

The Commission of Inquiry on Palestine and Israel: To Speak of Genocide from a European Liberal Lens

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The Commission of Inquiry on Palestine and Israel: To Speak of Genocide from a European Liberal Lens

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Abstract: This short piece is based on a talk given at a side event in the 56th session of the Human Rights Council titled 'Commission of Inquiry Report on Gaza and the World's Role in Addressing Genocide'. The intervention provides commentary on the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel's report of the 27th of May 2024. The intervention takes the report as a starting point to reflect on the wider limitations of the liberal mainstream engagement with international law. It argues that the commission's report fell short of the demands of truth-telling in times of atrocity in a settler colonial context. Liberal mainstream reading of international law is often portrayed as the only possible road. This portrayal is false in its undervaluation of rich histories of colonisation, global south-state practice, scholarship, and the demands of justice.

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Introduction

The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel is tasked with fact-finding, taking root causes into consideration. The findings of the Commission in its reports on the 27th of May 2024 will indeed be useful going forward, but their limitations call for a moment of reflection which questions the presumptions made in the conversation. Truth telling is the first step of transitional justice. It entails recognising the reality which shaped the lives of the affected population. Hearing the affected population and validating their stories is an essential step in healing. Nonetheless, truth telling in the context of mass atrocity is not a straightforward task. To communicate complex social phenomena, one needs to choose between different frameworks that can be used to conceptualise such reality. At times, one may choose frameworks which undervalue, misrepresent, or even distort reality. Indeed, these are common occurrences in international legal circles, after all – international legal frameworks are notorious for their colonial residues.

Imagine a group of European/European-educated scholars discussing an atrocity in the global south. We have to agree that their perception of the truth must be limited on multiple fronts. They most likely have never experienced such precarity, their history and education have been oriented towards a specific comprehension of reality shaped by the European experience and philosophy, and they do not *de facto* associate with the affected population. This of course does not mean that their discussion of the atrocity is inevitably distorting, but we can at least agree that their discussion ought to commence from a premises which recognises the limitations and possible cognitive biases of their perception.

Further diligence in the task of truth telling is required by the UN Duty to protect. If we are to take statements of regret in the 2005 World Summit over the failure of the UN and international community to adequately address the genocides in Rwanda and Bosnia seriously, then we must presume an institutional obligation to better comprehend atrocity in order to prevent it.

To speak of atrocity, one must ask how atrocities work? How can the mass dehumanisation of a population be enabled? In this short piece, I reflect on the Commission of inquiry's report by discussing three features of how atrocities work.

Atrocities are Often Facilitated by or Reactive to Systemic and Structural Precarity

Victims of atrocities are often in a pre-existing condition of precarity that is politically or economically maintained. The commission, though tasked with identifying root causes, did not elaborate on the centrality of the refugee status of over 70% of the population of Gaza, the deep running effects of effective control practiced by Israel in Gaza elucidated through the siege and other forms of long-running collective punishment, how the high proportion of children in Gaza's population is reactive to prior ethnic cleansing, among other elements. Even when it spoke of past attacks on Gaza, it started in 2005 – overlooking a long history that can at least be traced to the 1930's.

Indeed, the primary missing element in the report is the 'G' word. The Commission noted that it took a strategic decision not to undertake an analysis of genocide, leaving the task to the International Court of Justice. They believe that providing the facts is the most needed contribution required at the time being. The Commission's report represents a missed opportunity to include a reflection on root causes in the analysis of the ongoing genocide, a move which would have gone against the institutional wave of hyper positivist conceptualisations of the notion of genocide, on which I will elaborate later.

The Palestinian context is that of a contemporary case of colonisation, or in legal terms – alien domination and subjugation. The myriad of peremptory norms violations by Israel (including violations of the right of self-determination, prohibition against aggression, and the prohibition against apartheid) logically leads to this conclusion, which was historically recognised by the UNGA. To articulate the reality of the Palestinian people, one must recognise the validity of the international legal terminology required to capture such contexts. Here, I am referring to concepts found for example in the Declaration on Friendly Relations and the Declaration on Granting Independence to Colonial People (1960). To articulate the reality of the atrocity from an outsider's perspective, one must hear the perspective of the affected population, and further consider the validity of the affected population's conceptualisation of such reality. In other words, it is only respectful to treat the Palestinian perspective on international legal discourse as worthwhile engaging with when narrating their reality.

The commission's reading of reality was married to a particular conservative conceptualisation of international law which facilitated fragmentation. The report relies solely on the language of international humanitarian law, and human rights law (understood narrowly). Both frameworks are heavily critiqued for their colonial residues and negation of

the agency of the affected population once interpreted in isolation of other instruments. The commission defended itself by noting that their mandate falls under the human rights council, but this argument does not reflect the historical comprehension of the mandate of the human rights council which for example repeatedly articulated the right of self-determination, right of sovereignty over natural resources and the people's right to struggle against alien domination and subjugation in its resolutions.

Even within the boundaries of these bodies of law, the commission adopted a limited reading and defended it as the only path, as if our discipline was a science that is forever doomed to the limitations of the European gaze. In their rationale, the commission ignored the inherent indeterminacy of international legal language and the obvious choices presented for international legal practitioners in their analysis.

I would add, if the commission is serious about its engagement with gender-based violence on a feminist premises, intersectional feminism (as the appropriate framework to recall in such a context) is all about empathy and the recognition of personal agency. Yet alas – a liberal comprehension of what feminism and gender-based violence have overshadowed that aspect of the analysis. The result were confusing contradictory statements which ignore the usage of this discourse on sexual violence in Israel's incitement policy.

The role of third states in maintaining Israel's colonialisation of Palestine is a root cause that was absent from the Commission's consideration. Atrocity is facilitated by a long global supply chain feeding into capital accumulation. To comprehend atrocity, and conceptualise ways forward – discussion of how the atrocity was financially enabled is of the essence. While the commission notes the role of the United States in the supply of weapons (Gaza Report, para.78), it fails to go further by highlighting the central role of third-state and corporate complicity through incitement and facilitation of grave violations of international law.

As such, elements of asymmetry, resilience, and exploitation are almost completely absent from the commission's analysis despite their acute relevance to reality. The Commission undertook a consistent exercise of balancing between the oppressed and the oppressor, forgoing some fundamental elements required for making value judgements on the subject matter. An opportunity to narrate how core causes have led to the atrocity was missed. Issues at the centre of the Palestinian narrative elucidated in the stories of detainees and mass graves gained only the secondary attention of the commission.

Atrocity is Facilitated by a Belief System which Dehumanises the Subjugated Population

In early October, it was clear that Israel sought to create a momentum that relied on civilising rhetoric fuelled by misinformation and an excess of representations to justify retaliation against the Palestinian people. In other words, it sought to create a 9/11 moment. This rhetoric was taken forward by international media, which openly paraded what can only be called atrocity propaganda. This is exemplified in the false 40 babies headline which infiltrated Western media for weeks. Israeli exceptionalism (see Segal and Daniele 2024) stretched to journalistic practices. Atrocity propaganda is a common practice in such contexts, yet it was openly endorsed by mainstream media. Historical evidence of the dangers of such poor journalistic practices is recalled in the context of the Yugoslav wars in 1991, where a Serbian photographer claimed that 40 babies were killed by Serbian forces – the anger over that lie fuelled genocidal sentiments.

In its narration, the commission did not guard against implicating itself in such a logic of incitement. The commission engaged with bad-faith Israeli and mainstream media reports in good faith. The most egregious example of this is found in paragraph 90 of the report on Gaza, where the commission engages in good faith with Israeli reports on a command centre under al-Shifa hospital, despite the absence of any evidence. By doing so, the commission forgoes a nuanced articulation of how Israel falsely claimed that the hospital was used by Palestinian fighters as a human shield to justify what has been termed medical lawfare – a practice where hospitals sheltering thousands of displaced and injured people were mercilessly targeted (Gordon and Perujini, 2024).

The commission repeatedly noted that it was not granted access to investigate in Palestine and Israel by the Israeli authorities. Israel is currently in breach of its duty to preserve evidence as instated in the provisional measures of the ICJ. Further, Israel has a history of evidence destruction – one may recall the bombardment of Al-Khiam prison where systemic torture facilitated by Israel was committed for over 10 years in the South of Lebanon. The commission does not articulate how this absence then shapes its methodology of evidence collection and its probability standards. To the contrary, it sustains a rigid conception of evidence collection, accepting a reduction of reality imposed by Israel.

Reading the report, one can feel the physical and cognitive distance that was maintained by the Commission. I was constantly reminded of Judith Butler's work on the frames of war, where they demonstrate how some lives are framed as less grievable than others (Butler, 2009). At all times, the

commission was devoted to a forced balancing exercise which inevitably bestowed more humanity on the Israeli subject. Comparing the detail and narration of stories in the October 7th report to the Gaza report, one is met with a stark difference in the humanisation of the subject whether they are combatants or civilians. In its recommendations, the Commission recommends freedom for the Israeli hostages, and humane treatment for the thousands of Palestinian arbitrarily detained and often under a state-mandated policy of torture. What the commission is saying: some deserve freedom, others can only aspire to basic necessities. Similarly, the Israeli combatants benefited from the benefit of the doubt that was often absent for the assessment of the Palestinian combatant. When describing the acts of Israel, the Commission used assertions of intent much less frequently. Here, the commission is translating a recurring bias for state over non-state actors in international legal thought, a bias that is dangerous in contexts of settler colonisation.

Atrocity is facilitated by narratives that are normalised by powerful actors. The status quo of the world we live in gives 'the power to narrate' to the perpetrator. Israel aligns itself with the European liberal, though such alignment is dwindling. Israel's logic is aligned with the neoliberal proliferation of war. To talk of the truth of Palestinian subjugation and domination, one is tasked with speaking truth to power in times of intentional ambiguity.

To Prevent Atrocity, We Must Learn from History

When international lawyers proclaim that a genocide is happening in Gaza they are referred to technical articulations of the Genocide Convention premised on an imaginary of genocide that is particular to the European context. Underlying this perception is a dismissal of colonial histories which clearly articulate the interconnection between colonial and genocidal practices. The fact that the Commission found the context of settler colonisation to be an irrelevant factor to the determination of Genocide speaks to this point. Had the commission taken the histories of states of the global south seriously, it would have sought to challenge the urge to go down the path of conservative readings of the genocide framework. However, it is notable that the commission did reflect on systemic practices by the IDF such as the enactment of al Dahyia Doctrine and the Hannibal Directive.

While the commission did not entertain Israel's atrocious interpretation of 'self-defence' (Gaza report, para 27), it failed to note how such revengeful rhetoric has been historically used to justify genocide against indigenous

populations. Here, I am recalling the example of the Herero and Nama Genocide by German forces which was a retaliatory response to acts of resistance by subjugated people.

These limitations are reflected in the Commission's weak articulation of recommendations. An abundance of literature has sought to articulate third state and corporate responsibility in the case of the Genocide in Gaza. The Human Rights Council and UN experts have previously articulated the need for an arms embargo and other economic measures by third states. These tangible recommendations for third-states are nowhere to be found in the report. Further, the commission could have drawn from lessons learned in the case of apartheid South Africa to put forth tangible recommendations. None of the above is to be found in the report.

To conclude, I am aware that the Commission will respond by refuting the relevance of my interdisciplinary and critical reading of the needs of the law. The commission would respond noting that such reflections fall outside the remit of its mandate and capacity. As a rebuttal, I would argue that these reflections on how we conceive of atrocity are at the centre of legal questions on transitional justice. Dismissing them as irrelevant is a choice, such a choice is perhaps eased by the belief system of the UN. Within the layers of UN bureaucracy is a normalised belief system where the European Universal Liberal perspective is the truth. Talking to the commission, I was bewildered by their strong belief in the United Nations system of belief. As demonstrated by actors such as Francesca Albanese and Michal Fakhri, one can deify this system of belief and engage on different premises with the law.

The commission was under heavy fire by the same states complicit in the ongoing genocide. One can wonder if it is fear of indirect coercion that had a role to play in its choices. Here again, political power would have had a role in shaping how the truth is framed.

The violence normalised in the European liberal lens claiming civilisation is suffocating. Walking in the Human Rights Council, one is reminded of dystopian films. As I read the report, I had the urge to invite the Commission to stand in front of the dead bodies of over 14 thousand children in mass graves and to observe the army of amputees and orphans to draw the parallels of imageries in past colonial and genocidal contexts. In times of atrocity, one has the responsibility to call things by their name even when there is a price to pay when speaking truth to power. Tip-toeing around the truth, fragmenting it, and framing it reductively is a violent act. International legal practitioners cannot claim innocence under the umbrella of the liberal European. As international lawyers, our job entails reflecting on questions of causality and justice. If this ongoing genocide has taught us anything – it is that the negation of critique can at sometimes be bloody business.

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