

What the ICJ ruling on genocide means to the Palestinian Resistances. A decolonial approach to the international law



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WHAT THE ICJ RULING ON GENOCIDE MEANS TO THE PALESTINIAN RESISTANCES. A DECOLONIAL APPROACH TO THE INTERNATIONAL LAW FRAMEWORKS

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ABSTRACT:

The present paper aims to understand what the international law frameworks, scopes and limitations are for the Palestinians, specifically on what the ICJ ruling on genocide means for the resistance groups in Palestine. The latter shall be studied from a decolonial approach to the international law empowerments based on the Frantz Fanon's tenets on violence and politics. The theory mentioned is selected as one of the few frameworks that could portray a wide image of the colonialism and genocide Palestine is currently facing, and Fanon's theory assist to comprehend the challenges for the resistance groups in Palestine, which should be understood as political and/or violent groups who participate in the Palestinian political arena. Furthermore, the methodology applied consists of a qualitative analysis with special focus on documentary research due to the ICJ ruling's nature.

KEY WORDS (4-6)

ICJ, Palestine, genocide, decolonialism, Fanon, resistances.



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Introduction

The object of this research paper is to analyze what the challenges for the resistance groups may be in Palestine after the International Court of Justice (from now on ICJ) ruling on whether the Israeli government is committing genocide against the Palestinian people, consequently, violating the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (from now on the Genocide Convention). Additionally for that purpose and based on the theory mentioned above, the present paper supports the following hypothesis: the ICJ ruling on genocide over the Palestinian people represents neither further conclusion nor peace for Palestine, given the fact that the Court and the international law frameworks have not yet started the conversation from a decolonial approach to fully understand the deep colonialism in Palestine. Additionally, the ruling fell short to recognize the role of the Palestinian resistance groups in the case, simplifying them by just addressing one of the hegemonic political parties, Hamas.

As an introduction on that matter, the last couple of months there has been an escalation of violence, deaths, and destruction upon the Palestinian people from the institutional forces of Israel, an event that increased since October 7th, 2023, when a series of confrontations between Hamas, a Palestine Islamist party, and the Israel Defense Forces, best known as the military army of Israel, took place on the Gaza Strip.



The media showed the narrative of Israeli nationals and foreigners being held hostage by Hamas and were previously attacked by them while they were attending an international music festival. However, the present paper focuses not on the analysis of the incidents that followed October 7th nor the media narrative upon the “terrorist” groups who attacked each other but on the consequences on the escalation of violence, the constant sufferings of the Palestinians, the destruction of their homes, their villages, their universities, and their hospitals.

In other words, the paper tries to summarize what has happened in the Gaza Strip since then until the proceedings instituted by South Africa against Israel before the ICJ, on December 29th, 2023 (Regional International Center for Western Europe, 2024).

Primarily, in order to analyze the importance of the proceedings introduced by the South African lawyers and the consequently ICJ ruling on the case accusing Israel of committing genocide in Gaza issued on January 26th, 2024, it is imperative to understand what the 84 pages South African’s application consisted of in order to interpret the ICJ ruling and statement on the case. Only then the future scenarios for the Palestinians living in Gaza and Palestine as a nation can be understood in the face of the consecutive actions to end the genocide.

To provide the needed context for this paper, it is essential to conceive the ICJ as a United Nations body composed of a 15 judge panel that reaches decisions by a simple majority, the Court is considered the most authoritative arbiter of issues in international law (ICJ, n.d.). Within its faculties, the Court can either settle legal disputes between states or give non-binding advisory opinions on legal questions referred by the United Nations.

The application instituted by South Africa in an attempt to utilize the international institutions, which aim to contribute to the world peace, were possible and legitimate in accordance with Articles 36 (1) and 40 of the Statue of the Court and the Article 38 of the Rules of Court, as mentioned in the legal brief titled Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), from now on referred as Application.



There is an important matter to highlight in the discourse of the case presented by South Africa. The condemnation of all violations of international law includes the direct targeting of Israeli civilians and other nationals by Hamas and other Palestinian armed groups. That is, the brief does consider the resistance groups (which some of them are in fact armed groups) as subjects who perpetuate the violence in the situation based on the argument that no armed attack on a state's territory can justify the breach the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (best known as the Genocide Convention).

One of the main arguments for the case for being submitted falls into the 75-year-long apartheid, its 56-year long belligerent occupation of Palestinian territory and its 16-year long blockade of Gaza. The elements mentioned above, as the paper states, breach of the Fourth Geneva Convention and other war crimes against humanity, and specially they are committed with the specific intent to destroy Palestinians in Gaza as part of a broader Palestinian national, racial, and ethnic group (Application, 2023).

Furthermore, the brief (2023) South Africa introduced to the Court contains several data concerning the consequences of the violent uprising and attacks of Israel onto the Palestinians in Gaza. According to it, by 29 October 2023 alone, it was estimated that 6,000 bombs per week had been dropped on the tiny enclave, moreover, by 7 November 2023, 312 Palestinian families in Gaza had lost over 10 members each. By 16 November 2023, the food infrastructure in Gaza was already considered "no longer functional". The arguments described before are just a minor example of the whole scenario for Palestinians living in Gaza, considering that the data explained consists only of the last year.



ICJ ruling on genocide ¿is it possible?

For the purpose of this subchapter, it is important to acknowledge what the ICJ capacities are in accordance with its creation from a United Nations organ. As stated in its constitutive chapter, the Court holds two roles: the first related to settling, in accordance with international law, legal disputes between States, and the second one responds to provide advisory opinions on legal matters (International Court of Justice, n.d.)

In order for the Court to settle disputes, the latter had to have been submitted by States and, subsequently for its advisory function, the Court must have heard from them by an authorized United Nations organ or specialized agencies. On that matter, the case presented by South Africa to the Court about an Israeli genocide upon the Palestinians was authorized and accepted by the judges because it falls on their responsibility.

In reality, the Court has not many options in its power to declare strong measures to be implemented by the Israeli government. In fact, the 2023's brief introduced by South Africa was not the first time the Court had heard of a matter concerning the security of the Palestinians lives. In the past, around 2004, the ICJ was asked to rule on a decision for the Israeli government to stop the construction of the wall in the Gaza Strip, that not only threatened the lives of the Palestinians who lived there but also endangered their access to natural resources such as water, food, and others.

The Court did rule in favor of the Palestinians issuing its decision and considering the construction of the wall in Gaza as illegal and against the international laws. However, their ruling faced the indifference of the Israeli government who, in many times, denied assisting the Court sessions and, at the end, ended up ignoring its decision.

The former brings up the question on whether this case will be any different from the past, not only because Israel has more allies than then (though in a geopolitical sense) but also because more than three months have passed since the beginning of the scandalous increase of the use of violence upon Palestinians, which some authors label as a genocide case.



In this regard, the question whether the Court could finally declare that a genocide is happening in Palestine remains unknown, not because there is some lack of evidence, but because the Court must face the limits within its power to declare it. In the best scenario, the ruling, as stated in an argument before, will be passed to the United Nations and specifically into the Security Council, a UN organ that does have the capability of discussing such matters. However, as the hierarchic international order established, if any of the five veto-nations decide to apply its power to do so, the hearing and the consequently recommendation issued by the ICJ remains powerless.

It should be noted then what the Court did say on the matter of genocide. According to the 29 pages of the provisional measures issued by the ICJ on January 26th (2024), Israel must take all reasonable measures within its power to prevent genocide and the violation of the obligations provided by the Genocide Convention: article II, article III (a-e), article IV, article V and VI; as well as to allow and/or not inhibit the collection and conservation of evidence of genocidal acts committed against Palestinians in Gaza.

On the human rights topic, the Court asked Israel to perform the obligations of reparation in the interest of Palestinians victims, which means the Israeli government must allow the safe return of displaced or abducted Palestinians to their homes and protect them from any violation of their human rights with the necessity of reconstructing what it has destroyed in Gaza (Request for the indication of provisional measures, 2024).

In this case the question that arises between academics, scholars and most generally the public opinion is: why did the Court not simply declare Israel has committed genocide against the Palestinians living in Gaza, given South Africa did exhibit all the proofs needed according to the Genocide Convention? The latter question supports the idea of the necessity of a decolonial approach when analyzing the Palestinian apartheid.

Furthermore, for the purpose of this paper it is necessary to highlight what the Court considers as genocide so it can be understood how the judges can point out when one is happening. According to the Genocide Convention (1948), with the intent to physically destroy, in whole or in part, a national, ethnic, racial, or religious group, any of the following acts can constitute genocide:



- A. Killing
- B. Causing serious bodily or mental harm
- C. Deliberately inflicting conditions of life calculated to cause the group's physical destruction.
- D. Imposing measures intended to prevent births within the group.
- E. Forcibly transferring children of the group to another group.

As mentioned above, there are several indications the Court can take into consideration when analyzing the existence of a genocide, however, it should be noted that what the Court issued on January 26th does not represent a final ruling, in fact, it can take months for the judges to finally come up with a closing ruling. That is, the relevance of the ICJ hearing is its capability (better understood as its enforcement) to declare provisional measures for both parties in an attempt to stop the situation from becoming worse.

As a matter of fact, the first objective of the South Africa team of lawyers when the case was first introduced and heard by the Court was for it to declare a ceasefire based in the evidence described in the accusation procedures (2024), namely the fact that 23,210 Palestinians have been killed, nearly two million people were forced to flee their homes, Israel is blocking the delivery of humanitarian aid, Israel has bombed hospitals, et cetera.

Decolonial approach to the international law

Before approaching the critique of the international law and its measures to colonial cases, it is first necessary to introduce a brief idea of what it must be comprehended as decolonial. Given the decolonial theories were introduced by a series of authors (from different parts of the world) mostly after the Second World War in an attempt to understand conflicts that were ongoing at that time and could not have been explained without the decolonial arguments, it is imperative to focus on one definition.



For the purpose of this paper, the theory proposed by Anibal Quijano, a Peruvian sociologist who dedicated his research on the decolonial approaches from a Latin American perspective, fits perfectly into the category of a decolonial study. Quijano (2001), then, brought the concept of decoloniality of power, understood as the expression of colonial relations, since it establishes the forms of imposition of subjectivities in all areas of social existence (work, sex, and collective authority).

The relevance of Quijano's claims respond to the necessity of visualizing that what is happening in Palestine not only is a subject of study for international law but also for social studies that can help analyze non hegemonic factors involved such as race and religion. It is evident the Court is aware of the mentioned elements; however, its procedures and final rulings are mostly not sensible of them, which results in a non-binding solution that considers them as part of a solution.

When stated in the title of the subchapter "decolonial approach" one must understand that the decolonial theories must be part of the discussion of Palestine as an essential requirement if it is intended to comprehend the whole picture of the situation. There is no better option to study a colonial conflict than to do so from a decolonial approach.

On the question: Why is it fundamental to contemplate the decolonial viewpoint? The answer relies on the critique of the law frameworks and its mechanisms to prevent acts of violence, discrimination, destruction, and genocide to happen in scenarios where these actions are unfolding. While it is true international law establishes a certain order among states, the reality is there are some subjects who are willing to overdo them for the purpose of their own interests.

That is, if the law recognizes several limitations of how far the power of a state can go, it also must acknowledge the limitations within its powers. Historically, the latter is the reason why international humanitarian law was created: to protect the lives of the people who may experience the effects of armed conflict (ICRC, 2004). Thereunder, the participation of South Africa in this case (Genocide on Palestine) and its background as a decolonial state who suffered from a regime of an apartheid for long years becomes relevant. Once again, it is highlighted that some actors are able to recognize the existence of situations such as genocide better and faster than international law organizations (whose duties are to be the optimal party to serve justice).



However, the ruling of the ICJ on the Palestinian case is somewhat incompetent in understanding what the Palestinians needed. If there is a situation in which the Court must respect the procedures the international frameworks establish, the least it can do is to issue a statement that does help to cease the violence Palestinians in Gaza are suffering, that is, for the final ruling to demand a ceasefire. Which did not happen on 26 January 2024.

Since the ruling of the ICJ did not fully satisfy the intentions of the Palestinians, it is necessary to rethink what the violence can mean. As Fanon (2014) described, there are some cases where the colonial rule ought to be overthrown through violence. That is, the use of force becomes a tool for the colonized to defend themselves of the occupation. On that matter, it is a requisite to understand that one of the main purposes of the existence of the international law is to prevent the use of violence. Nonetheless, this same speech is not brought up when discussing the side of the colonized, but only on how the colonizers must or must not use the violence as a power weapon.

The above mentioned happened exactly to Palestine on what the ICJ issued as provisional measures in January 2024, condemning the violence of both parties (Israel and Hamas) which is essentially correct according to the international humanitarian frameworks (to prevent and condemn all acts of violence) but insufficient. If the Court calls for the cease of force of Hamas, how does the Palestinians in Gaza shall defend themselves against the ongoing and unprecedented use of violence of Israel?

Of course, not all Palestinians in Gaza are (or wished to be) represented by Hamas, in fact their main resistance strategy is simply to condemn the acts and hope for a ceasefire (a temporary solution the ICJ was not able to call), but as Fanon (1961) stated, the same violence the colonialist used for the destruction of the indigenous cells, will be vindicated and appropriated by the colonized, as it is now noted in the acts of armed groups in Palestine, best known as brigades.



What the genocide means to the Palestinians Resistances

The motive of the use the decolonial theory to understand the implications of the case, and to analyze whether the Court understood accordingly the genocide in Gaza, based in the last ruling issued on January 26, 2024, consist of emphasizing better scenarios and to determine whether it is possible to think of another period of peace or an end of genocide for the Palestinians in Gaza.

To think as Palestine as a sole individual is to obscure the other forces that are fighting for freedom. Not only there are political parties involved in the conversation of the future of Palestine but also nonpolitical parties, such as armed groups who also constitute resistance groups. Given it is not the purpose of this analysis to describe the relationship among the political forces in Palestine, we should take the latter into consideration when thinking of what the ICJ ruling means to the nation and groups.

These armed groups (or brigades) are entities that emerged in Palestine since the 80's and continued its growth until now, becoming more influential and having more power in the Palestinian political arena. Nowadays, almost every political party in Palestine has one armed group or wing.

These brigades coexist in all parts of the occupied territories, mostly in the West Bank and the Gaza Strip.

The multiple coexisting parties in Palestine respond to the unsteady scenario of a wayless political agenda from the Palestinian side to face and fight against the colonization. The ICJ must start a conversation on Palestine based on a colonization focus, that is, to think of Palestine as a country that have suffered the colonization of a Zionism project and furthermore a genocide perpetrated by their military wings to secure the elimination of the Palestinians of the land, which the Zionism considered as theirs by biblically sources.

The question that arises once explained the Palestine panorama is whether the resistance groups were contemplated in the Application instituted by the ICJ in January. There is no doubt the ICJ contemplated a Palestinian group in their first ruling issued on January 26th, 2024, Hamas (called as an entity portraying terrorist acts), but its understating was oriented for them to stop their military strategies against the Israeli defense forces.



The latter represented not a solution nor a momentary action to prevent the genocide. The only thing that perpetuated was the Palestinian side to not fight or defend themselves as stated earlier.

One of the main aspects to be acknowledged is that Hamas is primarily an Islamic party and not a terrorist group. It is obvious that the western media helped spreading the narrative of terrorist entities who initiated the violence and consequently the confrontation with Israel, leading to the decision of the Israel government and its military wing to attack civilians. However, there can be multiple narratives involve in who is considered as a terrorist agent.

In fact, it is relevant to ask why the Court appointed the case to Hamas only instead of Palestine. If there is within its fundamental criteria to hear from disputes between states, the situation where the ICJ rulings become oriented to the Islamic group contradict its purpose. Some academics question why does the ruling conceive so much attention in one group in Palestine (Hamas), instead of the country itself? Some of them may argue it is because the Court has followed the Israeli narrative of utilizing Hamas as the political figure, and its public enemy to justify the violent attacks in Gaza.

The relevance of the study of the resistance groups in Palestine is not only to prove there are some parties who fight back against the colonization regime, better understood as an apartheid, but also to highlight the Court lack of acknowledgment of them as relevant participants in the scenario. As El-Kurd (2024) stated, the ICJ has failed to implement South Africa's first and most important requested provisional measure: "the State of Israel shall immediately suspend its military operations in and against Gaza."

Conclusions

There are two different approaches onto the realization of what the Court ruling meant for the Palestine as a whole nation and for the Palestinians surviving in Gaza. The first one leads the conversation to the progressive creation of an international framework that can be used as jurisprudence in future scenarios not only for the Palestinian cause but for other countries that may encounter genocide.



And the second refers to what the ICJ ruling meant for the Palestinians in Gaza, currently suffering the violence of the Israeli force.

Returning to the construction of a Palestinian jurisprudence, it can be useful to question if the previous 2003's ICJ ruling of the construction of the apartheid wall in Gaza as illegal and in violation of international law helped or prevented the ongoing building of the wall which had an impact on the daily life of the habitants of the Occupied Palestinian Territories, undermining their right to self-determination. The latter in contrast with the current case-law the Court is analyzing on Palestine again, to determine whether this time the ruling may turn out differently.

Then, as in the consequences for the Palestinians of Gaza, the ruling comes as a first step to try to eradicate the violence and present genocide committed by Israel forces. However, there is a wide space of difference between the significance of the ruling to the international frameworks and to the actual consequences for the people living in the Gaza Strip.

Furthermore, it is a necessary to underline the empowerment or the capacity of the ICJ in the Palestinian case. As explained above, the Court has no binding obligations for the states to comply with the ruling, nevertheless, the final decision can be send to the Security Council of the United Nations for further discussion, in terms of the relevance (genocide), to analyze it and decide what procedures might be the optimal option to put an end to the case, in other words, to come up with a resolution.

Taking into consideration the arguments presented by the decolonial theory to analyze the conclusions of the ICJ on the Palestinian case brought by South Africa, it can be noted that the international institutions designed to maintain the international peace and security have no longer the needing empowerment to resolve situations that completely violate the international humanitarian law. In the opinions of academics of the Palestinian cause, the decision of the Court does not fulfill the necessity of the Palestinians in Gaza, the result may be not enough.

In accordance with the international law limitations onto the Palestinian case (genocide), Fanon's ideas (1961) represent a clear understanding as in why rethinking the existence of armed groups or brigades in Palestine and their specifical violent activity in Gaza against the Israeli forces is necessary.



That is, according to Fanon, the group become their own leaders and therefore establish their own political agendas into their struggle for freedom, which inevitably develops into a “legal” form of resistance against the apartheid.

As Wargan (2024) states “the result (meaning the [almost] recognition of the ongoing genocide in Gaza by the state of Israel) would not have been possible if the Palestinian resistance had not shifted the balance of material forces, in other words, part of the victory is theirs, and it shall be recognized as that”. This quote fully represents the importance of the Court to recognize the progress and struggle for the Palestinians resistance groups in Gaza.

In terms of what it can be expected from this case-law, there is high probability the violence in Gaza continues, meaning a nonstop for the ongoing genocide, caused by the ineffectiveness of the Court to demand an immediate ceasefire and to the bureaucratic international law procedures.

The rise of more counterattacks by Hamas and or other resistance groups against the Israeli forces presents as another possible scenario.

Moreover, from a decolonial approach it should be expected more government, authors, and communities to speak up about the necessity of a permanent ceasefire in Palestine, not only as a quick resolution to the uprisings (originated in October 2023) but as a resolution to put an end to more than seven decades of colonization accompanied with constant killing, violence and erasing of the Palestinian lives, culture, and history.



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