolute, with no limitations.⁴¹ The Oslo Accords do not regulate Palestine's prescriptive jurisdiction (nor could they do so),⁴² but rather its ability to exercise criminal jurisdiction over certain categories of persons (Israelis) and over parts of its territory (such as Area C).

The ability to conduct criminal proceedings is part and parcel of Palestine's *enforcement* jurisdiction. Enforcement jurisdiction 'refers to a state's right under international law to deploy investigative, coercive or custodial powers, whether through police or other executive action or through its courts'.⁴³ In the case at hand, the Oslo Accords undoubtedly limit Palestine's enforcement jurisdiction. In fact, they award exclusive jurisdiction over Israelis and crimes committed in Area C to Israel.⁴⁴ That a state cannot exercise its criminal (enforcement) jurisdiction by virtue of a bilateral agreement (or other international obligation) has nothing to do with the fact that the state lawfully possesses the underlying (prescriptive) jurisdiction under international law.⁴⁵ If anything, the Oslo Accords demonstrate Palestine's pre-existing jurisdiction to delegate the exercise of its criminal jurisdiction to other entities.⁴⁶ Indeed, if Palestine did not possess this jurisdiction in the first place, it could not have concluded the Oslo Accords. Any arguments that the Accords' references to 'criminal jurisdiction' (of the Palestinian Council and of Israel, respectively) mean jurisdiction to prescribe misapprehend the notion of prescriptive jurisdiction.⁴⁷ Moreover, as discussed in more detail in the next section, any interpretation granting Israel prescriptive jurisdiction over Palestine's territory would be inconsistent with the legal framework of the law of occupation. Under this body of law, Israel does not possess prescriptive jurisdiction over the occupied Palestinian territory, as that is a sovereign prerogative that rests with the representatives of the occupied people.

Furthermore, when the Accords state that Israel has 'sole' jurisdiction over offences committed by Israelis and in Area C,⁴⁸ that does not mean that they grant Israel exclusive jurisdiction over its nationals. While the Oslo Accords are binding on Israel and Palestine, they do not bind other subjects of international law, and cannot withdraw Israelis from the jurisdiction of other courts, whether domestic or international.⁴⁹

⁴⁰ R O'Keefe, 'Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"' (2016) 49 *Vanderbilt Journal of Transnational Law* 1, 4.

⁴¹ *SS Lotus (France v Turkey)* 1927 PCIJ Ser A No 10, 19.

⁴² *Contra* Jacobs et al (n 21).

⁴³ O'Keefe (n 40) 4.

⁴⁴ Art I(2) of Annex IV to the Interim Agreement states that 'Israel has *sole* criminal jurisdiction' (emphasis added).

⁴⁵ O'Keefe (n 40) 5.

⁴⁶ Stahn (n 32) 451; *Situation in the State of Palestine* (Submission pursuant to Rule 103 – Professors Asem Khalil & Halla Shoaibi) ICC-01/18, 16 March 2020, paras 24–25.

⁴⁷ Jacobs et al (n 21).

⁴⁸ Art I(2), Annex IV, Oslo II.

⁴⁹ See *mutatis mutandis* B van Schaak, 'Can the Int'l Criminal Court Try US Officials?—The Theory of "Delegated Jurisdiction" and Its Discontents (Part II)' (*Just Security*, 9 April 2018), www.justsecurity.org/54620/intl-criminal-court-officials-the-theory-delegated-jurisdiction-discontents-part-ii (discussing how the SOFA

It has also been argued that, when states enter into bilateral agreements limiting their domestic jurisdiction, their jurisdictional competences remain intact (including their enforcement jurisdiction). The proponents of this theory view the effect of those agreements as to oblige the state on whose territory the crime is committed to refrain from exercising its enforcement jurisdiction in relation to a particular class of persons or geographical area.⁵⁰ Under this view, the Oslo Agreements would not even curtail Palestine's enforcement jurisdiction as such, but only limit its ability to exercise it with respect to Israelis and crimes committed in Area C.

In conclusion, any prior agreements potentially limiting the enforcement of a state's criminal jurisdiction domestically do not affect the Court's territorial jurisdiction, which is regulated by the Statute and not by bilateral agreements. For this reason, the Oslo Accords have no bearing on the Court's jurisdiction in the situation in Palestine. Palestine retains the right under customary international law to delegate its enforcement jurisdiction to another entity (in this case, the ICC) in respect of conduct committed on its territory.

8.2.4. Under the Law of Occupation an Occupying Power has Very Limited Prescriptive Jurisdiction Over the Occupied Territory

The Oslo Accords are best interpreted in their proper context: an agreement on the gradual transfer of power from Israel, the occupying power, to the occupied population, represented by the Council. Such transfer of power, and the ensuing distribution of jurisdiction between Israel and Palestine, occurred within the constraints imposed by the applicable law, namely the law of occupation.⁵¹

Under the law of occupation, the occupying power does not acquire sovereignty over the occupied territory, but is only an administrator for such time as the territory remains under occupation.⁵² Sovereignty rests with the occupied sovereign, namely, in this case, Palestine and its people. As Dinstein put it, 'the sovereignty of the displaced sovereign over the occupied territory is not terminated. It is not even suspended.'⁵³

One of the corollaries of the above principle is that plenary prescriptive jurisdiction over the occupied territory, which is an attribute of sovereignty,⁵⁴ rests with the representatives of the occupied people.⁵⁵ Such prescriptive jurisdiction is unaffected by belligerent occupation.⁵⁶ The law of occupation only grants the occupying power the ability to issue military orders when the need arises for the maintenance

between the US and Afghanistan is only binding on the parties and does not bind other domestic courts or the ICC).

⁵⁰ *ibid.*

⁵¹ Prosecution Response (n 24) paras 69–70; *Situation in the State of Palestine* (Submissions Pursuant to Rule 103 – Robert Heinsch & Giulia Pinzauti) ICC-01/18 (16 March 2020) 63–67.

⁵² Art 55 Hague Regulations. See also Heinsch & Pinzauti submission (n 51) 64.

⁵³ Y Dinstein, *The International Law of Belligerent Occupation* (CUP, 2009) 113.

⁵⁴ S Besson, 'Sovereignty' in *Max Planck Encyclopaedia of Public International Law* (2011) 118.

⁵⁵ Prosecution Response (n 24) para 70.

⁵⁶ H Jöbstl, 'An Unlikely Day in Court? Legal Challenges for The Prosecution of Israeli Settlements under The Rome Statute' (2018) 51 *Israel Law Review* 339, 351–52: 'A state retains such prescriptive territorial jurisdiction even when under occupation. The Oslo Accords cannot take away this inherent criminal

of security and public order, but without transforming ‘the laws in force in the country’.⁵⁷ Other than that, the domestic jurisdiction of the occupying power does not and shall not apply in the occupied territory.⁵⁸ Thus, the occupying power has very limited prescriptive jurisdiction over the occupied territory. In contrast, the occupying power is responsible to ‘take all the measures in his power to restore and ensure, as far as possible, public order and safety’.⁵⁹ In other words, the occupying power retains enforcement jurisdiction over the occupied territory for the duration of the occupation.

Against this backdrop, it is apparent that the Accords concern the gradual transfer of responsibilities and authority from Israel, as an occupying power, to the PNA. Thus, where Oslo II refers to a ‘transfer’ of jurisdiction from Israel to the PNA during the redeployment phases,⁶⁰ this term truly indicates ‘a restoration of the full exercise of jurisdiction to the sovereign state, namely Palestine’.⁶¹ It does not indicate that Israel has the sovereign prerogative of prescriptive jurisdiction over Palestine’s territory. This is a prerogative that rests, and remains, with the occupied Palestinian people. In keeping with that, it was within Palestine’s rights to refer the situation occurring on its territory to the ICC.

8.3. IMPLICATIONS OF THE OSLO ACCORDS FOR ICC PROCEEDINGS

The considerations above do not imply that the Oslo Accords have no bearing whatsoever on ICC proceedings in the situation in Palestine. To the contrary, the Accords – which have an impact on Palestine’s ability to prosecute alleged Rome Statute crimes committed on its territory – are relevant in two important respects: complementarity and cooperation.

Regarding complementarity, the relevance of the Oslo Accords is that they render the Palestinian national judicial system substantially unavailable. As is well known, states have the primary responsibility for the investigation and prosecution of Rome Statute crimes, and the Court can step in only in case of inaction by the domestic authorities, or if the domestic proceedings resulted from the unwillingness or inability to genuinely carry out the proceedings.⁶² The principle of complementarity is operationalised as an admissibility test in Article 17 of the Statute. The provision envisages the Court’s jurisdiction over a state party’s territory where the state is unable to prosecute due to the ‘unavailability of its national judicial system’.⁶³ The admissibility assessment undertaken by the Office of the Prosecutor takes into

jurisdiction but merely oblige the State of Palestine not to exercise it with regard to Israeli nationals or conduct in Area C’.

⁵⁷ Art 43 Hague Regulations.

⁵⁸ Arts 54, 64 and 66 GC IV and Art 43 HR.

⁵⁹ Art 43 HR.

⁶⁰ Oslo II, Arts XI(2)(e) and XVII.

⁶¹ Heinsch & Pinzauti submission (n 51) para 66.

⁶² *Prosecutor v Katanga and Ngudjolo Chui* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497 (25 September 2009) (App Ch) paras 75–79.

⁶³ Art 17(3) RS.

account the limits on the exercise of jurisdiction by an occupied sovereign. Without full control over its territory, Palestine is unable to fulfil its duty to exercise criminal jurisdiction over those responsible for alleged Rome Statute crimes committed on its territory.⁶⁴ Moreover, the Oslo Accords limit the exercise of Palestine's enforcement and adjudicative jurisdiction to less than 40 per cent of its territory, thereby rendering it unable to genuinely prosecute.⁶⁵ The Accords also proscribe the prosecution of Israeli nationals by Palestinian courts, whereas territorial jurisdiction typically subsists irrespective of the nationality of the offender.⁶⁶

Secondly, at a later stage of proceedings, the Accords may affect the execution of request under Part 9 of the Statute, as Palestine only has limited enforcement jurisdiction. The Rome Statute takes into account that states may have conflicting obligations on the strength of pre-existing agreements. Articles 97–98 address this situation. In particular, Article 98(2) provides that the Court shall not ask a state party to surrender a suspect if it has a prior undertaking not to do so. It is noteworthy that these provisions are enshrined in Part 9 of the Statute ('International Cooperation and Judicial Assistance'), rather than in Part 2 ('Jurisdiction, Admissibility and Applicable Law'). This means that for the drafters such agreements could create cooperation problems, rather than jurisdictional problems.⁶⁷ This argument further supports the interpretation that bilateral agreements limiting domestic jurisdiction do not affect the Court's jurisdiction, but only the obligation to cooperate with the Court and problems in relation thereto.

The ICC Appeals Chamber has confirmed the above interpretation. In the *Afghanistan* Appeal Judgment, it held that bilateral agreements limiting a state party's jurisdiction may have an impact on that state's ability to cooperate with the Court, but do not bar the Court's jurisdiction to investigate alleged Rome Statute crimes committed on that state's territory.⁶⁸ This judgment, albeit issued in a different context, is a highly persuasive authority, and the majority of Pre-Trial Chamber I in the Palestine situation correctly adopted the same line of reasoning when it held that the Oslo Accords 'are not pertinent to the issue of the authorization of an investigation'.⁶⁹ While the wording of Article 98(2) is reminiscent of status of forces agreements (SOFAs), given that it refers to 'sending State', the provision does not exclude other types of agreements from its purview. Authoritative commentators confirm this interpretation.⁷⁰ Although the content of the Oslo Accords is markedly different from

⁶⁴Shany (n 22) 339: 'situations in which states (or quasi-states) lose control over parts of their territory represent a paradigmatic case for self-referral of situations to the ICC in so far as they reflect the "inability of the State genuinely to prosecute"'.

⁶⁵Heinsch & Pinzauti submission (n 51) para 67.

⁶⁶As well as the nature of the conduct. See O'Keefe (n 40) 5.

⁶⁷Stahn (n 32) 451.

⁶⁸*Afghanistan* Appeal Judgment (n 2).

⁶⁹P-TC I Decision on the scope of the Court's territorial jurisdiction in Palestine (n 3) para 129.

⁷⁰Kreß (n 36), mn 162 (arguing that the provision applies to agreements need to make use of the technical concept of a 'sending' and a 'receiving' state and give rise to the same conflict of international obligations); O'Keefe (n 40) 8 (arguing that although Art 98(2) refers to jurisdictional rights typically found in SOFAs, 'there is no reason why it cannot cover other agreements falling within the terms of the provision'); C Kress and K Prost, 'Article 98' in O Triffterer and K Ambos (eds), *The Rome Statute of The International Criminal Court: A Commentary*, 3rd edn (Beck, 2016) 2143. *Contra* Kovács Partly Dissenting Opinion (n 8) para 364 (arguing that the content of the Oslo Accords is very different from the content of the other kinds of agreements to which art 98 applies).

SOFAs, they likewise have the effect to limit the exercise of a state party's jurisdiction. Thus, there is no reason to exclude them from the scope of application of Article 98(2).

In his Partly Dissenting Opinion appended to the decision on the scope of the Court's territorial jurisdiction in Palestine, Judge Kovács expressed a different view on this point. He argued that 'the extrapolation of the *dicta* contained in Pre-Trial Chamber II's decision and in the Appeals Chamber's judgment [in Afghanistan] to the Oslo Accords is problematic'.⁷¹ He disagreed with the majority that the Accord's impact is only to be dealt with at a later stage of proceedings when admissibility and cooperation are under scrutiny. He also submitted that the proper approach would have been a 'harmonized interpretation' of the provisions of the Oslo Accords and the Rome Statute, which would allow Palestine to implement its obligations under both treaties at the same time.⁷² While undoubtedly well researched and extensively reasoned, Judge Kovács' dissent is unpersuasive for several reasons, outlined below.

8.3.1. The *Afghanistan* Appeal Judgment is a Highly Persuasive Authority

The *Afghanistan* Appeal Judgment, while not binding per se on the Palestine Pre-Trial Chamber,⁷³ provided an authoritative interpretation of the statutory provisions on territorial jurisdiction. Likewise, it authoritatively interpreted the provisions regulating cooperation problems in case a state party contracted conflicting obligations by virtue of pre-existing bilateral agreements limiting domestic jurisdiction. The majority thus decided to be guided by this decision in its reasoning.⁷⁴ Conversely, the two reasons provided by Judge Kovács for departing from the *Afghanistan* Appeal Judgment – namely, that the Oslo Accords are of a different kind, and that Palestine, unlike Afghanistan, is not a state – are unpersuasive.

First, Judge Kovács argued that the content of the agreements at issue in *Afghanistan* was very different from that of the Oslo Accords.⁷⁵ While it is a fact that the Oslo Accords are not SOFAs, the preceding section already explained that the scope of application of Article 98 is not limited to SOFAs. Second, Judge Kovács pointed out that the SOFAs at issue in the *Afghanistan* Appeal Judgment were contracted between two sovereign states. Instead, in his view Palestine is a 'special entity',⁷⁶ which he elsewhere defines as a '*nasciturus* state, recognized already as a full State by a great number of States, but not recognized as such by another number of States'.⁷⁷

At first sight, Judge Kovács seems to raise a valid point. While some date Palestine's statehood to the mandate period,⁷⁸ many would argue that the decisive moment in

⁷¹ Kovács' Partly Dissenting Opinion (n 8) para 364.

⁷² *ibid* para 366.

⁷³ Under Art 21(2) RS the Court '*may* apply principles and rules as interpreted in its previous decisions' (emphasis added).

⁷⁴ P-TC I Decision on the Court's territorial jurisdiction in Palestine (n 3) paras 128–29.

⁷⁵ Kovács Partly Dissenting Opinion (n 8) 360.

⁷⁶ *ibid* 360.

⁷⁷ *ibid* 326.

⁷⁸ J Quigley, *The Statehood of Palestine* (CUP, 2010) 3–114; MM Qafisheh, 'Citizens of the State of Palestine and the Future of Palestinian Refugees: Legal and political scenarios, in *idem* (ed) *Palestine Membership in the United Nations: Legal and Practical Implications* (Cambridge Scholars Publishing, 2013) 45, 120 (dating statehood to the entry into force of the Lausanne Peace treaty).

Palestine's quest for statehood was GA resolution 67/19 of 29 November 2012, which accorded Palestine the status of non-member observer state in the United Nations.⁷⁹ Thus, one may argue that Palestine's statehood at the time when the Oslo Accords were concluded was uncertain, unlike Afghanistan's situation when it concluded the SOFAs with the US.

Nevertheless, the conclusion that Judge Kovács draws – that the uncertainty regarding Palestine's statehood excludes the Oslo Agreements from the purview of Article 98(2) – is open to challenge because at the time the Accords were concluded, Palestine already had at a minimum the sovereign prerogative of prescriptive jurisdiction. Even on the assumption that Palestine may not have been a fully fledged state by 1993–95, the very fact that the PLO as the legitimate representative of the Palestinian people concluded these international agreements with Israel demonstrates that at the very least Palestine already possessed the sovereign prerogative of prescriptive jurisdiction by virtue of its signature of the Accords.⁸⁰ This is sufficient to render Palestine's situation comparable to that of Afghanistan, as far as the conclusion of bilateral agreements is concerned. Other sovereign prerogatives may have consolidated over time, culminating with Palestine's collective recognition as a non-member observer state within the United Nations in 2012. This is consistent with the theory that the creation of states is a 'process'⁸¹ and that there are some modes of creation of states that occur over time rather than 'at the stroke of midnight'.⁸² This may well be the case when a territory gradually acquires statehood while under belligerent occupation. But what matters here is that at the time of conclusion of the Oslo Accords, Palestine had the sovereign prerogative to conclude agreements with other states limiting the extent of its domestic jurisdiction.

Thus, there are no valid grounds to distinguish Palestine's situation from Afghanistan's, contrary to what Judge Kovács argued. Therefore, the principle that was articulated in the *Afghanistan* Appeal Judgment – that bilateral agreement limiting domestic jurisdiction are relevant to cooperation rather than to territorial jurisdiction – also applies to the Oslo Accords in the Palestine situation.

8.3.2. The Court Correctly Determined the Scope of its Territorial Jurisdiction by Reference to the Rome Statute Only

As explained in Section 8.2.1, the Court's jurisdiction is regulated by Article 12 of the Statute. This provision makes no reference to states parties' domestic criminal

⁷⁹ D Akande, 'Palestine as a UN Observer State: Does this Make Palestine a State?' (*EJIL:Talk!*, 3 December 2012), www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/; Situation in Palestine, Statement by the Office of the Prosecutor (3 April 2012), www.icc-cpi.int/sites/default/files/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf.

⁸⁰ See section 8.2.4.

⁸¹ J Crawford, *The Creation of States in International Law*, 2nd edn (OUP, 2006) 255.

⁸² *ibid* 349. For example, the grant of independence by the previous sovereign can take place through 'the gradual devolution of accretion of power in a local unit to the point where it is eventually seen as a separate state' (*ibid* 330). In this case, the acquisition of independence (and of statehood) may not occur at 'any clearly defined point in time' (*ibid* 349–50). Secession is another mode of creation that can occur over time. See for example the case of Guinea-Bissau (*ibid* 386). In practice, the distinction between devolution and secession may be artificial in some circumstances as elements of both processes can coexist (*ibid* 375).

jurisdiction pursuant to the international obligations they may have contracted. The consequence of this for Palestine's situation is that the Oslo Accords are not applicable by the Court in determining the scope of its jurisdiction, nor do they have a bearing on it. The problem is rather that Palestine has undertaken conflicting obligations through the Oslo Accords and by ratifying the Rome Statute. The former oblige Palestine to not exercise enforcement jurisdiction over Israelis, or over crimes committed in Area C and in East Jerusalem. The latter impose on it an obligation to cooperate with the Court, including for the execution of arrest warrants for the commission of crimes over the entirety of Palestine's territory, and irrespective of the nationality of the offender. Thus, in the future Palestine may well find itself in a situation in which it is faced with conflicting obligations under the Rome Statute and the Accords.

To solve this tension, Judge Kovács argued in his opinion that the Court should have interpreted the jurisdictional provisions in the Rome Statute in harmony with the rules of competence under the Oslo Accords.⁸³ Thus, in his opinion the Court could only investigate alleged crimes committed in Area C and in East Jerusalem subject to Israel's consent. This proposition is unconvincing for two main reasons.

First, as already explained, the Accords do not form part of the applicable law for determining the Court's jurisdiction under Article 21(1)(b) of the Statute. They are not applicable to determining the scope of the Court's jurisdiction even if they are binding on Palestine. Second, Judge Kovács' proposed 'harmonized interpretation' finds no basis in the VCLT or in international law insofar as it relates to two instruments with non-identical parties and that do not necessarily relate to the same subject matter.⁸⁴ Whether the rules on treaty interpretation codified in the VCLT apply at all to the interpretation of the Oslo Accords depends on their legal status as agreements between states (Article 2(1)(a) VCLT). In any event, given that the parties to the Oslo Accords and the Rome Statute are not the same, resolving treaty conflicts cannot disregard the principle that a treaty binds the parties and only the parties; it does not create obligations for third states. The implication is that it is not possible to reconcile the treaties by interpreting one (the Rome Statute) by reference to the other (the Oslo Accords) where this would affect the rights and obligations of the other states parties to the Rome Statute, unless their consent is also obtained.⁸⁵ By the same token, neither treaty can be invalidated, or subordinated to the other, by applying other principles of conflict resolution such as *lex posterior* (a later law repeals an earlier law) or *lex specialis* (special law repeals general law).⁸⁶ In any event, these considerations do not pertain to the opening of an investigation. If at a later stage of proceedings Palestine receives a cooperation request from the Court

⁸³ Kovács' Partly Dissenting Opinion (n 8) para 366.

⁸⁴ It is generally accepted that conflicts between treaties may be solved by way of a harmonising interpretation that gives 'the widest possible degree of application to both colliding provisions', even if this rule is not mentioned in the VCLT (N Matz-Lück, 'Treaties, Conflicts between, in *Max Planck Encyclopaedia of Public International Law* (2010) para 20). However, in the case at hand the treaties do not necessarily relate to the same subject-matter and have non-identical parties. These factors limit the operation of harmonising interpretations.

⁸⁵ S Ranganathan, 'Responding to Deliberately Created Treaty Conflicts' in C Tams et al (eds), *Research Handbook on the Law of Treaties* (Elgar, 2014) 447, 452.

⁸⁶ *ibid* 452–53.

that conflicts with Palestine's obligations under the Oslo Accords, the conflict will be solved pursuant to Article 98(2) of the Rome Statute. In contrast, Judge Kovács' proposed harmonised interpretation in practice has the effect of giving priority to the provisions of the Oslo Accords on the repartition of competences over the jurisdictional provisions of the Rome Statute. This approach finds no basis under the rules on treaty interpretation enshrined in the VCLT or in customary international law.⁸⁷ The majority of Pre-Trial Chamber I correctly determined the scope of the Court's territorial jurisdiction by reference to the jurisdictional provisions in the Statute only.

CONCLUSION

This chapter has argued that the Oslo Accords do not bar ICC jurisdiction over alleged Rome Statute crimes committed on Palestine's territory, including those committed against the Bedouin communities at risk of displacement in Area C. Under the jurisdictional provisions of the Rome Statute, when a state party confers jurisdiction to the ICC, the Court's jurisdiction over Rome Statute crimes is automatic over that state's territory. No further expression of consent is necessary. There is also no requirement that the state in question has a parallel jurisdictional title in its domestic legal order. By the same token, any prior agreements potentially limiting the enforcement of that state's criminal jurisdiction domestically do not affect the Court's territorial jurisdiction. If one assumes that the basis of the Court's jurisdiction is *jus puniendi*, any bilateral agreements on the exercise of criminal jurisdiction domestically have no bearing on the Court's jurisdiction. Even if one adopts the delegation theory, the arguments on the relevance of the Oslo accords conflate a state's jurisdiction to prescribe with its enforcement jurisdiction and disregard the law of occupation. However, these are distinct notions, relating to distinct competences. A state may undertake by treaty to refrain from exercising certain jurisdictional rights, such as the right to conduct criminal proceedings; however, it still retains this right under customary international law in respect of conduct committed on its territory. The Oslo Accords did not, and could not, strip Palestine of the (prescriptive) jurisdiction over its territory, but they only limited the exercise of this jurisdiction. In this sense, they do not affect the Court's jurisdiction over alleged Rome Statute crimes committed on Palestine's territory.

Accordingly, the alleged crimes committed against the Palestinian Bedouin community in Area C fall within the ambit of the Court's territorial jurisdiction. It is hoped that the prosecutor will undertake a comprehensive investigation of the situation as a whole, without overlooking the crimes committed against the Bedouin community. Failing to include these alleged crimes within the scope of the investigation would result in an artificial and unjustified separation of the Bedouin community from the broader Palestinian polity.

⁸⁷ Applying Kovács' harmonised interpretation comes closer to the application of the *lex prior* principle – a principle that has not found general acceptance in international law. Matz-Lück (n 84) para 17.