

INTERNATIONAL COURT OF JUSTICE

*Proceedings instituted by South Africa against
the State of Israel on 29 December 2023
(South Africa v. Israel)*

Co-Agent's Opening Statement

Dr. Tal Becker

(30 minutes)

Madame President, Distinguished Members of the Court,

It is an honor to appear before you again on behalf of the State of Israel.

1. The State of Israel is singularly aware of why the Genocide Convention, which has been invoked in these proceedings, was adopted. Seared in our collective memory is the systematic murder of six million Jews as part of a pre-meditated and heinous program for their total annihilation.
2. Given the Jewish people's history, it is not surprising that Israel was among the first States to ratify the Genocide Convention, without reservation, and to incorporate its provisions in its domestic legislation. For some, the promise of "Never Again" for all peoples is a slogan; for Israel, it is the highest moral obligation.
3. Raphael Lemkin, a Polish Jew who witnessed the unspeakable horrors of the Holocaust, is credited with coining the term Genocide. He helped the world

recognize that the existing legal lexicon was simply inadequate to capture the devastating evil that the Nazi Holocaust unleashed.

4. The Applicant has now sought to invoke this term in the context of Israel's conduct in a war it did not start and did not want. A war in which Israel is defending itself against Hamas, Palestinian Islamic Jihad, and other terrorist organizations whose brutality knows no bounds.
5. The civilian suffering in this war, like in all wars, is tragic. It is heartbreaking. The harsh realities of the current hostilities are made especially agonizing for civilians given Hamas's reprehensible strategy of seeking to maximize civilian harm to both Israelis and Palestinians, even as Israel seeks to minimize it.
6. But, as this Court has already made clear, the Genocide Convention was not designed to address the brutal impact of intensive hostilities on the civilian population, even when the use of force raises "very serious issues of international law" and involves "enormous suffering" and "continuing loss of life".¹ The Convention was set apart to address a malevolent crime of the most exceptional severity.
7. We live at a time when words are cheap. In an age of social media and identity politics, the temptation to reach for the most outrageous term, to vilify and demonize, has become for many irresistible. But if there is one place where words should still matter, where truth should still matter, it is surely a court of law.

¹ *Legality of the Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J Reports 1999, p. 132-133, paras 16-17 and p. 138, para. 40.*

8. The Applicant has regrettably put before the Court a profoundly distorted factual and legal picture. The entirety of its case hinges on a deliberately curated, decontextualized, and manipulative description of the reality of current hostilities.
9. South Africa purports to come to this Court in the lofty position of a guardian of the interest of humanity. But in delegitimizing Israel's 75-year existence in its opening presentation, that broad commitment to humanity rang hollow. And in its sweeping counter-factual description of the Israeli-Palestinian conflict, it seemed to erase both Jewish history and any Palestinian agency or responsibility. Indeed, the Application delegitimization of Israel since its very establishment in 1948 in its submissions, sounded barely distinguishable from Hamas's own rejectionist rhetoric.
10. It is unsurprising, therefore, that in the Applicant's telling, both Hamas's responsibility for the situation in Gaza, and the very humanity of its Israeli victims are removed from view.
11. The attempt to weaponize the term genocide against Israel in the present context, does more than tell the Court a grossly distorted story, and it does more than empty the word of its unique force and special meaning. It subverts the object and purpose of the Convention itself – with ramifications for all States seeking to defend themselves against those who demonstrate total disdain for life and for the law.

Madame President, Members of the Court,

12. On Saturday, October 7, a Jewish religious holiday, thousands of Hamas and other militants breached Israel's sovereign territory by sea, land, and air, invading over twenty Israeli communities, bases and the site of a music festival. What proceeded,

under the cover of thousands of rockets fired indiscriminately into Israel, was the wholesale massacre, mutilation, rape and abduction of as many citizens as the terrorists could find before Israel's security forces repelled them. Openly displaying elation, they tortured children in front of their parents, and parents in front of their children, burned people, including infants, alive, and systematically raped and mutilated scores of women, men and children. All told, some 1,200 people were butchered that day, more than 5,500 maimed, and some 240 hostages abducted, including infants, entire families, persons with disabilities and Holocaust survivors, some of whom have since been executed; many of whom have been tortured, sexually abused and starved in captivity.² Representatives of the hostages' families are in this Court room today and we acknowledge their presence and their boundless suffering.

13. We know of the brutality of October 7 not only from the harrowing testimonies of the survivors, the unmistakable proof of carnage and sadism left behind, and the forensic evidence taken at the scene. We know it because the assailants proudly filmed and broadcast their barbarism.
14. The events of that day are all but ignored in the Applicant's submissions. But we are compelled to share with the Court some fraction of its horror - the largest calculated mass murder of Jews in a single day since the Holocaust.
15. We do so not because these acts - however sadistic and systematic - release Israel of its obligations to uphold the law as it defends its citizens and territory. That is unquestionable. We do so rather because it is impossible to understand the armed

² Volume, Tab 8.

conflict in Gaza, without appreciating the nature of the threat Israel is facing, and the brutality and lawlessness of the armed force confronting it.

16. In the Volume of materials submitted to Members of the Court access has been provided to a portion of the raw footage for separate screening. But I am obliged to put before the Court today some small fragment of the scenes of unfathomable cruelty that took place in hundreds of locations on that horrible day.
17. Johnny Siman Tov, a wheat farmer, and his wife Tamar, an activist for women's rights, lived in Kibbutz Nir Oz. When the rocket fire started, they hid in the safe room with their 4 year-old son, Omer, and their 6 year-old twins, Arbel and Shachar. During their rampage, Hamas militants set fire to their house. Johnny texted his sister Ranae "They're here. They're burning us. We're suffocating". The whole family was burned alive, to ashes, making DNA identification especially difficult.³
18. A survivor of the Nova music festival massacre testified to police to witnessing a Hamas militant brutally raping a young woman, as another militant cut off her breast and toyed with it. A second militant then raped her again, shooting her in the head while still inside her.⁴
19. In one video recorded by a home surveillance system, a Hamas militant throws a grenade into a safe room where a father and his two sons have rushed to hide. The father is killed; the two sons are injured and bleeding as a militant pulls them into the living room. One child can be heard screaming to his brother, "Why am I alive?"

³ <https://www.lbc.co.uk/news/theyre-burning-us-horrific-final-texts-family-killed-kibbutz/>

⁴ <https://edition.cnn.com/2023/11/17/world/israel-investigates-sexual-violence-hamas/index.html>

I can't see anything. They're going to kill us". The militant casually opens the fridge, takes out a bottle and drinks.⁵

20. And then there is this [**Screen Clip 1**]: [In yet another recording, a Hamas militant called Mahmoud, is heard excitedly calling his parents from Kibbutz Mefalsim. "Open my Whatsapp" he says "Look how many I killed with my own hands. Your son killed Jews!". "I'm talking to you from a Jewish woman's phone. I killed her and I killed her husband. I killed ten with my own hands!". "Dad, ten with my own hands" he shouts with palpable joy. "Mom, your son is hero", he says].⁶
21. As stated, none of these atrocities absolve Israel of its obligations under the law. But they do enable the Court to appreciate three core aspects of the present proceedings, which the Applicant has obscured from view.
22. **First**, that if there have been acts that may be characterized as genocidal, then they have been perpetrated against Israel. If there is a concern about the obligations of States under the Genocide Convention, then it is in relation to their responsibilities to act against Hamas's proudly declared agenda of annihilation, which is not a secret, and is not in doubt.
23. The annihilationist language of Hamas's Charter is repeated regularly by its leaders,⁷ with the goal, in the words of one member Hamas's political bureau, of the "cleansing of Palestine of the filth of the Jews".⁸ It is expressed no less chillingly in

⁵ <https://www.cbsnews.com/news/israel-video-of-hamas-terror-attacks-war-in-gaza/>

⁶ <https://www.timesofisrael.com/idf-publishes-audio-of-hamas-terrorist-calling-family-to-brag-of-killing-jews/>

⁷ The Covenant of the Islamic Resistance Movement (HAMAS), 18 August 1988., https://avalon.law.yale.edu/20th_century/hamas.asp. Volume, Tab 6A.

⁸ <https://www.memri.org/tv/hamas-political-bureau-member-fathi-hammad-at-gaza-rallies-cleanse-palestine-of-filth-cancer-of-the-jews>, Volume, Tab 6A.

the words of senior Hamas member, Ghazi Hamad, to Lebanese Television on October 24th, 2023 who refers to the October 7th attacks, what Hamas calls the Al Aqsa Flood, as follows: **[Screen clip 2]** [*“The Al Aqsa Flood”, he says “is just the first time, and there will be a second, a third and a fourth”*]. In the continuation of this interview, Hamad is asked: “Does that mean the annihilation of Israel”. “Yes, of course.” he answers. “The existence of Israel is illogical”; and then says “Nobody should blame us for the things we do. On October 7, October 10, October 1,000,0000 – everything we do is justified”.⁹ Given that on October 7, before any military response by Israel, South Africa issued an official statement blaming Israel for the “recent conflagration”,¹⁰ - essentially blaming Israel for the murder of its own citizens - one wonders whether the Applicant agrees.

24. **Second**, it is in response to the slaughter of October 7 – which Hamas openly vows to repeat - and to the ongoing attacks against it from Gaza, that Israel has the inherent right to take all legitimate measures to defend its citizens and secure the release of the hostages. This right is also not in doubt. It has been acknowledged by States across the world.¹¹
25. Astonishingly, the Court has been requested to indicate a provisional measure calling on Israel to suspend its military operations. But this amounts to an attempt to deny Israel its ability to meet its legal obligations to the defense of its citizens, to the hostages, and to over 110,000 internally displaced Israelis unable to safely return to their homes.

⁹ Ghazi Hamad, Hamas Political Bureau, Interview to LBC TV, 24 October 2023, <https://www.memri.org/reports/hamas-official-ghazi-hamad-we-will-repeat-october-7-attack-time-and-again-until-israel> Volume, Tab 6A

¹⁰ South Africa Department of International Relations and Cooperation official website, Statement of 7 October 2023, <https://www.dirco.gov.za/south-africa-calls-for-the-immediate-cessation-of-violence-restraint-and-peace-between-israel-and-palestine/> Volume, Tab 11

¹¹ Volume, Tab 12A

26. The Applicant in its submissions to the Court makes almost no mention of the ongoing humanitarian suffering of Israel's citizens at the hands of Hamas,¹² and treats the hostages still held in captivity, as barely afterthought. But is there a reason these people [on your screen] are unworthy of protection? *[Show slide - 3]*
27. Hamas is not party to these proceedings. The Applicant, by its request, seeks to thwart Israel's inherent right to defend itself – to let Hamas not just get away with its murder, literally, but render Israel defenseless as Hamas continues to commit it.
28. Yesterday, Counsel for the Applicant made the astonishing claim that Israel was denied this right, and as a matter of fact should not be able to protect itself from Hamas' attacks. But allow me to draw attention to these words written by Professor Lowe: "The source of the attack, whether a state or non-state actor, is irrelevant to the existence of the right" to self-defense. "Force may be used to avert a threat because no-one, and no state, is obliged by law passively to suffer the delivery of an attack".¹³ Israel agrees with these words, as I suspect would any sovereign State.
29. If the claim of the Applicant now is that in the armed conflict between Israel and Hamas, Israel must be denied the ability to defend its citizens – then the absurd upshot of South Africa's argument is this: Under the guise of the allegation against Israel of genocide, this Court is asked to call for an end to operations against the ongoing attacks of an organization that pursues an *actual* genocidal agenda. An organization that has violated every past ceasefire and used it to rearm and plan new atrocities. An organization that declares its unequivocal resolve to advance its

¹² Volume, Tab 7, 8.

¹³ Chatham House, Principles of International Law on the Use of Force by States in Self-Defence, Vaughan Lowe, p. 22, October 2005.

genocidal plans. That is an unconscionable request, and it is respectfully submitted that it cannot stand.

30. **Third**, the Court is informed of the events of October 7 because, if there are any Provisional Measures that should appropriately be indicated here, they are indeed with respect to South Africa itself.
31. It is a matter of public record, that South Africa enjoys close relations with Hamas, despite its formal recognition as a terrorist organization by numerous States across the world.¹⁴ These relations have continued unabated *even* after the October 7 atrocities.¹⁵ South Africa has long hosted and celebrated its ties with Hamas figures, including a senior Hamas delegation that – incredibly – visited the country for a “solidarity gathering” just weeks after the massacre.¹⁶
32. In justifying instituting these proceedings, South Africa makes much of its obligations under the Genocide Convention. It seems fitting, then, that it be instructed to comply with those obligations itself; to end its own language of delegitimization of Israel’s existence; end its support for Hamas; and to use its influence with this organization so that Hamas permanently ends its campaign of genocidal terror and releases the hostages.

Madame President, Members of the Court,

¹⁴ Volume, Tab 11; Volume, Tab 6B.

¹⁵ Volume, Tab 11.

¹⁶ Palestine Conference in Johannesburg Calls For True, Meaningful Liberation, *Palestine Chronicle*, 7 December 2023, <https://www.palestinechronicle.com/palestine-conference-in-johannesburg-calls-for-true-meaningful-liberation/>.

33. The hostilities between Israel and Hamas have exacted a terrible toll on both Israelis and Palestinians. But any genuine effort to understand the cause of this toll must take account of the horrendous reality created by Hamas within the Gaza Strip.
34. When Israel withdrew all its soldiers and civilians from Gaza in 2005 it left a coastal area with the potential to become a political and economic success story. Hamas's violent take-over in 2007 changed all that. Over the past 16 years of its rule, Hamas has smuggled countless weapons into Gaza, and has diverted billions in international aid, not to build schools, hospitals or shelters to protect its population from the dangers of the attacks it launched against Israel over many years, but rather to turn massive swathes of the civilian infrastructure into perhaps the most sophisticated terrorist stronghold in the history of urban warfare.¹⁷
35. Remarkably, counsel for South Africa described the suffering in Gaza as “unparalleled and unprecedented”, as if they are unaware of the utter devastation wrought in wars that have raged just in recent years around the world. Sadly, the civilian suffering in warfare is not unique to Gaza. What is actually “unparalleled and unprecedented” is the degree to which Hamas has entrenched itself within the civilian population, and made Palestinian civilian suffering an integral part of its strategy.
36. Hamas has systematically and unlawfully embedded its military operations, militants and assets throughout Gaza within and beneath densely populated civilian areas. It has built an extensive warren of underground tunnels for its leaders and fighters several hundred miles in length throughout the Strip, with thousands of access

¹⁷ Volume, Tab 9.

points and terrorist hubs located in homes, mosques, UN facilities, schools and perhaps most shockingly hospitals.¹⁸

37. This is not an occasional tactic. It is an integrated, preplanned, extensive and abhorrent method of warfare. Purposely and methodically murdering civilians. Firing rockets indiscriminately. Systematically using civilians, sensitive sites and civilian objects as shields. Stealing and hoarding humanitarian supplies - allowing those under its control to suffer, so that it can fuel its fighters and terrorist campaign.
38. The appalling suffering of civilians – both Israeli and Palestinian – is first and foremost the result of this despicable strategy; the horrible cost of Hamas not only failing to protect its civilians but actively sacrificing them for its own propaganda and military benefit. And if Hamas abandons this strategy, releases the hostages and lays down its arms, the hostilities and suffering would end.

Madame President, Members of the Court,

39. There are many distortions in the Applicant's submission to the Court, but as shall be demonstrated by Counsel, there is one that overshadows them all. In the Applicant's telling, it is almost as if there is no intensive armed conflict taking place between two parties at all, no grave threat to Israel and its citizens, only an Israeli assault against Gaza.
40. The Court is told of widespread damage to buildings, but it is not told, for example, how many thousands of these buildings were destroyed because they were booby

¹⁸ Ibid.

trapped by Hamas, how many became legitimate targets because of the strategy of using civilian objects and protected sites for military purposes, how many buildings were struck by over 2000 indiscriminate terrorist rockets that misfired and landed in Gaza itself.

41. The Court is told of over 23,000 casualties, as the Applicant repeats, as many have, unverified statistics provided by Hamas itself – hardly a reliable source.¹⁹ Every civilian casualty in this conflict is a human tragedy that demands our compassion. But the Court is not told how many thousands of casualties are in fact militants, how many were killed by Hamas fire, how many were civilians taking direct part in hostilities, and just how many are the tragic result of legitimate and proportionate use of force against military targets.²⁰
42. And the Court is also told of the dire humanitarian situation in Gaza, but it is not told of Hamas’s practice of stealing and hoarding aid,²¹ it is not told of the extensive Israeli efforts to mitigate civilian harm,²² of the humanitarian initiatives being undertaken to enable the flow of supplies and provide medical attention to the wounded.²³
43. The Applicant purports to describe the reality in Gaza. But it is as if Hamas, and its total contempt for civilian life, just do not exist as a direct cause of *that* reality. Hamas is widely estimated to have over 30,000 fighters and is known to bring minors no older than 15 or 16 into its ranks. They are coming for us. But, in South Africa’s telling, they have all but disappeared. There are no explosives in mosques

¹⁹ Volume, Tab 14.

²⁰ Volume, Tab 13.

²¹ Volume, Tab 10.

²² Volume, Tab 4.

²³ Volume, Tab 5.

and schools and children's bedrooms, no ambulances used to transport fighters, no tunnels and terrorist hubs under sensitive sites, no fighters dressed as civilians, no commandeering of aid trucks, no firing from civilian homes, UN facilities and even safe zones. There is only Israel acting in Gaza.

44. The Applicant is essentially asking the Court to substitute the lens of armed conflict between a State and a lawless terrorist organization, with the lens of a so-called genocide of a State against a civilian population. But it is not offering the Court a lens, it is offering it a blindfold.

Madame President, Members of the Court

43. The nightmarish environment created by Hamas has been concealed by the Applicant, but it is the environment in which Israel is compelled to operate. Israel is committed, as it must be, to comply with the law, but it does so in the face of Hamas's utter contempt for the law. It is committed, as it must be, to demonstrate humanity, but it does so in the face of Hamas's utter inhumanity
44. As will be presented by Counsel, these commitments are a matter of express government policy, military directives and procedures.²⁴ They are also an expression of Israel's core values. And, as shall also be shown, they are matched by genuine measures on the ground to mitigate civilian harm under the unprecedented and excruciating conditions of warfare created by Hamas.²⁵

²⁴ Volume, Tab 1 & 2.

²⁵ Volume, Tab 4 & 5.

45. It is plainly inconceivable – under the terms set by this very Court - that a State conducting itself in this way may be said to be engaged in Genocide, not even *prima facie*.
46. The key component of genocide - the intention to destroy a people in whole or in part - is totally lacking. What Israel seeks by operating in Gaza is not to destroy a people, but to protect a people, its people, who are under attack on multiple fronts, and to do so in accordance with the law, even as it faces a heartless enemy determined to use that very commitment against it.
47. As will be detailed by Counsel, Israel’s lawful aims in Gaza have been clearly and repeatedly articulated by its Prime Minister, its Defense Minister, and all members of the War Cabinet. As the Prime Minister reiterated yet again just this week “Israel is fighting Hamas terrorists, not the civilian population”.²⁶
48. Israel aims to ensure that Gaza can never again be used as a launch pad for terrorism. As the Prime Minister reaffirmed, Israel seeks neither to permanently occupy Gaza or to displace its civilian population.²⁷ It wants to create a better future for Israelis and Palestinians alike, where both can live in peace, thrive and prosper, and where the Palestinian people have all the power to govern themselves, but not the capacity to threaten Israel.
49. If there is a threat to that vision - if there is a humanitarian threat to the Palestinian civilians of Gaza - it stems primarily from the fact that they have lived under the control of a genocidal terrorist organization that has total disregard for their life and

²⁶ Benjamin Netanyahu, Prime Minister of Israel (@IsraeliPM, on X (9:49pm, January 10, 2024), <https://twitter.com/IsraeliPM/status/1745186120109846710>.

²⁷ Ibid.

well-being. That organization, Hamas, and its sponsors, seek to deny Israel, Palestinians, and Arab States across the region, the ability to advance a common future of peace, co-existence, security, and prosperity. Israel is in a war of defense against Hamas - not against the Palestinian people - to ensure that they do not succeed.

50. In these circumstances, there can hardly be a charge more false or more malevolent than the allegation against Israel of genocide.
51. The Applicant has, regrettably, engaged in a transparent attempt to abuse the Convention's compulsory jurisdiction mechanism, and in particular the Provisional Measures phase of proceedings, to bring under the purview of the Court matters over which, in truth, it lacks jurisdiction.
52. Madame President, Members of the Court, the Genocide Convention was a solemn promise made to the Jewish people, to all peoples, of "Never Again". The Applicant invites the Court to betray that promise. If the term genocide can be so diminished in the way it advocates, if Provisional Measures can be triggered in the way it suggests, the Convention becomes an aggressor's charter. It will reward, indeed encourage, the terrorists who hide behind civilians, at the expense of the States seeking to defend against them.
53. To maintain the integrity of the Genocide Convention, to maintain its promise, and the Court's own role as its guardian, it is respectfully submitted that this Application and Request should be dismissed for what they are – a libel, designed to deny Israel the right to defend itself according to the law from the unprecedented terrorist onslaught it continues to face, and to free the 136 hostages Hamas still holds.

54. I thank you for your kind attention. May I ask, Madame President, that you call Professor Shaw to the podium.