

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 14 February 2020

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 Application for Leave to File Amicus Curiae Observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request

Source: Federative Republic of Brazil

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

The Office of the Prosecutor

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

The competent authorities of the State of
Palestine

The competent authorities of the State of
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**Victims Participation and Reparations
Section**

Other

I. The Applicant and the ICC

1. The Federative Republic of Brazil would like to take part as “amicus curiae” by submitting written observations about the question of jurisdiction set forth in paragraph 220 of the Prosecutor’s request with regard to the Situation in the State of Palestine¹.

2. Brazil supported the establishment of a permanent, impartial and independent international criminal court. While steadfastly defending the principles and values enshrined in the Rome Statute, in order to ensure responsibility to perpetrators of the most heinous crimes and to end impunity, Brazil has been equally mindful of the need to respect State sovereignty.

3. In this regard, there is a permanent interest to shield the ICC from undue political interference. This guideline was at the core of the agreement reached among sovereign States in the Rome Statute. As a judicial institution, the ICC must continue to undertake its mandate in an independent and impartial manner, acting strictly within the legal framework of the Rome Statute. 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 in the preamble of the Rome Statute.

II. Summary of observations to be submitted by Brazil if leave were to be granted

4. Under article 12(2)(a) of the Rome Statute, in the cases of referral by a State Party or of “proprio motu” investigations, the Court may exercise its jurisdiction if the conduct has occurred in the territory of a State that is party to the Statute or has otherwise accepted the Court’s jurisdiction (principle of territoriality). Accordingly, the Court has jurisdiction if the conduct was either completed in the territory of a State Party or if it was initiated in the territory of a State Party and continued in the territory of a non-State Party or vice versa.

¹ ICC-01/18-12, para. 220.

5. In its report from 22 January 2020, the Prosecution 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 Prosecution submitted that Palestine is also a ‘State’ for the purposes of the Rome Statute according to relevant principles and rules of international law². With regard to the definition of the territory, the Prosecution considered that the territorial scope of the Court’s jurisdiction in the situation of Palestine extends to the Occupied Palestinian Territory³.

6. As correctly asserted in the Prosecutor’s report⁴, in a letter to the President of the Palestinian Authority, dated 1 December 2010, the Brazilian government has 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. Brazilian Government also reaffirmed its conviction “that only a negotiating process 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”.

7. 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. As a matter of fact, under international law, recognition is not constitutive of statehood for third states not involved in the act of recognition. Additionally, the mere accession to an international treaty does not necessarily determine that the State party is a sovereign State under international law. As the Prosecutor remarked, “the question of Palestine’s statehood under international law does not appear to have been definitively resolved”⁵. Furthermore, much of the dispute with respect to the situation in Palestine concerns the definition of its territory, which the Prosecution considers to comprise the “Occupied Palestinian Territory”⁶.

² ICC-01/18-12, para. 101, p. 55.

³ ICC-01/18-12, para. 102, p. 56.

⁴ ICC-01/18-12, para. 215, p. 109.

⁵ ICC-01/18-12, para. 35, p. 17.

⁶ ICC-01/18-12, paras. 190-192, pp. 103-104.

8. 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 the jurisdiction of the Court, warning against any undue expansion of the reach of international criminal law. 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.

9. 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; alternatively, it may be considered that two different conflicts (one international and the other non-international) existed in parallel during the relevant period"⁷. 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.

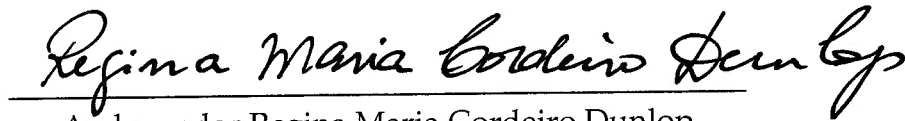
10. In Brazil's view, the complex Israeli-Palestinian question needs to be addressed through political dialogue between the parties and not through an international criminal process, which would be detrimental to both justice and peace. Initiating an investigation on "the situation in the State of Palestine"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

⁷ ICC-01/18-12, para. 94, footnote 341, p. 53.

III. Conclusion and relief requested

11. For all the foregoing reasons, Brazil respectfully requests that this Honorable Chamber grant it leave, pursuant to rule 103 of the Court's Rules of Procedure and Evidence, to file written observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request on the "Situation in the State of Palestine".

Respectfully Submitted,



Ambassador Regina Maria Cordeiro Dunlop

on behalf of

The Federative Republic of Brazil

Dated this 14 February 2020

At The Hague, The Netherlands