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Court

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PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

Public Document

Brazilian Observations on ICC Territorial Jurisdiction in Palestine

Source: **The Federative Republic of Brazil**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. On 20 December 2019, the Office of the Prosecutor (hereinafter "OTP") at the International Criminal Court (hereinafter "ICC") filed a request, pursuant to Article 19(3) of the Rome Statute of the ICC, seeking a ruling from the Pre-Trial Chamber concerning jurisdiction in the Occupied Palestinian Territory (OPT).

2. On 22 January 2020, the Pre-Trial Chamber I received the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'[1].

3. On 28 January 2020, the Pre-Trial Chamber I issued the 'Order setting the procedure and the schedule for the submission of observations', thereby, inter alia, inviting: the State of Palestine, victims in the Situation in the State of Palestine, and the State of Israel to submit written observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request, without addressing any other issues arising from this Situation, by no later than 16 March 2020; and other States, organizations and/or persons to submit applications for leave to file such written observations by no later than 14 February 2020[2].

4. On 14 February 2020, pursuant to Rule 103 of the Rules of Procedure and Evidence, Brazil presented to Pre Trial Chamber I an "Application for leave to file amicus curiae observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request on the "Situation in the State of Palestine"[3].

5. On 20 February 2020, the Pre-Trial Chamber I granted leave to Brazil to submit the observations summarized in its application, by no later than 16 March 2020[4].

[1] ICC-01/18-12.
[2] ICC-01/18-14.
[3] ICC-01/18-47.
[4] ICC-01/18-63.

The Chamber also reminded all amicus curiae that their observations shall be limited to the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request.

II. Brazil and the International Criminal Court

6. Brazil supported the establishment of a permanent, impartial and independent international criminal court, with jurisdiction over the most serious international crimes, as a major step forward in the fight against impunity and in the prevention of such crimes.

7. As a founding member of the ICC, for the last two decades Brazil has been engaged in the Court's activities and has been following closely the cases brought before the Court. The Brazilian delegation to the 2010 Kampala Review Conference contributed to the definition of the crime of aggression. The Brazilian government also lends full support to the ICC current review process. While defending the principles and values enshrined in the Rome Statute, Brazil has been equally mindful of the need to respect State sovereignty.

8. In this regard, there is a permanent need to shield the ICC, a unique legal tribunal, from undue political interference. This guideline was at the very core of the agreement reached among sovereign States during the Rome Conference.

9. Brazil reiterates its continuous support for the Court as a judicial institution, which must continue to undertake its mandate in an independent and impartial manner, acting strictly within the legal framework of the Rome Statute.

10. Brazil would caution against any decision that would make political use of the Rome Statute. The ICC politicization would jeopardize its own legitimacy and credibility, undermining our common resolution to "guarantee lasting respect for and the enforcement of international justice", as set forth in the preamble of the Rome Statute.

III. Observations on the scope of the ICC's territorial jurisdiction in the situation of Palestine

3.1 The ICC and the principle of delegation of jurisdiction

11. During the negotiations for the establishment of a permanent international criminal court in Rome, several proposals, with different levels of ambition, were presented. As carefully and lengthily negotiated by States representatives, the ICC's jurisdiction was not based on the principle of universal jurisdiction. Instead, an agreement was reached by rejecting the ambitious model of universal jurisdiction and compromising over a limited jurisdiction regime, based on the principle of delegation.

12. Therefore, under the Rome Statute, the ICC may only exercise jurisdiction if the crime was committed by a State party national, or in the territory of a State Party (Article 12(2)), or in a State that has accepted the jurisdiction of the Court (Article 12(3)), or if the crime was referred to the ICC Prosecutor by the United Nations Security Council - Article 13 (b), pursuant to a resolution adopted under Chapter VII of the United Nations Charter.

13. Article 12 of the Rome Statute, on the "Preconditions to the exercise of jurisdiction", reads as follows:

> "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect

> to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

14. In sum, when examining if the Court may exercise its jurisdiction over the territory of a State that is party to the Statute or has otherwise accepted the Court's jurisdiction, the Court jurisdiction relies on sovereign States delegating their own criminal jurisdiction over their sovereign territory to the Court, under Article 12(2)(a). This understanding was previously stated by the Prosecutor when discussing the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar to the People's Republic of Bangladesh:

> "Article 12(2)(a)itself functions to delegate to the Court the States Parties' own 'sovereign ability to prosecute' article 5 crimes"[5].

15. In its report from 22 January 2020, the Prosecutor considers that Palestine is the "State on the territory of which the conduct in question occurred" (under article 12(2)(a)) because of its status as an ICC State Party. Alternatively, the OTP submitted that Palestine is also a 'State' for the purposes of the Rome Statute according to relevant principles and rules of international law[6]. With regard to the definition of the territory, the Prosecutor considered that the territorial scope of the Court's jurisdiction in the situation of Palestine extends to the Occupied Palestinian Territory, which comprises the West Bank, including East Jerusalem, and Gaza[7].

3.2 Unilateral Act of Recognition of the State of Palestine

16. As correctly asserted in the Prosecutor´s report[8], in a letter to the President of the Palestinian Authority, dated 1 December 2010, the Brazilian government has

[5] Bangladesh/Myanmar, Prosecutor's Request, ICC-RoC46(3)-01/18-1, para. 49, page 26.
[6] ICC-01/18-12, para. 101, page 55.
[7] ICC-01/18-12, para. 102, page 56.
[8] ICC-01/18-12, para. 215, page 109.

recognized the State of Palestine within the 1967 borders. In its act of recognition, Brazil reiterated its understanding that "only dialogue and peaceful coexistence with neighbors can truly advance the Palestinian cause". The Brazilian government also reaffirmed its "conviction that a negotiating process that results in two States, living side by side in peace and security, is the best way to achieve peace in the Middle East, a goal that is in the interest of all humankind. Brazil will be always ready to help in whatever may be necessary".

17. As any other act of recognition by another State, the Brazilian unilateral and discretionary act of recognition of the State of Palestine does not entail "erga omnes" effects to third states. In fact, under international law, recognition is not constitutive of statehood for third states not involved in the referred act.

18. The International Court of Justice (ICJ), in the Nuclear Tests Cases, made clear that a different understanding of this act on the part of a third State would not obligate France in anyway, given that this third State is not a party to the referred act:

> "The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text."[9]

19. The International Law Commission (ILC), in its Guiding Principles applicable to unilateral declaration of States capable of creating legal obligations with commentaries thereto, has also made clear that a unilateral declaration creates no obligation to third States, except if clearly accepted by a third State. In its analysis, the Commission only referred to unilateral acts stricto sensu, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law. According to guiding Principle 9:

> "No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur

[9] Nuclear Tests Cases, (Australia v. France; New Zealand v. France), Reports of Judgments, Advisory Opinions and Orders, Judgments of 20 December 1974. pages 269 and 474.

> obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration"[10].

20. The referred ILC's guiding principle reiterates the well-established principle of international law that obligations cannot be imposed by a State upon another State without its consent. Under Article 34 of the 1969 Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent". Therefore, one could only refer to the mandatory nature of a unilateral act to those States that have manifestly accepted it. Without a clear consent, the unilateral act would be, for third parties, "res inter alios acta".

21. Hence, presupposing unilateral acts of recognition would create, ipso facto, obligations to third parties would be contrary to the principle of international law that in fields such as the law of treaties is known as pacta tertiis nec nocent nec prosunt, as stated by Professor Malgosia Fitzmaurice:

> "The relationship between third parties and treaties is defined by a general formula pact tertiis nec nocent nec prosunt. This principle has been recognized in state's practice as fundamental, and its existence has never been questioned. For states non-parties to the treaty, the treaty is res inter alios acta."[11]

22. When it comes specifically to a unilateral act of recognition, each State has the power to assess the existence of the elements that compose a State. Divergences may naturally arise in such assessment. According to Professor Hélène Ruiz Fabri:

> "Elle est irréductible du fait du caractère 'horizontal' de la société internationale et de l'intersubjectivité qui caractérise l'ordre juridique international. Il en résulte que tous les Etats existants sont titulaires du pouvoir d'appréciation, qu'ils exercent de façon concurrente, et qu'il peut y avoir des divergences d'appréciation. Il ne suffit pas pour résoudre le problème de ces divergences de considérer que les uns ne respectent pas la réalité alors que les autres s'y tiennent. Ainsi que l'écrit fort justment Jean-Denis Mouton, l'ordre juridique international 'se

[10] ILC, *Guiding Principles applicable to unilateral declaration of States capable of creating legal obligations with commentaries thereto*, A/61/10, p. 369.
[11] FITZMAURICE Malgosia, *Third Parties and the Law of Treaties*, Max Planck Yearbook of United Nations Law, Heidelberg, vol. 6, 2002, p. 38.

> caractérise par le fait que chaque Etat atteste pour lui-même la signification qu'il attribue à un fait; cette prétention, si elle rencontre l'acceptation d'un ou d'autres Etats, va faire naître un être juridique n'ayant d'existence qu'entre eux (...) L'Etat, dans cette perspective, se présente, au plan du droit international, comme un être intersubjectif'"[12].

23. According to the Brazilian diplomatic practice on State recognition, each State will take its own decision on the matter, based on its own analysis of statehood criteria. For instance, the Brazilian unilateral recognition of Israel, on February 9 1949, was based on the analysis of constitutive elements of statehood, as attested by the report from the Brazilian Ministry of Foreign Affairs:

> "On February 7, 1949, the Government of Brazil decided to recognize, by Decree, the State of Israel and its Government. In this regard, a telegram was sent to the Brazilian Embassy in Washington to inform the Special Representative of Israel of our recognition. The day after the recognition, the Legation of Egypt in Rio de Janeiro sent a memorandum to the Ministry of Foreign Affairs, in which it regretted that a number of powers, some of which having traditional friendship with the Arabs, had recognized the State of Israel. Itamaraty replied that 'the Brazilian government, always faithful to its feelings of friendship towards Egypt, could not accept such an interpretation', and added: "In effect, according to the classic doctrine of international law, recognition is nothing more than a declaratory act, by which one State officially takes note of the existence of another. This existence, with all the attributes that derive from it, however, does not depend on the formality of such recognition. In this sense, it can be said that, with the recognition of the State of Israel, the Brazilian Government added nothing to the legal conditions that qualify that State as a member of the international community. It is important to remember, however, that, even after proclaiming, on May 15 1948, the advent and the independence of the State of Israel, which emerged for international life, invested with the attributes that gave it legal personality - territory, homogeneous population and self-government - the Brazilian government still waited for the new State to consolidate itself, to assert its sovereign rights and to proceed with its institutional organization. However, after that, it would no longer be lawful to deny him his recognition, especially when several other States had anticipated to recognize him"[13].

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[12] RUIZ FABRI, Hélène. Genèse et disparition de l'État à l'époque contemporaine. *Annuaire Français de Droit International.* Paris, vol. 38, 1992, 163-164.
[13] CANÇADO TRINDADE, Antônio Augusto. *Repertório da Prática Brasileira do Direito Internacional Público* (período 1941-1960). Brasília: FUNAG, 2012, p. 127-128.

24. In sum, Brazilian recognition of the State of Palestine does not entail "erga omnes" effect and is not an evidence of statehood for third parties not involved in and for purposes other than the original unilateral act of recognition.

3.3 Palestine's accession to the Rome Statute

25. Additionally, accession to an international treaty does not necessarily determine that the State party is a sovereign State under international law. Palestinian membership in international organizations and its accession to multilateral treaties do not imply the recognition of the State of Palestine, once its statehood shall be attested in accordance with international law.

26. On 29 November 2012, the date of the International Day of Solidarity with the Palestinian People and the 65th anniversary of the adoption by the General Assembly of Resolution 181(II), the sixty-seventh session of the United Nations General Assembly (UNGA) adopted Resolution 67/19, with 138 voted in favor, 9 against, and 41 abstentions.

27. As we may see from its negotiation process and the deliberation that took place in the UNGA, this resolution was not intended to and did not provide the basis to affirm that Palestine is a sovereign State for the scope and purpose of Article 12 of the Rome Statute. It actually accorded to Palestine "non-member observer State" status in the United Nations and reaffirmed the right of the Palestinian people to self-determination. It also affirmed UNGA's "determination to contribute to the achievement of the inalienable rights of the Palestinian people and the attainment of a peaceful settlement in the Middle East".

28. Following the adoption of UNGA Resolution 67/19, Palestine requested accession to the Rome Statute. As treaty depositary, the UN Secretary-General circulated Palestine's instrument of accession, based on the "all States formula" access, while recognizing that "it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-

General"[14]. Indeed, the treaty depositary is limited to an administrative role and could not, in anyway, asses the question of Palestine statehood.

29. The formal presentation of an instrument of accession, in that case, was not sufficient to demonstrate that the ICC has criminal jurisdiction over the territory of the acceding State. In this regard, it is equally worth noting that the Palestinian accession to the Rome Statute itself was contested and objected by other States, including ICC State Parties.

Conclusions

30. As the Prosecutor remarked, "the question of Palestine's statehood under international law does not appear to have been definitively resolved"[15]. Furthermore, much of the dispute with respect to the question of Palestine concerns the definition of its territory. It is our view that this contested and controversial question will not find a proper solution, nor a final settlement with a ruling from a Court intended to investigate the most serious international crimes and punish its perpetrators.

31. Given its unique character, as an international criminal tribunal of last resource, ICC jurisprudence seems to decide rather strictly whether a case appears to fall within its jurisdiction, warning against any undue expansion of international criminal law.

32. It is equally worth noting that, besides the definition of the ICC territorial jurisdiction, the questions around Palestine statehood and the definition of its territory are far more complex than the scope of the consultation at hand. For instance, in relation to the preliminary examination on the 2014 hostilities in Gaza, the Prosecutor's view of the context in which a crime was committed is that it "may be classified as either an international or non-international armed conflict [IAC or NIAC]; alternatively, it may be considered that two different conflicts

[14] UNSG "Note to correspondents" on Accession of Palestine to multilateral treaties, 07 January 2015.
[15] ICC-01/18-12, para. 35, page 17.

(one international and the other non-international) existed in parallel during the relevant period" . The uncertainty in that regard – as either an IAC or a NIAC – is of great relevance; different contexts may result in the provision of different crimes by the Rome Statute.

33. In Brazil's view, the complex Israeli-Palestinian question need to be addressed through political dialogue between the parties and not through an international criminal process, which would be detrimental to both justice and peace. Initiating an investigation on "the situation in the State of Palestine" would not serve the "interests of justice", a condition established by article 53 of the Rome Statute.

34. Brazil holds the belief that should the Prosecutor open an investigation, the criminal procedure will not be conducive to facilitating the resumption of the dialogue, one that by nature is highly political, between Israelis and Palestinians. Conversely, initiating an investigation would compromise the search for a just and negotiated political solution for achieving last and enduring peace in the Middle East. Brazil expresses its deep concern about the dangerous consequences of this situation for the credibility and legitimacy of the Court itself and for the peace process in the Middle East.

Minister-Counsellor Pedro Escosteguy Cardoso
on behalf of
The Federative Republic of Brazil

Dated this 16 March 2020

At The Hague, The Netherlands