

## **A VALIDADE DOS ATOS E INTERAÇÃO DO TRIBUNAL PENAL INTERNACIONAL NO CONFLITO ISRAELO-PALESTINO**

### **THE VALIDITY OF THE ACTS AND INTERACTION OF THE INTERNATIONAL CRIMINAL COURT IN THE ISRAELI-PALESTINIAN CONFLICT**

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#### **RESUMO**

Insero no contexto do conflito Israelo-Palestino, encontra-se o Tribunal Penal Internacional ao aceitar a Palestina como um dos seus integrantes tornando-se, assim, um dos mais novos atores dentro do cenário do conflito. A partir dessa interação, pretende-se discorrer se os atos de acesso ao Estatuto de Roma promovidos pela Palestina, bem como se a forma que o Tribunal está agindo e pretende continuar atuando, encontram suporte legal permissivo dentro do emaranhado jurídico envolvendo as duas nações beligerantes e o órgão judicial. Em face desse cenário político-jurídico tão único em que se encontra o Tribunal, criam-se inúmeras questões em relação à atuação da Corte dentro do conflito que merecem também uma análise pois é através da resolução dessas questões que se chega ao objetivo, com essa sendo feita através de levantamento de documentação indireta. Então, observou-se que, em razão do contexto confuso diante da natureza incerta do caráter estatal da entidade palestina e da ocupação israelense, a visão funcional de toda a situação é a ferramenta mais apropriada, entendendo-se como válida as ações tomadas tanto pela Palestina quanto pelo Tribunal Penal Internacional. Assim, conclui-se que a perspectiva funcional das atribuições do Tribunal e a interpretação mais moderna dos critérios para se considerar a Palestina como um País,

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**Palavras-chave:** Tribunal Penal Internacional. Direito Internacional Penal. Israel. Palestina. Direito Internacional Público.

## **ABSTRACT**

Within Israeli-Palestinian conflict we find the International Criminal Court becoming one of the newest actors in the scenario when it accepted Palestine as one of its members. From this interaction, it is planned to discuss the acts of access to the Rome Statute promoted by Palestine, as well as the way in which the Court acts and intends to continue to act. In light of this unique political and legal scenario in which the Court finds itself, many questions have arisen regarding the Court's actions in the conflict which, even if the objective is whether the acts involved find permissive international legal support, also deserve to be analyzed because it is through the resolution of these issues that the objective is achieved, this will be done through indirect documentation. Second, it was observed that due to the confusing context of the uncertain nature of the statehood of the Palestinian entity and the Israeli occupation, the functional view of the whole situation is the most appropriate tool, as the actions undertaken by both Palestine and the International Criminal Court are considered valid. Thus, it is concluded that the functional perspective of the Court's functions and the most modern interpretation of the criteria for considering Palestine as a country, based on human rights, for the purposes of the Rome Statute provide the validity of Palestine's presence as a party and the investigation by the International Court.

**Keywords:** International Criminal Court. International Criminal Law. Israel. Palestine. International Public Law.

## **INTRODUCTION**

Of the controversial issues of international law, in particular those involving the blindness or omission of the international community, the Israeli-Palestinian conflict takes a unique place; This conflict that, while attracting eyes from all over the world and from leaders of various nations, also little is seen, on the part of these same actors, actions that bring light to the problem, making the whole context of this confrontation sustain itself in several

unsolved issues, being only one of them the recognition of Palestine as a State. This lack of firm positions and certainties in relation to the conflict does not necessarily come for the sake of conspiracy against the people Palestinian or something of the sort, but because it is a situation of extreme complexity, involving significant political, social and historical aspects.

States and International Society as a whole, even if aware of the Israeli-Palestinian situation, settle into the cycle of ignoring the conflict until something relevant and new unfolds from it. This ignorance or omission remained until, on December 20, 2019, the then prosecutor of the International Criminal Court (hereinafter ICC or Tribunal), Fatou Bensouda, announced the end of the preliminary examination<sup>3</sup> of the situation in the Palestinian territory and the beginning of the de facto investigation there, covering all areas considered to be part of Palestine, including those under de facto control of the State of Israel, this being the theme of the present work<sup>4</sup>.

The investigation decision raised questions of the most diverse natures and sources, being these formal, about the autonomy and power of international bodies, or also practical, in the light of the effects that this decision handed down by the said Court would produce in the legal and material spheres and how it would affect the lives of those who have their lives affected by the Israeli-Palestinian dilemma, either by simply living in the region or otherwise affected.

Why the Israeli-Palestinian conflict is so complex and so sensitive is a deep and troubled issue and precisely because of this it deserves to be studied to sustain the rest of the work. Palestine is in an international-legal limbo where there is debate in several areas of whether this entity can be considered a state itself or just an international entity. This confusion leads to several questions about its sovereignty and especially about the lands that are under its ownership, territories that are under Israeli occupation.

Within this already extremely sensitive context, the ICC is inserted, declaring the opening of the investigation of events that occurred in Palestine and including in the scope of this investigation the West Bank and the Gaza Strip, places under the rule of Israeli power.

It is worth mentioning that despite the recent attention that this fact has brought, the Court actually entered the international scene in the year 2015 when it accepted that Palestine join its framework of member states. This entry was only possible in 2012, after its

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<sup>3</sup> Legal procedure where the International Criminal Court makes a prior analysis of a factual situation, assessing whether the criteria necessary to give rise to the action of the body are met.

<sup>4</sup> TRIBUNAL PENAL INTERNACIONAL. *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*. Haia. 2021b. Disponível em: <https://www.icc-pi.int/court-record/icc-01/18-143>. Acesso em: 12 de dez. 2022. p. 51

recognition as a non-member observer state of the United Nations and this fact, together with a delicate political moment, where the relations of the two States were extremely fragile, instigated Palestine, in April 2014, to integrate the list of member states of various human rights treaties and, in January 2015, that of the Rome Statute (hereinafter the Statute or RE), including the use of Article 12 (3) of the same statute to change the temporal jurisdiction of the Court to since the beginning of June 2014, when hostilities intensified.

With the jurisdiction established by the ICC, there was, since then, the preliminary examination of the situation that resulted in the opening, in fact, of the investigation in the Palestinian area, communicated on March 3, 2021.

This fact provoked statements from various leaders and governments around the world, such as those coming from Israel, Germany, England and, of course, the United States of America, a staunch ally of Israel since 1960, always helping financially, in the billions<sup>56</sup> of dollars, and politically, as seen through the history of veto in the Security Council in situations related to Israel<sup>7</sup>.

And, in conjunction with recent friction between the ICC and the U.S. Government over the investigation of the situation in Afghanistan (which includes the analysis of acts of U.S. troops present, which imposed "Executive Order 13928 of June 11, 2020 on Blocking the Property of Certain Persons Associated with the International Criminal Court,"<sup>8</sup> one observes the legitimacy of this Court by doing, permanently and independently, exactly what it was assigned to do by its founding members: to investigate and punish the worst crimes capitulated in the history of humanity, impartially, fairly and, most importantly, without fear of any force that tries to prevent due retribution.

In this context, the present study aims to determine whether the acts are in accordance with the international institutes and diplomas that are inserted the agents of the ICC, Palestine and Israel Trinomial; that is, what is the validity of the acts under a legal analysis, whether Palestine is a member of the ICC, or whether Palestine accepts it in its list of States Parties, in

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<sup>5</sup> UNITED STATES OF AMERICA. *U.S. Foreign Aid to Israel*. Washington, March 1. 2023. Available at: <https://sgp.fas.org/crs/mideast/RL33222.pdf>. Accessed: May 17, 2023.

<sup>6</sup> RYNHOLD, Jonathan. *The Future of US-Israeli Relations*. In: THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES. *Survival* October-November 2021: The Limits of Power. Abingdon-on-Thames: Routledge, 2021. 1<sup>a</sup> ed. p. 122.

<sup>7</sup> *Ibid.*, p. 122.

<sup>8</sup> No original: "Executive Order 13928 of June 11, 2020 (Blocking Property of Certain Persons Associated With the International Criminal Court)"; Veja: <https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>

short, of the issues involving the recent investigation within the territories claimed by Palestine, but occupied by Israel.

And three specific ones are now unraveled from this general objective: (i) to assess the validity of the equal scope of the Palestinian movement for access to the Rome Statute, due to its peculiar state character; (ii) to verify also what would be the validity of the ICC in accepting the Palestine claim both in its theoretical scope, within the legal web of the body, and practical, related to the future application of the acts taken; (iii) and also to determine how the Jewish state may be affected.

The present study is justified in view of the historical and controversial effects in the political and legal fields that arise from any international entity that at least surrounds the question of the state character of Palestine, even more punctual when brought within the scope of International Criminal Law and thus creating or bringing light to various questions, such as: (i) the power and autonomy of the International Courts, analyzing what would be the limits of the *Kompetenz-Kompetenz Institute*; (ii) the territorial issue (*ratione loci*) of ICC jurisdiction, specifically now in the Palestinian areas under Israeli rule; (iii) the possibility and validity of the recognition of Palestine as a country, a theme that is essential to the questioning

The research will be carried out through a literature / bibliographic review and is carried out by indirect documentation, through consultations with official documents of international bodies, such as the ICC and the UN, and also of the States involved, as well as books, scientific and journalistic articles related to the matter. From this collection, the inductive analysis allows to make an integral analysis and aligned with the problem and the objectives.

## **THE VALIDITY OF PALESTINIAN ACCESS TO THE INTERNATIONAL AND INTERNATIONAL CRIMINAL SYSTEM**

It begins with a phrase from the Qur'an, the holy Islamic book:

And when two groups of believers fight each other, then reconcile them. And if one group provokes another, fight the provocateur, until Allah's designs are fulfilled. If, however, (the designs) are fulfilled, then reconcile them equitably and be equitable, for Allaah appreciates the equitable." (Qur'an, Al-Hujurat 49, 9)

Observing the theme of the work in a topographical way, it is seen that it is mainly about three actors: Israel and Palestine, two international entities that are in conflict over lands

that both claim to be their right<sup>9</sup> and the International Criminal Court, which entered the conflict at the request of Palestine to act in the international crimes that occurred from June 2014 to an undetermined date<sup>10</sup> and this will be the first to be discussed, since it is in the eye of the hurricane that exists between them.

The international body stands as a culmination of an international history that longed for a form of protection from the atrocities that have occurred across the globe in the tragic history of humanity, such as the holocaust, Rwandan genocide and. It is an international architecture that aimed at the protection of Human Rights<sup>11</sup> and that had its discussion started shortly after the 1st World War<sup>12</sup>, aiming to allow the accountability of the individual.

The body is treated as a culmination of this history because it needed a permanent and prior Court and solution, to try to avoid the greatest criticism of the International Criminal Courts, that these would be *ad hoc* tribunals<sup>13</sup>, born in 2002, July 1<sup>st</sup> in Rome.

It is within its competence the crimes of war, genocide, against humanity and aggression according to articles 5 to 8 *bis* of the Rome Statute<sup>14</sup> or, in the words of Mazzuoli<sup>15</sup>:

The ICC, as has already been reported, is competent to judge, on a permanent and independent basis, the most serious crimes that affect the whole of the international society of States and that outrage the conscience of humanity (our translation).<sup>16</sup>

In this case, the conduct of both Palestinian and Israeli initiatives within Palestinian soil would be investigated<sup>17</sup> and, because Israel is not part of the Rome Statute, questions are raised that led to the need for the present work.

Understanding the role of the ICC, one turns one's eyes to the belligerent states. Israel is a state or country properly since UN Security Council resolution 181 (II) said while

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<sup>9</sup> BEAUCHAMP, Zack. *What are Israel and Palestine? Why are they fighting?*. Vox, Washington, D.C., 14 maio 2018. Disponível em: <https://www.vox.com/2018/11/20/18080002/israel-palestine-conflict-basics>. Acesso em: 27 de maio 2023. np.

<sup>10</sup> TRIBUNAL PENAL INTERNACIONAL. *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*. Haia. 2021c. Disponível em: <https://www.icc-cpi.int/court-record/icc-01/18-12>. Acesso em: 13 de dez. 2022. p. 4.

<sup>11</sup> MAZZUOLI, Valerio. *Course in Public International Law*. 14th ed. Rio de Janeiro: Forensics, 2021a. p. 930.

<sup>12</sup> SHAW, Malcolm. *International Law*. 6 ed. Cambridge: Cambridge University Press, 2008. p. 399.

<sup>13</sup> MAZZUOLI, Valerio. *Course in Public International Law*. 14th ed. Rio de Janeiro: Forensics, 2021a. p. 933.

<sup>14</sup> SHAW, Malcolm. *International Law*. 6 ed. Cambridge: Cambridge University Press, 2008. p. 411.

<sup>15</sup> MAZZUOLI, Valerio. *Course in Public International Law*. 14th ed. Rio de Janeiro: Forensics, 2021a. p. 943.

<sup>16</sup> On the original language: O TPI, como já se noticiou, é competente para julgar, com caráter permanente e independente, os crimes mais graves que afetam todo o conjunto da sociedade internacional dos Estados e que ultrajam a consciência da humanidade.

<sup>17</sup> TRIBUNAL PENAL INTERNACIONAL. *Questions and Answers on the Decision on the International Criminal Court's territorial jurisdiction in the Situation in Palestine*. Haia. 2021d. Disponível em: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/palestine/210215-palestine-q-a-eng.pdf>. Acesso em: 13 de dez. 2022. p. 2.

Palestine is an international entity that enjoys almost all the elements essential to the formation of a state, with the exception of territory (sometimes also called "de jure state"), yet territory is exactly the central issue of this conflict, where both Israel and Palestine claim the same territories<sup>18</sup>.

This was especially aggravated after the Six-Day War or June War, which took place from June 5 to 10, 1967, which allowed the Israeli occupation of the West Bank and the Gaza Strip<sup>19</sup>, even though this has a large Islamic portion of the population and also that the land itself is, even if only formally, under Palestinian ownership, with the occupation causing several atrocities on both sides of the conflict<sup>20</sup>, thus evidencing that the conflict is not as black and white as some may believe.

In this context, even if the central part of the present work is related to international bodies and their action, especially the ICC, it is the countries that form the core of the International Society, possessing rights and duties unique to them<sup>21</sup>, which are essential to its functioning, as well as also dictate the entire interaction of the International Society, since international bodies are supported by states, both figuratively and literally.

To analyze the effects and consequences that the relationship between the International Criminal Court and the Israeli-Palestinian issue has caused, one must first take a step back and understand the issues that contribute to at least being valid this relationship, since it is fruitless to discuss the merits and consequences of something that has its basis compromised, corrupting the whole structure, so that, aiming at a comprehensive understanding of the subject, this study begins with a brief exposition on the question of the possible quality of the country of Palestine.

One of the most controversial issues within the Palestinian context, which in itself is an extremely controversial topic, as already brought up earlier in the introduction of the present work, is whether Palestine is configured as an independent and sovereign state in the same way that the other actors within the international scenario are characterized (Israel, United States, Brazil, or among the other countries that are *part of the Islamic Umma*), and

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<sup>18</sup> BEAUCHAMP, Zack. *What are Israel and Palestine? Why are they fighting?*. Vox, Washington, D.C., 14 maio 2018. Disponível em: <https://www.vox.com/2018/11/20/18080002/israel-palestine-conflict-basics>. Acesso em: 27 de maio 2023. np.

<sup>19</sup> Ibid., np.

<sup>20</sup> ORGANIZATION OF THE UNITED NATIONS. *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict - A/HRC/29/52*. New York: UN, 2015. Available in: <https://www.ohchr.org/en/hr-bodies/hrc/co-i-gaza-conflict/report-co-i-gaza>. Accessed: May 28, 2023. p. 19 and 20

<sup>21</sup> LAWSON, Rick. Review of "Recognition and the United Nations" by John Dugard. *Leiden Journal of International Law*. Cambridge, v. 1, n.1 p. 102-108, 1988. p. 103.

precisely this issue has special relevance to the work at hand due to the significant part that being considered a country has in the process of integration into the Rome Statute<sup>22</sup>, specifically with this quality entailing the crucial consequence of allowing the entity to integrate the diploma, as provided in Art. 125 thereof.

The controversy is based on the fact that there is no certain and recognized way of understanding an entity as a State, there is no body in charge or treaty recognized in the international *body iuris* that has the power to affirm this. The closest to this is the Treaty of Montevideo, but this is endowed with other issues that do not allow it to act as the last arbiter in the question of formation of countries, existing only a kind of general and historical understanding in relation to the subject<sup>23</sup>, which ends up harming the creation of new states, which, in the current global scenario, can only be created with the diminution or undoing of others<sup>24</sup>, such as Kurdistan, for example, and Palestine itself.

So, to understand the validity of Palestinian access, one must begin with the analysis of the state character of Palestine, one that aims to understand if at least there is a ground for debating the state character and thus arriving at the nerve center of the subject: the international legal personality of Palestine and the consequent possibility of entering into international treaties.

## **THE ASSERTION OF PALESTINE AS A STATE AND SUPPORTING THEORIES**

The theme State Character of Palestine will be dealt with here, which, for reasons of structure, begins with an excerpt from the vast international legal framework related to State Theories, discussing how these apply in the Palestine Question.

In particular, two more relevant positions stand out when dealing with the issue of the determination of an entity as a State, but which are divergent, namely: the Theory of Elements of the State (also called the Theory of Declaratory Recognition) and the Theory of Constitutive Recognition; treated onward.

These are important to what is being treated with the Theory of Elements of the State or Theory of Declaratory Recognition making an objective analysis of the elements that an entity must possess to be in fact considered a State and the Theory of Constitutive Recognition based on the subjective element of Recognition by international society, gaining

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<sup>22</sup> PELLET, Alain, The Palestinian Declaration and the Jurisdiction of the International Criminal Court. *Journal of International Criminal Justice*, Oxford, v. 8, n. 4, p. 982, set. 2010.

<sup>23</sup> SHAW, Malcolm. *International Law*. 6 ed. Cambridge: *Cambridge University Press*, 2008. p. 198.

<sup>24</sup> *Ibid.*, p. 198.



this subjectivity precisely because there are no purely objective criteria, leaving recognition uncertain<sup>25</sup>.

### ***THEORY OF STATE ELEMENTS***

Starting with the first, the Theory of the Elements of the State, it states that there is a hard core of elements that an entity must possess to wear the mantle of country namely: (i) Permanent population, (ii) Determined territory, (iii) Government and (iv) Ability to enter into relations with other States; and, with the possession of each of them, it would automatically become a State<sup>26</sup>.

The most classic diploma that supports such a proposition is the Montevideo Convention, also known as the Conventions on the Rights and Duties of States and on Political Asylum, signed on December 26, 1933 in the capital of Uruguay, bringing them soon in its inaugural article.

Nevertheless, it is pointed out that this diploma did not create the elements of the State, as well as the Theory of the Elements of the State also did not create them, but only inscribed in international law the culmination of the world history in relation to the theme, that is, how the countries operated in relation to their own Sovereignty in the formation of, currently called, International Society.

The above theory is initially incompatible with the claim of Palestine as a sovereign state, this on the grounds that, even if the other elements are not questioned, the territory that the entity claims as its own is not, in fact, under its power. The claimed territories are under occupation by the Israeli state, which, even if it is considered illegal in the international arena, as stated by several resolutions of the United Nations Security Council,<sup>27</sup> still affects the territorial character necessary for the state qualification under this theory.

### ***CONSTITUTIVE RECOGNITION THEORY***

Faced with the elements of the state Shaw<sup>28</sup>, in his work, points out that "Such provisions are not exhaustive or immutable. As will be seen below, other elements may be

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<sup>25</sup> Ibid., p. 198.

<sup>26</sup> Ibid., p. 198.

<sup>27</sup> In particular, there are the following resolutions: 446, 452, 465, 471 and 476.

<sup>28</sup> SHAW, Malcolm. International Law. 6 ed. Cambridge: Cambridge University Press, 2008. p. 198.

relevant, including self-determination and recognition." This sentence inaugurates the present subsection of the Theory of Constitutive Recognition.

The present theory is more favorable to the Palestinian election. by recognizing the validity of its sister theory and its elements, set forth above, initially and eventually adding a kind of supra requirement: International Recognition; which, when present, can mitigate the need of the others, either when one of the elements of the Montevideo Convention is not present or when all are not<sup>29</sup>, thus evidencing the importance of the above requirement.

This way of thinking finds more and more weight and relevance in the present day since there are several forms of states today, each with its uniqueness that must be and is recognized as already placed decades ago by the International Court of Justice itself<sup>30</sup> in its consultative capacity recognizing that there are unique state configurations when it comes to the Western Sahara, which was founded under the "religious bond of Islam rather than territory"<sup>31</sup>, drawing parallels to the belligerent countries on screen.

The recognition of the entity as such allows it to ascend to the status of State itself, this feat, in general, through sovereign acts of other countries, individual or through the UN, as shown by the trend<sup>32</sup>, and precisely due to movements and political motivations<sup>33</sup>, together with a greater respect for the normative elements of prohibition of the use of force and self-determination<sup>34</sup>, can and tend to use more of the aspect of Constitutive Recognition, without extreme obedience to the objective elements of the State to the detriment of Declaratory Recognition<sup>35</sup>.

However, the point that gives it the greatest advantage within this context also harms it, which is the point of abstraction (or non-consolidation of this concept), of there being no precedents and firm recognitions that allow objectively to determine the recognition. However, this does not make the theory useless in any way, only worthy of further study and analysis to understand Palestine's place on the international stage and its relationship to International Recognition.

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<sup>29</sup> LAWSON, Rick. Review of "Recognition and the United Nations" by John Dugard. *Leiden Journal of International Law. Cambridge*, v. 1, n.1 p. 102-108, 1988. p. 105.

<sup>30</sup> INTERNATIONAL COURT OF JUSTICE. *Sahara Occidental: Avis Consultatif du 16 octobre 1975*. Haia, 1975. p. 36.

<sup>31</sup> *Ibid.*, p. 36.

<sup>32</sup> LAWSON, Rick. Review of "Recognition and the United Nations" by John Dugard. *Leiden Journal of International Law. Cambridge*, v. 1, n.1 p. 102-108, 1988. p. 103.

<sup>33</sup> *Ibid.*, p. 103.

<sup>34</sup> SHAW, Malcolm. *International Law*. 6 ed. Cambridge: *Cambridge University Press*, 2008. p. 198 and 206.

<sup>35</sup> LAWSON, Rick. Review of "Recognition and the United Nations" by John Dugard. *Leiden Journal of International Law. Cambridge*, v. 1, n.1 p. 102-108, 1988. p. 103.

## THE INTERNATIONAL LEGAL PERSONALITY OF THE STATE OF PALESTINE

In principle, it should be understood that for there to be Rights and Duties, these attributable to anyone, there is a condition of pre-existence contained in the figure of Legal Personality, thus being recognized as individuals within the legal system in which it is inserted<sup>36</sup>. With the Legal Personality of International character being no different.

A myriad of entities can be endowed with International Legal Personality, from Regional Organizations to States, thus possessing Rights and Duties strictly linked to the nature of the entity<sup>3738</sup> that change according to this nature, obeying the needs of the entity.

For the case in question, the International Legal Personality can be understood mainly as a possibility of participation in the international scenario and acceptance by the community<sup>39</sup>, moving away from the Theory of State Elements and approaching the Theory of International Recognition.

As already seen above, the integration of Palestine in the UN and in various mechanisms for the protection of human rights as well as in the Rome Statute of January 2015<sup>40</sup>, reaffirms that it has International Legal Personality is in fact even if not in law; both because of the impact on the community that this has taken, and also because of the recognition that is necessary for the realization of such an impact (with both requirements often going hand in hand), understanding, even if there is no right formula, the two requirements placed for the International Legal Personality eventually reaffirming Palestine as a state.

It is also pointed out that, because it is such an abstract and uncertain field, one cannot speak of a more certain form of recognition, which is exercised through the sovereignty of other countries, than the express individual and direct recognition or mediated by an international organization so that Resolution 67/19 would be nothing more than the concentration of the sovereign exercise of several countries that converged to agree on the status of State of Palestine.

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<sup>36</sup> SHAW, Malcolm. *International Law*. 6 ed. Cambridge: Cambridge University Press, 2008. p. 195-196.

<sup>37</sup> PELLET, Alain, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*. *Journal of International Criminal Justice*, Oxford, v. 8, n. 4, p. 981-999, set. 2010. p. 985.

<sup>38</sup> SHAW, Malcolm. *International Law*. 6 ed. Cambridge: Cambridge University Press, 2008. p. 196-197.

<sup>39</sup> *Ibid.*, p. 197.

<sup>40</sup> TRIBUNAL PENAL INTERNACIONAL. *Annex I to the Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I*. Haia. 2018. Disponível em: <https://www.icc-cpi.int/court-record/icc-01/18-1-axxi>. Acesso em: 12 de maio 2023. p. 2.

There is no more evident demonstration of the practical effect of this recognition, for the subject of the work, than the fact that the entry into the ICC in 2015 was not the first attempt by Palestine to enter the Court, the first was, in fact, in 2009, where the then prosecutor Luis Moreno-Ocampo rejected the Palestinian claim stating that he could not judge the state question of Palestine and passing this responsibility to the attributions of the UN, as it was then in 2015.

Even if this personality is one of uncertain boundaries with this intermittent place that is found affecting it, once again, this is enough for what is discussed, as explained in the next chapter.

## **SELF-DETERMINATION OF THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT**

It is evidenced through the whole context of the conflict that the resolution of the Pretrial Chamber I is completely in accordance with international legal framework as punctuated by the same:

"Moreover, since its accession to the Statute, the [UN] Assembly of States Parties ("ASP") has not treated Palestine in any way differently from any other State Party. There is no reason for the [International Criminal] Court to do so now<sup>41</sup>."

Notably the decision set forth above that deal with the subject of the Court that are of special importance and validity, because these self-commands come, not only from the very legal structure brought by the Statute, but also as a principle recognized in International Law.

The legal grounds present in the Statute and which supported the understanding of the Chamber are essential here, such as Article 19(1), which places a kind of self-satisfaction of the Court in relation to the jurisdiction of the cases brought before it, allowing it to make a judgment as to jurisdiction, jurisdiction, and admissibility.

This is important, because it is this capacity that brings validity to the determinations and decisions made by the Court. This capacity is nourished by a principle recognized in international law<sup>42</sup> called *Kompetenz-Kompetenz*, la *compétence-compétence*, or, as it is

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<sup>41</sup> TRIBUNAL PENAL INTERNACIONAL. *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*. Haia. 2021b. Disponível em: <https://www.icc-cpi.int/court-record/icc-01/18-143>. Acesso em: 12 de dez. 2022.

<sup>42</sup> INTERNATIONAL COURT OF JUSTICE. *Nottebohm Case (Liechtenstein V. Guatemala)*: Preliminary Objections. The Hague, 1953. Available in: <https://www.icj-cij.org/case/18/preliminary-objections>. Access in: 13 de mar. 2023.

known in Brazil, *a competência da competência*. Expressly recognized also by the ICC, when applied in the Bemba case, where it is expressed in its paragraph 23:

The Chamber considers that, notwithstanding the wording of Article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element for the exercise by any judicial body of its functions. Such power is derived from the well-recognized principle of "*la compétence de la Compétence*"<sup>4344</sup>.

This principle values that a judicial body has powers of recognition of its own jurisdiction and competence as a natural function, this being attributed to it as a basic prerogative for its proper functioning<sup>45</sup> and given the constant need of the various international criminal tribunals that have already existed to resolve sensitive issues to their jurisdiction, this institute becomes even more relevant.

With all this brought in, it is evident that the ICC has regular competence to exercise its functions on Palestinian soil, both in terms of theoretical and political application, as well as in practice; even if, depending on the factual situation, there is still doubt about Israeli civilians, for the immediate purposes of opening and maintaining the investigation of the situation in Palestine, the ICC is fully empowered.

## **FINAL CONSIDERATIONS**

Studying the validity, from an international legal perspective, of the interaction of the International Criminal Court with the Israeli-Palestinian conflict, it was found that this problem faces a series of obstacles and challenges, which are natural to the scenario as tortuous as the conflict of two nations, challenges that reflected in the making of the research. The greatest challenge encountered occurred because of the nature of most, if not all, of the issues of conflict involved in the scenario in question: that these have a completely abstract nature, whether speaking of sovereignty, formal territorial possession or the very quality of

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<sup>43</sup> INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA. *The Prosecutor V. Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*. The Hague, 1995. Available in: <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. Accessed: May 18, 2023.

<sup>44</sup> No Original: The Chamber considers that, notwithstanding the language of article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived from the well-recognised principle of "*la compétence de la compétence*".

<sup>45</sup> INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA. *The Prosecutor V. Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*. The Hague, 1995. Available in: <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. Accessed: May 18, 2023.

State that certain entities possess and the requirements for this, the questions do not have any objective parameters to attest much less a physical body to touch, and it cannot be forgotten that the theme lies within the field of Law, a purely theoretical science with the objective parameters meeting within the laws that a person or entity must obey, so when we speak here of something abstract, it translates into something that either does not have a regulatory legislative structure or where it is uncertain which of the possible structures would apply.

And, as a result of this nature, the dissent existing in the academic scenario in relation to all issues of such nature due to simply not existing a firm and concrete way to deal with all these issues together, and there is doubt even in relation to Resolution 67/19, that is, whether this instrument, in fact, produced any effect, This doubt is fueled even by representatives who, when voting positively, stated that such a vote would not imply a recognition of the quality of State.

However, the problems are pivotal to the position reached with the work, because precisely by making the scenario, reinforcing the need for a functional view of the whole issue, both from the academic and practical point of view, when talking about the need for the adoption of this vision by the ICC in its future practices to deal with the situation.

Analyzing the history of Palestine in relation to the International Society, under the functional view, we reach the position of the present work on the juridical-international validity of the interaction of the ICC with the Israeli-Palestinian scenario. Recalling that *prima facie* legal validity is something objective, being nothing more than the acts being in conformity with the law or other provisions that validate them, here however, because it is linked to so many abstract issues, this objective character is progressively mitigated the more one enters the problem, this occurs especially because this validating structure is not something simple, As if a law says yes or no, but a whole factual and international legislative tangle, with several factors to be analyzed, which do not allow a shallow and objective analysis, as well as does not allow an absolute position to be taken, immediately and definitively, because it requires a meticulous consideration of the factual-legal-political factors to reach a conclusion.

From the framework exposed in the present work, the hypothesis found here is that Palestine exists within a margin of discretion that interacts in a particular way with other international entities, with these validating or not the state identity of Palestine according to their own interests; therefore, the work brought tools to guide this margin of discretion to a favorable to the Palestinian election, thus ending up trying to resolve it and, at the same time, identifying as valid the decisions of the International Criminal Court with regard to Palestine

and its territories, even if they are *de facto* occupied by Israel. Therefore, the decisions of this Court must be respected, because they find support in the International Society, finding support also in the other pronouncements of the Court itself and support in the actions of the United Nations, making valid its acts, which in no way violate the right of Israel.

It should be noted that other nations party to the Rome Statute must cooperate with the ICC fully, not only by refraining from interfering, but by taking positive action when requested by the Court, in accordance with Chapter 9 of the Statute, as represented by Art. 86 thereof.

As far as the State of Israel is concerned, it should refrain from actions against ICC members, not only because it proves fruitless, as seen by the US retaliation against the ICC in the situation in Afghanistan, but because it would also characterize a complete disregard for International Justice and Society.

Since in the same way that the self-composition of the parties should not be allowed in domestic law, the same reasons apply to an international conflict, only increasing the scale and, especially, pointing out that, until then, the war conflict between the entities only brought death and destruction to both parties through the action of the ICC a more lasting justice is born.

And finally, it is crucial to understand that we will still see the ICC's performance in Palestine, as other steps are taken in the formal and practical spheres, especially from the findings of the investigation, so that the present work serves as an aid to the beginning of the understanding and analysis of these issues.

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