No. 24-704

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE; AL-HAQ; AHMED ABU ARTEMA; MOHAMMED AHMED ABU ROKBEH; MOHAMMAD HERZALLAH; AYMAN NIJIM; LAILA ELHADDAD; WAEIL ELBHASSI; BASIM ELKARRA; and DR. OMAR EL-NAJJAR,
Plaintiffs-Appellants,
v.
JOSEPH R. BIDEN, JR., *President of the United States*; ANTONY J. BLINKEN, *Secretary of State*; and LLOYD JAMES AUSTIN III, *Secretary of Defense*, in their official capacities,
Defendants-Appellees.
On Appeal from the United States District Court for the Northern District of California, Case No. 4:23-cv-05829-JSW

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF *AMICI CURIAE* AND AUTHORITY TO FILE

Amici curiae, listed in the Appendix, are national and international human rights organizations, bar associations, and social justice movement lawyers from around the world with an interest in upholding fundamental international legal norms. All parties to this appeal have consented to the filing of this brief. No party's counsel contributed to the drafting of this brief in whole or in part, and no party's counsel or third person contributed funds in preparing or submitting the brief.

Amici represent groups committed to upholding principles of equality, justice, and dignity, including impacted communities and marginalized groups all over the world, many of whom are at risk of genocide or human rights violations. *Amici* are deeply concerned that norms protecting against the most heinous of crimes — genocide — are presently imperiled in light of the massive, ongoing Israeli military attacks and humanitarian deprivations targeting Palestinians in Gaza, with the full military and diplomatic support of the United States government. *Amici* have a deep interest in ensuring compliance with the provisional measures issued by the International Court of Justice in the Application of the Convention on the Prevention and punishment of the Crime Of Genocide in the Gaza Strip *(South Africa v. Israel).* They submit this brief to share their considerable collective expertise on the customary international law norms

regarding genocide, including the duties at stake in this case to prevent, and not aid and abet, the continued destruction of the Palestinian people in Gaza. Observance of these fundamental norms is essential to stave off further atrocities and avert the risks to international peace and security that will continue to escalate if the United States fails to adhere to its fundamental obligations under international law. The stakes for the rule of law and the most fundamental moral principles of humanity are exceedingly high.

SUMMARY OF ARGUMENT

Characterized as the "crime of crimes,"[1] genocide is the "denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity." Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 23 (May 28) [hereinafter *Genocide Convention Advisory Opinion*]. Genocide is defined as seeking to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. It is the "as such" element that "makes genocide an exceptionally

[1] *See*, *e.g.*, William Schabas, *Genocide in International Law: The Crime of Crimes* (2009).

grave crime." *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Judgement Vol. I, ¶ 551 (Int'l Crim. Trib. for the former Yugoslavia Mar. 24, 2016).

The customary international law norm prohibiting genocide is reflected in the Genocide Convention, the first human rights treaty adopted by the General Assembly of the United Nations ("U.N.") on December 9, 1948. The Genocide Convention represents the international community's commitment to "never again" after the atrocities committed by the Nazi regime against millions of Jewish, Roma and other minority peoples. Given the historic context from which the Genocide Convention emerged, coupled with the exceptional gravity of the crime, the prohibition against genocide has attained the status of a *jus cogens* norm (a peremptory norm from which no State may derogate or suspend compliance)[2] imposing obligations on all States to ensure "the co-operation required 'in order to liberate mankind from such an odious scourge.'" *Genocide Convention Advisory Opinion* at 23. These obligations include the specific duties to prevent genocide and avoid complicity in its commission. Genocide Convention, arts. I, III(e).

The international community set bright-line standards for these obligations to ensure that allegations of genocide elicit a response that eliminates any

[2] "Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent." *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 715 (9th Cir. 1992).

possibility of genocide or even a serious risk of genocide. International courts and tribunals have routinely applied these well-defined and judicially manageable standards to address whether particular conduct runs afoul of these obligations. Accordingly, where, as here, two courts have found that Israel's conduct in Gaza plausibly constitutes genocide, allegations of the United States' violations of the duties to prevent genocide and avoid complicity in its commission are clearly justiciable.

As a decentralized legal system, international law relies on individual States themselves to enforce the obligations to which they have consented, imposing a primary duty on the domestic courts of each State to ensure the compliance of their executive and legislative bodies with international law. International forums for assessing violations and enforcing international law norms, including the International Court of Justice ("ICJ"), the International Criminal Court ("ICC"), and the U.N. Security Council, thus serve as mechanisms of *last resort*. In the present proceedings, however, federal courts in the United States offer not simply the primary forum but the *only* meaningful forum available to the Plaintiffs to seek enforceable redress for the alleged violations. The United States has refused to accept the ICJ's jurisdiction over its alleged violations of the norm against genocide without its consent and has blanketly rejected the ICC's jurisdiction over any international crimes. The United States also has a history of exercising its veto

power in the Security Council to prevent enforcement of ICJ rulings against the United States, and has strongly indicated, through its actions and statements, that it would obstruct Security Council enforcement of any ICJ rulings involving Israel's actions in Gaza. This Court's assessment of Plaintiffs' allegations is thus appropriate *and necessary*, and would follow the example set by other national courts in ensuring accountability and redress for such violations by actors subject to their jurisdiction.

Critically, world leaders are closely tracking accountability for the United States' breaches of peremptory international law norms. History teaches that impunity for grave violations, particularly by a central actor in the international community like the United States, results in and facilitates their duplication elsewhere. This was most acutely seen in the consequences of the United States' contribution to the erosions of peremptory norms of international law in its 2003 invasion of Iraq and conduct in its "War on Terror." The failure to hold the executive branch accountable to the law would embolden other world leaders to seize on the United States' substantial breach of international law in its unconditional support for the Israeli attacks on Palestinians in Gaza, and use this breach as a license to violate other fundamental norms in a manner that threatens vulnerable communities across the globe and U.S. moral and strategic interests.

ARGUMENT

The international law prohibition of genocide includes a prohibition of complicity in its commission and a corresponding duty to prevent genocide. Violations of these obligations have been proven to be justiciable time and time again by international courts and tribunals. Yet, the architecture of enforcement of international law has long depended first and foremost on domestic courts, only to be *supplemented* by international adjudicatory and enforcement mechanisms. Where, as here, the United States is alleged to have violated the international law obligations it consented to undertake, international law views U.S. courts to be the primary mechanism to ensure compliance and redress, particularly since the United States has obstructed enforcement by any available international forum. Consequently, if U.S. courts refuse to adjudicate the executive's conduct contributing to a genocide, the peremptory international law norms imposing a duty to prevent genocide and prohibiting complicity in genocide are rendered wholly meaningless.

I. The Prohibition of Genocide is a Peremptory Norm that No State May Violate

The Genocide Convention codifies the *jus cogens* or peremptory norm prohibiting genocide. *See*, *e.g.*, Application of Convention on Prevention and Punishment of Crime of Genocide *(Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, 111, ¶ 161 (Feb. 26). Binding on all States, peremptory

norms, such as those prohibiting genocide, torture, slavery, and wars of aggression, are "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331. They may not be modified by domestic law or treaties. *See*, *e.g.*, *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001). Indeed, no circumstances — not even the existence of an armed conflict nor the exercise of the right of self-defense under the laws governing States' use of force — can preclude the wrongfulness of violating peremptory norms. *See* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 84-85, U.N. Doc. A/56/10, Supp. No. 10 (Nov. 2001) [hereinafter ILC Articles on State Responsibility] (Article 26); Application of Convention on Prevention and Punishment of Crime of Genocide *(Gam. v. Myan.)*, Order on Request for Indication of Provisional Measures, 2020 I.C.J. 3, 27, ¶ 74 (Jan. 23); *Prosecutor v. Thaçi et al.*, Case No. KSC-BC-2020-06/F01536, Decision on Defence Motion for Judicial Notice of Adjudicated Facts with Annex I, ¶ 24 n. 52 (Kosovo Specialist Chambers May 18, 2023).

The Genocide Convention prohibits certain enumerated acts that are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Genocide Convention, art. II. The determination of

whether a "national, ethnical, racial, or religious" group was targeted takes into account (1) objectively, the "particular political, social, historical, and cultural context" giving shape to the group's identity, *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Judgment, ¶ 65 (Int'l Crim. Trib. for Rwanda June 7, 2001), and (2) subjectively, "the stigmatisation of a group as a distinct national, ethnical or racial unit by the community." *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia Dec. 14, 1999). In times of armed conflict, the targeted group may also include military personnel "belonging to a protected group because of their membership in that group." *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Judgement, ¶ 833 (Int'l Crim. Trib. for the former Yugoslavia June 10, 2010).

Because a group is comprised not only "of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land," the physical or biological destruction of a group may, in addition to killings, also include acts such as forcible transfer "conducted in such a way that the group can no longer reconstitute itself." *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Trial Judgement, ¶ 666 (Int'l Crim. Trib. for the former Yugoslavia Jan. 17, 2005). The reference to "in whole or in part" makes clear that genocide may be committed against only a "significant enough [portion] to have an impact on the group as a whole,"

Prosecutor v. Tolimir, No. IT-05-88/2-T, Trial Judgement, ¶ 749 (Int'l Crim. Trib. for the former Yugoslavia Dec. 12, 2012) (internal quotations omitted), such as when the population targeted is "emblematic of the overall group, or is essential to its survival." *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgement, ¶ 12 (Int'l Crim. Trib. for the former Yugoslavia Apr. 19, 2004). As such, the group targeted may be limited to a certain geographic area. *See Bosn. & Herz.*, 2007 I.C.J. at 126, ¶ 199.

The requisite intent for genocide may be inferred from a totality of circumstances, including the overall context and systematic nature, scale, or repetition of attacks directed against the same group, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeal Judgement, ¶ 47 (Int'l Crim. Trib. for the former Yugoslavia July 5, 2001); the use of "dehumanizing narratives and rhetoric" in officials' public statements, *Gam. v. Myan.*, 2020 I.C.J. at 22-23, ¶¶ 55-56 (internal quotations omitted); *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, ¶ 539 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007); and "the existence of a plan or policy." *Jelisić Appeal Judgment*, ¶ 48. Facts demonstrating the requisite intent to destroy a group may also focus on the "intangible" characteristics that cohere a group, *Blagojević & Jokić*, ¶ 659, such as deliberate destruction of "cultural and religious property and symbols of the targeted group." *Bosn. & Herz.*, 2007 I.C.J. at 186, ¶ 344.

Acts of genocide may be carried out through acts of violence such as killings, torture, and other assaults, *see*, *e.g.*, *Tolimir*, ¶ 737, as well as other acts "causing serious bodily or mental harm," such as forcible transfer of persons not merely as "a temporary displacement for their immediate safety," but rather as "a critical step in achieving the ultimate objective of the attack…to eliminate" them as a group, *Blagojević & Jokić*, ¶ 650, and actions that leave survivors unaware of the whereabouts of their loved ones or the circumstances of their death. *Id*. at ¶ 653.

Acts of genocide also include those that "deliberately inflict[ ] on the group conditions of life calculated to bring about its physical destruction in whole or in part," such as "deprivation of food, medical care, shelter or clothing," Application of Convention on Prevention and Punishment of Crime of Genocide *(Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, 70, ¶ 161 (Feb. 3); "systematic expulsion from homes," *id*.; contamination of water, *Prosecutor v. Al Bashir*, Case No. ICC-02/0501/09, Second Decision of the Prosecution's Application for a Warrant of Arrest, ¶ 38 (Int'l Crim. Court July 12, 2010); and "domicide," defined as "the massive and deliberate destruction of homes in order to cause human suffering" and that undermines the right to return home. Balakrishnan Rajagopal, *Rep. of the Special Rapporteur on adequate housing as a component to the right to an adequate standard of living and on the right to non-discrimination in this context*,

¶¶ 5, 8, 41, U.N. Doc. A/77/190 (July 19, 2022). Moreover, when forcible transfers are used as a "means by which to ensure the physical destruction of a group," *Tolimir*, ¶ 741, even "deportations or expulsions [that] may be justified under the Geneva Conventions" during an armed conflict are prohibited acts of genocide. *Bosn. & Herz.*, 2007 I.C.J. at 181-82, ¶ 334.

On January 26, 2024, the International Court of Justice issued provisional measures addressing South Africa's claims that Israel's conduct in Gaza constitutes genocide of the Palestinian people. *See generally* Application of Convention on Prevention and Punishment of Crime of Genocide *(S. Afr. v. Isr.)*, Order on Request for Indication of Provisional Measures (Jan. 26, 2024). In its ruling, the ICJ relied on the above-described standards to determine: (1) that "Palestinians appear to constitute a distinct 'national, ethnical, racial or religious group', and hence a protected group within the meaning of Article II of the Genocide Convention" and that "Palestinians in the Gaza Strip form a substantial part of the protected group"; and (2) based on the findings of several U.N. agencies and statements made by senior Israeli officials, that "the facts and circumstances…are sufficient to conclude" that the claims that Israel's conduct constitutes genocide "are plausible." *Id*. at ¶¶ 45-54.

II. The Justiciability of the United States' Duties to Prevent and Not be Complicit in Genocide

As a peremptory norm, the norm prohibiting genocide imposes binding obligations not only on the State perpetrating the genocide, but also on all States in the international community — to prevent genocide and avoid complicity in its commission. *See* Genocide Convention, art. IX; *Bosn. & Herz.*, 2007 I.C.J. at 111, ¶ 162; *id*. at 114 ¶ 167. These corresponding duties have been precisely defined under treaty and customary international law with judicially manageable standards. Further, the text of the Genocide Convention, by definitively characterizing genocide and complicity in its commission as a crime and committing States to "undertake to prevent" its commission, mandates these duties in "obligatory" and "immediately" effective terms. *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1194 n.3 (9th Cir. 2017) (quoting Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties § 110(2) (Am. Law Inst., Tentative Draft No. 2, 2017). These immediately effective duties imposed by the Genocide Convention are notably different from those imposed by other treaties. *Compare* Genocide Convention, art. I ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, *is a crime* under international law which they *undertake to prevent* and to punish.") (emphasis added) *with Marshall Islands*, 865 F.3d at 1195 ("[T]he Treaty on the Non–Proliferation of Nuclear Weapons'] Article VI's use of the phrase 'undertakes *to pursue*,' like the phrase 'undertakes *to comply*' in *Medellín*, is 'a *commitment* on

the part of [the Treaty parties] to take *future* action through their political branches.'") (quoting *Medellín v. Texas*, 552 U.S. 491, 508 (2008) (emphasis added and in original)). No legislation is necessary to inform countries of their duty to prevent genocide.

A. Duty to Prevent Genocide

States' duty to prevent genocide, a standalone obligation, is an "overriding legal imperative." *Bosn. & Herz.*, 2007 I.C.J. at 111-13, ¶¶ 162-65; *id*. at 220, ¶ 427; *id*. (Joint Declaration of Judges Shi and Koroma) at 282, ¶ 5. This duty arises not only after the genocide "begins," but also — "since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act" — "at the instant that the State learns of, *or should normally have learned of*, the existence of a *serious risk* that genocide will be committed." *Id*. at 221-22, ¶ 431 (emphasis added). *See also* Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, Allegations of Genocide under Convention on Prevention and Punishment of Crimes of Genocide *(Ukr. v. Russ.)*, I.C.J., at ¶ 22 (Sept. 7, 2022). "From that moment onwards," where the State "has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent [ ], it is under a duty to make such use of these means as the circumstances permit." *Bosn. & Herz.*, 2007 I.C.J. at 222 ¶ 431. Thus, "a State may be found to have violated its

obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way." *Id*. at 223, ¶ 432.

This duty to prevent is "one of conduct and not one of result," or in other words, a duty of due diligence, in that "the obligation of States parties is [ ] to employ all means reasonably available to them, so as to prevent genocide so far as possible." *Id*. at 221, ¶ 430. Responsibility is "incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide." *Id*. at 221, ¶ 430. Determining the level of a State's responsibility to prevent genocide depends on its "capacity to influence effectively the action of persons likely to commit, or already committing, genocide," which in turn depends on, for example, "the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events." *Id*. at 221, ¶ 430. Thus, unlike many other international law norms, the obligation of each State to prevent genocide is not territorially bound, but instead delimited by each State's "capacity to influence" the relevant actors. *See id*. at 120, ¶ 183; *See also* Declaration of Intervention Under Article 63 of Statute Submitted by the United States of America, *Ukr. v. Russ.*, ¶ 10.

Finally, assertions that even if a State carrying this duty to prevent "had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide" are irrelevant "since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce." *Bosn. & Herz.*, 2007 I.C.J. at 221, ¶ 430.

B. Complicity in Genocide

"[P]articipation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg." *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, ¶ 526 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998). Under customary international law governing both State Responsibility and individual criminal liability, the requisite *mens rea* for complicity via aiding and abetting is knowledge of the perpetrator's genocidal intent, rather than shared genocidal intent. *See* ILC Articles on State Responsibility, at 65 (Article 16) (State Responsibility); *Prosecutor v. E. Ntakirutimana & G. Ntakirutimana*, Cases Nos. ICTR-96-10-A & ICTR-96-17-A, Appeal Judgement, ¶¶ 500-501 (Int'l Crim. Trib. for Rwanda Dec. 13, 2004) (individual criminal liability). Awareness that crimes of genocide "would probably be committed, and one of these crimes is in fact committed" is sufficient to

establish an individual's "knowledge." *Karadžić*, ¶ 577. A State's liability for complicity requires that "the relevant State organ or agency providing aid or assistance [ ] be aware of the circumstances making the conduct of the assisted State internationally wrongful" and "intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct." ILC Articles on State Responsibility, at 66, ¶¶ 3, 5.

The *actus reus* for complicity by aiding and abetting requires "acts or omissions specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime," which "have a substantial effect upon the perpetration of the crime," a "fact-based inquiry." *Karadžić*, ¶ 575-576 (internal quotations omitted). *Accord* ILC Articles on State Responsibility, at 66, ¶ 5. Such conduct may include "practical assistance, encouragement, or moral support," *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, ¶ 249 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998), such as "providing an essential facility or financing the activity in question," ILC Articles of State Responsibility, at 66, ¶ 1, or procuring "weapons, instruments or any other means to be used in the commission of an offence." *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Judgement and Sentence, ¶ 178 (Int'l Crim. Trib. for Rwanda Jan. 27, 2000). Whether such conduct has a "substantial effect" on the perpetration of a crime does not require geographic proximity, nor must it be established that

"the crime would not have been committed without the contribution of the aider and abettor." *Karadžić*, ¶ 576. Accord ILC Articles on State Responsibility, at 66, ¶ 5; *Bosn. & Herz.*, 2007 I.C.J. at 120, ¶ 183.

Despite the clarity of these duties to prevent and not be complicit in the commission of genocide, and the ICJ's and District Court's rulings that Israel is plausibly committing genocide, the United States continues an uninterrupted flow of an exceptionally high amount of military aid to Israel. John Hudson, *U.S. floods arms into Israel despite mounting alarm over war's conduct*, Wash. Post (Mar. 6, 2024). And the United States does so even as its officials admit growing concern over Israel's indiscriminate use of force resulting in tens of thousands of civilian deaths, ongoing obstruction of aid delivery, and failure to temper its calls for mass displacement of Palestinians. *Id*.

III. Domestic Courts' Integral Role in the Enforcement of the Prohibition of Genocide

The standards for the prohibition of genocide and complicity in its commission as well as the corresponding duty to prevent genocide, described above, can only serve as meaningful restraints on State conduct if they are enforced. Given the United States' efforts to block all available avenues for

international forums to enforce the prohibition of this "crime of crimes," federal courts of the United States remain as the sole viable venue for its enforcement.[3]

Domestic courts have long been considered the primary enforcement mechanism of international law, with international forums serving as mechanisms of "last resort." Karen C. Sokol, *Bringing Courts into Global Governance in a Climate-Disrupted World Order*, 108 Minn. L. Rev. 163, 177 (2023). In the "decentralized international legal system," individual States are the "final arbiter of legality" since they "interpret and apply" international norms "in the first instance." Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 Loy. L.A. Int'l & Comp. L. Rev. 133, 150 (2011). In States with a strong rule of law, domestic *courts* in particular play a critical function in assessing the legality of their State's conduct. *See* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. Chi. L. Rev. 469, 514 (2005). International law therefore "assigns to domestic courts a position more important to that of the Executive or the Legislature in the implementation of the State's international obligations," since courts serve as "the last opportunity for the State to comply with its international

[3] While another State's courts could theoretically exercise universal jurisdiction over U.S. nationals alleged to have committed international crimes such as genocide, the United States — through its posture vis-à-vis the ICJ and ICC described below — has shown that it would certainly prefer the scrutiny of its conduct by its own courts.

obligations" before a violation is escalated to international forums. Tzanakopoulos, at 152. *See also id*. at 152-53 (citing as examples, the requirement for "exhaustion of local remedies" in the area of international criminal law and, to varying extents, international human rights law, international economic law, and international investment law); Christopher A. Whytock, From International Law and International Relations to Law and World Politics, in *Oxford Research Encyclopedia of Politics* 1, 12 (2018) (explaining how domestic courts "contribute to enforcement by applying international law, finding conduct in violation of international law, then ordering compliance or requesting enforcement measures by other bodies"). This is true even if the domestic court's order is "merely declaratory in character" since it is often "all the 'enforcement' that States seek in international law"; such rulings offer "'juridical restitution' (i.e., the reversal of a juridical act in breach of international law)." Tzanakopoulos, at 145-46. This role of domestic courts is key in settling disputes brought by individuals against States for international law violations that harm them. *Id*. at 164 & n. 128.

With domestic courts playing a lead role, international law "reserves a mere subsidiary monitoring function" to international institutions. *Id*. at 152. Such institutions include the principal U.N. organs charged with adjudicating and enforcing peremptory norms of international law: the International Court of Justice, the International Criminal Court, and the United Nations Security Council.

As "the principal judicial organ of the United Nations," the International Court of Justice is empowered to settle disputes between States based on breaches of treaty law or customary international law. U.N. Charter, art. 92. States accept jurisdiction of the Court through a particular treaty, or by accepting the Court's compulsory jurisdiction over legal disputes concerning breaches of customary international law. *See* Statute of the International Court of Justice, art. 36(1), (2), June 26, 1945, 3 Bevans 1179, 59 Stat. 1055, T.S. No. 993; A Case Concerning Military and Paramilitary Activities in and against Nicaragua *(Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, 97, ¶ 182 (June 27). When a State fails to comply with an order of the ICJ, a party has recourse to the Security Council for enforcement of the ruling. U.N. Charter, art. 94(2). The ICC, by contrast, has jurisdiction over *individuals* "for the most serious crimes of international concern," including genocide, but only as "complementary to national criminal jurisdictions." Rome Statute of the International Criminal Court, art. 1, U.N. Doc. A/CONF.183/9 (July 17, 1998). Like the ICJ, the Security Council plays a significant role in ICC proceedings, in particular in referrals to the Prosecutor and, when such a referral takes place, in ensuring cooperation with the Court. *Id*. at art. 13(b); 87(7). And finally, as evidenced by its role in the enforcement of ICJ rulings and the operation of the ICC, the Security Council is a central enforcement mechanism of international law. It is the institution with the sole authority to issue binding resolutions on members

of the United Nations. *See* U.N. Charter, art. 25. However, its powers are limited by the veto authority of the five permanent members of the Security Council, which include the United States. *See* U.N. Charter, arts. 23(1); 27(3).

The United States has rendered impossible any assessment of its conduct in violation of peremptory norms of customary international law or the Genocide Convention in any of these international forums. First, the United States refused to accept the International Court of Justice's jurisdiction over violations of the Genocide Convention without its consent, *see* Genocide Convention, Reservation of the United States, and has done the same for violations of customary international law. In the 1980s, in response to the ICJ's exercise of jurisdiction over Nicaragua's claims that the United States had unlawfully used force and ultimately ruling against the United States, the United States withdrew from the ICJ's compulsory jurisdiction over customary international law violations. *See* Cong. Res. Serv., *The United States and the "World Court"* (2018). The United States has also blanketly rejected the jurisdiction of the International Criminal Court. *See*, *e.g.*, Antony J. Blinken, Secretary of State, Press Statement: Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court (Apr. 2, 2021). Closing off the availability of these judicial venues, the United States further exercises its veto power in the Security Council to obstruct enforcement of rulings by these bodies. The United States twice prevented the

Security Council from enforcing the *Nicaragua* ruling. *See* U.N. SCOR, 2704th mtg. at 54-55, U.N. Doc. S/PV.2704 (July 31, 1986); U.N. SCOR, 2718th mtg. at 51, U.N. Doc. S/PV.2718 (Oct. 28, 1986).[4]

Relevant to the present case, the United States has now thrice vetoed resolutions in the Security Council seeking to address Israel's conduct in Gaza. *See* U.N. Press, *Security Council Again Fails to Adopt Resolution Demanding Immediate Humanitarian Ceasefire in Gaza on Account of Veto by United States*, U.N. Doc. SC/15595 (Feb. 20, 2024); U.N. Press, *Security Council Fails to Adopt Resolution Demanding Immediate Humanitarian Ceasefire in Gaza on Account of Veto by United States*, U.N. Doc. SC/15519 (Dec. 8, 2023); U.N. Press, *Security Council Fails to Adopt Either of Two Draft Resolutions Addressing Conflict and Humanitarian Crisis in Gaza*, U.N. Doc. SC/15464 (Oct. 25, 2023). The United States has also made statements making plain that it would exercise its veto power to prevent enforcement of any ICJ rulings on this question and prevent Security Council referral of this matter to the ICC. *See* White House, *Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby* (Jan. 3, 2024); White House, *Press Briefing by Press*

[4] The United States' veto was the first ever veto of a Security Council resolution seeking to enforce an ICJ ruling and arguably in violation of the U.N. Charter. *See* Keith Highet, *Between a Rock and a Hard Place - The United States, the International Court, and the Nicaragua Case*, 21 Int'l L. 1083, 1093 (1987).

Secretary Karine Jean-Pierre, NSC Coordinator for Strategic Communications John Kirby, and National Climate Advisor (Jan. 26, 2024); *Cf.* Antony J. Blinken, Secretary of State, Press Statement, The United States Opposes the ICC Investigation into the Palestinian Situation, Mar. 3, 2021.

Accordingly, the only remaining forums to enforce the United States' compliance with the norm prohibiting genocide are institutions of the United States itself, namely the federal judiciary. If this Court were to decline jurisdiction over this case, it would result in foreclosing all judicial avenues to enforce this most fundamental of norms against the United States. This would be untenable and undermine the operation of the international legal system.

Indeed, at least one foreign court has allowed a case challenging its State's complicity in Israel's conduct in Gaza to proceed. On February 12, 2024, following the ICJ's ruling that Israel's acts and omissions may plausibly constitute genocide, a Dutch appeals court blocked further exports of United States-made F-35 fighter jet parts stockpiled in The Netherlands and destined for Israel because of its concern that such exports were contributing to furthering violations of international law. Notably, the appeals court reversed a lower court's ruling that it had no jurisdiction to weigh in on policy decisions of the government on the basis that policy decisions cannot override the risk of committing violations of international law. Stephanie van den Berg, *Dutch court orders halt to export of F-35 jet parts to*

Israel, Reuters (Feb. 12, 2024). A similar logic applies in the present case: the United States government cannot make a policy decision to violate a *jus cogens* norm of international law, and this Court should exercise judicial review as the only available and meaningful forum for accountability of such violations.

IV. The United States' Contribution to the Erosion of Long- and Widely-Held Peremptory Norms of International Law

Seventy-five years ago, the United States acted as a drafter of both the Genocide Convention and the Universal Declaration of Human Rights and assumed a key role on the U.N. Security Council to ensure that a rule of law would protect humanity from the worst atrocities committed prior to and during World War II, including genocide. The United States' singularly impactful role in shaping and enforcing international law — in part due to its veto power in the U.N. Security Council — gives it an outsized influence on how legal standards are applied. Accordingly, a failure to remedy the United States' breaches of its duties to prevent and not be complicit in genocide substantially increases the risk of degrading the rule of law and emboldening the commission of grave atrocities globally.

Examples demonstrating how the United States' actions can contribute to the erosion of peremptory norms include its use of force in its 2003 invasion of Iraq and conduct in its prosecution of the "War on Terror," which has led to a global proliferation of State misuse of the counterterrorism framework for political ends.

These examples show how failure to immediately redress breaches of fundamental human rights norms not only increases the danger to communities at risk of being targeted for human rights abuses in the short term, but may also result in unanticipated consequences that undermine international peace and security, and the United States' own interests, in the long term.

A. Erosion of Peremptory Norms Governing States' Use of Force

Despite a clear legal framework prohibiting the use of force unless it is either expressly authorized by the U.N. Security Council or meets the strict requirements of self-defense against imminent attack, *see* U.N. Charter, arts. 2(4), 42, 51, the United States bypassed the U.N. Security Council process for authorization of the use of force prior to its 2003 invasion of Iraq. Instead, the United States invoked past U.N. Security Council Resolutions 687 and 1441 that did not authorize the use of force for the stated purposes of disarming Iraq of its alleged weapons of mass destruction. *See* Permanent Rep. of the U.S. to the U.N., *Letter dated 20 March 2003 from Permanent Representative of the United States of America to the UN addressed to President of the Security Council*, U.N. Doc. S/2003/351 (Mar. 21, 2003); S.C. Res. 687 (Apr. 3, 1991); S.C. Res. 1441 (Nov. 8, 2002); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 Geo. L.J. 173, 179-229 (2004). It further advanced a novel notion of "preemptive self-defense" as justification for the invasion. *See* President George W. Bush, The National

Security Strategy of the United States of America (Sept. 2002). Declaring the United States' military action "illegal," then-U.N. Secretary General Kofi Annan warned that the notion of "preemptive self-defense" could lead to a breakdown of the international order. *See* Ewen MacAskill & Julian Borger, *Iraq war was illegal and breached UN charter, says Annan*, The Guardian (Sept. 15, 2004).

Nearly twenty years later, Russia's invocation of the United States' past conduct shows how the United States' prior failure to follow international norms has in fact facilitated similar behavior by other States that threatens international peace and security. Namely, Russia expressly invoked the United States' justifications of its 2003 invasion of Iraq to claim that its 2022 invasion of Ukraine was an act of preemptive self-defense against the threat of NATO expansion — a claim that, like the United States' justification for invading Iraq, did not meet the requirement that the use of force in self-defense only be deployed against attacks that are occurring or imminent. *See* Permanent Rep. of Russ. to the U.N., *Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*, U.N. Doc. S/2022/154 (Feb. 24, 2022); *see also id*. at Annex, p. 3 (referring to the "lack of any legal basis" for the United States' 2003 invasion of Iraq). The result has been disastrous: Russia's 2022 invasion of Ukraine has resulted in the deaths of at least 10,000 civilians and presents an ongoing threat to international peace and security.

U.N. Ukraine Press Release, *Civilian Deaths In Ukraine War Top 10,000, UN Says* (Nov. 21, 2023).

B. Erosion of Peremptory Norms Governing Conduct in Armed Conflicts

In the aftermath of the September 11, 2001 attacks, the United States spearheaded a global "War on Terror" that utilized counter-terrorism tactics that undermined norms governing armed conflict, including peremptory norms, and catalyzed the establishment of a global counter-terrorism framework. As a result, long-established legal norms — including the prohibitions against arbitrary detention, torture, and extrajudicial killings — have been materially degraded.

For example, the United States asserted that a *sui generis* legal regime must govern its conflict with Al Qaeda to justify its indefinite definition of detainees in the Guantánamo Bay detention camp. *See* Brief for Respondents at *37-40, 48-49, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875. The Supreme Court squarely rejected this argument, holding that the minimum international legal protections afforded to those detained during an armed conflict must apply. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006). Despite this ruling, however, U.N. experts have decried Guantánamo as "a site of unparalleled notoriety, defined by the systematic use of torture, and other cruel, inhuman or degrading treatment against hundreds of men brought to the site and deprived of their most fundamental rights." U.N. Human Rights Office of the High Comm'r

Press Release, *Guantanamo Bay: "Ugly chapter of unrelenting human rights violations" – UN experts* (Jan. 10, 2022). Consequently, these experts have also expressed concern that "[w]hen a State fails to hold accountable those who have authorized and practised torture and other cruel inhuman or degrading treatment it sends a signal of complacency and acquiescence to the world." *Id*.

Successive U.N. human rights experts on counter-terrorism since the start of the United States-led "War on Terror" have also raised alarms about States' rampant misuse of counterterrorism measures to target specific groups and silence human rights defenders around the world. A global study on the impact of counter-terrorism measures on civil society and civic space revealed that "misuse is often discriminatory, directed against religious, ethnic and cultural minorities, women, girls and LGBT and gender-diverse persons, indigenous communities, and other historically discriminated against groups in society." *See* Fionnuala Ní Aoláin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, at 2, U.N. Doc. A/78/520 (Oct. 10, 2023). The resulting "playbook of misuse" has included such serious human rights violations as judicial harassment, forced disappearances and arbitrary detentions, "misuse and misapplication" of "terrorist" designations and sanctions, and surveillance and targeting the financing of civil society groups, all under the guise of countering terrorism. *Id*. at 4.

Crackdowns on specific ethnic groups in the name of the "War on Terror," including mass detentions and other abuses of the Uyghurs in the Xinjiang province by China, *see* Phelim Kine, *How China hijacked the war on terror*, Politico (Sept. 9, 2021), and what are considered to have been acts of genocide by the Myanmar military against Rohingya Muslims, *see* U.N. Human Rights Office of the High Commissioner Press Release, *Myanmar: UN Fact-Finding Mission releases its full account of massive violations by military in Rakhine, Kachin and Shan States* (Sept. 18, 2018), demonstrate how specific groups are at heightened risk of human rights abuses when international norms erode. These are instructive antecedents for the present case.

Another example draws from the United States' covert program of extraterritorial targeted killings of its own citizens and foreign nationals. *See*, *e.g.*, Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 Harv. Nat'l Sec. J. 283, 284 (2011). These targeted killings have contravened both domestic law and the United States' international legal obligations. *Id*. These have emboldened similar violations by other States. For example, the United States and Canada recently acknowledged that India's counter-terrorism tactics included ordering the extraterritorial targeted killing of a Canadian citizen in Canada and an American citizen in New York. *See*, *e.g.*, Ellen Nakashima et al., *U.S. prosecutors allege assassination plot of Sikh separatist directed by Indian government employee*,

Wash. Post (Nov. 29, 2023). This tactic has been widely justified in India by invoking the United States' "War on Terror" targeted killings program. *See*, *e.g.*, Murtaza Hussain, *Indian Nationalists Cite Inspiration for Foreign Assassinations: U.S. "Targeted Killing" Spree*, The Intercept (Oct. 5, 2023).

CONCLUSION

The gravity of what is at stake here cannot be overstated. The need to curtail the ongoing horror unfolding in Gaza before the world's eyes, the moral imperative to prevent genocide, and the importance of respecting fundamental norms of international law all compel this Court to allow this case to move forward. Given the well-defined, judicially-manageable standards for violations of the duty to prevent genocide and complicity in its commission, Plaintiffs' claims against the United States are justiciable, and federal courts are the only available forums to meaningfully enforce the United States' compliance with the norm prohibiting genocide.

Dated: March 14, 2024

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APPENDIX

Amici International Human Rights Organizations

1. Academics for Palestine, Ireland
2. African Bar Association (AfBA), Africa
3. Alternative Information and Development Centre, South Africa
4. ALTSEAN-Burma, Burma
5. American Association of Jurists/Asociación Americana de Juristas, The Americas
6. Aprodeh-Peru, Peru
7. Arab Lawyers' Association, United Kingdom
8. Arab Lawyers' Union, Global
9. Asociación Libre de la Abogacía, Spain
10. Associação Portuguesa de Juristas Democratas, Portugal
11. Association Démocratique des Femmes du Maroc, Morocco
12. Association Marocaine des Droits Humains, Morocco
13. Atlanta Jericho, United States
14. Australian Centre for International Justice, Australia
15. Ayuda Legal Puerto Rico, Puerto Rico
16. Bahrain Center for Human Rights, Kingdom of Bahrain

17. Bahrain Human Rights Society (BHRS), Bahrain
18. BDS Australia, Australia
19. Beyond Borders Malaysia, Malaysia
20. Black Alliance for Peace, United States of America
21. Bridge Community Café, United States of America
22. Buffalo Human Rights Center, United States of America
23. Cabinet Maître Abderrahim Jamaï, Morocco
24. Çağdaş Hukukçular Derneği - Progressive Lawyers' Association, Turkey
25. Cairo Institute for Human Rights Studies (CIHRS), Tunisia
26. Canadians for Justice and Peace in the Middle East (CJPME), Canada
27. Cátedra UNESCO de Desarrollo Humano Sostenible (Universidad de Girona), Spain
28. Center for Egyptian Women's Legal Assistance (CEWLA), Egypt
29. Centre Delàs d'Estudis per la Pau, Spain (Catalonia)
30. Centre for Human Rights and Development (CHRD), Mongolia
31. Centre for Palestine Studies, SOAS, Palestine
32. Centro de Asesoría y Estudios Sociales (CAES), Spain
33. Centro de Estudios Legales y Sociales (CELS), Argentina
34. Centro di Ricerca ed Elaborazione per la Democrazia, Italy
35. Centro Popular de Direitos Humanos (CPDH), Brazil

36. Climate Craic CIC, Northern Ireland

37. Climate Justice for Palestine Belfast, Northern Ireland

38. Confederation of Lawyers of Asia and the Pacific (COLAP), Asia/Pacific

39. Coletivo Minha Voz Liberta, Brazil

40. Community Justice Project, United States of America

41. Community Resource Centre, Thailand

42. Consejo de Pueblos Wuxhtaj, Guatemala

43. Coordinación Colombia Europa Estados Unidos, Colombia

44. Corporación Colectivo de Abogados "José Alvear Restrepo" (CAJAR), Colombia

45. Corporación Colectivo de Objetores y Objetoras por Conciencia: Quinto Mandamiento, Colombia

46. Detroit Jericho Movement, United States of America

47. Dibeen Association for Environmental Development, Jordan

48. DITSHWANELO - The Botswana Centre for Human Rights, Botswana

49. Desis Rising Up & Moving (DRUM), United States of America

50. Egyptian Initiative for Personal Rights (EIPR), Egypt

51. Elseidi Law Firm, Egypt

52. Equal Education, South Africa

53. European Center for Palestine Studies, University of Exeter, United

Kingdom

54. European Legal Support Center (ELSC), The Netherlands

55. FAIR Law Firm, Indonesia

56. FairSquare, United Kingdom

57. Falana and Falana's Chambers, Nigeria

58. Forum Tunisien pour les Droits Economiques et Sociaux, Tunisia

59. Friedman, Gilbert + Gerhardstein, LLC (FG+G), United States of America

60. Fundación Enlace Social, Colombia

61. Giniw Collective, United States of America

62. Giuristi Democratici, Italy

63. Haldane Society of Socialist Lawyers, United Kingdom

64. ILGA Asia, Thailand

65. Indian Association of Lawyers, India

66. Institut de Drets Humans de Catalunya, Spain

67. Institut Novact de Noviolència, Spain

68. Instituto de Estudios Legales y Sociales del Uruguay, Uruguay

69. International Association of Democratic Lawyers, Global

70. International Centre for Ethnic Studies, Sri Lanka

71. International Peace Research Association, Global

72. Ireland-Palestine Solidarity Campaign, Ireland

73. Irídia - Center for the Defence of Human Rights, Spain

74. Japan Lawyers International Solidarity Association (JALISA), Japan

75. Kashmir Law and Justice Project, Kashmir

76. LABÁ - Direito, Espaço & Política, Brazil

77. La Ligue Algérienne pour la Défense des Droits de l'Homme (LADDH), Algeria

78. League for the Defence of Human Rights in Iran (LDDHI), Iran, France

79. Legal Centre Lesvos, Greece

80. Malcolm X Center for Self Determination, United States of America

81. Manushya Foundation, Thailand

82. Mass Incarceration Committee-National Lawyers Guild, United States of America

83. Minha Voz Liberta, Brazil

84. Minority Rights Group International, United Kingdom, Uganda, Hungary, Belgium

85. Mississippians for Palestine, United States of America

86. Monique and Roland Weyl People's Academy of International Law, Global

87. Movement for Black Lives, United States of America

88. Movement Law Lab/Global Network of Movement Lawyers, United States of America, Global

89. Mwatana for Human Rights, Yemen

90. National Association of Democratic Lawyers (NADEL), South Africa

91. National Conference of Black Lawyers, United States of America

92. National Jericho Movement, United States of America

93. National Lawyers Guild (NLG), United States of America

94. National Lawyers Guild - Louisiana Chapter, United States of America

95. National Lawyers Guild-San Francisco Bay Area chapter/NLG Task Force on the Americas, United States of America

96. National Union of Peoples' Lawyers, Philippines

97. Ndifuna Ukwazi, South Africa

98. New Abolitionist Movement, United States of America

99. New York City Jericho Movement, United States of America

100. International Campaign to Free Kamau Sadiki, United States of America

101. Oakland Jericho, United States of America

102. Observatori DESCA, Spain

103. Palestine Solidarity Campaign, South Africa

104. Palestinian American Bar Association, United States of America

105. Palestinian Bar Association, Palestine

106. Palestinian Centre for Human Rights, Palestine

107. Plenaria Memoria y Justicia, Uruguay

108. President Arab Lawyers Association, United Kingdom

109. ProDESC (Proyecto de Derechos Económicos, Sociales y Culturales), México

110. Project for Middle East Democracy, United States of America

111. Project South, United States of America

112. Pusat Bantuan Hukum Peradi Makassar, Indonesia

113. Rachel Corrie Foundation for Peace and Justice, United States of America

114. Rising Majority, United States of America

115. Rohingya Maìyafuìnor Collaborative Network, Canada - Global

116. Rural Women's Assembly, South Africa

117. SAGRC, South Africa

118. Salt River Heritage Society, South Africa

119. San Francisco Bay View National Black Newspaper, United States of America

120. SECTION27, South Africa

121. Showing Up for Racial Justice, Santa Cruz County, CA, United States of America

122. Sinai Foundation for Human Rights, United Kingdom

123. Socialist Lawyers Association of Ireland, Ireland

124. Socio-economic Rights Institute of South Africa (SERI), South Africa

125. South African Jews for a Free Palestine, South Africa

126. Spirit of Mandela Coalition, United States of America

127. Studio Fallout, United States of America

128. Syrian Center for Media and Freedom of Expression-SCM, Syria

129. Terra de Direitos, Brazil

130. The Center of Research and Elaboration on Democracy (CRED), Italy

131. The Palestine Institute for Public Diplomacy (PIPD), Palestine

132. The Palestinian Human Rights Organization PHRO, Palestine

133. Upstate Voices for Palestine, United States of America

134. Vamos PR, Puerto Rico

135. Visualizing Palestine, Canada-United States of America

136. Women's Legal Centre, South Africa

137. Yayasan Lembaga Bantuan Hukum Indonesia - YLBHI (Indonesia Legal Aid Foundation), Indonesia

138. Zabalaza Pathways Institute, South Africa

139. Zero Waste JXN, United States of America

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