



The ICC Investigation of the Situation in Palestine

Questions and Answers

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Table of Contents

1. What is the ICC and what is its mandate?	1
2. Which crimes fall within the jurisdiction of the ICC?	2
3. Which situations has the ICC Prosecutor been investigating?	3
4. Why is the ICC Prosecutor looking into the Situation in Palestine and is the Prosecutor competent to do so?	3
5. Where does the ICC investigation of the Situation in Palestine extend to?	4
6. Who is covered by the ICC investigation of the Situation in Palestine?	5
7. What considerations will guide the Prosecutor in selecting and prioritizing cases related to the Situation in Palestine?	6
8. The ICC Prosecutor announced that they were looking into the Situation in Palestine in 2015. Why is there still no trial? What are the next steps?	7
9. What is the role of Israel and Palestine in the ICC legal process?	9
10. Do third States have any role to play in this legal process?	10
11. (How) Can human rights and humanitarian organizations contribute to the ICC legal process?	10
12. Does the ICC protect those who provide information to the court?	11
13. What does the ICC investigation mean for the recognition of Palestinian statehood?	12

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Questions and Answers

The objective of this Q&A is to provide clarity on the ICC's mandate, competence, and legal process, in general and specifically for its investigation of the Situation in Palestine.

1. What is the ICC and what is its mandate?

The International Criminal Court (ICC) is an independent and impartial judicial institution which aims at holding accountable individuals responsible for the most serious crimes of concern to the international community. A permanent international court of last resort, it seeks to complement national courts, and is mandated to prosecute international crimes when States are unwilling or unable genuinely to do so.

The ICC was established in 2002 when its founding treaty, the [Rome Statute](#), entered into force. The Rome Statute includes provisions detailing the jurisdiction of the court, the admissibility of cases, the law applicable by the court (including general principles of criminal law), its composition, administration and financing, and the steps of the ICC legal process. The ICC consists of four organs: The Presidency (which conducts external relations with States, and assigns judges, situations and cases to the Court's judicial divisions), judicial divisions (the judges), the Registry (which is in charge, among other things, of outreach and support to the Defence and victims), and the Office of the Prosecutor. The Office of the Prosecutor conducts preliminary examinations, investigations, and prosecutions. In order to do so, it acts independently as a separate organ of the Court (Article 42 of the Rome Statute). There is also a 'Trust Fund for Victims', which provides assistance, support and reparations to victims. It was also founded based on the Rome Statute, but is separate from the Court.

More than 120 States are [parties](#) to the Rome Statute. The Assembly of States Parties meets regularly notably to elect judges and the Prosecutor, and to approve the Court's budget.

The ICC has competence over natural persons (individual human beings) rather than States. In this regard, the ICC is distinct from the International Court of Justice (ICJ).

Contrary to the ICC, the role of the ICJ is to settle legal disputes between States and to give opinions on legal questions, including on violations of international law by States. Both the ICC and ICJ sit in The Hague, Netherlands.

2. Which crimes fall within the jurisdiction of the ICC?

The ICC has jurisdiction over four categories of international crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. These crimes are defined respectively in Articles 6, 7, 8 and 8 *bis* of the Rome Statute, as well as in the ICC [Elements of Crimes](#) (a document separate from the Rome Statute). Crimes that do not fall under these four categories fall outside the jurisdiction of the ICC.

The ICC can exercise its jurisdiction in three circumstances:

First, if a State party to the Rome Statute refers a situation to the ICC Prosecutor (when this situation concerns the referring State's own territory or own nationals, this is sometimes referred to as a 'self-referral').

Second, an investigation can be initiated at the Prosecutor's own initiative ('*proprio motu* investigation'). In these first two cases, the Court may exercise jurisdiction only if the alleged crimes occurred on the territory of a State party to the Rome Statute (or on board a vessel or aircraft registered in such State) *or* if they were committed by a national of a State Party. The alternative 'or' means that the Court's jurisdiction includes crimes that occur in States not party to the Rome Statute provided they are committed by nationals of a State Party and, vice-versa, crimes committed by nationals of a State that is not party to the Rome Statute provided the crimes occurred in a State Party. It is also possible for a State not party to the Rome Statute to accept the jurisdiction of the Court by lodging an *ad hoc* declaration to that effect, pursuant to Article 12(3) of the Statute (the Court's jurisdiction thus extends to the territory and nationals of this State).

The third possibility for the Court to exercise its jurisdiction is if the United Nations (UN) Security Council refers a situation to the ICC Prosecutor. In this last case, the Court has jurisdiction irrespective of whether the alleged crimes were committed by a national of a State Party or on the territory of a State Party. However, this type of referral is rare owing to the veto power of the five permanent members of the Security Council.

3. Which situations has the ICC Prosecutor been investigating?

Since the establishment of the ICC in 2002, the Office of the Prosecutor has opened investigations in 14 contexts, including Afghanistan, Bangladesh/Myanmar, the Democratic Republic of the Congo, Georgia, Kenya, Libya, Mali, and Palestine. These investigations have resulted in 35 arrest warrants and 9 summonses to appear. To date, 17 people have appeared before the Court, and the judges have issued 9 convictions and 4 acquittals.

Before starting an investigation, the Prosecutor conducts a ‘preliminary examination’ (this is a statutory obligation if an investigation is initiated at the Prosecutor’s own initiative; and it has become prosecutorial policy and practice in case of State or UN Security Council referral – on these three triggers, see Question 2). Preliminary examinations are not criminal investigations: they are a preliminary step for the Prosecutor to assess whether a situation meets the Rome Statute criteria to warrant the opening of a formal investigation. There have been 13 preliminary investigations, including on Colombia, Nigeria, Palestine, Republic of Korea, the Republic of the Philippines, Ukraine and Venezuela.

4. Why is the ICC Prosecutor looking into the Situation in Palestine and is the Prosecutor competent to do so?

Palestine acceded to the Rome Statute on 2 January 2015 and effectively became a party to it on 1 April 2015. As a result, the ICC has jurisdiction over alleged crimes committed on or after 1 April 2015, on the territory of Palestine or by its nationals (see Question 2). In fact, the government of Palestine also gave jurisdiction to the ICC over crimes committed prior to this date: on 1 January 2015, it lodged a declaration under Article 12(3) of the Rome Statute, retroactively accepting the jurisdiction of the ICC over crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. As a result, the Court is competent to investigate alleged crimes that have been committed since 13 June 2014 either by Palestinian nationals, or on the territory of Palestine irrespective of the nationality of the perpetrators.

After the State of Palestine accepted the jurisdiction of the ICC in January 2015, the Office of the Prosecutor conducted a preliminary examination of the situation. The goal was to independently establish whether the Rome Statute criteria for opening a formal investigation were satisfied. Accordingly, the Office of the Prosecutor had to be satisfied that requirements of jurisdiction and admissibility had been met, i.e., that there was

sufficient evidence of alleged crimes of sufficient gravity falling within the ICC's jurisdiction, that there were no genuine proceedings related to these crimes at the national level, and that the opening of an investigation would serve the interests of justice and of the victims. In order to make this determination, the Prosecutor took account of information relayed in documents (sometimes referred to as '[communications](#)') submitted to her not just by the State of Palestine, but also by other reliable sources, including other States, as well as individuals and groups among whom were victims, and intergovernmental and non-governmental organisations. She also met with representatives of the governments of Palestine and of Israel.

In December 2019, the Prosecutor concluded that all criteria for the opening of a formal investigation were met. Namely, she was satisfied that crimes within the jurisdiction of the Court have been committed in the West Bank, including East Jerusalem, and the Gaza Strip; that potential cases would be admissible; and that there are no substantial reasons to believe that an investigation would not serve the interests of justice. In particular, the Prosecutor concluded that there is a reasonable basis to believe that war crimes have been committed in at least three circumstances. First, during the summer 2014 hostilities in Gaza. Second, in connection to Israel's occupation of the West Bank, including East Jerusalem, and the settlement enterprise. Third, during the Great March of Return starting in March 2018, when the Israeli military used force against protesters near the Gaza perimeter fence. This preliminary factual and legal assessment is without prejudice to other possible crimes that may be identified during the investigation.

Before she opened her investigation, the Prosecutor requested the Pre-Trial Chamber to confirm specifically where exactly the Court's jurisdiction – and therefore the Prosecutor's investigative powers – extends in relation to the Situation in Palestine. The Pre-Trial Chamber issued its decision on this matter on 5 February 2021 (see Question 5). Accordingly, the Prosecutor's investigation into the Situation in Palestine [officially started](#) on 3 March 2021.

5. Where does the ICC investigation of the Situation in Palestine extend to?

At the close of her preliminary examination, the Prosecutor asked the Pre-Trial Chamber to confirm that the Court's jurisdiction (and therefore the Prosecutor's investigation) extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza. Her confirmation [request](#) was motivated by the uniqueness of the situation, the fact that "Palestine does not have full control over the Occupied Palestinian Territory" and that "its borders are

disputed”. This clarity on the territorial jurisdiction of the Court was deemed important to reinforce the legal foundations for the investigation to proceed, and to facilitate cooperation in the conduct of the investigation.

The Pre-Trial Chamber issued its [decision](#) on this question on 5 February 2021. It clarified that its determination was without prejudice as to the status of Palestine as a State under general international law and did not constitute a judgement on the question of borders (see also Question 13). The first relevant question before the Pre-Trial Chamber was whether Palestine qualifies as a “State party to the Rome Statute” (rather than whether Palestine qualifies as a State according to the rules of international law governing statehood). In this regard, the Pre-Trial Chamber recalled that the UN General Assembly accepted Palestine as a non-member observer State in the UN, which enabled it to become a party to the Rome Statute. It further noted that Palestine acceded to the Statute in accordance with the ordinary procedure and shall thus have the right to exercise its prerogatives under the Statute, including transferring its criminal jurisdiction to the Court.

The Pre-Trial Chamber then proceeded to delimitate the territory of Palestine *for the purpose of defining the Court’s territorial jurisdiction*. The Chamber noted that Resolution 67/19 of the UN General Assembly, echoing language in earlier resolutions, reaffirmed the right of the Palestinian people to self-determination “in their State of Palestine on the Palestinian territory occupied since 1967”.¹ It is on this basis that the Chamber concluded that the Court has jurisdiction in the West Bank, including East Jerusalem, and Gaza.

For more on the 5 February 2021 decision, see also [the Q&A on the decision](#) issued by the ICC.

6. Who is covered by the ICC investigation of the Situation in Palestine?

The Office of the Prosecutor has a duty of independence. It must investigate all alleged crimes in a specific situation, no matter on which side of the conflict. The Office of the Prosecutor itself pledged to carry out its investigations independently, impartially and objectively. It has already established, from the preliminary examination of the Situation in Palestine, a reasonable basis to believe that crimes within the jurisdiction of the Court

¹ Resolution 67/19, adopted by the UN General Assembly on 4 December 2012, is significant because it also accorded Palestine ‘non-member observer State status in the United Nations’.

were allegedly committed by members of the Israeli military, Israeli civilian authorities, Hamas, and Palestinian armed groups.

It must be recalled here that individuals falling under the jurisdiction of the Court include Palestinian nationals as well as anyone alleged to have committed a crime in the West Bank, including East Jerusalem, or Gaza (this is because the Court has jurisdiction in this territory *as well as* over nationals of Palestine – see Questions 4 and 5). Israeli nationals thus fall under the jurisdiction of the Court if their crimes are committed in the occupied Palestinian territory (oPt).

The jurisdiction of the Court is not limited, under the Rome Statute, to any specific type of perpetrators. Military and civilian State agents may be prosecuted, as well as members of armed groups. However, as a court of last resort, concerned with the most serious crimes and with only limited resources, persons charged by the ICC are usually high- or mid-ranking perpetrators. As a matter of [policy](#), the Office of the Prosecutor focuses on those ‘most responsible’ perpetrators (e.g. high-ranking military commanders or civilian policy-makers). It envisages the prosecution of lower-level perpetrators only for crimes that were particularly grave or notorious.

Some crimes imply that the perpetrator must be a State official. This is the case of the war crime of unlawful transfer of an occupying power’s own population into the occupied territory (Article 8(2)(b)(viii) of the Rome Statute) – the charge under which those responsible for Israel’s settlement enterprise in the oPt could be prosecuted. This crime covers State policies and practices encouraging transfers, as opposed to the acts of individual settlers.

7. What considerations will guide the Prosecutor in selecting and prioritizing cases related to the Situation in Palestine?

When investigating a ‘situation’ (that is, a context in which crimes within the jurisdiction of the Court may have been committed, such as the Situation in Palestine), the Prosecutor identifies potential ‘cases’. A case consists of specific incidents during which one or more crimes may have been committed, and it may concern one or several suspects. The Prosecutor does not have the mandate nor resources to prosecute every criminal act occurring within a given situation and must therefore select and prioritize certain cases. Case selection is first and foremost determined by conditions laid out in the Rome Statute, but also partly left to the Prosecutor’s discretion.

According to the Rome Statute, a case must not only fall within the jurisdiction of the Court (see Questions 2, 5, 6), it must also be ‘admissible’ before the Court. Three conditions must be satisfied for a case to be admissible. First, the case must be of sufficient gravity. In assessing whether a case meets the gravity threshold, the Prosecutor [takes into account](#) quantitative and qualitative considerations, relating to the scale, nature, manner of commission and impact of the crimes. Second, the suspect must not have already been tried for the same conduct. Third, the case is admissible before the ICC if it has not been investigated or prosecuted domestically or, when it has, if the State is not genuinely able or genuinely willing to carry out the investigation or prosecution. In other words, under this ‘complementarity condition’, a case is admissible if the State either fails to take any action or is unable or unwilling genuinely to investigate, or prosecute when relevant: for instance, when sham proceedings are carried out with a view to shield perpetrators from responsibility.²

The Office of the Prosecutor will typically select and prioritize only some of the potential cases satisfying the admissibility criteria. It exercises discretion in this respect, but on the basis of transparent criteria, laid out in a [policy paper](#) on case selection and prioritization.

8. The ICC Prosecutor announced that they were looking into the Situation in Palestine in 2015. Why is there still no trial? What are the next steps?

The ICC has a specific legal process, that consists of several stages in sequence: (1) preliminary examination; (2) investigation; (3) pre-trial; (4) trial; (5) appeals; (6) enforcement of sentence. Some of these elements are similar to criminal legal processes of courts within national jurisdictions.

For the Situation in Palestine, the ICC legal process is now at the investigation stage. The Office of the Prosecutor confirmed on 3 March 2021 the initiation of an investigation respecting the Situation in Palestine, upon conclusion of its preliminary examination and the decision of the Pre-Trial Chamber confirming the territorial scope of the Court’s jurisdiction in the Situation in Palestine.

² For instance, alleged crimes committed during hostilities in Gaza in the summer of 2014 by Palestinian armed groups could be admissible to the extent that no domestic court has been active in relation to these crimes. For alleged crimes committed by the Israeli military at the time, the question is rather whether the proceedings conducted by Israel were genuine or not. With respect to alleged crimes associated with Israel’s settlement enterprise, the Court will also have to determine whether Israel has been active and, if so, whether it is not only *genuinely* able but also willing to carry out proceedings.

During the investigation, the Office of the Prosecutor will have to collect and examine evidence, identify the gravest incidents and those most responsible for these crimes. The Office of the Prosecutor must collect and disclose both incriminating and exonerating evidence.

If the Office of the Prosecutor has sufficient evidence against the alleged perpetrators, it can then proceed to submit a request to the ICC judges to issue either arrest warrants or summonses for the suspects to appear (voluntarily). Arrest warrants are issued to ensure the person's appearance at trial and that the proceedings may be conducted. Arrest warrants may be open, or sealed, i.e., the information is withheld from the public and only accessible to those authorized by the court to implement the arrest. The Court does not try persons in absentia so hearings cannot begin without the suspect in the custody of the ICC. Persons arrested and transferred to the ICC would then be held in custody at the ICC's detention centre.

Before proceeding to trial, the charges against the defendants have to first be confirmed by the pre-trial judges, to establish that there is indeed sufficient evidence to commit the case to trial.

If and when the case goes to trial, evidence will be presented by both the Office of the Prosecutor and the accused (assisted by their counsel), in turn, and witnesses will be questioned. The Office of the Prosecutor must prove that the accused persons are guilty beyond reasonable doubt. The judges will consider all the evidence presented, then issue a verdict and in the case of guilt also issue a sentence, as well as order reparations for the victims. Ordinarily, the ICC judges can issue sentences of up to 30 years of imprisonment, unless there are exceptional circumstances that warrant a life sentence.

Upon the outcome of the verdict, both the Prosecutor and the Defence have the right to appeal the decision, be it acquittal or conviction. The appeal is decided by a different set of judges than those who decided on the original verdict. Where applicable, the sentence would then be enforced, and served by the persons found guilty, whilst those acquitted would then be released.

The preliminary examination of the Situation in Palestine took about five years to conclude, and it is anticipated that the investigation will also be a lengthy process. If potential cases eventually advance to the later stages of the ICC legal process, they will doubtlessly take considerably more time to complete.

9. What is the role of Israel and Palestine in the ICC legal process?

Within one month of the Prosecutor's announcement on 3 March 2021 of the investigation, Israel and Palestine each had the opportunity to request the Office of the Prosecutor to defer to relevant domestic investigations (pursuant to Article 18(2) of the Rome Statute). This one-month period has now elapsed.

The cooperation of States with the ICC is an important factor for its effective functioning. Israel and Palestine both have a role in the judicial process. The Office of the Prosecutor has also [expressly called](#) on the "support and cooperation of the parties", i.e., Israel and Palestine. Their cooperation is important notably in supporting the process of collecting evidence, and later on in the arrest and transfer of suspects to the ICC. At this stage, given that Israel retains control of the international borders of the oPt, its unwillingness to cooperate with the investigation may mean that the ICC's investigators may not be allowed into the oPt, and would consequently hinder the collection of evidence.

States Parties to the Rome Statute have an obligation to cooperate with the ICC (pursuant to Article 86 of the Rome Statute), which applies to Palestine. The State of Palestine has [welcomed](#) the Prosecutor's investigation.

States that are not party to the Rome Statute, such as Israel, have no obligation of cooperation with the Court under this instrument. The Israeli Prime Minister has [stated](#) that Israel rejects the ICC's decision to investigate the Situation in Palestine, and intends to oppose it, thereby providing clear indication of Israel's unwillingness to cooperate with the investigation. Israel can however be asked to cooperate with the Court (Article 87(5) of the Rome Statute) and may even be required to do so if the UN Security Council adopts a resolution, under Chapter VII of the UN Charter, to that effect. In addition, it is worth recalling that, as a party to the Geneva Conventions from 1949, Israel is [obligated](#) to suppress all violations of IHL by its agents and additionally to search for, prosecute or hand over to other courts, perpetrators of 'grave breaches' of the Geneva Conventions.

Because of the control it exercises over the territory and its residents, Israel's conduct with respect to the oPt is also subject to obligations emanating from international human rights law. Such obligations include investigating and prosecuting alleged violations committed by its agents. Palestinians have a right to a remedy and reparation, which includes a right to see alleged violations affecting them being investigated and prosecuted when appropriate. When it fails to meet this obligation, Israel should at least support accountability efforts by other States or international courts.

10. Do third States have any role to play in this legal process?

As the ICC does not have enforcement powers of its own, the cooperation, particularly of States Parties, is critical to supporting the judicial and prosecutorial functions of the Court. Support from States in the process of preliminary examinations, investigations, prosecutions and judicial proceedings are essential to ensure that perpetrators of international crimes are brought to justice.

All States Parties to the Rome Statute have a general obligation to cooperate with the ICC in its investigation and prosecution of crimes (pursuant to Article 86 of the Rome Statute).

States not party to the Rome Statute may nonetheless be invited to provide assistance to the Court, or be required to provide assistance if so ordered by the UN Security Council (pursuant to Article 87(5) of the Rome Statute). As highlighted above, all States are [required](#) per the 1949 Geneva Conventions (which are universally ratified) to suppress all violations of the Conventions, and additionally, search for, prosecute before their own courts or hand over to other courts, perpetrators of ‘grave breaches’ of the Geneva Conventions. Thus, arguably, even States that are not party to the Rome Statute must hand over alleged perpetrators of ‘grave breaches’, when they are subject to an arrest warrant issued by the ICC. Aside from such cooperation with the ICC, third States are also entitled and even obligated to prosecute alleged grave breaches, on the basis of universal jurisdiction.

Furthermore, the diplomatic and public demonstration of support of all States in various forums – both national and international – are critical to maintain and broaden the support for the international criminal justice system, and not hinder or obstruct the execution of its mandate and functions. Such support complements other forms of cooperation with the Court (such as providing assistance in the legal process), which are important for strengthening the legitimacy of the ICC for international criminal justice.

11. (How) Can human rights and humanitarian organizations contribute to the ICC legal process?

Civil society organizations play a significant role in supporting the Court’s mandate to hold those responsible accountable for their crimes. They are important sources of information and networks of contacts, that facilitate access to affected areas and provide on the ground support for the Court’s work on the situation it is examining or investigating. Based in or around the local affected communities, they can function as a liaison to connect the investigative team and to support in the identification of potential

participating victims and witnesses. Civil society organizations may function as formal intermediaries of the Court (as defined by the [ICC Guidelines on intermediaries](#)), be it through the request of the Court, the choice of a victim or other individuals of interest in their contact with the Court, or by self-appointment (see Question 12).

During the preliminary examination of the Situation in Palestine, local civil society organizations have provided the Office of the Prosecutor with specialist information.

During the investigation, individuals and groups [may provide](#) the Office of the Prosecutor with information that may be used as evidence. According to the [ICC Rules of Procedure and Evidence](#) (Rule 103) a Chamber of the Court may also, at any stage of the proceedings, allow any State, organization or individual to submit observations on an issue. For instance, in the Situation in Palestine, the Pre-Trial Chamber issued an [Order](#) that sets out the procedure for States, organizations or persons to submit observations on the question of jurisdiction, pursuant to the same Rule.

12. Does the ICC protect those who provide information to the court?

The ICC has a victim and witness protection programme, to ensure that victims and (both prosecution and defence) witnesses participating in the legal process, as well as other persons who are at risk on account of testimony from a participating witness are protected. Protective measures include protecting the witnesses' identity and whereabouts, so as to conceal their interaction with the ICC from their community and the general public. Parts of hearings may also be conducted in private or closed sessions to protect the identity of the witness(es) or other persons at risk on account of testimony. The Victims and Witnesses Unit within the ICC's Registry is responsible for providing protective measures and security arrangements, as well as other appropriate assistance in this regard.

Strictly speaking, persons other than victims and witnesses are not included in the scope of protection offered by the ICC, unless they may be at risk on account of the testimony given by a witness. However, a range of individuals and organizations interact with victims and witnesses and with the Court and perform different functions that facilitate the legal process. As such, even if they are not victims or witnesses participating in the legal process, they may nonetheless be at similar risk, given their relationship with victims or witnesses, their support to them (such as in their participation of the legal process), or their interaction with the Court. For this reason, the ICC extends certain protections to some individuals and groups, if they qualify and are selected as intermediaries, which

formalizes and standardizes their engagement with the Court. An intermediary, [as defined by the ICC](#) for the purposes of its engagements, is an entity or an individual “who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other”. The formal status of an intermediary is applied only to those who fulfil certain criteria and are assessed to be suitable. This includes a risk assessment. This formalization obliges the Court to prevent or manage security risks and implement protective measures for contracted and otherwise approved intermediaries (and other unapproved intermediaries on a case-by-case basis).

13. What does the ICC investigation mean for the recognition of Palestinian statehood?

The Pre-Trial Chamber’s decision from 5 February 2021 regarding the territorial scope of the investigation in the Situation in Palestine only determined that Palestine qualifies as a State in the sense of a State Party for the purposes of the Rome Statute.

The Pre-Trial Chamber [noted](#) that the ICC does not have constitutional competence to determine matters of statehood binding on the international community. The Pre-Trial Chamber also expressly noted that as the Rome Statute does not require a determination on whether Palestine fulfils the prerequisites of statehood under general international law, its decision does not pronounce on the status of Palestine beyond the context of the exercise of the ICC’s jurisdiction, and should not have such legal consequence.

The Pre-Trial Chamber’s decision did address the right of the Palestinian people to self-determination and made reference to the explicit recognition of this right by different bodies, but it did not conclusively resolve the complex legal questions surrounding Palestinian statehood in international law, nor did it purport to do so.

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