

Season 5, Episode 2 (November 2023)

Failing Accountability in Palestine and Israel

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Tine: Welcome to this new episode of Justice Visions. And today we are actually taking a slightly different approach from our last episodes because, of course, we wanted to respond to the escalating violence in Palestine and Israel because our research, of course, revolves around issues of justice and accountability. It would be odd not to be talking about these international crimes unfolding in a climate of total impunity. And there is also, of course, the fact that my co-host for today, Brigitte Herremans, has strong ties to the region. Don't you Brigitte?

Brigitte: I worked for quite a long time for two Belgian NGOs on the Israeli-Palestinian question, mainly focusing on respect for international law. And I spent a lot of time in Palestine and Israel and Gaza also really holds a special place in my heart because I used to visit frequently until I was banned from entering Israel in 2016. But in essence, I really observed how Israel has shifted from holding Palestinian politicians and armed groups responsible for violations of international law to placing the responsibility on civilians mainly. And this shift was really highlighted by statements of Israeli politicians suggesting recently that there is no such thing as an innocent civilian in Gaza.

Tine: And I think that this very important shift is also why we're doing the episode today, because it's, of course, Israel's interpretation or reinterpretation of its obligations under international humanitarian law that is at the core of this episode, along, of course, with the international community's inability, and I would say unwillingness, to promote accountability. And these are, of course, very complex topics that have received widespread coverage already, including in other podcasts, some of which we'll link to in the show notes of this episode, because of course we cannot say everything about a conflict. But we did want to do an episode on the topic and we chose to invite speakers who really focus on dissecting this failing accountability and approaching it from different angles.

Brigitte: It's important to focus on how international lawyers also look at this. This was what we wanted to highlight. And of course, international lawyers specialized in different aspects of the conflict, and that is why we selected four eminent speakers, among whom Ben Saul who is the special rapporteur on a UN on human rights and counter-terrorism. Sari Bashi, who is the program director at Human Rights Watch and also has extensive experience on working in the Gaza Strip. Nada Kiswanson who is a MENA specialist for Impunity Watch, who also recently coauthored, edited a book on responsibilities under occupation by Israel. And lastly, Shawan Jabarin, who is the general director of Al-Haq, one of the most important human rights organizations in the Palestinian territories.

Tine: Right. And you have done interviews with all four of them. And we'll listen to ask for those interviews in this episode. But maybe to start with the basics, I think it's important to see to the absence of recognition of the immunity of civilians is really at the heart of the accountability problem that we're looking at and that we're talking about here in this episode today. So let's listen to Sari talking about that.

Sari: What is so heartbreaking about the current escalation of violence is the ways in which all parties are flouting their obligations to civilians and the way that outsiders in the international community are being selective about which civilians they care about. So on October 7th, Palestinian armed groups massacred civilians in southern Israel and took others hostage, committing unspeakable war crimes. Some countries in the world appropriately condemned those crimes. And then the Israeli military responded by engaging in a pretty horrific act of collective punishment, by cutting off humanitarian supplies, food, drinking. Water, fuel, electricity to Gaza and then proceeded to launch airstrikes that were characterized by the massive use of explosive weapons in densely populated areas in ways that were predicted to cause massive civilian deaths and have caused massive civilian deaths. And there are some people who are concerned about that and believe that Palestinian civilians in Gaza need to be protected. But there aren't enough people who believe that civilians, families, children need to be protected full stop, no matter who they are.

Brigitte: So many human rights organizations stress it's quite outrageous that civilians in Gaza have to bear the brunt yet another time for the crimes committed by armed groups and the way in which the international community and, of course, especially the United States have reacted when the Israeli government declared that it wants to flatten the Gaza Strip, eradicate Hamas, and also aims for damage rather than precision was also seen as tantamount to giving a carte blanche to Israel for a war of retaliation. And Shawan stresses that the protection of civilians has never been an international priority. But of course, what is happening today is quite unprecedented.

Shawan: This is the bloodiest wave I have seen in my life. I saw things here in 2000 and also in 2002 when they invaded the Palestinian cities here and they killed people in Jenin, Nablus, Hebron, Ramallah, everywhere. But this is unprecedented. Not only the scale, but also the kinds of attacks and killings and the destruction, the mass destruction of civilians, objects, civilian residential areas. In one attack sometimes they kill 100, 300 civilians. Most of them are children and women. And it's continuing. Now it's in front of cameras and on the screens of the TVs. This is unprecedented. And it doesn't happen in a vacuum. We have been under this situation for 75 years. And what we are seeing and the hospitals we see, women, children, sick people, all people, targeting civilians. It doesn't show that you are strong. I think it shows that you are in the lowest standards and scales of humanity. That's how I look at it. And there is no protection provided to the civilians by anyone. They are counting and calculating how many children were killed. I am sure that when things are finished, maybe we will reach 20,000 to 25,000 Palestinians. This is not just a huge, huge number, but this is, trying to erase, I think, Gaza. Levelling, Gaza, levelling neighbourhoods.

That's what they are doing. I think the characterization of this situation as a war crime, it doesn't give the full story and the full picture about what is going on. It's crimes against humanity and also treats the crime of genocide. That's since the beginning, you know, they showed their intention to commit the crimes. When they said that Palestinians have to leave and to go to Sinai. And another thing when they said: We will cut the water, we will cut off water and anyone cut to water, it means that he doesn't want to see life in this area. And there is no safe place in Gaza. Even when they ask people to move from the north to the south and during their way to the south also, they shelled them.

Tine: What also transpires from this intervention by Shawan is also that it is so extremely worrying, this complete disrespect for the rules of proportionality and the indiscriminate attacks, which is also something actually that Sari talked about.

Sari: Human Rights Watch has documented, for example, a strike on an ambulance outside Shifa Hospital in which no warning was given, which is in flagrant violation of international law. And these are hospitals who are struggling to operate even without being attacked because they don't have any more supplies. And I have concerns about the evacuation orders that the Israeli military has issued. So early on. The Israeli military told everyone in northern Gaza more than a million people to evacuate to southern Gaza. And there have been additional evacuation orders issued since then. While international humanitarian law encourages warring parties to issue warnings to civilians, where those warnings allow civilians to keep themselves safe. Issuing a warning to people to leave when there's no safe place to go and no safe way to get there is not an effective warning. And it also risks being forcible displacement. People in Gaza know a lot about forcible displacement because 70% of them have not been allowed to return to the homes that they fled the last time they were running away from the Israeli army.

Tine: And here we hear that it is actually inconceivable to think that there is no safe space in the Gaza Strip and that these widespread crimes are continuing in order to qualify those. It is crucial to conduct investigations in order to judge the lawfulness of each one of Israeli strikes. And that is also something which Ben Saul, the special rapporteur on human rights and counterterrorism stresses.

Ben Saul: You potentially need to know more about what kind of precautions Israel took in the targeting process or what information was it relying on? Did it do everything feasible to obtain all the necessary information on what was the target? Was it really a military objective? How many civilians were nearby? What kind of calculation was Israel making about how many civilians it thought were likely to be killed or not? Was it being careless in those kinds of precautions and the judgments it makes about civilian likely civilian harm and choice of weapons and timing of attack and all of the factors which go into that. So from the outside, not knowing more about those targeting processes, it can be difficult. On the other hand, you can obtain evidence through all kinds of other means to get a sense of whether a certain pattern of attack might be indicative of indiscriminate or disproportionate strikes. In terms of accountability, obviously, the parties themselves bear the primary obligation to hold their own forces accountable for violations of international humanitarian law through disciplinary measures, war crimes prosecutions where necessary. Unfortunately, both sides in this conflict

have a very poor record at holding their own forces to account, certainly for war crimes over many, many decades, actually. And this kind of prevailing impunity has been one of the really shocking things about this conflict. Other states, of course, may exercise universal jurisdiction over war crimes. So there is the possibility for other states to conduct their own investigations and potentially proceed with prosecutions or extradition requests where that is possible. The difficulty, of course, is obtaining custody of, for example, Israeli or Hamas military personnel.

Brigitte: And as we know from previous rounds of violence, it might be really hard to look into the evidence as Israel will not accommodate investigations. And the lack of access to the field is one of the key problems to investigate violations committed by all warring parties.

Tine: That is true. And I think actually that is particularly worrying in light of Israel's attacks against hospitals, which it justifies by claiming that Hamas operates from there.

Brigitte: Yes, And that is a key point that Sari is making.

Sari: There have been allegations that Palestinian armed groups are unlawfully endangering civilians, either by locating weapons or personnel in civilian areas, or even the Israeli military has alleged that they're preventing civilians from fleeing. We're not in a position to be able to corroborate those claims. It's very difficult to do research right now in Gaza. I will say in the past, we have documented in previous hostilities armed groups endangering civilians by firing rockets from civilian areas. And I want to be really clear, that's a grave violation of international law. It endangers civilians. There's two things that worry me. First of all, the way that the Israeli military is weaponizing international humanitarian law and misrepresenting it, to claim that they can then treat civilians who are in those areas as being fair game. So the Israeli military, for example, dropped leaflets on northern Gaza telling civilians that if they did not flee, they risked being considered complicit in terrorist activity. And they've also blocked aid from reaching northern Gaza and said: If you want aid, go to southern Gaza. So that is not what international law requires. It doesn't matter why civilians remain in an area. Either they can't or won't leave. They retain their civilian protections. And the Israeli military is obligated to continue to supply them with lifesaving humanitarian aid as the occupying power and certainly not to block that aid. The second concern is the way that misrepresentations are being made without being criticized. You know, the coverage of this conflict is so polarized. If you watch, news media from one country and from another, it's as if you are watching two completely different conflicts.

Tine: What's striking is that despite the misrepresentation of the nature of the conflict and the crimes, it's impossible not to acknowledge that Israel's current assault on the Gaza Strip has elements of revenge to it, which is also what Nada stresses. And what she insists on is that it is problematic in and of itself because, of course, states are supposed to have abandoned that eye for an eye logic a long time ago. And her concern is that here we are looking at a situation where more is at play.

Nada: The allegedly disproportionate and indiscriminate bombing of innocent Palestinians in their homes, the dehumanization of Palestinians by Israeli political and military leaders calling, for example, for the erasure of Gaza, referring to Palestinians as human animals, depriving them of humanitarian needs, as well as attacks against refugee camps and medical facilities, all of this strongly suggest that Israel aims to inflict maximum amount of destruction and suffering in Gaza. There is no regard for the loss of civilian life. Another concern of mine is that the world is watching the devastation of Gaza live and around the clock. But nothing substantive and powerful is done to put an end to it. The Security Council has not been able to agree to a full cessation of hostilities. And this display of incompetence does not really bode well for the future.

Brigitte: As Nada stresses here, it is of course, not the first time that Israel is escalating hostilities in Gaza. Several independent bodies have documented the mass displacement of Palestinians and also Israeli attacks against civilians, health facilities and UNRWA schools in past military operations.

Nada: So in that sense, in my view, what is happening today is very much a consequence of the international community's past failures to ensure that individual perpetrators is held to account for past wrongdoing, but also states' failure to exert sufficient pressure on Israel to act in accordance with its legal obligations towards the occupied population, unconditionally lift the 16 year long closure on the Gaza Strip and its occupation. There has been a collapse of the post-World War norms based order in regards to Israel's control over the Palestinian territory. And Israel has been given extraordinary leeway to act in a way that best fits it. We see this unfold today in the Security Council, and we see it unfold on the ground where things are only getting worse. What sets this operation apart is the imposition of the complete siege on the Gaza Strip and the deprivation of essential needs such as fuel, food, drinking water and electricity. There is also very little effort made on the part of Israel to justify its attacks against civilians. The killing of more than 11,000 Palestinians over the period of around a month, most of them children and women, indicate that soldiers are not being restrained. There are no red lines. And if anything, statements by Israeli leaders seem to encourage more violence. This has then led to unprecedented warnings by UN experts and leaders and human rights organizations that genocide is in the making.

Tine: And it's also a fact that several UN experts actually stated that serious violations perpetrated by Israel against Palestinians following the events of October 7th suggests that the possibility of a genocide is actually unfolding.

Brigitte: Yes, and this is also something that Palestinian civil society organizations are also pointing the attention to. They called on the UN Commission of Inquiry to condemn Israel's ongoing war crimes, crimes against humanity and intent to commit genocide in Gaza. And for them, this is also reminiscent of the Nakba, the 1948 catastrophe when Israel was established and Palestine was transformed and over 500 villages were demolished, leading to a mass exodus from Palestine. But of course, at the same time, what is happening

now is unprecedented because of the nature of Israel's violence. And this is something that Shawan highlights.

Shawan: Now it's a genocide. This is deepening the hate in people's minds. Some of the families, and I am speaking here about not just tens, I am speaking about hundreds of their families, they were erased completely. They were even dissolved from the civil registration file, because the whole family was killed. Here in a situation like this when you are pushing people from a place to another place and the people, they are looking for a place to stay with their friends, maybe with their family members. And here you see the places for ten persons became, you know, 200 persons. That's because when they used to attack one house, they killed 40, 30, 50 in one time. And the priority, you give the priority in that space to women and children. That's the case. It has happened intentionally, because you know which place you attack and you attack residential areas. And even with this very destructive weapons that you use when you shoot, it is a revenge against civilians for political reasons: to clean Gaza from the Palestinians, the things that they haven't implemented in 1948. Maybe they feel this is a time to implement it, to push Palestinians outside, to kill Palestinians, to erase Palestinians, you know, from the land in Palestine. This is the first time ever we have been facing these things. Even our field workers, they couldn't go to document, just by chance they left their houses ten minutes before the air strike attacked their houses and demolished their houses.

Tine: So it's striking, of course, that many observers, among whom the UN secretary general, have actually argued that this escalation of violence did not happen in a vacuum. And that is also something that Sari stresses, that it is important to look into the root causes of this conflict.

Sari: Human Rights Watch has followed the lead of Palestinian human rights organizations and intellectuals in concluding that the Israeli government is carrying out the crimes against humanity of apartheid and persecution against Palestinians. And a significant element of those crimes is the quest for Jewish demographic supremacy in the land between the river and the sea. And that includes, for example, not letting refugees return. So Gaza is 70% refugees. These are people who have for 75 years not been allowed to return to the areas in Israel or their parents and grandparents fled or were expelled from. And it's not an accident that these escalations tend to start in Gaza. There's something going on that people who are interested in the future, even in de-escalation, should be looking at why is this violence happening? So the wilful impeding of relief supplies, in particular fuel, which is a war crime and is leading to deaths and injuries from lack of supplies, the ability to power, sewage, pumping plants to purify water, massive use of explosive weapons in densely populated areas in ways that has contributed to the thousands and thousands of civilians being killed. Those kinds of attacks risk unlawfully indiscriminate attacks. And they're also, contrary to a widely accepted new standard, calling for countries to limit that use. Because if you use explosive weapons in densely populated cities, if you bomb a crowded neighbourhood, it is expected that you will kill children. And that's what's been happening.

Tine: And that, I think, is leading us to have a second major theme in our episode, which is the issue of accountability, of course, and the lack of accountability, especially at the international level. There's a distinct pattern of selectivity which is also manifested at the level of the International Criminal Court, for example.

Ben Saul: The International Criminal Court has been investigating for some years. I think there is a pretty stark difference between the speed with which the ICC prosecutor mobilized resources as soon as the latest round of the Ukraine war broke out, compared with the situation in Israel, which has been an ongoing investigation for quite some years now. No indictments issued, as happened within the first year of the Ukraine conflict, despite there being some very stark examples of war crimes on both sides in the Israel-Palestine dispute. In relation to Israel's conduct, I mean, the illegal Israeli settlements in the West Bank, contrary to the fourth Geneva Convention, they constitute a very clear war crime, in the same way that the forced transfers were fairly evident crimes to the prosecutor in the situation in Ukraine. So, I think the credibility and legitimacy of the court in large parts of the world is absolutely at stake.

Brigitte: So Nada has recently co-edited an academic volume on Israel's prolonged occupation, and she dedicated the chapter in which she also looks at the situation of Palestine at the International Criminal Court.

Nada: It examines the two principal Israeli domestic avenues that are theoretically available to Palestinians that seek to obtain justice and bring violations to an end. These are, namely the Israeli High Court of Justice and the Israeli military justice system. I argue in that chapter, based on my own examination, that there are structural, substantial and procedural problems with these mechanisms, such as a lack of independence by the High Court, an unwillingness to rule on petitions related to Israeli's practices in Palestine, like, for example, on settlements, an inherent conflict of interest within the military system and inadequate subpar investigations. These serious shortcomings render these mechanisms unable and unwilling to bring justice to Palestinians. And in the absence of domestic mechanisms, Israelis can only feasibly be investigated, prosecuted and punished in accordance with international law by the International Criminal Court. One truly understands the power of the ICC, once one realizes that there is no other independent mechanism with a mandate to prosecute international crimes available for Palestinians. And this is, of course, where the crux lies. Israel has refused to cooperate with the court, and many states, including European states, have attempted to limit the court's reach in this regard for this very reason. What is needed is then political will to support the ICC fully without compromise, and also to complement the court by enabling domestic courts' exercise of universal jurisdiction over grave crimes committed in Palestine. Simply, accountability has to be considered an integral part of any transition towards peace.

Tine: Here we are really getting at a very important point, which is that the understanding that accountability is crucial does not seem to be a universally shared understanding, especially by countries like the United States, which actively work against accountability initiatives. And I would say that also European states, including Germany, actually have opposed to the ICC's the international criminal court's jurisdiction over crimes in Palestine. And that's

striking because it seems to point to a dynamic of forgetting that state parties to the Geneva Convention of 1949 have an obligation to ensure respect for international humanitarian law. And this is also something that Shawan talks about when he talks about the selectivity and the lack of involvement in any kind of accountability enforcement today, that that actually constitutes complicity.

Shawan: Look, according to international law, I think there is no problem in the texts. I think it includes and covers everything: the protection of civilians, the protection of the hospitals and clinics and also the staff, doctors, medics and everyone. This is clear in the international humanitarian law and international human rights law. The problem is not in the law. The problem, I think it is in the political world. And the problem is in the States. Another thing is the prevention. It's part of the obligation under, for instance, the genocide convention from 1948. States have an obligation to prevent and also to take all measures possible to help and to protect civilians. What is going on here in this case? No one acts according to his or her obligation under the convention. This is also why they are complicit because they haven't acted. And more than that, they continue providing assistance to Israel. More than that, I think they paralyzed even the international system to protect Palestinians like, for instance, the Security Council to issue and to release a ceasefire resolution. That makes them complicit with the crime and mainly the US, mainly the US, mainly UK and mainly Germany. Because of that we submitted jointly with other human rights organizations, and submitted the case against Biden and Blinken and also the American defence minister. And here we submitted in California in a federal court. And I think there are in other countries, human rights groups submitting also and going after their countries or their governments because they failed also to act. This is the case, the international system failed here.

Brigitte: It is quite outrageous that the EU and the majority of European states only started to stress the need to respect international humanitarian law around the end of October, a couple of weeks into the violence. And this is, of course, quite appalling.

Tine: It is. And then, you know, we also always try to bring in a note of hope in this episode. And I think it is actually quite relevant to point out. Belgium, for example, has actually emphasized the significance of international law and has actually actively been advocating for accountability, including by increasing its financial support to the International Criminal Court. That is, very important to highlight and it's also something that Sari talks about.

Sari: I do think it is exceptional, the position that Belgium has taken, not just in being clear about the universal nature of humanitarian protections, but also in providing funding to the International Criminal Court, which is, you know, its prosecutor is tasked with investigating crimes by all parties going back to 2014, but including this conflict. And that's really important. It's not just words. It needs to be deeds. And I hope Belgium will also encourage other state parties to the ICC to be strengthening it not just with words, but also with resources and protections. I hope it will show people, show government leaders that there needs to be another way. The European Union is really important on this and it's been very difficult to get traction from the European Union. We've called for a number of

EU states to suspend arms transfers to the Israeli military, the UK and Germany, in addition to Canada and the United States, are funding sending weapons to the Israeli military. We've asked them to suspend those weapons transfers. We've also asked Iran to suspend weapons transfers to Hamas and Islamic Jihad because of the real risk that those weapons will be used and grave abuses against civilians. I think there's an opportunity for Belgium to really display what principles means, not just for Europe. And I hope that European countries and all countries will recognize that their engagement needs to be twofold right now, immediately protecting civilians, but also adjusting some of their policies that are focused on a so-called peace process without paying attention to the abuses on the ground.

Tine: Beside these violations, Palestinian organizations, both in Palestine and Israel, are facing increasing pressure.

Brigitte: Yes, the space for civil society is shrinking rapidly. In 2021, Israel has labelled six Palestinian human rights organizations as terrorist organizations. Al-Haq is one of those.

Tine: Which, of course, has a lot of impact on their work, which is something that Shawan talks about because it draws the attention away from their primary task, which is documenting human rights violations.

Shawan: They try to carry out a big smear campaign against us to silence us and other organizations when they failed completely to approve any of their allegations and accusations, they came and they used their political hand. They declared us and designate us as a terrorist organization. But because we work in this field, it is not a job and it is not a picnic. We decided to continue our work to defend our children and grandchildren, and to continue fighting and struggling for truth and for justice. And even if the crisis will be our life, we know that the Israelis, they have expertise in assassinations. But we are ready and willing also to pay the price, instead of stepping back or giving up. We will not give up. We will not step back. And we will continue. And I am sure that we have our friends everywhere.

Brigitte: It is quite remarkable to hear how determined Shawan in his struggle for accountability and justice. And of course, this exemplifies the Palestinian steadfastness or what Palestinians call *sumud*, their resistance against practices of occupation and violence. And he is quite stark also in the way how he expresses his zeal for a better future and his hope that it's possible to obtain this.

Shawan: Fighting for a better situation to live in, for better society, for a democratic society, for human, values and society to live in. That by itself, it encouraged me to wake up in the morning. It is enough to encourage me to give me inspiration. And the hope also is coming from the better future. I know what it means to see colleagues and others. They lost their beloved persons and in the same times the Israelis, they came and punished them to demolish their houses for punitive reasons. And I know what it means, to humiliate a person on checkpoints. We have enough resources and we are rich people, you know, and we it means a lot for us, you know, to live in dignity.

Brigitte: It's inspiring how Palestinian human rights defenders continue their resistance against all odds, against the occupation. Also in the face of the aggression, intimidation and smear campaigns which have continued and also increased lately and up until today. This is also quite important to highlight. They have been assisted by Israeli human rights defenders and human rights organizations who joined them in this common struggle against the occupation and against practices of mass death and dehumanization.

Tine: Thank you, Brigitte, for highlighting that, because I think that topic of resistance is so important. We have spent this episode talking about accountability, which to some extent is of course, something that takes place at the institutional level. But at the same time, we're also observing that there is so much happening bottom up in terms of resistance. And in a way, I think that also takes us to next episode where we will also be talking more about how in other contexts people engage in resistance as a way to also seek accountability often. So we will be talking more about that in the next episode.