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South African Lawfare at The Hague

Motions before any court—criminal or civil, national or international—contain references to hard evidence and a careful reading of legal precedent. The South African ICJ application has neither.



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17 Jan 2024 · 12 min read



International Court of Justice (ICJ) prior to the hearing of the genocide case against Israel, brought by South Africa, 12 January 2024. Alamy



On January 11, 2024, the Republic of South Africa submitted an application to the International Court of Justice (ICJ) in The Hague. It charged Israel with committing genocide in Gaza and petitioned the ICJ to intervene judicially. The legal basis for this application is the [1948 United Nations Convention on the Prevention and Punishment of Genocide](#), which defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

We will know, perhaps in a matter of weeks, what the ICJ makes of South Africa's case. Many—including [Tal Becker](#), a legal advisor to Israel's Foreign Ministry—have already denounced it as an inversion of recent history. It is Hamas, they point out, who have called for the genocide of their enemies, and who launched a pogrom on October 7.

Israel's Tal Becker gives the opening remarks for Israel at...



Opening remarks at the ICJ by Tal Becker.

Nevertheless, it is worth examining the South African application in order to understand how poorly it is constructed as a matter of law, and how deceptive it is as propaganda. Generally speaking, motions before any court—criminal or civil, national or international—contain references to hard evidence and a careful reading of legal precedent to back the claims therein. The South African application has neither.

The application is 84 pages long and includes 574 footnotes. Its aim is not to convict any particular Israeli of genocide, but to show that a *prima facie* case exists that merits the ICJ's intervention. South Africa cites the case brought in 2019 by The Gambia against Myanmar alleging the latter's genocide of the Rohingya people, a Muslim ethnic group in the Rakhine state, hundreds of thousands of whom fled to Bangladesh. In that case, the ICJ ruled that a *prima facie* case of genocide existed, based on evidence presented in the report completed in 2018 by a UN fact-finding mission to the region. The [court noted that](#) "at least some of the acts alleged by The Gambia

are capable of falling within the provisions of the [Genocide Convention.” The ICJ then ordered Myanmar to halt its genocidal activities. South Africa hopes to do the same with Israel.

SA-Israel ICJ case | Blinne Ni Ghralaigh KC



Blinne Ni Ghralaigh KC presents the case against Israel at the ICJ.

The UN fact-finding mission in the Myanmar case undertook a two-year investigation, during which it interviewed over 1,000 victims and analyzed documents, photographs, and videos. It recorded over 1,000 examples of anti-Rohingya hate speech on Facebook alone. It found evidence of deliberate starvation through the confiscation of fields and the killing of livestock. It found corroborating evidence of face-to-face mass killings in hundreds of villages, including murders of very young children and the throwing of infants into burning houses and rivers. The UN mission also reported widespread sexual violence, including a “notable pattern” of “mass gang rape”—indeed, the descriptions are eerily similar to the stories of sexual violence committed by members of Hamas on October 7.

The Myanmar case is mostly used to establish South Africa's standing to bring genocide charges before the ICJ, and the ICJ's ability to intervene, but the two cases are entirely different. The Rohingya have no national charter calling for the destruction of Myanmar, they have not launched thousands of rockets at cities and villages, and they have not carried out systematic terror attacks against Myanmar's civilians. Nor is there a global chorus at the UN vilifying the Myanmar state and calling for its eradication. Finally, the UN investigation of Myanmar was [serious and painstaking](#), and not simply thrown together with a predetermined outcome. But the main problem with the South African argument against Israel relates not to its political context or its legal standing but to its evidentiary basis.

The application's early pages report that other world leaders have called Israel's actions in Gaza genocidal, including the leaders of Iran, Algeria, Turkey, Iraq, Libya, and the Palestinian Authority president Mahmoud Abbas. How these statements of opinion qualify as evidence of anything is anyone's guess. The application also cites past UN fact-finding commissions to argue that Israel has been pursuing a genocide of the Palestinians for years. It ignores that the methodology of these commissions was deeply flawed. Their investigations took days, not years, and their evidentiary basis was mostly testimony from witnesses in Gaza with no knowledge of Israeli decision-making. At times, this practice is unintentionally comical, such as when South Africa cites a [UN economic report from 2015](#) that predicted Gaza "could become uninhabitable by 2020," but left unexplained why Gaza's population keeps increasing.

Other uses of past UN fact-finding reports are simply disingenuous. In September 2009, the UN [conducted an investigation](#) into the 2008-09

Israeli operation in Gaza known as Cast Lead, a three-week military engagement following a barrage of Hamas rocket attacks. The South African application reproduces 19 passages from that report verbatim, including inflammatory claims that Israel used Hamas rocket attacks as a pretext to target “the people of Gaza as a whole,” and that Cast Lead was “a deliberately disproportionate attack designed to punish, humiliate, and terrorize a civilian population.”

The 2009 report is better known as the Goldstone Report, named for the South African supreme court justice Richard Goldstone who led the UN fact-finding mission. There were numerous problems with the Goldstone report, not the least of which was that part of the “fact-finding” came from two days of televised public hearings in Gaza City. During these hearings, commission members such as Pakistan’s Hina Jilani asked witnesses leading questions such as, “Can I ask you if you’re able to give us an idea whether there was some kind of a pattern of destruction?” Other witnesses, during testimony concerning the destruction of a mosque in Jabaliya, failed to mention that the mosque had been used for military purposes. The Izz al-din al-Qassam Brigades’ own sources [later revealed](#) that those killed in the mosque were senior operatives of Hamas and Islamic Jihad.

Nor does the South African application mention that, in 2011, Richard Goldstone himself disavowed the conclusions of his own commission after he reviewed Israel’s evidence. “While the investigations published by the Israeli military and recognized in the U.N. committee’s report have established the validity of some incidents that we investigated in cases involving individual soldiers,” [he wrote](#) in the *Washington Post*, “they also indicate that civilians were not intentionally targeted as a matter of policy.” He added:

The purpose of the Goldstone Report was never to prove a foregone conclusion against Israel. I insisted on changing the original mandate adopted by the Human Rights Council, which was skewed against Israel. I have always been clear that Israel, like any other sovereign nation, has the right and obligation to defend itself and its citizens against attacks from abroad and within. Something that has not been recognized often enough is the fact that our report marked the first time illegal acts of terrorism from Hamas were being investigated and condemned by the United Nations. I had hoped that our inquiry into all aspects of the Gaza conflict would begin a new era of evenhandedness at the U.N. Human Rights Council, whose history of bias against Israel cannot be doubted.

Amazingly, the name Richard Goldstone is nowhere to be found in the entire South African application. Goldstone was a critical figure in the dismantling of Apartheid in South Africa, and the prosecutor who indicted Jean-Paul Akayesu, the first man ever convicted of genocide. That the application's authors, who claim to be defending human rights, are too embarrassed to mention one of South Africa's most preeminent human-rights figures is telling.

The application's main arguments concerning the current war in Gaza are similarly flawed in terms of evidentiary weight. The war has not yet concluded, so amassing thousands of corroborating witness statements and documents has not been possible. Just about all of the evidence comes from UN statements, and from two sources in particular.


The first of these sources are the daily "Flash Updates" published by the UN's Office for the Coordination of Humanitarian Affairs (UN OCHA).

To demonstrate Israel’s genocidal intent, the application cites these updates more than 70 times, which supposedly report Israeli atrocities in real time, complete with exact death tolls from very recent engagements. On multiple occasions, South Africa cites [Flash Update #78](#) (December 27, 2023) and its associated [daily “impact report” chart](#) of the same date in support of the allegation—repeated six times—that the Israelis have inflicted 21,110 fatalities up to that date, 70 percent of whom are said to have been women and children.

Citing the same report repeatedly is not corroborating evidence. More importantly, the South African application does not question the reliability of figures supplied by the Hamas-run Gaza Health Ministry, nor does it mention that the health ministry [fails to distinguish](#) between Hamas or Islamic Jihad fighters killed, Gazans killed inadvertently or deliberately by those groups, and Gazans killed in Israeli strikes on Hamas targets. The South Africans also ignore the small-print disclaimer included by the UN—not on the Flash Updates themselves, but tucked away at the bottom of daily impact report charts of casualty figures—that “The UN has so far not been able to produce independent, comprehensive, and verified casualty figures.” Given that the South Africans are trying to make a *prima facie* case for genocide, and given that proving something requires verifiable evidence, the inclusion of a warning that the casualty figures are unverifiable ought to be important.

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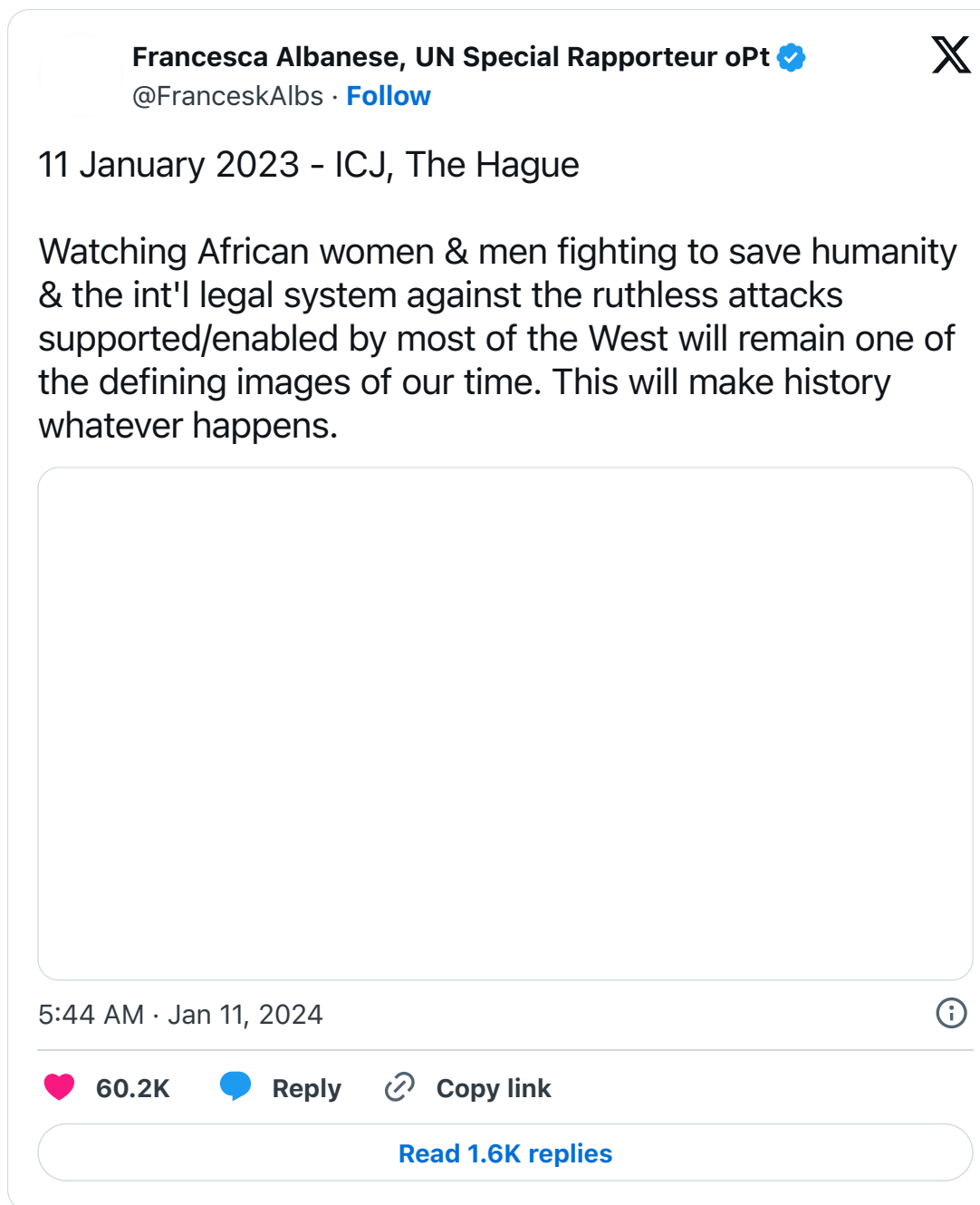


The second major source for the South African application is the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories. This office was created in 1993 by a UN Commission on Human Rights resolution, [which described](#) the new rapporteur's job as "to investigate Israel's violations of the principles and bases of international law, international humanitarian law, and the Geneva Convention relative to the Protection of Civilian Persons in time of war." The rapporteur's research was to be mainly witness testimony, which presents the same evidentiary problems as later UN fact-finding missions to Gaza.

The UNCHR resolution made no pretense of impartiality—it espoused "the right of the Palestinian people to resist Israeli occupation by all means, in accordance with the relevant United Nations resolutions, consistent with the purposes and principles of the Charter of the United Nations, as has been expressed by the Palestinian people by their brave intifada since December 1987, in legitimate resistance against the Israeli military occupation." According to the terms of this resolution, Palestinian attacks on Israelis were deemed courageous, while Israeli responses were presumed to be unlawful. Palestinian war crimes and human-rights violations were placed beyond its remit.

The current special rapporteur is Francesca Albanese, a longtime UN

human-rights official. In June 2023, Albanese called for all 5.9 million Palestinian individuals classified as refugees to be allowed to resettle in Israel—a demographic development that would mean the end of the country as a Jewish state. In November 2023, she claimed that “Israel cannot claim the right to self-defense emanating from a territory it occupies,” even though Israel’s occupation of Gaza ended in 2005 and Hamas turned it into a theocracy in 2007. On January 11, 2024, she praised the South African legal team presenting the case for genocide to the ICJ. They are, [Albanese says](#), “fighting to save humanity ... against the ruthless attacks supported [and] enabled by most of the West.”



On multiple occasions, the South African application cites the statements of a biased observer, appointed by a biased committee, on the authority of a biased resolution, whose Twitter feed is filled with anti-Israeli vitriol. In return, that biased observer praises the legal team that has repeatedly relied on her own statements.

The South Africans are careless with other numbers too. They claim, for instance, that within two months of the war's outbreak, the Israelis had

killed 94 journalists in Gaza. This death toll, the South Africans allege, outstrips the number of journalists killed in all of World War II. This allegation [comes from Al Jazeera](#), which claims that 69 journalists were killed in the Second World War. But I know of no study that provides casualty figures for journalists from all countries involved in that war. According to Ray Mosely's book [Reporting War](#), 69 journalists accredited to Allied forces were killed, but he has no figures on Soviet reporters, who surely died in far higher numbers in urban battles such as Stalingrad. Reporters without Borders, which has [filed its own complaints](#) with the International Criminal Court against both Israel and Hamas, [counts 17 journalists killed](#) doing their jobs during the Gaza war by December 14. Reporters without Borders [has also noted](#) that the conflicts in Syria and Iraq have been far deadlier places for journalists.

There are other basic factual problems. South Africa claims that “reports are multiplying of Israeli soldiers performing summary executions, including of multiple members of the same family.” The evidence for this allegation is a single report—not “multiplying reports”—filed from Ramallah by the UN Office of the High Commissioner for Human Rights of an alleged incident in Gaza City in which family members were said to have been killed at close range. Israel flatly denies the allegation.

South Africa also quotes statements made by furious Israeli officials immediately after October 7, such as Defense Minister Yoav Gallant's enraged outburst, two days after the massacre, that “we are fighting human animals” (which surely referred to Hamas killers and rapists, not all Palestinians). Dehumanizing speech has been used by investigators of other genocides to allege genocidal intent and

instigation. But in the Myanmar studies, genocidal intent is alleged by pointing to thousands of examples of hate speech from senior government officials and the media over a long period of time. When David Crane, lead prosecutor of the Special Court for Sierra Leone from 2002 to 2005, appeared on NPR to discuss accusations of genocide made against Israel, [he said this](#):

Whomever is perpetrating this international crime has to have a specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group. If I was charged with investigating and prosecuting genocide, I would have to have in large measure a smoking gun, in other words, someone—a rebel group, a person, a head of state—directing his organizations to destroying whole or in part a peoples. It's a difficult crime to prove.

The dehumanizing language uttered by Israeli politicians ultimately means little by itself. “All of this,” Crane says, “is largely political rhetoric.” Intemperate statements made in grief and anger are not proof of state policy.

The Genocide Convention mentions “imposing measures to prevent births within the group.” It has been alleged by Juzoor, a Palestinian NGO, that shortages of medical supplies and plasma in Gaza are causing Palestinian women to die from post-partum bleeding. Doctors in Gaza, it is further alleged, are performing hysterectomies to save the lives of the mothers. The South Africans cite this report, as well as a statement by Reem Alsalem, the Jordanian-born Special Rapporteur on Violence Against Women and Girls. Her remit notwithstanding, Alsalem did not manage to condemn Hamas’s gang rapes and murders of Israeli women on October 7, but [she has since denounced](#) what she

calls “reproductive violence inflicted by Israel on Palestinian women,” and “the assault on Palestinian women’s dignity and rights [which] has taken on new and terrifying dimensions, as thousands have become victims of war crimes, crimes against humanity and an unfolding genocide.”

And the law? The South African application promises on its first page that it has paid close attention to the jurisprudence of tribunals that have ruled on genocide cases. One would expect such an application to do so, as courts are by their nature conservative in interpreting law, and are usually unconvinced without citation to legal precedent. Yet the only jurisprudence South Africa discusses is the aforementioned Gambian case against Myanmar to establish South Africa’s legal standing. The South Africans discuss no actual precedents from the body of genocide convictions since 1998, even though the International Criminal Tribunal for Rwanda (ICTR) alone issued 35 such convictions.

The legal arguments in the Myanmar case refer repeatedly to the 1998 ICTR judgement of Jean-Paul Akayesu, a local mayor in Rwanda who became the first man ever convicted of genocide. It is hardly surprising that the South Africans do not discuss the Akayesu case. Aware that it was setting precedent by interpreting the 1948 Genocide Convention for the first time, the ICTR was very careful. It began with a close reading of the convention itself, the official versions of which are in French and English. The court noticed that while [the French text](#) defines the homicidal aspect of genocide as *meurtre de membres du groupe*, the English-language version mentions *killing members of the group*. “[The] term ‘killing,’” [said the court](#), “is too general, since it could very well include both intentional and unintentional homicides,

whereas the term ‘*meurtre*’ [murder] is more precise.” The court used the French version, since murder indicates intent to cause death.

As for aiding, abetting, planning, and preparing genocide, the ICTR found that “it must be proven that [the accused] acted with specific genocidal intent.” Incitement had to knowingly provoke another to engage in a criminal act—it had to be “more than mere vague or indirect suggestion.” The precedent, in short, does not in the least support South Africa’s genocide allegation.

SA-Israel ICJ case | Malcolm Shaw (KC)



Malcolm Sshaw KC presents the case for the defense at the ICJ.

So, we shall wait. The ICJ’s judges number 18—a lucky number in Judaism, representing life itself. Hopefully, they will see the South African application for what it is, and relegate it to the ever-increasing pile of anti-Israeli propaganda.

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