

Judge Rosalie Abella on the charges brought by South Africa against Israel
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Rosalie Silberman Abella FRSC is a Canadian jurist. In 2004, Abella was appointed to the Supreme Court of Canada, becoming the first Jewish woman and refugee to sit on the Canadian Supreme Court bench. She retired from the federal bench in 2021.

The charges brought by South Africa at the International Court of Justice are a cynical abuse of the postwar international legal order

The International Court of Justice is about to hear arguments in a case, brought by South Africa – the country that in 2015 refused to send former Sudanese president Omar al-Bashir of Sudan to the International Criminal Court to stand trial for his contribution to war crimes in Darfur, and instead facilitated his return to Sudan where he continued his crimes – that alleges that Israel has not complied with the Genocide Convention and calls on the court to order Israel to stop committing acts of “genocide” in Gaza.

To me, this case represents an outrageous and cynical abuse of the principles underlying the international legal order that was set up after the Second World War.

Hamas’s explicit and unapologetic goal is to eliminate Jews. The elimination of Jews is genocide. That is why Hamas murdered, raped, beheaded, kidnapped and tortured Jews on Oct. 7, 2023: to eliminate them, because they were Jews. It is a legal absurdity to suggest that a country that is defending itself from genocide is thereby guilty of genocide.

The end of the Second World War prevented Hitler from fully implementing his genocidal plan to eliminate Jews. And the world signed the Genocide Convention 75 years ago to make sure it never happened to anyone else. Now, we find ourselves in the perverse situation where a genocidal organization such as Hamas is able to escape legal scrutiny or sanction for committing genocidal acts, while the country that is the intended target of its genocidal intentions is being called upon by the International Court of Justice to defend itself from allegations of genocide.

This is an insult to what genocide means, an insult to the perception of the ability of international courts to retain their legitimacy and transcend global politics, and an insult to the memory of all of those on whose behalf the Genocide Convention was created.

History will judge Israel’s response to Hamas’s genocidal attack on Oct. 7 and determine whether the retaliatory measures it took to protect its security were conducted in accordance with the law. That is a legal question that will necessarily balance purpose, cause, effect and context. It will consider issues such as what limits there are on a state defending itself from terrorism – Israel’s Supreme Court has been the global judicial leader in defining the requisite legalities; how a state can address, let alone eradicate the threats to its security and survival when it is confronting an adversary like Hamas, which ruthlessly uses innocent civilians as human shields and embeds itself in civilian public spaces such as schools, hospitals and mosques; what measures justify the search for kidnapped civilians; and the consequential harm.

There will inevitably be accountability – if only the world showed the same obsessive interest in holding other countries to legal account.

The unbearable tragedy of war lies in the deaths and suffering of innocent civilians, and there can be no doubt that the deaths and suffering of thousands of civilians in Gaza is an unbearable tragedy. That is why the international community developed a sophisticated set of legal instruments after the Second World War: to prevent, minimize and sanction global conflicts.

Seventy-five years after the birth of the Genocide Convention and of the state of Israel, both of which rose from the ashes of Auschwitz, we find genocide and rape and torture in full and flagrant flight in too many parts of the world. Yet the country that finds itself as the designated avatar of genocide is Israel.

As a lawyer, I find it shameful; as a Jew, I find it heartbreaking; and as the child of Holocaust survivors, I find it unconscionable...